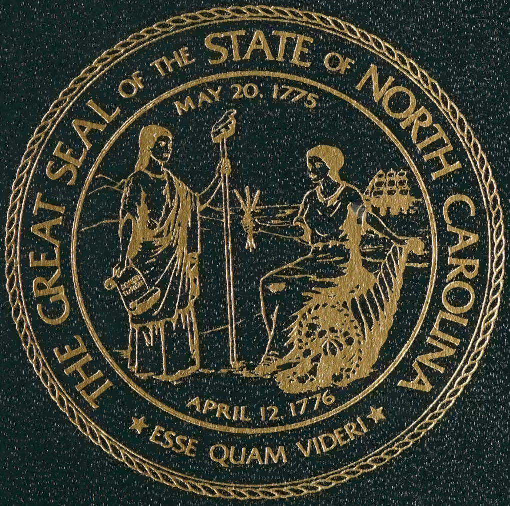
GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED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GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

Volume 1

Chapters 1, 1A

Prepared Under the Supervision of
The Department of Justice
of the State of North Carolina
by
the Editorial Staff of the Publisher

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Preface

This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2009 Regular Session that are within Chapters 1 and 1A, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

Roy Cooper
Attorney General

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Original Preface

It has been customary for the publication of each official revision of the North Carolina statutes to contain, in its preface, a reference to the authority for the revision and the general procedure for the execution of this authority. Read together, these prefaces form a continuous history of the North Carolina codes through the last official code, the Consolidated Statutes. As a projection of that history, the steps which have led to the preparation and adoption of the General Statutes of 1943 are hereinafter set forth.

The Act of the General Assembly creating the North Carolina Department of Justice, Chapter 315, Public Laws 1939, authorized the Attorney General to set up therein a division to be designated as the Division of Legislative Drafting and Codification of Statutes.

This Division was assigned two principal duties by the statute: (1) to prepare bills to be presented to the General Assembly at the request of the Governor, State officials and departments, and members of the General Assembly, and to advise and assist counties, cities and towns in drafting legislation to be submitted to the General Assembly; (2) to supervise the recodification of the general public statutes and to keep such recodification current.

With respect to the latter duty, the General Assembly authorized the Division to arrange with any publisher or publishers for doing the necessary editorial work and publication of the recodification, with annotations, appendixes, and index, under the supervision and direction of the Division and subject to the final approval and acceptance by the General Assembly. Acting upon this legislative authority, the Attorney General contracted with The Michie Company, Law Publishers of Charlottesville, Virginia, for publication of this recodification. It should be pointed out that The Michie Company, for over fifteen years, had published the unofficial codes and supplements in the State, and its Code of 1939 was used as a basis upon which to prepare the new codification.

This Division was set up on July 1, 1939, with W. J. Adams, Jr., as the director of the staff employed to carry on the work.

At the request of the Attorney General, Honorable Kingsland Van Winkle, President of the North Carolina Bar Association, and Honorable Fred S. Hutchins, President of the North Carolina State Bar, appointed a committee of able lawyers to assist in planning the new code. For the North Carolina Bar Association the following were named: Bennett H. Perry, Henderson; H. G. Hedrick, Durham; H. Gardner Hudson, Winston-Salem; Clifford Frazier, Greensboro; and Bryan Grimes, Washington. For the North Carolina State Bar the following were named: C. W. Tillett, Charlotte; Jack Joyner, Statesville; H. J. Hatcher, Morganton; Frank E. Winslow, Rocky Mount; and William T. Joyner, Raleigh.

At the request of the Attorney General, the following named persons also served as a part of this committee: Honorable A. A. F. Seawell, Associate Justice of the Supreme Court; Dean M. T. VanHecke, of the University of North Carolina Law School; Dean H. C. Horack, of the Duke University Law School; Dean Dale F. Stansbury, of the Wake Forest Law School; and Dillard S. Gardner, Raleigh, Supreme Court Marshal and Librarian.

Full acknowledgment is made of the valuable assistance given by this committee in formulating the plans for the new code. The members of the committee very generously responded to the call for this service, giving a great deal of their valuable time to it without compensation or even reimbursement for their travel expenses.

In keeping with the procedure in prior revisions, the General Assembly of 1941 (Public Laws, Chapter 35) authorized the preparation and printing of a Legislative Edition of the proposed code for submission to the General Assembly of 1943.

The General Assembly of 1941 also adopted Joint Resolution No. 33, providing for a Commission on Recodification to cooperate with the Attorney General and the Division of Legislative Drafting and Codification of Statutes, naming on this Commission the following persons:

Representatives F. E. Wallace, J. A. Pritchett, Hubert C. Jarvis, Irving Carlyle, Rupert T. Pickens, Julian R. Allsbrook, J. Q. LeGrand, O. L. Richardson, Arch T. Allen, John Kerr, Jr., George R. Uzzell, W. Frank Taylor, S. O. Worthington, J. T. Pritchett, Forrest A. Pollard, and T. E. Story; Senators Jeff D. Johnson, Jr., E. T. Sanders, J. C. Pittman, Wade B. Matheny, John W. Wallace, John D. Larkins, Jr., Thomas J. Gold, Archie C. Gay, Herbert Leary, and Hugh G. Horton.

The Commission organized shortly after the adjournment of the Legislature and elected Mr. F. E. Wallace as Chairman.

The members of this Commission have cooperated to the fullest possible extent in the manner provided by the Statute. Every chapter and every section of the new code has been checked and approved by the Commission. This has involved an enormous amount of work as must be evident. The cooperation and approval of this Commission affords assurance that the work has been properly done and errors reduced to a minimum. A detailed statement of the methods used in preparing the new code may be found in the Preface to the Legislative Edition.

The Act revising and consolidating the General Statutes of the State of North Carolina was ratified on February 4, 1943. Chapter 15 of the Session Laws of 1943 provided that this Act should not be printed in the Session Laws of 1943.

Chapter 15 of the Session Laws of 1943 provided that the Division, under the direction of the Attorney General, should complete and perfect the recodification, which should be designated "General Statutes", by inserting 1943 Acts in their proper places, deleting repealed statutes and making other necessary corrections and rearrangements. This Act specifically provided that "after the completion of such codification of the general and public laws of one thousand nine hundred and forty-three, such laws, as they appear in the printed volumes of the General Statutes, shall be deemed an accurate codification of the statutes of one thousand nine hundred and forty-three contained therein."

Chapter 543 of the Session Laws of 1943 enacted many of the recommendations of the Attorney General and the Legislative Commission, and Legislative Committees, designed to clarify various statutes, and correct other defects, and these changes are reflected in the General Statutes.

Volume and Chapter Arrangement

It is clearly apparent that a one-volume code is no longer practicable because of the increase in the volume of legislation, the great increase in the size of the index, the use of much heavier paper, and the inclusion of frontal tables and additional supplemental material. After much consideration, a four-volume code was decided upon as the most practicable.

Once the idea of a one-volume code was abandoned, it became necessary to devise a new classification and arrangement of statutes since the arrangement used in the Consolidated Statutes would require in many instances that all volumes be consulted in the study of certain related statutes in different chapters. In order to avoid this inconvenience as much as possible, an effort was made to group related chapters in larger "divisions" and to place related divisions together. At the same time, it was necessary to maintain a balance so that all four volumes would be as nearly uniform in size as would be conveniently possible.

It is believed that the adopted chapter arrangement will be convenient and also allow for an expansion of the code within a basic framework.

Numbering System

The enactment of thousands of new laws since adoption of the Consolidated Statutes of 1919 made it necessary to change the section numbers in the new code. The numbering system of the Consolidated Statutes had grown unwieldy through much sub-numbering. Furthermore, adherence to the old system forestalled any improvement in the arrangement of the statutes.

The choice of a satisfactory numbering system for the new code was carefully studied. After a consideration of various systems, it was finally decided that a modified form of consecutive numbering would be the most satisfactory system to adopt, and such a system was approved by the Legislative Commission on Recodification. This system consists of: (1) numbering the chapters of the code consecutively, (2) using the chapter number as the first part of each code section number, and (3) numbering the sections in each chapter consecutively from "one" on through the end of the chapter. The code section number consists of the chapter number, a dash, and the number of the section in the chapter. This system will have two advantages. New sections may be added indefinitely at the end of each chapter without necessitating sub-numbering and disturbing the numbering system. This numbering system will readily permit the insertions of new chapters with a minimum of inconvenience and confusion in the numbering of the new sections. The old Consolidated Statutes section number has been carried forward in the citations at the end of the statutes as has been the practice heretofore in noting prior official code references. Comparative tables translating the Consolidated Statutes and Michie Code section numbers to the new code numbers are included in an appendix.

Local Laws

The recodification has been made of the "general public statutes." North Carolina has enacted a great volume of private, special and local legislation. The problem of local legislation seems to be more serious in North Carolina than in most states. The problem of the proper disposition of these laws has harassed the preparation of the General Statutes to an even greater degree than prior revisions, which have included many local laws for convenience or to fill some gap in the general laws. However, with the great increase in the volume and complexity of legislation, it was clearly apparent that to continue to include in the code statutes which are essentially local in nature (except for necessary exceptions) would result in an overbulky code and greatly complicate the search for the general laws.

The last official revision of the statutes was that embodied in the two volumes of the Consolidated Statutes of 1919, as brought forward by the third volume in 1924. Thus, the main basis for the present work is that revision and subsequent public session laws. However, many of the statutes in the "public laws" volumes are of local application, and it was necessary to make a decision as to which statutes should be codified. It was finally decided that any statute or portion of a statute which did not affect at least 10 or more counties would not be placed in the code. All portions of the statutes or direct amendments to statutes affecting 9 counties or less have merely been cited in the first annotation paragraph following the statute and entitled "Local Modification." Under this heading the affected counties, together with the appropriate session law or Consolidated Statutes citation, have been listed alphabetically without any attempt to summarize the provisions of the local laws modifying the general law. It was found that any attempt to analyze the exact effect of particular local provisions would often be not only misleading but inaccurate in the absence of a comprehensive study of all the vast body of local legislation appearing in the Public-Local and Private Law volumes since the vast majority of local laws do alter the general law without making direct references.

A great deal of attention has been devoted to the index in a section-by-section analysis, designed (1) to delete inapplicable index references, (2) to correct inaccurate index references, and (3) to add new index references where sections or portions of sections are found to be indexed inadequately or not at all. At the same time, index lines have been repeated as often as the limitations of space and utility permit, to the end that "Cross References" or "See" references (some of which are absolutely necessary in a code index) may be reduced to a minimum, and where they cannot be entirely eliminated, the inclusive section numbers have been listed along with the Cross Reference.

As will be noted, the index type has been increased from six point to eight point, and set in a two-column page.

Annotations

The work of preparing the annotations rested largely with the editorial staff of the publishers. The editors, in co-operation with the Division's Codification Staff, have made an effort to provide annotations which are as complete and accurate as are necessary for an understanding of the statutes. It is believed that the proper function of the code annotations is to aid in the construction of the statutes and that the annotations should not take the scope of a general digest of case law. In an effort to provide effective annotations, various sources have been checked, including the citators, the annotations of the Consolidated Statutes of 1919, and the annotations in Pell's Revisal of 1908. Annotations in the General Statutes begin with Volume 1 and extend through Volume 222 of the North Carolina Reports.

Additional Features

A complete table of contents is inserted at the beginning of each volume of the code and will be of considerable assistance in locating any chapter or article immediately. Frontal tables, listing the titles of each section in a chapter, are being placed at the beginning of each chapter and should be of great assistance in locating any section desired. The code will be kept current for as long as possible by pocket supplements. The comparative tables have been expanded, and citations have been added to the State Constitution indicating the authority by which the various constitutional provisions were adopted. The appendix material has also been supplemented.

The Publisher's Editorial Staff

The publisher's editorial staff, headed by A. Hewson Michie, the Company's President, and Chas. W. Sublett, Editor-in-Chief, specially assisted by Beirne Stedman and Robert H. Davis, Jr., has cooperated fully in the preparation of this code, and, notwithstanding difficulties brought on by war conditions, has ably carried its responsibilities associated with this publication.

The Codification Staff

The staff of the Division has varied from two to five lawyers, including the director, and one secretary. The calls of the military and naval services and the opportunities for advancement elsewhere have resulted in many changes in personnel since the work was first begun. During this time the following persons have served on the legal staff: Moses B. Gillam, Jr., Cornelia McKimmon Trott, James E. Tucker, Garmon Stuart, John Lawrence, Harry W. McGalliard, James B. McMillan, Kemp Yarborough, J. B. Bilisoly, Sarah Starr Gillam, Junius D. Grimes, Jr., Joseph B. Cheshire, IV, Catherine Paschal and Joel Denton; and the following persons have served as secretaries: Minerva Coppage, Marjorie Mann and Effie McLean English. All of them have given loyal and diligent service. Grateful acknowledgment is made to them for their labors which were both extensive and difficult.

When W. J. Adams, Jr., was named Assistant Attorney General in October, 1941, Harry W. McGalliard was appointed Director of the Division. Mr. Adams continued to assist in the supervision of the recodification work. Mr. McGalliard has continued to serve as Director until the present. He has personally done the important job of revising the index.

Continuous Revision

The General Assembly of 1943 enacted Chapter 382 of the Session Laws, which provides in part as follows:

"In order that the laws of North Carolina, as set out in the General Statutes of North Carolina, may be made and kept as simple, as clear, as concise and as complete as possible, and in order that the amount of construction and interpretation of the statutes required of the courts may be reduced to a minimum, it shall also be the duty of the Division of Legislative Drafting and Codification of Statutes to establish and maintain a system of continuous statute research and correction. To that end the Division shall:

"1. Make a systematic study of the general statutes of the State, as set out in the General Statutes and as hereafter enacted by the General Assembly, for the purpose of ascertaining what ambiguities, conflicts, duplications and other imperfections of form and expression exist therein and how these defects may be corrected.

"2. Consider such suggestions as may be submitted to the Division with respect to the existence of such defects and the proper correction thereof.

"3. Prepare for submission to the General Assembly from time to time bills to correct such defects in the statutes as its research discloses."

By Joint Resolution No. 23, the General Assembly of 1943 created a Commission on Statutory Revision, consisting of Senators Irving E. Carlyle, Brandon P. Hodges, D. E. Hudgins, Wade B. Matheny and K. A. Pittman; and Representatives Oscar G. Barker, Frank W. Hancock, Jr., A. I. Ferree, Bryan Grimes, W. I. Halstead, Robert Moseley and Kerr Craige Ramsey, "to cooperate with the Attorney General and the Division of Legislative Drafting and Codification of Statutes in the study of the recommendations of the Division with respect to desirable clarifying statutes and the preparation of such proposed statutes for submission to the General Assembly of 1945."

The General Assembly, by this Act and Resolution, laid the foundation for a system of continuous statutory revision in North Carolina similar to systems that have been inaugurated in some of the other states with much success.

The purpose of this system is to provide an agency which will continuously study the statutory law of the State, and prepare recommendations to successive General Assemblies in the form of revision bills for the elimination of statutory defects as soon as possible after their appearance, and thus to avoid, or at least postpone, the necessity of the periodical bulk revisions that have heretofore been necessary.

SUPPLEMENTS

Under the contract with the publishers, the General Statutes will be kept current by use of cumulative pocket supplements for as long as possible and a minimum period of eight years, before any other edition can be published. The publishers will issue these supplements within six months of each regular or extra session of the General Assembly, and they will contain complete annotations and indexes. Each six months after the publication of the General Statutes, the publishers have agreed to issue interim annotation supplements, containing all pertinent annotations since the publication of the General Statutes or the last supplement, all of which will be done under the supervision of the Department of Justice.

HARRY MCMULLAN,
Attorney General.

August 15, 1943

Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R.	Potter's Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 2009 Regular Session affecting Chapters 1 and 1A of the General Statutes.

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted through September 18, 2009. These cases will be printed in the following reporters:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

User's Guide

The following guide contains comments on a few of the features found in the North Carolina General Statutes. These comments are made to increase the usefulness of the General Statutes to its users.

If you have any questions or suggestions concerning the General Statutes of North Carolina, please write or call toll free 1-800-833-9844, fax toll free 1-800-643-1280, e-mail us at customer.support@bender.com, or visit our website at www.lexisnexis.com. Direct written inquiries to:

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This guide is designed to help both the lawyer and the layperson get the most out of the General Statutes of North Carolina. It gives brief information on how to use each of the following features most effectively:

—Amendment Notes
—Analyses
—Attorney General's Opinions
—Case Notes
—Comments
—Constitutional History and Amendments
—Continued Lines
—Cross References
—Editor's Notes
—Historical Citations
—Indexes
—Legal Periodicals
—Local Modifications
—Numbering and Structure
—Postponed and Contingent Effective Dates
—Repealed, Recodified and Transferred Sections
—Reserved Lines
—Retention of Obsolete Material
—Tables

AMENDMENT NOTES

Amendment notes show, without editorial comment, changes made in a statute by the legislature. If the changes are extensive and a detailed comparison would be impractical or confusing, the note may simply indicate that the amendment "rewrote the section." In those instances, the user should consult the Session Laws to determine the changes made by the amendment.

Amendment notes are generally retained for those sections which have been amended within the previous two years.

ANALYSES

In addition to the table of contents in the preliminary pages of each volume, each chapter of the General Statutes is preceded by an analysis, which enables the user to see its contents at a glance. Use of the chapter analyses can reduce the need to use the general index and can also provide a quick understanding of the scope of the chapter.

ATTORNEY GENERAL'S OPINIONS

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. These may be found under the section in question under the heading "Opinions of Attorney General."

CASE NOTES

All reported state and federal cases which arise in North Carolina and construe North Carolina law have been read and fully annotated under pertinent statutes and rules. These annotations may be found under the heading "Case Notes." All case notes have been read and edited to assure their continuing accuracy. Where a decision has undergone subsequent review, the reviewing court's action is noted in the case citation if it affects the annotated point. Where two or more decisions apply to the same section or rule in essentially identical terms, their citations are cumulated under the case note.

The terms "applied," "quoted," "stated" and "cited" are used in the case notes to refer the user to cases which apply, quote from, paraphrase or otherwise refer to a given section or rule, but which, in the editor's view, do not lend themselves to a substantive paragraph under the section or rule in question.

Where a section or rule has been substantially amended or repealed and the subject matter is reenacted in a new section or rule, the editor has retained those case notes which, while construing the former law, may also construe or contribute to the user's understanding of the new provision.

All annotations are intended as source material, and the user is urged to review the actual case itself rather than relying wholly on an annotation.

For scope of annotations, the preliminary pages in the volumes should be consulted.

COMMENTS

Certain chapters of the General Statutes contain official commentaries to the material therein. These are shown under the heading "Official Comment," "Amended Official Comment," or the like, as appropriate. These commentaries are not prepared by the publisher, but are included as an additional feature for the user. Drafters' Comments and North Carolina Comments are also carried in certain chapters.

CONSTITUTIONAL HISTORY AND AMENDMENTS

Provisions of the Constitution of 1868, as amended through 1969, are noted under the catchline "History" under the corresponding sections of the current Constitution of 1970.

Proposed amendments to the Constitution are noted under the affected section under the heading "Proposed Amendment(s)." Amendments to the Constitution which have been approved by a vote of the people are shown under the "Effect of Amendments" heading. Amendments to the Constitution which have been defeated are shown under the heading "Defeated Amendment Proposals."

CONTINUED LINES

Beginning in 1995, boldface lines began to be carried at the top of the text of those pages on which sections or parts of sections set out more than once to reflect postponed or contingent effective dates occur. (See Postponed and Contingent Effective Dates.)

CROSS REFERENCES

Cross references refer the user to other statutes or rules of court that may modify or supplement a statutory provision or place it in context. They are not included for sections immediately preceding or following the section at hand within the same chapter and do not cite all related statutes. The general index should be used to locate all of the law on a subject.

EDITOR'S NOTES

These notes inform the user about special circumstances connected with the section, such as noncodified material affecting the interpretation or operation of the section, effective dates of new provisions, etc. In addition, editor's notes may explain additions or corrections made by the editors in the text, under the direction of the Revisor of Statutes, and other matters of interest to the user.

HISTORICAL CITATIONS

The material appearing in parentheses immediately following the text of a section is the historical citation. The citation includes, in chronological order, all session laws, by year, chapter and, where appropriate, section, that enact or amend that Code section. The historical citation also indicates the citation of the section in the various codes prior to the General Statutes of 1943.

INDEXES

The general index for the North Carolina General Statutes is published in two volumes, which are updated and replaced every year. Also included with the index volumes are two specialized indexes, the Executive Agency Index and the Combined Short Title/Popular Name Index. In addition, a "Ready Reference Index" is included in each volume. This index gives a brief description of the contents of the volume, along with the section numbers of the described material.

For some basic principles concerning index use, consult the Foreword to the Indexes in the first volume of the general index.

LEGAL PERIODICALS

Legal periodicals published in North Carolina have been examined for relevancy to General Statutes sections and rules, and are cited when some relationship is found.

LOCAL MODIFICATIONS

An act which expressly amends a General Statutes section, but which is applicable to fewer than ten localities, or an act applicable to fewer than ten localities which makes some express exception to or modification of a General Statutes section, is shown under the heading "Local Modification" following the affected section.

NUMBERING AND STRUCTURE

The General Statutes are organized by chapters, which are numbered consecutively. New chapters inserted between two preexisting chapters utilize the number of the chapter which will immediately precede the new chapter, with a letter of the alphabet added at the end of the number, beginning with the letter "A." (Thus the chapters immediately following Chapter 115 are Chapters 115A, 115B, 115C, etc.) Many of the chapters are subdivided into articles and parts.

For the most part the chapters utilize a two-part numbering system, with the chapter number as the first part of the code section number and the sections of the chapter numbered consecutively thereafter (usually but not always from "one" to the end of the chapter). A dash separates the chapter number and section number. Additional sections are inserted between preexisting sections in a chapter by use of a period, followed by consecutive numbers starting with "one."

Some of the chapters in the General Statutes utilize a three-part numbering scheme, with the chapter number as the first part of the code section number, the article number as the second part, and the sections of the chapter numbered consecutively as the final part. (See, e.g., Chapter 25.)

POSTPONED AND CONTINGENT EFFECTIVE DATES

Legislation which is effective later than January 1 of the year following the year of the legislative session is considered postponed. Legislation which is effective only upon the happening of some event that may or may not take place is considered contingent.

Postponed and contingent legislation is generally set out with the postponed effective date or other explanatory information in parentheses in the section catchline. The section or portion of section affected may be set out twice to show the current and postponed or contingent versions thereof.

Beginning in 1995, boldface lines began to be carried at the top of the text of those pages on which sections or parts of sections are set out more than once to reflect postponed or contingent effective dates. (See Continued Lines.)

REPEALED, RECODIFIED AND TRANSFERRED SECTIONS

Where a section or group of sections has been repealed, recodified or transferred, its section number has been retained in its former location, and an indication of the action has been included. Editor's notes and cross references may follow, explaining the action and referring the user to new or present provisions, if any.

RESERVE LINES

Certain sections are reserved for future codification purposes expressly by the General Assembly or have been so reserved by the Publisher.

RETENTION OF OBSOLETE MATERIAL

It is strongly suggested that users retain obsolete volumes and supplements after they are replaced, for reference purposes and for a verbatim representation of the exact wording of each section as it read from year to year.

TABLES

Volume 19 of the North Carolina General Statutes contains five sets of tables: (1) Table comparing the 1868 Constitution, as amended through 1969, to the 1970 Constitution; (2) Table comparing the Revisal of 1905 and Pell's Revisal of 1908 to the Consolidated Statutes of 1919; (3) Table comparing the Consolidated Statutes of 1919 to the General Statutes; (4) Table of sections appearing in the Consolidated Statutes of 1919 but deleted from the General

Statutes; (5) Table of Laws codified subsequent to 1919, arranged by year and act number.

Volume 19 also contains a Table of Sections Added, Amended or Repealed for the year in question.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

December 2009

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2009 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

ROY COOPER
Attorney General of North Carolina

Contents of North Carolina Code 2009

VOLUME 1

Chapter 1. Civil Procedure
Chapter 1A. Rules of Civil Procedure

VOLUME 2

Chapter 1B. Contribution
Chapter 1C. Enforcement of Judgments
Chapter 1D. Punitive Damages
Chapter 1E. Eastern Band of Cherokee Indians
Chapter 2. Clerk of Superior Court [Repealed and Transferred.]
Chapter 3. Commissioners of Affidavits and Deeds [Repealed.]
Chapter 4. Common Law
Chapter 5. Contempt [Repealed.]
Chapter 5A. Contempt
Chapter 6. Liability for Court Costs
Chapter 7. Courts [Repealed and Transferred.]
Chapter 7A. Judicial Department
Chapter 7B. Juvenile Code
Chapter 8. Evidence
Chapter 8A. Interpreters for Deaf Persons [Recodified.]
Chapter 8B. Interpreters for Deaf Persons

VOLUME 3

Chapter 8C. Evidence Code
Chapter 9. Jurors
Chapter 10. Notaries [Repealed.]
Chapter 10A. Notaries [Recodified.]
Chapter 10B. Notaries
Chapter 11. Oaths
Chapter 12. Statutory Construction
Chapter 13. Citizenship Restored
Chapter 14. Criminal Law

VOLUME 4

Chapter 15. Criminal Procedure
Chapter 15A. Criminal Procedure Act
Chapter 15B. Victims Compensation
Chapter 15C. Address Confidentiality Program
Chapter 16. Gaming Contracts and Futures
Chapter 17. Habeas Corpus
Chapter 17A. Law-Enforcement Officers [Recodified.]
Chapter 17B. North Carolina Criminal Justice Education and Training System [Recodified.]
Chapter 17C. North Carolina Criminal Justice Education and Training Standards Commission
Chapter 17D. North Carolina Justice Academy
Chapter 17E. North Carolina Sheriffs' Education and Training Standards Commission

Chapter 18. Regulation of Intoxicating Liquors [Repealed.]
Chapter 18A. Regulation of Intoxicating Liquors [Repealed.]

VOLUME 5

Chapter 18B. Regulation of Alcoholic Beverages
Chapter 18C. North Carolina State Lottery
Chapter 19. Offenses Against Public Morals
Chapter 19A. Protection of Animals
Chapter 20. Motor Vehicles
Chapter 21. Bills of Lading
Chapter 22. Contracts Requiring Writing
Chapter 22A. Signatures
Chapter 22B. Contracts Against Public Policy
Chapter 22C. Payments to Subcontractors
Chapter 23. Debtor and Creditor
Chapter 24. Interest

VOLUME 6

Chapter 25. Uniform Commercial Code
Chapter 25A. Retail Installment Sales Act
Chapter 25B. Credit
Chapter 25C. Sales of Artwork
Chapter 26. Suretyship
Chapter 27. Warehouse Receipts [Repealed.]
Chapter 28. Administration [Repealed.]
Chapter 28A. Administration of Decedents' Estates
Chapter 28B. Estates of Absentees in Military Service
Chapter 28C. Estates of Missing Persons
Chapter 29. Intestate Succession
Chapter 30. Surviving Spouses
Chapter 31. Wills

VOLUME 7

Chapter 31A. Acts Barring Property Rights
Chapter 31B. Renunciation of Property and Renunciation of Fiduciary Powers Act
Chapter 31C. Uniform Disposition of Community Property Rights at Death Act
Chapter 32. Fiduciaries
Chapter 32A. Powers of Attorney
Chapter 33. Guardian and Ward [Repealed and Recodified.]
Chapter 33A. North Carolina Uniform Transfers to Minors Act
Chapter 33B. North Carolina Uniform Custodial Trust Act
Chapter 34. Veterans' Guardianship Act
Chapter 35. Sterilization Procedures
Chapter 35A. Incompetency and Guardianship
Chapter 36. Trusts and Trustees [Repealed.]
Chapter 36A. Trusts and Trustees
Chapter 36B. Uniform Management of Institutional Funds Act [Repealed.]
Chapter 36C. North Carolina Uniform Trust Code
Chapter 36D. North Carolina Community Trust for Persons with Severe Chronic Disabilities
Chapter 36E. Uniform Prudent Management of Institutional Funds Act

Chapter 37. Allocation of Principal and Income [Repealed.]
Chapter 37A. Uniform Principal and Income Act
Chapter 38. Boundaries
Chapter 38A. Landowner Liability
Chapter 39. Conveyances
Chapter 40. Eminent Domain [Repealed.]
Chapter 40A. Eminent Domain
Chapter 41. Estates
Chapter 41A. State Fair Housing Act
Chapter 42. Landlord and Tenant
Chapter 42A. Vacation Rental Act
Chapter 43. Land Registration
Chapter 44. Liens
Chapter 44A. Statutory Liens and Charges
Chapter 45. Mortgages and Deeds of Trust
Chapter 45A. Good Funds Settlement Act
Chapter 46. Partition
Chapter 47. Probate and Registration
Chapter 47A. Unit Ownership
Chapter 47B. Real Property Marketable Title Act
Chapter 47C. North Carolina Condominium Act
Chapter 47D. Notice of Settlement Act [Expired.]
Chapter 47E. Residential Property Disclosure Act
Chapter 47F. North Carolina Planned Community Act
Chapter 48. Adoptions

VOLUME 8

Chapter 48A. Minors
Chapter 49. Bastardy
Chapter 49A. Rights of Children
Chapter 50. Divorce and Alimony
Chapter 50A. Uniform Child-Custody Jurisdiction and Enforcement Act
Chapter 50B. Domestic Violence
Chapter 50C. Civil No-Contact Orders.
Chapter 51. Marriage
Chapter 52. Powers and Liabilities of Married Persons
Chapter 52A. Uniform Reciprocal Enforcement of Support Act [Repealed.]
Chapter 52B. Uniform Premarital Agreement Act
Chapter 52C. Uniform Interstate Family Support Act
Chapter 53. Banks
Chapter 53A. Business Development Corporations and North Carolina Capital Resource Corporations
Chapter 53B. Financial Privacy Act
Chapter 54. Cooperative Organizations
Chapter 54A. Capital Stock Savings and Loan Associations [Repealed.]
Chapter 54B. Savings and Loan Associations
Chapter 54C. Savings Banks
Chapter 55. North Carolina Business Corporation Act
Chapter 55A. North Carolina Nonprofit Corporation Act

VOLUME 9

Chapter 55B. Professional Corporation Act
Chapter 55C. Foreign Trade Zones
Chapter 55D. Filings, Names, and Registered Agents for Corporations, Nonprofit Corporations, and Partnerships

Chapter 56. Electric, Telegraph and Power Companies [Repealed.]
Chapter 57. Hospital, Medical and Dental Service Corporations [Recodified.]
Chapter 57A. Health Maintenance Organization Act [Recodified.]
Chapter 57B. Health Maintenance Organization Act [Recodified.]
Chapter 57C. North Carolina Limited Liability Company Act
Chapter 58. Insurance

VOLUME 10

Chapter 58A. North Carolina Health Insurance Trust Commission [Recodified.]
Chapter 59. Partnership
Chapter 59B. Uniform Unincorporated Nonprofit Association Act
Chapter 60. Railroads and Other Carriers [Repealed and Transferred.]
Chapter 61. Religious Societies
Chapter 62. Public Utilities
Chapter 62A. Public Safety Telephone Service and Wireless Telephone Service
Chapter 63. Aeronautics
Chapter 63A. North Carolina Global TransPark Authority
Chapter 64. Aliens
Chapter 65. Cemeteries
Chapter 66. Commerce and Business
Chapter 67. Dogs
Chapter 68. Fences and Stock Law
Chapter 69. Fire Protection
Chapter 70. Indian Antiquities, Archaeological Resources and Unmarked Human Skeletal Remains Protection
Chapter 71. Indians [Repealed.]
Chapter 71A. Indians
Chapter 72. Inns, Hotels and Restaurants
Chapter 73. Mills
Chapter 74. Mines and Quarries
Chapter 74A. Company Police [Repealed.]
Chapter 74B. Private Protective Services Act [Repealed.]
Chapter 74C. Private Protective Services
Chapter 74D. Alarm Systems
Chapter 74E. Company Police Act
Chapter 74F. Locksmith Licensing Act
Chapter 74G. Campus Police Act
Chapter 75. Monopolies, Trusts and Consumer Protection
Chapter 75A. Boating and Water Safety
Chapter 75B. Discrimination in Business
Chapter 75C. Motion Picture Fair Competition Act
Chapter 75D. Racketeer Influenced and Corrupt Organizations
Chapter 75E. Unlawful Activities in Connection With Certain Corporate Transactions
Chapter 76. Navigation
Chapter 76A. Navigation and Pilotage Commissions
Chapter 77. Rivers, Creeks, and Coastal Waters
Chapter 78. Securities Law [Repealed.]
Chapter 78A. North Carolina Securities Act
Chapter 78B. Tender Offer Disclosure Act [Repealed.]
Chapter 78C. Investment Advisers
Chapter 78D. Commodities Act

Chapter 79. Strays [Repealed.]
Chapter 80. Trademarks, Brands, etc
Chapter 81. Weights and Measures [Recodified.]
Chapter 81A. Weights and Measures Act of 1975
Chapter 82. Wrecks [Repealed.]
Chapter 83. Architects [Recodified.]
Chapter 83A. Architects
Chapter 84. Attorneys-at-Law
Chapter 84A. Foreign Legal Consultants
Chapter 85. Auctions and Auctioneers [Repealed.]
Chapter 85A. Bail Bondsmen and Runners [Recodified.]
Chapter 85B. Auctions and Auctioneers
Chapter 85C. Bail Bondsmen and Runners [Recodified.]
Chapter 86. Barbers [Recodified.]
Chapter 86A. Barbers

VOLUME 11

Chapter 87. Contractors
Chapter 88. Cosmetic Art [Repealed.]
Chapter 88A. Electrolysis Practice Act
Chapter 88B. Cosmetic Art
Chapter 89. Engineering and Land Surveying [Recodified.]
Chapter 89A. Landscape Architects
Chapter 89B. Foresters
Chapter 89C. Engineering and Land Surveying
Chapter 89D. Landscape Contractors
Chapter 89E. Geologists Licensing Act
Chapter 89F. North Carolina Soil Scientist Licensing Act
Chapter 89G. Irrigation Contractors
Chapter 90. Medicine and Allied Occupations
Chapter 90A. Sanitarians and Water and Wastewater Treatment Facility Operators
Chapter 90B. Social Worker Certification and Licensure Act
Chapter 90C. North Carolina Recreational Therapy Licensure Act
Chapter 90D. Interpreters and Transliterators
Chapter 91. Pawnbrokers [Repealed.]
Chapter 91A. Pawnbrokers Modernization Act of 1989
Chapter 92. Photographers [Deleted.]
Chapter 93. Certified Public Accountants
Chapter 93A. Real Estate License Law
Chapter 93B. Occupational Licensing Boards
Chapter 93C. Watchmakers [Repealed.]
Chapter 93D. North Carolina State Hearing Aid Dealers and Fitters Board
Chapter 93E. North Carolina Appraisers Act
Chapter 94. Apprenticeship
Chapter 95. Department of Labor and Labor Regulations
Chapter 96. Employment Security

VOLUME 12

Chapter 97. Workers' Compensation Act
Chapter 98. Burnt and Lost Records
Chapter 99. Libel and Slander
Chapter 99A. Civil Remedies for Criminal Actions
Chapter 99B. Products Liability

Chapter 99C. Actions Relating to Winter Sports Safety and Accidents
Chapter 99D. Civil Rights
Chapter 99E. Special Liability Provisions
Chapter 100. Monuments, Memorials and Parks
Chapter 101. Names of Persons
Chapter 102. Official Survey Base
Chapter 103. Sundays, Holidays and Special Days
Chapter 104. United States Lands
Chapter 104A. Degrees of Kinship
Chapter 104B. Hurricanes or Other Acts of Nature
Chapter 104C. Atomic Energy, Radioactivity and Ionizing Radiation [Repealed and Recodified].
Chapter 104D. Southern States Energy Compact
Chapter 104E. North Carolina Radiation Protection Act
Chapter 104F. Southeast Interstate Low-Level Radioactive Waste Management Compact [Repealed.]
Chapter 104G. North Carolina Low-Level Radioactive Waste Management Authority Act of 1987 [Repealed.]
Chapter 105. Taxation

VOLUME 13

Chapter 105A. Setoff Debt Collection Act
Chapter 105B. Defaulted Student Loan Recovery Act
Chapter 106. Agriculture
Chapter 107. Agricultural Development Districts [Repealed.]
Chapter 108. Social Services [Repealed and Recodified.]
Chapter 108A. Social Services
Chapter 108B. Community Action Programs
Chapter 109. Bonds [Recodified.]
Chapter 110. Child Welfare
Chapter 111. Aid to the Blind
Chapter 112. Confederate Homes and Pensions [Repealed.]
Chapter 113. Conservation and Development
Chapter 113A. Pollution Control and Environment
Chapter 113B. North Carolina Energy Policy Act of 1975
Chapter 114. Department of Justice
Chapter 115. Elementary and Secondary Education [Repealed.]
Chapter 115A. Community Colleges, Technical Institutes, and Industrial Education Centers [Repealed.]
Chapter 115B. Tuition and Fee Waivers

VOLUME 14

Chapter 115C. Elementary and Secondary Education
Chapter 115D. Community Colleges
Chapter 115E. Private Educational Facilities Finance Act [Recodified.]
Chapter 116. Higher Education
Chapter 116A. Escheats and Abandoned Property [Repealed.]
Chapter 116B. Escheats and Abandoned Property
Chapter 116C. Continuum of Education Programs
Chapter 116D. Higher Education Bonds
Chapter 117. Electrification
Chapter 118. Firemen's and Rescue Squad Workers' Relief and Pension Fund [Recodified.]
Chapter 118A. Firemen's Death Benefit Act [Repealed.]

Chapter 118B. Members of a Rescue Squad Death Benefit Act [Repealed.]
Chapter 119. Gasoline and Oil Inspection and Regulation
Chapter 120. General Assembly
Chapter 120C. Lobbying
Chapter 121. Archives and History
Chapter 122. Hospitals for the Mentally Disordered [Repealed.]
Chapter 122A. North Carolina Housing Finance Agency
Chapter 122B. North Carolina Agricultural Facilities Finance Act [Repealed.]
Chapter 122C. Mental Health, Developmental Disabilities, and Substance Abuse Act of 1985

VOLUME 15

Chapter 122D. North Carolina Agricultural Finance Act
Chapter 122E. North Carolina Housing Trust and Oil Overcharge Act
Chapter 123. Impeachment
Chapter 123A. Industrial Development [Repealed.]
Chapter 124. Internal Improvements
Chapter 125. Libraries
Chapter 126. State Personnel System
Chapter 127. Militia [Repealed.]
Chapter 127A. Militia
Chapter 127B. Military Affairs
Chapter 127C. Advisory Commission on Military Affairs
Chapter 128. Offices and Public Officers
Chapter 129. Public Buildings and Grounds
Chapter 130. Public Health [Repealed.]
Chapter 130A. Public Health
Chapter 130B. Hazardous Waste Management Commission [Repealed.]
Chapter 131. Public Hospitals [Repealed.]
Chapter 131A. Health Care Facilities Finance Act
Chapter 131B. Licensing of Ambulatory Surgical Facilities [Repealed.]
Chapter 131C. Charitable Solicitation Licensure Act [Repealed.]
Chapter 131D. Inspection and Licensing of Facilities
Chapter 131E. Health Care Facilities and Services
Chapter 131F. Solicitation of Contributions
Chapter 132. Public Records
Chapter 133. Public Works
Chapter 134. Youth Development [Recodified.]
Chapter 134A. Youth Services [Repealed.]
Chapter 135. Retirement System for Teachers and State Employees; Social Security; Health Insurance Program for Children

VOLUME 16

Chapter 136. Transportation
Chapter 137. Rural Rehabilitation [Repealed.]
Chapter 138. Salaries, Fees and Allowances
Chapter 138A. State Government Ethics Act
Chapter 139. Soil and Water Conservation Districts
Chapter 140. State Art Museum; Symphony and Art Societies
Chapter 140A. State Awards System
Chapter 141. State Boundaries
Chapter 142. State Debt
Chapter 143. State Departments, Institutions, and Commissions

VOLUME 17

Chapter 143A. State Government Reorganization
Chapter 143B. Executive Organization Act of 1973
Chapter 143C. State Budget Act
Chapter 143D. The State Governmental Accountability and Internal Control Act
Chapter 144. State Flag, Official Governmental Flags, Motto, and Colors
Chapter 145. State Symbols and Other Official Adoptions
Chapter 146. State Lands
Chapter 147. State Officers
Chapter 148. State Prison System
Chapter 149. State Song and Toast
Chapter 150. Uniform Revocation of Licenses [Repealed.]
Chapter 150A. Administrative Procedure Act [Recodified.]
Chapter 150B. Administrative Procedure Act
Chapter 151. Constables [Repealed.]
Chapter 152. Coroners
Chapter 152A. County Medical Examiner [Repealed.]
Chapter 153. Counties and County Commissioners [Repealed.]
Chapter 153A. Counties
Chapter 153B. Mountain Resources Planning Act
Chapter 154. County Surveyor [Repealed.]
Chapter 155. County Treasurer [Repealed.]
Chapter 156. Drainage
Chapter 157. Housing Authorities and Projects
Chapter 157A. Historic Properties Commissions [Transferred.]
Chapter 158. Local Development
Chapter 159. Local Government Finance

VOLUME 18

Chapter 159A. Pollution Abatement and Industrial Facilities Financing Act [Unconstitutional.]
Chapter 159B. Joint Municipal Electric Power and Energy Act
Chapter 159C. Industrial and Pollution Control Facilities Financing Act
Chapter 159D. The North Carolina Capital Facilities Financing Act
Chapter 159E. Registered Public Obligations Act
Chapter 159F. North Carolina Energy Development Authority [Repealed.]
Chapter 159G. Water Infrastructure
Chapter 159H. [Reserved.]
Chapter 159I. Solid Waste Management Loan Program and Local Government Special Obligation Bonds
Chapter 160. Municipal Corporations [Repealed.]
Chapter 160A. Cities and Towns
Chapter 160B. Consolidated City-County Act
Chapter 160C. Baseball Park Districts [Repealed.]
Chapter 161. Register of Deeds
Chapter 162. Sheriff
Chapter 162A. Water and Sewer Systems
Chapter 162B. Continuity of Local Government in Emergency
Chapter 163. Elections and Election Laws
Chapter 164. Concerning the General Statutes of North Carolina
Chapter 165. Veterans
Chapter 166. Civil Preparedness Agencies [Repealed.]
Chapter 166A. North Carolina Emergency Management Act

Chapter 167. State Civil Air Patrol [Repealed.]
Chapter 168. Persons with Disabilities
Chapter 168A. Persons with Disabilities Protection Act

VOLUME 19

Constitution of North Carolina
Constitution of the United States
Tables

Table of Contents

VOLUME 1

Chapter 1. Civil Procedure, G.S. 1-1 to 1-618

Subchapter I. Definitions and General Provisions

Art. 1. Definitions, G.S. 1-1 to 1-7
Art. 2. General Provisions, G.S. 1-8 to 1-13

Subchapter II. Limitations

Art. 3. Limitations, General Provisions, G.S. 1-14 to 1-34
Art. 4. Limitations, Real Property, G.S. 1-35 to 1-45.1
Art. 5. Limitations, Other Than Real Property, G.S. 1-46 to 1-55
Art. 5A. Limitations, Actions Not Otherwise Limited, G.S. 1-56

Subchapter III. Parties

Art. 6. Parties, G.S. 1-57 to 1-75

Subchapter IIIA. Jurisdiction

Art. 6A. Jurisdiction, G.S. 1-75.1 to 1-75.12

Subchapter IV. Venue

Art. 7. Venue, G.S. 1-76 to 1-87.1

Subchapter V. Commencement of Actions

Art. 8. Summons, G.S. 1-88 to 1-108
Art. 9. Prosecution Bonds, G.S. 1-109 to 1-112
Art. 10. Joint and Several Debtors, G.S. 1-113 to 1-115
Art. 11. Lis Pendens, G.S. 1-116 to 1-120.2

Subchapter VI. Pleadings

Art. 12. Complaint [Repealed.]
Art. 13. Defendant's Pleadings [Repealed.]
Art. 14. Demurrer [Repealed.]
Art. 15. Answer, G.S. 1-134.1 to 1-139
Art. 16. Reply [Repealed.]
Art. 17. Pleadings, General Provisions, G.S. 1-143 to 1-160
Art. 18. Amendments, G.S. 1-161 to 1-169

Subchapter VII. Pretrial Hearings; Trial And Its Incidents

Art. 18A. Pretrial Hearings [Repealed.]
Art. 19. Trial, G.S. 1-170 to 1-187
Art. 20. Reference [Repealed.]
Art. 21. Issues [Repealed.]
Art. 22. Verdict and Exceptions, G.S. 1-201 to 1-207

Subchapter VIII. Judgment

Art. 23. Judgment, G.S. 1-208 to 1-246
Art. 24. Confession of Judgment [Repealed.]
Art. 25. Submission of Controversy Without Action [Repealed.]
Art. 26. Declaratory Judgments, G.S. 1-253 to 1-267
Art. 26A. Three-Judge Panel for Redistricting Challenges, G.S. 1-267.1
Art. 26B. Distribution of Unpaid Residuals in Class Action Litigation, G.S. 1-267.10

Subchapter IX. Appeal

Art. 27. Appeal, G.S. 1-268 to 1-301
Art. 27A. Appeals and Transfers from the Clerk, G.S. 1-301.1 to 1-301.3

Subchapter X. Execution

Art. 28. Execution, G.S. 1-302 to 1-324.7
Art. 29. Execution and Judicial Sales [Repealed or Transferred.]
Art. 29A. Judicial Sales, G.S. 1-339.1 to 1-339.40
Art. 29B. Execution Sales, G.S. 1-339.41 to 1-339.71
Art. 29C. Validating Sections, G.S. 1-339.72 to 1-339.77
Art. 30. Betterments, G.S. 1-340 to 1-351
Art. 31. Supplemental Proceedings, G.S. 1-352 to 1-368

Subchapter XI. Homestead And Exemptions

Art. 32. Property Exempt from Execution [Repealed.]

Subchapter XII. Special Proceedings

Art. 33. Special Proceedings, G.S. 1-393 to 1-408.1

Subchapter XIII. Provisional Remedies

Art. 34. Arrest and Bail, G.S. 1-409 to 1-439
Art. 35. Attachment, G.S. 1-440 to 1-471
Art. 36. Claim and Delivery, G.S. 1-472 to 1-484.1
Art. 37. Injunction, G.S. 1-485 to 1-500
Art. 38. Receivers, G.S. 1-501 to 1-507.11
Art. 39. Deposit or Delivery of Money or Other Property, G.S. 1-508 to 1-510

Subchapter XIV. Actions in Particular Cases

Art. 40. Mandamus [Repealed.]
Art. 41. Quo Warranto, G.S. 1-514 to 1-532
Art. 42. Waste, G.S. 1-533 to 1-538
Art. 43. Nuisance and Other Wrongs, G.S. 1-538.1 to 1-539.2C
Art. 43A. Adjudication of Small Claims in Superior Court [Repealed.]
Art. 43B. Defense of Charitable Immunity Abolished; and Qualified Immunity for Volunteers, G.S. 1-539.9 to 1-539.14
Art. 43C. Actions Pertaining to Local Units of Government, G.S. 1-539.15 to 1-539.20
Art. 43D. Abolition of Parent-Child Immunity in Motor Vehicle Cases, G.S. 1-539.21 to 1-539.24

Art. 43E. Affirmative Defense Based On Year 2000 Failure [Expired.]

Subchapter XV. Incidental Procedure In Civil Actions

Art. 44. Compromise, G.S. 1-540 to 1-543
Art. 44A. Tender, G.S. 1-543.1 to 1-543.9
Art. 44B. Structured Settlement Protection Act, G.S. 1-543.10 to 1-543.15
Art. 45. Arbitration and Award [Repealed.]
Art. 45A. Arbitration and Award [Repealed.]
Art. 45B. International Commercial Arbitration and Conciliation, G.S. 1-567.30 to 1-569
Art. 45C. Revised Uniform Arbitration Act, G.S. 1-569.1 to 1-569.31
Art. 46. Examination Before Trial [Repealed.]
Art. 47. Motions and Orders [Repealed.]
Art. 48. Notices, G.S. 1-585 to 1-592
Art. 49. Time, G.S. 1-593 to 1-594
Art. 50. General Provisions as to Legal Advertising, G.S. 1-595 to 1-604
Art. 51. False Claims Act, G.S. 1-605 to 1-618
Chapter 1A. Rules of Civil Procedure, Rules 1 to 84
Art. 1. Scope of Rules—One Form of Action, Rules 1, 2
Art. 2. Commencement of Action; Service of Process, Pleadings, Motions, and Orders, Rules 3 to 6
Art. 3. Pleadings and Motions, Rules 7 to 16
Art. 4. Parties, Rules 17 to 25
Art. 5. Depositions and Discovery, Rules 26 to 37
Art. 6. Trials, Rules 38 to 53
Art. 7. Judgment, Rules 54 to 63
Art. 8. Miscellaneous, Rules 64 to 84

Chapter 1.

Civil Procedure.

SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.

Article 1.

Definitions.

Sec.
1-1. Remedies.
1-2. Actions.
1-3. Special proceedings.
1-4. Kinds of actions.
1-5. Criminal action.
1-6. Civil action.
1-7. When court means clerk.

Article 2.

General Provisions.

1-8. Remedies not merged.
1-9. [Repealed.]
1-10. Plaintiff and defendant.
1-11. How party may appear.
1-12. [Repealed.]
1-13. Jurisdiction of clerk.

SUBCHAPTER II. LIMITATIONS.

Article 3.

Limitations, General Provisions.

1-14. [Repealed.]
1-15. Statute runs from accrual of action.
1-15.1. Statutes of limitation and repose for civil actions seeking to recover damages arising out of a criminal act.
1-16. [Repealed.]
1-17. Disabilities.
1-18. Disability of marriage.
1-19. Cumulative disabilities.
1-20. Disability must exist when right of action accrues.
1-21. Defendant out of State; when action begun or judgment enforced.
1-22. Death before limitation expires; action by or against personal representative or collector.
1-23. Time of stay by injunction or prohibition.
1-24. Time during controversy on probate of will or granting letters.
1-25. [Repealed.]
1-26. New promise must be in writing.
1-27. Act, admission or acknowledgment by party to obligation, co-obligor or guarantor.
1-28. Undisclosed partner.
1-29. Cotenants.
1-30. Applicable to actions by State.
Sec.
1-31. Action upon a mutual, open and current account.
1-32. Not applicable to bank bills.
1-33. Actions against bank directors or stockholders.
1-34. Aliens in time of war.

Article 4.

Limitations, Real Property.

1-35. Title against State.
1-36. Title presumed out of State.
1-37. Such possession valid against claimants under State.
1-38. Seven years' possession under color of title.
1-39. Seizin within twenty years necessary.
1-40. Twenty years adverse possession.
1-41. Action after entry.
1-42. Possession follows legal title; severance of surface and subsurface rights.
1-42.1. Certain ancient mineral claims extinguished in certain counties.
1-42.2. Certain additional ancient mineral claims extinguished; oil, gas and mineral interests to be recorded and listed for taxation.
1-42.3. Additional ancient mineral claims extinguished in certain counties; oil, gas and mineral interests to be recorded and listed for taxation in such counties.
1-42.4. Additional ancient mineral claims extinguished in Ashe County; oil, gas and mineral interests to be recorded and listed for taxation.
1-42.5. Additional ancient mineral claims extinguished in Avery County; oil, gas and mineral interests to be recorded in such county.
1-42.6. Additional ancient oil, gas or mineral interests extinguished in Alleghany County; recording interests; listing interests for taxation.
1-42.7. Additional amount mineral claims extinguished in Chatham County; oil, gas and mineral interests to be recorded and listed for taxation.
1-42.8. Ancient mineral claims extinguished in Rutherford County; oil, gas and mineral interests to be recorded and listed for taxation.
1-42.9. Ancient mineral claims extinguished in certain counties; oil, gas and mineral interests to be recorded and listed for taxation.

Sec.
1-43. Tenant's possession is landlord's.
1-44. No title by possession of right-of-way.
1-44.1. Presumption of abandonment of railroad right-of-way.
1-44.2. Presumptive ownership of abandoned railroad easements.
1-45. No title by possession of public ways.
1-45.1. No adverse possession of property subject to public trust rights.

Article 5.

Limitations, Other Than Real Property.

1-46. Periods prescribed.
1-46.1. Twelve years.
1-47. Ten years.
1-48. [Transferred.]
1-49. Seven years.
1-50. Six years.
1-51. Five years.
1-52. Three years.
1-53. Two years.
1-54. One year.
1-54.1. Two months.
1-55. Six months.

Article 5A.

Limitations, Actions Not Otherwise Limited.

1-56. All other actions, 10 years.

SUBCHAPTER III. PARTIES.

Article 6.

Parties.

1-57. Real party in interest; grantees and assignees.
1-58. Suits for penalties.
1-59. Suit for penalty, plaintiff may reply fraud to plea of release.
1-60. Suit on bonds; defendant may plead satisfaction.
1-61. [Repealed.]
1-62. Action by purchaser under judicial sale.
1-63 through 1-69. [Repealed.]
1-69.1. Unincorporated associations and partnerships; suit by or against.
1-70, 1-71. [Repealed.]
1-72. Persons jointly liable.
1-72.1. Procedure to assert right of access.
1-73 through 1-75. [Repealed.]

SUBCHAPTER IIIA. JURISDICTION.

Article 6A.

Jurisdiction.

1-75.1. Legislative intent.
1-75.2. Definitions.
1-75.3. Jurisdictional requirements for judgments against persons, status and things.
Sec.
1-75.4. Personal jurisdiction, grounds for generally.
1-75.5. Joinder of causes in the same action.
1-75.6. Personal jurisdiction — Manner of exercising by service of process.
1-75.7. Personal jurisdiction — Grounds for without service of summons.
1-75.8. Jurisdiction in rem or quasi in rem — Grounds for generally.
1-75.9. Jurisdiction in rem or quasi in rem — Manner of exercising.
1-75.10. Proof of service of summons, defendant appearing in action.
1-75.11. Judgment against nonappearing defendant, proof of jurisdiction.
1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction.

SUBCHAPTER IV. VENUE.

Article 7.

Venue.

1-76. Where subject of action situated.
1-76.1. Where deficiency debtor resides or where loan was negotiated.
1-77. Where cause of action arose.
1-78. Official bonds, executors and administrators.
1-79. Domestic corporations, limited partnerships, limited liability companies, and registered limited liability partnerships.
1-80. Foreign corporations.
1-81. Actions against railroads.
1-81.1. Venue in apportionment or redistricting cases.
1-82. Venue in all other cases.
1-83. Change of venue.
1-84. Removal for fair trial.
1-85. Affidavits on hearing for removal; when removal ordered.
1-86. [Repealed.]
1-87. Transcript of removal; subsequent proceedings; depositions.
1-87.1. [Repealed.]

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

Article 8.

Summons.

1-88 through 1-104. [Repealed.]
1-105. Service upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles.
1-105.1. Service on residents who establish residence outside the State and on

Sec.
residents who depart from the State.
1-106 through 1-107.3. [Repealed.]
1-108. Defense after judgment set aside.

Article 9.

Prosecution Bonds.

1-109. Bond required of plaintiff for costs.
1-110. Suit as an indigent; counsel; suits filed pro se by prison inmates.
1-111. Defendant's, for costs and damages in actions for land.
1-112. Defense without bond.

Article 10.

Joint and Several Debtors.

1-113. Defendants jointly or severally liable.
1-114. Summoned after judgment; defense.
1-115. [Repealed.]

Article 11.

Lis Pendens.

1-116. Filing of notice of suit.
1-116.1. Service of notice.
1-117. Cross-index of lis pendens.
1-118. Effect on subsequent purchasers.
1-119. Notice void unless action prosecuted.
1-120. Cancellation of notice.
1-120.1. Article applicable to suits in federal courts.
1-120.2. Filing of notice by cities and counties in certain cases.

SUBCHAPTER VI. PLEADINGS.

Article 12.

Complaint.

1-121 through 1-123. [Repealed.]

Article 13.

Defendant's Pleadings.

1-124 through 1-126. [Repealed.]

Article 14.

Demurrer.

1-127 through 1-134. [Repealed.]

Article 15.

Answer.

1-134.1 through 138. [Repealed.]
1-139. Burden of proof of contributory negligence.

Article 16.

Reply.

1-140 through 1-142. [Repealed.]

Article 17.

Pleadings, General Provisions.

Sec.
1-143 through 1-147. [Repealed.]
1-148. Verification before what officer.
1-149. When verification omitted; use in criminal prosecutions.
1-150 through 1-160. [Repealed.]

Article 18.

Amendments.

1-161 through 1-163. [Repealed.]
1-164. Amendment changing nature of action or relief; effect.
1-165. [Repealed.]
1-166. Defendant sued in fictitious name; amendment.
1-167 through 1-169. [Repealed.]

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

Article 18A.

Pretrial Hearings.

1-169.1 through 1-169.6. [Repealed.]

Article 19.

Trial.

1-170 through 1-173. [Repealed.]
1-174. [Repealed.]
1-175 through 1-180. [Repealed.]
1-180.1. Judge not to comment on verdict.
1-181. Requests for special instructions.
1-181.1. View by jury.
1-181.2. Use of evidence by the jury.
1-182, 1-183. [Repealed.]
1-183.1. Effect on counterclaim of dismissal as to plaintiff's claim.
1-184, 1-185. [Repealed.]
1-186. Exceptions to decision of court.
1-187. [Repealed.]

Article 20.

Reference.

1-188 through 1-195. [Repealed.]

Article 21.

Issues.

1-196 through 1-200. [Repealed.]

Article 22.

Verdict and Exceptions.

1-201. [Repealed.]
1-202. Special controls general.
1-203 through 1-207. [Repealed.]

SUBCHAPTER VIII. JUDGMENT.

Article 23.

Judgment.

Sec.
1-208. [Repealed.]
1-208.1. Judgment docket, judgment and docket book defined.
1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.
1-209.1. Petitioner who abandons condemnation proceeding taxed with fee for respondent's attorney.
1-209.2. Voluntary nonsuit by petitioner in condemnation proceeding.
1-210. Return of execution; order for disbursement of proceeds.
1-211 through 1-215. [Repealed.]
1-215.1. Judgments or orders not rendered on Mondays validated.
1-215.2. Time within which judgments or orders signed on days other than Mondays may be attacked.
1-215.3. Validation of conveyances pursuant to orders made on days other than Mondays.
1-216. [Repealed.]
1-217. Certain default judgments validated.
1-217.1. Judgments based on summons erroneously designated alias or pluries validated.
1-217.2. Judgments by default to remove cloud from title to real estate validated.
1-218 through 1-222. [Repealed.]
1-223. Against married persons.
1-224 through 1-227. [Repealed.]
1-228. Regarded as a deed and registered.
1-229. Certified registered copy evidence.
1-230. In action for recovery of personal property.
1-231. What judge approves judgments.
1-232. Judgment roll.
1-233. Docketed and indexed.
1-234. Where and how docketed; lien.
1-235. Of appellate division docketed in superior court; lien.
1-236. [Repealed.]
1-236.1. Transcripts of judgments certified by deputy clerks validated.
1-237. Judgments of federal courts docketed; lien on property; recordation; conformity with federal law.
1-238. [Repealed.]
1-239. Paid to clerk; docket credited; transcript to other counties; notice to attorney for judgment creditor; judgment creditor to give notice of payment; entry of payment on docket; penalty for failure to give notice of payment.
Sec.
1-239.1. Records of cancellation, assignment, etc., of judgments recorded by photographic process.
1-240. [Repealed.]
1-241. Clerk to pay money to party entitled.
1-242. Credits upon judgments.
1-243. For money due on judicial sale.
1-244. [Repealed.]
1-245. Cancellation of judgments discharged through bankruptcy proceedings.
1-246. Assignment of judgment to be entered on judgment docket, signed and witnessed.

Article 24.

Confession of Judgment.

1-247 through 1-249. [Repealed.]

Article 25.

Submission of Controversy Without Action.

1-250 through 1-252. [Repealed.]

Article 26.

Declaratory Judgments.

1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.
1-254. Courts given power of construction of all instruments.
1-255. Who may apply for a declaration.
1-256. Enumeration of declarations not exclusive.
1-257. Discretion of court.
1-258. Review.
1-259. Supplemental relief.
1-260. Parties.
1-261. Jury trial.
1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.
1-263. Costs.
1-264. Liberal construction and administration.
1-265. Word "person" construed.
1-266. Uniformity of interpretation.
1-267. Short title.

Article 26A.

Three-Judge Panel for Redistricting Challenges.

1-267.1. Three-judge panel for actions challenging plans apportioning or redistricting State legislative or congressional districts.

Article 26B.

Distribution of Unpaid Residuals in Class Action Litigation.

Sec.
1-267.10. Distribution of unpaid residuals in class action litigation.

SUBCHAPTER IX. APPEAL.

Article 27.

Appeal.

1-268. Writs of error abolished.
1-269. Certiorari, recordari, and supersedeas.
1-270. Appeal to appellate division; security on appeal; stay.
1-271. Who may appeal.
1-272 through 1-276. [Repealed.]
1-277. Appeal from superior or district court judge.
1-278. Interlocutory orders reviewed on appeal from judgment.
1-279. [Repealed.]
1-279.1. Manner and time for giving notice of appeal to appellate division in civil actions and in special proceedings.
1-280. [Repealed.]
1-281. Appeals from judgments not in session.
1-282. [Repealed.]
1-283. Trial judge empowered to settle record on appeal; effect of leaving office or of disability.
1-284. [Repealed.]
1-285. Undertaking on appeal.
1-286. Justification of sureties.
1-287, 1-287.1. [Repealed.]
1-288. Appeals by indigents; clerk's fees.
1-289. Undertaking to stay execution on money judgment.
1-290. How judgment for personal property stayed.
1-291. How judgment directing conveyance stayed.
1-292. How judgment for real property stayed.
1-293. Docket entry of stay.
1-294. Scope of stay; security limited for fiduciaries.
1-295. Undertaking in one or more instruments; served on appellee.
1-296. Judgment not vacated by stay.
1-297. Judgment on appeal and on undertakings; restitution.
1-298. Procedure after determination of appeal.
1-299 through 1-301. [Repealed.]

Article 27A.

Appeals and Transfers from the Clerk.

1-301.1. Appeal of clerk's decision in civil actions.

Sec.
1-301.2. Transfer or appeal of special proceedings; exceptions.
1-301.3. Appeal of estate matters determined by clerk.

SUBCHAPTER X. EXECUTION.

Article 28.

Execution.

1-302. Judgment enforced by execution.
1-303. Kinds of; signed by clerk; when sealed.
1-304. Against married woman.
1-305. Clerk to issue, in six weeks; penalty; limitations on issuance.
1-306. Enforcement as of course.
1-307. Issued from and returned to court of rendition.
1-308. To what counties issued.
1-309. Sale of land under execution.
1-310. When dated and returnable.
1-311. Against the person.
1-312. Rights against property of defendant dying in execution.
1-313. Form of execution.
1-314. Variance between judgment and execution.
1-315. Property liable to sale under execution; bill of sale.
1-316. Sale of trust estates; purchaser's title.
1-317. Sheriff's deed on sale of equity of redemption.
1-318. Forthcoming bond for personal property.
1-319. Procedure on giving bond; subsequent levies.
1-320. Summary remedy on forthcoming bond.
1-321. Entry of returns on judgment docket; penalty.
1-322. Cost of keeping livestock; officer's account.
1-323. Purchaser of defective title; remedy against defendant.
1-324. [Repealed.]
1-324.1. Judgment against corporation; property subject to execution.
1-324.2. Agent must furnish information as to corporate officers and property.
1-324.3. Shares subject to execution; agent must furnish information.
1-324.4. Debts due corporation subject to execution; duty, etc., of agent.
1-324.5. Violations of three preceding sections misdemeanor.
1-324.6. Proceedings when custodian of corporate books is a nonresident.
1-324.7. Duty and liability of nonresident custodian.

Article 29.

Execution and Judicial Sales.

1-325 through 1-328. [Repealed.]
1-329. [Transferred.]

Sec.
1-330. [Repealed.]
1-331, 1-332. [Transferred.]
1-333, 1-334. [Repealed.]
1-335. [Transferred.]
1-336. [Repealed.]
1-337, 1-338. [Transferred.]
1-339. [Repealed.]

Article 29A.

Judicial Sales.

Part 1. General Provisions.

1-339.1. Definitions.
1-339.2. Application of Part 1.
1-339.3. Application of Article to sale ordered by clerk; by judge; authority to fix procedural details.
1-339.3A. Judge or clerk may order public or private sale.
1-339.4. Who may hold sale.
1-339.5. Days on which sale may be held.
1-339.6. Place of public sale.
1-339.7. Presence of personal property at public sale required.
1-339.8. Public sale of separate tracts in different counties.
1-339.9. Sale as a whole or in parts.
1-339.10. Bond of person holding sale.
1-339.11. Compensation of person holding sale.
1-339.12. Clerk's authority to compel report or accounting; contempt proceeding.

Part 2. Procedure for Public Sales of Real and Personal Property.

1-339.13. Public sale; order of sale.
1-339.13A. Public sale of timber by sealed bid; appraisal; bid procedure.
1-339.14. Public sale; judge's approval of clerk's order of sale.
1-339.15. Public sale; contents of notice of sale.
1-339.16. Public sale; time for beginning advertisement.
1-339.17. Public sale; posting and publishing notice of sale of real property.
1-339.18. Public sale; posting notice of sale of personal property.
1-339.19. Public sale; exception; perishable property.
1-339.20. Public sale; postponement of sale.
1-339.21. Public sale by auction; time of sale.
1-339.22. Public sale by auction; continuance of uncompleted sale.
1-339.23. Public sale; when confirmation of sale of personal property necessary; delivery of property; bill of sale.
1-339.24. Public sale; report of sale; when final as to personal property.
1-339.25. Public sale; upset bid on real property; compliance bond.
1-339.26. Public sale by auction; separate upset bids when real property sold in parts; subsequent procedure.
1-339.27. [Repealed.]
1-339.27A. Ordering resale of real property after sale or upset bid.
1-339.28. Public sale; confirmation of sale.
1-339.29. Public sale; real property; deed; order for possession.
1-339.30. Public sale; failure of bidder to make cash deposit or to comply with bid; resale.
1-339.31. Public sale; report of commissioner or trustee in deed of trust.
1-339.32. Public sale; final report of person, other than commissioner or trustee in deed of trust.

Part 3. Procedure for Private Sales of Real and Personal Property.

1-339.33. Private sale; order of sale.
1-339.34. Private sale; exception; certain personal property.
1-339.35. Private sale; report of sale.
1-339.36. Private sale; upset bid; subsequent procedure.
1-339.37. Private sale; confirmation.
1-339.38. Private sale; real property; deed; order for possession.
1-339.39. Private sale; personal property; delivery; bill of sale.
1-339.40. Private sale; final report.

Article 29B.

Execution Sales.

Part 1. General Provisions.

1-339.41. Definitions.
1-339.42. Clerk's authority to fix procedural details.
1-339.43. Days on which sale may be held.
1-339.44. Place of sale.
1-339.45. Presence of personal property at sale required.
1-339.46. Sale as a whole or in parts.
1-339.47. Sale to be made for cash.
1-339.48. Life of execution.
1-339.49. Penalty for selling contrary to law.
1-339.50. Officer's return of no sale for want of bidders; penalty.

Part 2. Procedure for Sale.

1-339.51. Contents of notice of sale.
1-339.52. Posting and publishing notice of sale of real property.
1-339.53. Posting notice of sale of personal property.
1-339.54. Notice to judgment debtor of sale of real property.
1-339.55. Notification of Governor and Attorney General.

Sec.
1-339.56. Exception; perishable property.
1-339.57. Satisfaction of judgment before sale completed.
1-339.58. Postponement of sale.
1-339.59. Procedure upon dissolution of order restraining or enjoining sale.
1-339.60. Time of sale.
1-339.61. Continuance of uncompleted sale.
1-339.62. Delivery of personal property; bill of sale.
1-339.63. Report of sale.
1-339.64. Upset bid on real property; compliance bond.
1-339.65. Separate upset bids when real property sold in parts; subsequent procedure.
1-339.66. [Repealed.]
1-339.66A. Ordering resale of real property after upset bid.
1-339.67. Confirmation of sale of real property.
1-339.68. Deed for real property sold; property subject to liens; orders for possession.
1-339.69. Failure of bidder to comply with bid; resale.
1-339.70. Disposition of proceeds of sale.
1-339.71. Special proceeding to determine ownership of surplus.

Article 29C.

Validating Sections.

1-339.72. Validation of certain sales.
1-339.73. Ratification of certain sales held on days other than the day required by statute.
1-339.74. Sales on other days validated.
1-339.75. Certain sales validated.
1-339.76. Validation of sales when payment deferred more than two years.
1-339.77. Validation of certain sales confirmed prior to time prescribed by law.

Article 30.

Betterments.

1-340. Petition by claimant; execution suspended; issues found.
1-341. Annual value of land and waste charged against defendant.
1-342. Value of improvements estimated.
1-343. Improvements to balance rents.
1-344. Verdict, judgment, and lien.
1-345. Life tenant recovers from remainderman.
1-346. Value of premises without improvements.
1-347. Plaintiff's election that defendant take premises.
1-348. Payment made to court; land sold on default.
Sec.
1-349. Procedure where plaintiff is under disability.
1-350. Defendant evicted, may recover from plaintiff.
1-351. Not applicable to suit by mortgagee.

Article 31.

Supplemental Proceedings.

1-352. Execution unsatisfied, debtor ordered to answer.
1-352.1. Interrogatories to discover assets.
1-352.2. Additional method of discovering assets.
1-353. Property withheld from execution; proceedings.
1-354. Proceedings against joint debtors.
1-355. Debtor leaving State, or concealing himself, arrested; bond.
1-356. Examination of parties and witnesses.
1-357. Incriminating answers not privileged; not used in criminal proceedings.
1-358. Disposition of property forbidden.
1-359. Debtors of judgment debtor may satisfy execution.
1-360. Debtors of judgment debtor may be summoned.
1-360.1. Execution on the property of debtors of judgment debtor.
1-361. Where proceedings instituted and defendant examined.
1-362. Debtor's property ordered sold.
1-363. Receiver appointed.
1-364. Filing and record of appointment; property vests in receiver.
1-365. Where order of appointment recorded.
1-366. Receiver to sue debtors of judgment debtor.
1-367. Reference.
1-368. Disobedience of orders punished as for contempt.

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

Article 32.

Property Exempt from Execution.

1-369 through 1-392. [Repealed.]

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

Article 33.

Special Proceedings.

1-393. Chapter and Rules of Civil Procedure applicable to special proceedings.
1-394. Contested special proceedings; commencement; summons.
1-394.1. Special proceedings to determine authority to transfer structured settlement payment rights.

Sec.
1-395. Return of summons.
1-396. When complaint filed.
1-397. [Repealed.]
1-398. Filing time enlarged.
1-399. [Repealed.]
1-400. Ex parte; commenced by petition.
1-401. Clerk acts summarily; signing by petitioners; authorization to attorney.
1-402. Judge approves when petitioner is infant.
1-403. Orders signed by judge.
1-404. Reports of commissioners and jurors.
1-405. No report set aside for trivial defect.
1-406. Commissioner of sale to account in sixty days.
1-407. Commissioner holding proceeds of land sold for reinvestment to give bond.
1-407.1. Bond required to protect interest of infant or incompetent.
1-407.2. When court may waive bond; premium paid from fund protected.
1-408. Action in which clerk may allow fees of commissioners; fees taxed as costs.
1-408.1. Clerk may order surveys in civil actions and special proceedings involving sale of land.

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

Article 34.

Arrest and Bail.

1-409. Arrest only as herein prescribed.
1-410. In what cases arrest allowed.
1-411. Order and affidavit.
1-412. Undertaking before order.
1-413. Issuance and form of order.
1-414. Copies of affidavit and order to defendant.
1-415. Execution of order.
1-416. Vacation of order for failure to serve.
1-417. Motion to vacate order; jury trial.
1-418. Counter affidavits by plaintiff.
1-419. How defendant discharged.
1-420. Defendant's undertaking.
1-421. Defendant's undertaking delivered to clerk; exception.
1-422. Notice of justification; new bail.
1-423. Qualifications of bail.
1-424. Justification of bail.
1-425. Allowance of bail.
1-426. Deposit in lieu of bail.
1-427. Deposit paid into court; liability on sheriff's bond.
1-428. Bail substituted for deposit.
1-429. Deposit applied to plaintiff's judgment.
1-430. Defendant in jail, sheriff may take bail.
1-431. When sheriff liable as bail.
1-432. Action on sheriff's bond.
1-433. Bail exonerated.

Sec.
1-434. Surrender of defendant.
1-435. Bail may arrest defendant.
1-436. Proceedings against bail by motion.
1-437. Liability of bail to sheriff.
1-438. When bail to pay costs.
1-439. Bail not discharged by amendment.

Article 35.

Attachment.

Part 1. General Provisions.

1-440. [Superseded.]
1-440.1. Nature of attachment.
1-440.2. Actions in which attachment may be had.
1-440.3. Grounds for attachment.
1-440.4. Property subject to attachment.
1-440.5. By whom order issued; when and where; filing of bond and affidavit.
1-440.6. Time of issuance with reference to summons or service by publication.
1-440.7. Time within which service of summons or service by publication must be had.
1-440.8. General provisions relative to bonds.
1-440.9. Authority of court to fix procedural details.

Part 2. Procedure to Secure Attachment.

1-440.10. Bond for attachment.
1-440.11. Affidavit for attachment; amendment.
1-440.12. Order of attachment; form and contents.
1-440.13. Additional orders of attachment at time of original order; alias and pluries orders.
1-440.14. Notice of issuance of order of attachment when no personal service.

Part 3. Execution of Order of Attachment; Garnishment.

1-440.15. Method of execution.
1-440.16. Sheriff's return.
1-440.17. Levy on real property.
1-440.18. Levy on tangible personal property in defendant's possession.
1-440.19. Levy on stock in corporation.
1-440.20. Levy on goods in warehouses.
1-440.21. Nature of garnishment.
1-440.22. Issuance of summons to garnishee.
1-440.23. Form of summons to garnishee.
1-440.24. Form of notice of levy in garnishment proceeding.
1-440.25. Levy upon debt owed by, or property in possession of, the garnishee.
1-440.26. To whom garnishment process may be delivered when garnishee is corporation.

Sec.
1-440.27. Failure of garnishee to appear.
1-440.28. Admission by garnishee; setoff; lien.
1-440.29. Denial of claim by garnishee; issues of fact.
1-440.30. Time of jury trial.
1-440.31. Payment to defendant by garnishee.
1-440.32. Execution against garnishee.

Part 4. Relating to Attached Property.

1-440.33. When lien of attachment begins; priority of liens.
1-440.34. Effect of defendant's death after levy.
1-440.35. Sheriff's liability for care of attached property; expense of care.

Part 5. Miscellaneous Procedure Pending Final Judgment.

1-440.36. Dissolution of the order of attachment.
1-440.37. Modification of the order of attachment.
1-440.38. Stay of order dissolving or modifying an order of attachment.
1-440.39. Discharge of attachment upon giving bond.
1-440.40. Defendant's objection to bond or surety.
1-440.41. Defendant's remedies not exclusive.
1-440.42. Plaintiff's objection to bond or surety; failure to comply with order to furnish increased or new bond.
1-440.43. Remedies of third person claiming attached property or interest therein.
1-440.44. When attached property to be sold before judgment.

Part 6. Procedure after Judgment.

1-440.45. When defendant prevails in principal action.
1-440.46. When plaintiff prevails in principal action.

Part 7. Attachments in Justice of the Peace Courts.

1-440.47 through 1-440.56. [Repealed.]

Part 8. Attachment in Other Inferior Courts.

1-440.57. [Repealed.]

Part 9. Superseded Sections.

1-441 through 1-471. [Superseded.]

Article 36.

Claim and Delivery.

1-472. Claim for delivery of personal property.
1-473. Affidavit and requisites.
Sec.
1-474. Order of seizure and delivery to plaintiff.
1-474.1. Notice of hearing; waiver; permissible form of notice and waiver.
1-475. Plaintiff's undertaking.
1-476. Sheriff's duties.
1-477. Exceptions to undertaking; liability of sheriff.
1-478. Defendant's undertaking for replevy.
1-479. Qualification and justification of defendant's sureties.
1-480. Property concealed in buildings.
1-481. Care and delivery of seized property.
1-482. Property claimed by third person; proceedings.
1-483. Delivery of property to intervener.
1-484. Sheriff to return papers in 10 days.
1-484.1. Remedy not exclusive.

Article 37.

Injunction.

1-485. When preliminary injunction issued.
1-486. When solvent defendant restrained.
1-487. Timberlands, trial of title to.
1-488. When timber may be cut.
1-489 through 1-492. [Repealed.]
1-493. What judges have jurisdiction.
1-494. Before what judge returnable.
1-495. Stipulation as to judge to hear.
1-496, 1-497. [Repealed.]
1-498. Application to extend, modify, or vacate; before whom heard.
1-499. [Repealed.]
1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond.

Article 38.

Receivers.

Part 1. Receivers Generally.

1-501. What judge appoints.
1-502. In what cases appointed.
1-502.1. Applicant for receiver to furnish bond to adverse party.
1-503. Appointment refused on bond being given.
1-504. Receiver's bond.
1-505. Sale of property in hands of receiver.
1-506. [Repealed.]
1-507. Validation of sales made outside county of action.

Part 2. Receivers of Corporations.

1-507.1. Appointment and removal.
1-507.2. Powers and bond.
1-507.3. Title and inventory.
1-507.4. Foreclosure by receivers and trustees of corporate mortgagees or grantees.

Sec.
1-507.5. May send for persons and papers; penalty for refusing to answer.
1-507.6. Proof of claims; time limit.
1-507.7. Report on claims to court; exceptions and jury trial.
1-507.8. Property sold pending litigation.
1-507.9. Compensation and expenses; counsel fees.
1-507.10. Debts provided for, receiver discharged.
1-507.11. Reorganization.

Article 39.

Deposit or Delivery of Money or Other Property.

1-508. Ordered paid into court.
1-509. Ordered seized by sheriff.
1-510. Defendant ordered to satisfy admitted sum.

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

Article 40.

Mandamus.

1-511 through 1-513. [Repealed.]

Article 41.

Quo Warranto.

1-514. Writs of sci. fa. and quo warranto abolished.
1-515. Action by Attorney General.
1-516. Action by private person with leave.
1-517. Solvent sureties required.
1-518. Leave withdrawn and action dismissed for insufficient bond.
1-519. Arrest and bail of defendant usurping office.
1-520. Several claims tried in one action.
1-521. Trials expedited.
1-522. Time for bringing action.
1-523. Defendant's undertaking before answer.
1-524. Possession of office not disturbed pending trial.
1-525. Judgment by default and inquiry on failure of defendant to give bond.
1-526. Service of summons and complaint.
1-527. Judgment in such actions.
1-528. Mandamus to aid relator.
1-529. Appeal; bonds of parties.
1-530. Relator inducted into office; duty.
1-531. Refusal to surrender official papers misdemeanor.
1-532. Action to recover property forfeited to State.

Article 42.

Waste.

1-533. Remedy and judgment.
1-534. For and against whom action lies.

Sec.
1-535. Tenant in possession liable.
1-536. Action by tenant against cotenant.
1-537. Action by heirs.
1-538. Judgment for treble damages and possession.

Article 43.

Nuisance and Other Wrongs.

1-538.1. Strict liability for damage to person or property by minors.
1-538.2. Civil liability for larceny, shoplifting, theft by employee, embezzlement, and obtaining property by false pretense.
1-538.3. Negligent supervision of minor.
1-539. Remedy for nuisance.
1-539.1. Damages for unlawful cutting, removal or burning of timber; misrepresentation of property lines.
1-539.2. Dismantling portion of building.
1-539.2A. Damages for computer trespass.
1-539.2B. Double damages for injury to agricultural commodities or production systems; define value of agricultural commodities grown for educational, testing, or research purposes.
1-539.2C. Damages for identity theft.

Article 43A.

Adjudication of Small Claims in Superior Court.

1-539.3 through 1-539.8. [Repealed.]

Article 43B.

Defense of Charitable Immunity Abolished; and Qualified Immunity for Volunteers.

1-539.9. Defense abolished as to actions arising after September 1, 1967.
1-539.10. Immunity from civil liability for volunteers.
1-539.11. Definitions.
1-539.12. Immunity from civil liability for employers disclosing information.
1-539.13 through 1-539.14. [Reserved.]

Article 43C.

Actions Pertaining to Local Units of Government.

1-539.15. [Repealed.]
1-539.16. Notice of claims against local units of government.
1-539.17 through 1-539.20. [Reserved.]

Article 43D.
Abolition of Parent-Child Immunity in Motor Vehicle Cases.

Sec.
1-539.21. Abolition of parent-child immunity in motor vehicle cases.
1-539.22 through 1-539.24. [Reserved.]

Article 43E.
Affirmative Defense Based On Year 2000 Failure.

1-539.25, 1-539.26. [Expired.]

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

Article 44.
Compromise.

1-540. By agreement receipt of less sum is discharge.
1-540.1. Effect of release of original wrongdoer on liability of physicians and surgeons for malpractice.
1-540.2. Settlement of property damage claims arising from motor vehicle collisions or accidents; same not to constitute admission of liability, nor bar party seeking damages for bodily injury or death.
1-540.3. Advance payments.
1-541 through 1-543. [Repealed.]

Article 44A.
Tender.

1-543.1. Service of order of tender; return.
1-543.2 through 1-543.9. [Reserved.]

Article 44B.
Structured Settlement Protection Act.

1-543.10. Title.
1-543.11. Definitions.
1-543.12. Structured settlement payment rights.
1-543.13. Jurisdiction.
1-543.14. Procedure for approval of transfers.
1-543.15. No waiver; penalties.

Article 45.
Arbitration and Award.

1-544 through 1-567. [Repealed.]

Article 45A.
Arbitration and Award.

1-567.1 through 1-567.20. [Repealed.]
1-567.21 through 1-567.29. [Reserved.]

Article 45B.
International Commercial Arbitration and Conciliation.

Part 1. General Provisions.

Sec.
1-567.30. Preamble and short title.
1-567.31. Scope of application.
1-567.32. Definitions and rules of interpretation.
1-567.33. Receipt of written communications or submissions.
1-567.33A. Severability.

Part 2. International Commercial Arbitration.

1-567.34. Waiver of right to object.
1-567.35. Extent of court intervention.
1-567.36. Venue and jurisdiction of courts.
1-567.37. Definition and form of arbitration agreement.
1-567.38. Arbitration agreement and substantive claim before court.
1-567.39. Interim relief and the enforcement of interim measures.
1-567.40. Number of arbitrators.
1-567.41. Appointment of arbitrators.
1-567.42. Grounds for challenge.
1-567.43. Challenge procedure.
1-567.44. Failure or impossibility to act.
1-567.45. Appointment of substitute arbitrator.
1-567.46. Competence of arbitral tribunal to rule on its jurisdiction.
1-567.47. Power of arbitral tribunal to order interim measures.
1-567.48. Equal treatment of parties; representation by attorney.
1-567.49. Determination of rules of procedure.
1-567.50. Place of arbitration.
1-567.51. Commencement of arbitral proceedings.
1-567.52. Language.
1-567.53. Statements of claim and defense.
1-567.54. Hearings and written proceedings.
1-567.55. Default of a party.
1-567.56. Expert appointed by arbitral tribunal.
1-567.57. Court assistance in obtaining discovery and taking evidence.
1-567.58. Rules applicable to substance of dispute.
1-567.59. Decision making by panel of arbitrators.
1-567.60. Settlement.
1-567.61. Form and contents of award.
1-567.62. Termination of proceedings.
1-567.63. Correction and interpretation of awards; additional awards.
1-567.64. Modifying or vacating of awards.
1-567.65. Confirmation and enforcement of awards.

Sec.
1-567.66. Applications to superior court.
1-567.67. Appeals.
1-567.68. [Recodified.]
1-567.69 through 1-567.77. [Reserved.]

Part 3. International Commercial Conciliation.

1-567.78. Appointment of conciliators.
1-567.79. Representation.
1-567.80. Report of conciliators.
1-567.81. Confidentiality.
1-567.82. Stay of arbitration; resort to other proceedings.
1-567.83. Termination of conciliation.
1-567.84. Enforceability of decree.
1-567.85. Costs.
1-567.86. Effect on jurisdiction.
1-567.87. Immunity of conciliators and parties.
1-568 through 1-569. [Repealed.]

Article 45C.

Revised Uniform Arbitration Act.

1-569.1. Definitions.
1-569.2. Notice.
1-569.3. When Article applies.
1-569.4. Effect of agreement to arbitrate; nonwaivable provisions.
1-569.5. Application for judicial relief.
1-569.6. Validity of agreement to arbitrate.
1-569.7. Motion to compel or stay arbitration.
1-569.8. Provisional remedies.
1-569.9. Initiation of arbitration.
1-569.10. Consolidation of separate arbitration proceedings.
1-569.11. Appointment of arbitrator; service as a neutral arbitrator.
1-569.12. Disclosure by arbitrator.
1-569.13. Action by majority.
1-569.14. Immunity of arbitrator; competency to testify; attorneys' fees and costs.
1-569.15. Arbitration process.
1-569.16. Representation by lawyer.
1-569.17. Witnesses; subpoenas; depositions; discovery.
1-569.18. Judicial enforcement of preaward ruling by arbitrator.
1-569.19. Award.
1-569.20. Change of award by arbitrator.
1-569.21. Remedies; fees and expenses of arbitration proceeding.
1-569.22. Confirmation of award.
1-569.23. Vacating award.
1-569.24. Modification or correction of award.
1-569.25. Judgment on award; attorneys' fees and litigation expenses.
1-569.26. Jurisdiction.
1-569.27. Venue.
1-569.28. Appeals.
Sec.
1-569.29. Uniformity of application and construction.
1-569.30. Relationship to federal Electronic Signatures in Global and National Commerce Act.
1-569.31. Short title.

Article 46.

Examination Before Trial.

1-570 through 1-576. [Repealed.]

Article 47.

Motions and Orders.

1-577 through 1-584. [Repealed.]

Article 48.

Notices.

1-585 through 1-589. [Repealed.]
1-589.1. Withholding information necessary for service on law-enforcement officer prohibited.
1-590 through 1-592. [Repealed.]

Article 49.

Time.

1-593. How computed.
1-594. Computation in publication.

Article 50.

General Provisions as to Legal Advertising.

1-595. Advertisement of public sales.
1-596. Charges for legal advertising.
1-597. Regulations for newspaper publication of legal notices, advertisements, etc.
1-598. Sworn statement prima facie evidence of qualifications; affidavit of publication.
1-599. Application of two preceding sections.
1-600. Proof of publication of notice in newspaper; prima facie evidence.
1-601. Certain legal advertisements validated.
1-602 through 1-604. [Reserved.]

Article 51.

False Claims Act.

1-605. Short title; purpose.
1-606. Definitions.
1-607. False claims; acts subjecting persons to liability for treble damages; costs and civil penalties; exceptions.
1-608. Civil actions for false claims.
1-609. Rights of the parties to qui tam actions.
1-610. Award to qui tam plaintiff.
1-611. Certain actions barred.
1-612. State not liable for certain expenses.

Sec.
1-613. Private action for retaliation action.
1-614. Civil investigative demand.
1-615. False claims procedure.
1-616. Remedies under other laws; severability of provisions; liberality of legislative construction; adoption of legislative history.
1-617. Reporting.
1-618. Rules.

SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.

ARTICLE 1.

Definitions.

§ 1-1. Remedies.

Remedies in the courts of justice are divided into —

(1) Actions.

(2) Special proceedings. (C.C.P., s. 1; Code, s. 125; Rev., s. 346; C.S., s. 391.)

Cross References. — For Rules of Civil Procedure, see Chapter 1A.

CASE NOTES

References to Superior Court Deemed to Refer Also to District Court. — Following the provisions of G.S. 7A-193, the references in Chapter 1 of the General Statutes to the superior court are deemed to refer also to the district court. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Admission of Patient to Hospital for Mentally Ill. — A proceeding in accordance with the provisions of G.S. 122-36 et seq. (see now G.S. 122C-341 et seq.), in strictness, seems to be neither a civil action nor a special proceeding, notwithstanding this section. In re Cook, 218 N.C. 384, 11 S.E.2d 142 (1940).

Exhaustion of Remedies. — Individual's constitutional claims against the sheriff, the sheriff's department, the county, and the detective, based upon the stopping, searching, and detaining of the individual and the retention of his property, were dismissed because the existing common law remedies of false imprisonment, trespass to chattels, and negligence were appropriate alternatives under the facts alleged in the complaint, and waiver of governmental immunity was not pleaded. Seaton v. Owens, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 22298 (M.D.N.C. Dec. 8, 2003).

Civil Actions or Special Proceedings. — Trial court erred in denying the father's motion to set aside the order entered against him that terminated his parental rights in his minor daughter; the record showed that the summons that was issued in his case was not served upon him within the time limit for service of process under the civil procedure rule then in effect and since that rule applied to civil actions or special proceedings such as a termination of parental rights case, the order was entered without the trial court having acquired personal jurisdiction over the father, and thus was void. In re A.B.D., 173 N.C. App. 77, 617 S.E.2d 707, 2005 N.C. App. LEXIS 1925 (2005).

Applied in Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985); In re Dunn, 73 N.C. App. 243, 326 S.E.2d 309 (1985); In re McKinney, 158 N.C. App. 441, 581 S.E.2d 793, 2003 N.C. App. LEXIS 1191 (2003).

Cited in In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985); Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources, 333 N.C. 318, 426 S.E.2d 274 (1993).

§ 1-2. Actions.

An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense. (C.C.P., s. 2; 1868-9, c. 277, s. 2; Code, s. 126; Rev., s. 347; C.S., s. 392.)

CASE NOTES

An inquisition of lunacy is not a civil action as defined in this section. In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

Applied in Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

Cited in Gillikin v. Gillikin, 248 N.C. 710, 104 S.E.2d 861 (1958); In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818 (1979); In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); Charns v. Brown, 129 N.C. App. 635, 502 S.E.2d 7, 1998 N.C. App. 668 (1998); In re Brooks, 143 N.C. App. 601, 548 S.E.2d 748, 2001 N.C. App. LEXIS 344 (2001); In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003); In re Summons Issued to Ernst & Young, LLP, 191 N.C. App. 668, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (2008).

§ 1-3. Special proceedings.

Every other remedy is a special proceeding. (C.C.P., s. 3; Code, s. 127; Rev., s. 348; C.S., s. 393.)

Cross References. — As to special proceedings generally, see G.S. 1-393. As to special proceeding for partition of real estate, see G.S. 46-1. As to special proceeding in allotment of year's allowance, see G.S. 30-27 et seq.

CASE NOTES

What Are Special Proceedings. — Any proceedings which prior to the Code of Civil Procedure might have been commenced by petition or by motion on notice, such as proceedings for dower, partition and year's allowance, are special proceedings under this section. Tate v. Powe, 64 N.C. 644 (1870); Felton v. Elliott, 66 N.C. 195 (1872).

One test of a special proceeding is whether or not existing statutes direct a procedure different from the ordinary. Woodley v. Gilliam, 64 N.C. 649 (1870).

Proceedings in bastardy are special proceedings. State v. McIntosh, 64 N.C. 607 (1870).

Proceedings to obtain damages for injuries to land caused by erection of a mill are special proceedings because made so by the statute creating a statutory remedy. Sumner v. Miller, 64 N.C. 688 (1870).

A petition by an administrator to sell lands for the payments of debts is a special proceeding. Hyman v. Jarnigan, 65 N.C. 96 (1871); Badger v. Jones, 66 N.C. 305 (1872).

An action to recover the possession of land, such as ejectment, is not a special proceeding. Woodley v. Gilliam, 64 N.C. 649 (1870).

Mandamus to try title to an office is not a special proceeding. State ex rel. Howerton v. Tate, 66 N.C. 231 (1872).

An inquisition of lunacy is not a special proceeding under this section. In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

Applied in Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985); In re Summons Issued to Ernst & Young, LLP, 191 N.C. App. 668, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (2008).

Cited in N. Jacobi Hdwe. Co. v. Jones Cotton Co., 188 N.C. 442, 124 S.E. 756 (1924); Gillikin v. Gillikin, 248 N.C. 710, 104 S.E.2d 861 (1958); In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818 (1979); In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources, 333 N.C. 318, 426 S.E.2d 274 (1993); In re Brooks, 143 N.C. App. 601, 548 S.E.2d 748, 2001 N.C. App. LEXIS 344 (2001); In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

§ 1-4. Kinds of actions.

Actions are of two kinds —

(1) Civil.

(2) Criminal. (C.C.P., s. 4; Code, s. 128; Rev., s. 349; C.S., s. 394.)

CASE NOTES

Cited in In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); In re King, 79 N.C. App. 139, 339 S.E.2d 87 (1986).

§ 1-5. Criminal action.

A criminal action is —

(1) An action prosecuted by the State as a party, against a person charged with a public offense, for the punishment thereof.

(2) An action prosecuted by the State, at the instance of an individual, to prevent an apprehended crime against his person or property. (Const., art. 4, s. 1; C.C.P., s. 5; Code, s. 129; Rev., s. 350; C.S., s. 395.)

CASE NOTES

History. — This section worked a significant change in the law of the State with its enactment in the Code of Civil Procedure. Prior to that time "all suits prosecuted in the name of the State were not necessarily criminal suits as distinguished from civil suits — the true test being that when the proceeding was by indictment the suit was criminal, and when by action or other mode, though in the name of the State, it was a civil suit." State v. Pate, 44 N.C. 244 (1853). Hence, a warrant to keep the peace was a civil action though brought in the name of the State. See State v. Locust, 63 N.C. 574 (1869). But this section changed the rule in all such cases, the test now being whether the person is charged with a public offense or whether the action is prosecuted by the State at the instance of an individual to prevent an apprehended crime against the person or property of the individual; in either case the action being a criminal proceeding. See Bumgarner v. Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957); Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953).

An inquisition of lunacy is not a criminal action within the meaning of this section. In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

Private Individuals as Prosecutors. — No person is regarded as a prosecutor for a public offense unless he is so marked on the bill of indictment. State v. Lupton, 63 N.C. 483 (1869).

Section as Remedy for Defendant's Criminal Acts. — Where alleged acts of defendant are criminal, plaintiff is not entitled to equitable relief in the nature of an injunction, but is furnished an adequate remedy by this section. Carolina Motor Serv., Inc. v. Atlantic C.L.R.R., 210 N.C. 36, 185 S.E. 479, 104 A.L.R. 1165 (1936).

Remedy Against Alleged Unconstitutional Discrimination in Statutes. — By prosecuting, under this section, persons doing acts allowed by a statute, a remedy against alleged unconstitutional discrimination of such statute is afforded. Newman v. Watkins, 208 N.C. 675, 182 S.E. 453 (1935).

As to proper titles of criminal cases, see Larkins v. Murphy, 68 N.C. 381 (1873).

Applied in In re Dunn, 73 N.C. App. 243, 326 S.E.2d 309 (1985).

Cited in State v. Rumfelt, 241 N.C. 375, 85 S.E.2d 398 (1955).

§ 1-6. Civil action.

Every other is a civil action. (C.C.P., s. 6; Code, s. 130; Rev., s. 351; C.S., s. 396.)

Cross References. — As to form of action, see G.S. 1A-1, Rule 2.

CASE NOTES

COURT HAD JURISDICTION. — Because the date a rule was to be applied fell on a Saturday, and a planning board or official had no authority to modify the provisions of a state statute by "interpretation," the adjacent property owners were not required to appeal the "interpretation" to the Board of Adjustment; thus, the trial court had jurisdiction to hear the matter. Murdock v. Chatham County, — N.C. App. —, 679 S.E.2d 850, 2009 N.C. App. LEXIS 1164 (July 21, 2009).

Cited in Gillikin v. Gillikin, 248 N.C. 710, 104 S.E.2d 861 (1958); VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

§ 1-7. When court means clerk.

In the following sections which confer jurisdiction or power, or impose duties, where the words "superior court," or "court," in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular session of the court, in which cases the judge of the court alone is meant. (C.C.P., s. 9; Code, s. 132; Rev., s. 352; C.S., s. 397; 1971, c. 381, s. 12.)

Cross References. — As to jurisdiction of the clerk, see G.S. 1-13.

Legal Periodicals. — For discussion of this section and its history, see 1 N.C.L. Rev. 15 (1923) and 1 N.C.L. Rev. 199 (1923).

CASE NOTES

History. — It was pointed out in Brittain v. Mull, 91 N.C. 498 (1884), that the clerk does not exercise power in respect to pleadings and practice to any considerable extent in civil actions (as distinguished from special proceedings) because questions arising in such matters arise mainly in term time when the judge must act directly. This was due to the suspension act, but since the Crisp act in 1919 the rule is otherwise. See 1 N.C.L. Rev. 199 (1923).

As to the power of the legislature to confer jurisdiction upon the clerk, see Bank of N. Wilkesboro v. Wilkesboro Hotel Co., 147 N.C. 594, 61 S.E. 570 (1908).

Clerk Acts for Court. — Although the terms "court" and "superior court," as used in this section, mean the clerk of the court as indicated, the clerk is given no separate jurisdiction apart from the court itself. Insofar as civil procedure is concerned, at least, the clerk acts as and for the court in the instances specified. His acts are performed by the court through him and stand as those of the court if not excepted to and reversed or modified on appeal, and thus there is no divided jurisdiction between the clerks and the judge. The whole procedure is in the court and has its sanction. Jones v. Desern, 94 N.C. 32 (1886).

In special proceedings the clerk acts for the court in superintending the pleadings, practice and procedure, and in making all proper orders and judgments therein, unless his action is revised or modified by the judge upon appeal. Jones v. Desern, 94 N.C. 32 (1886); Adams v. Howard, 110 N.C. 15, 14 S.E. 648 (1892).

The clerk represents and is the court and has authority to exercise the discretionary powers conferred for the purpose of decreeing a sale of a decedent's estate for the payment of debts. Indeed, the clerk implies the court in cases like this. Tillett v. Aydlett, 90 N.C. 551 (1884).

This section gives the clerk power to enter a judgment for the recovery of money. Bank of N. Wilkesboro v. Wilkesboro Hotel Co., 147 N.C. 594, 61 S.E. 570 (1908).

Authority of Assistant Clerk to Tax Cost of Deposition. — An assistant clerk of the superior court had the authority to tax the cost of a deposition against a plaintiff who took a voluntary dismissal of his case before it reached the trial calendar. Thigpen v. Piver, 37 N.C. App. 382, 246 S.E.2d 67, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

Jurisdiction under G.S. 26-3 is conferred upon the clerk by virtue of this section. Bank of N. Wilkesboro v. Wilkesboro Hotel Co., 147 N.C. 594, 61 S.E. 570 (1908).

The term "superior court," as used in former G.S. 28-81, means clerk of the superior court. Pelletier v. Saunders, 67 N.C. 261 (1872).

Summary Remedy Against Railroad. — Under statute providing that a summary remedy by landowners against a railroad for damages caused by construction may be begun either in or out of term by service of petition, it is proper for the judge to appoint commissioners as provided if the proceeding is begun in term, but where the proceeding is begun in vacation the clerk may act for the court. Click v. Western N.C.R.R., 98 N.C. 390, 4 S.E. 183 (1887).

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Execution in Garnishment Proceedings. — In view of this section, when the judgment in garnishment proceedings under former G.S. 1-461 was entered up, the execution, which was awarded as a matter of course, could be issued by the clerk without application to the judge. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Extension of Time to File Complaint. — The clerk represents and is the court by virtue of this section and has the authority to exercise the discretionary powers conferred by G.S. 1A-1, Rule 6(b) for the purpose of extending additional time in which to file a complaint. Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

Cited in Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814 (1984).

Article 2.

General Provisions.

§ 1-8. Remedies not merged.

Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other. (C.C.P., s. 7; Code, s. 131; Rev., s. 353; C.S., s. 398.)

CASE NOTES

Propriety of Summons Upheld. — In view of this section, it was proper to serve a summons and order of arrest upon defendant while he was confined in jail upon his failure to give an appearance bond to answer for a secret criminal assault. White v. Underwood, 125 N.C. 25, 34 S.E. 104 (1899).

Cited in Scales v. Wachovia Bank & Trust Co., 195 N.C. 772, 143 S.E. 868 (1928).

Applied in Murdock v. Chatham County, — N.C. App. —, 679 S.E.2d 850, 2009 N.C. App. LEXIS 1164 (July 21, 2009).

§ 1-9: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provision relating to one form of action, see G.S. 1A-1, Rule 2.

§ 1-10. Plaintiff and defendant.

In civil actions the party complaining is the plaintiff, and the adverse party the defendant. (C.C.P., s. 13; Code, s. 134; Rev., s. 355; C.S., s. 400.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

§ 1-11. How party may appear.

A party may appear either in person or by attorney in actions or proceedings in which he is interested. (C.C.P., s. 423; Code, s. 109; Rev., s. 356; C.S., s. 401.)

Legal Periodicals. — For note on the right to defend pro se, see 48 N.C.L. Rev. 678 (1970).

CASE NOTES

The right to appear in actions either in person or by attorney is alternative, and a party has no right to "appear" both by himself and by counsel. Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

A party has the right to appear in propria persona or, in the alternative, by counsel. There is no right to appear both in propria persona and by counsel. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981).

A party has the right to appear in propria persona or by counsel, but this right is alternative. State v. Phillip, 261 N.C. 263, 134 S.E.2d 386, cert. denied, 377 U.S. 1003, 84 S. Ct. 1939, 12 L. Ed. 2d 1052, rehearing denied, 379 U.S. 874, 85 S. Ct. 28, 13 L. Ed. 2d 83 (1964).

This right is alternative. A party has no right to appear both by himself and by counsel, nor should he be permitted ex gratia to do so. Abernethy v. Burns, 206 N.C. 370, 173 S.E. 899 (1934). See also, McClamroch v. Colonial Ice Co., 217 N.C. 106, 6 S.E.2d 850 (1940).

A defendant has only two choices: to appear in propria persona or, in the alternative, by counsel. There is no right to appear both in propria persona and by counsel. State v. Forrest, 164 N.C. App. 272, 596 S.E.2d 22, 2004 N.C. App. LEXIS 827 (2004), cert. denied, 359 N.C. 193, 607 S.E.2d 653 (2004), aff'd, — N.C. —, 611 S.E.2d 833 (2005), remanded, Forrest v. North Carolina, 126 S.C. 29777 (U.S. 2006).

No Right to Appear in Person and by Counsel at Same Time. — This section simply means that a litigant may not appear both in propria persona and by counsel at one and the same time. It cannot be construed to mean that he may not first appear in person and then later appear through counsel. Thus, a litigant who elects to employ counsel at any stage of the proceedings may not be deprived of his counsel's services for the reason that he theretofore appeared in person. New Hanover County v. Sidbury, 225 N.C. 679, 36 S.E.2d 242 (1945).

When defendant filed his prose motion for a speedy trial, he was represented by counsel; although defendant's pro se motion was filed more than a year after his arrest, his assertion of the right to a speedy trial was made in violation of the rule that a defendant did not have a right to be represented by counsel and also appear pro se. State v. Spivey, 357 N.C. 114, 579 S.E.2d 251, 2003 N.C. LEXIS 422 (2003).

A party may not actively participate in trial proceedings when he is represented by counsel. Moorefield v. Garrison, 464 F. Supp. 892 (W.D.N.C. 1979).

No Right Under U.S. Const., Amend. VI to Serve as Co-Counsel. — While defendant had the right to appear either in propria persona or by counsel, defendant had no right under U.S. Const., Amend. VI to serve as co-counsel with his court-appointed attorney. State v. Parton, 303 N.C. 55, 277 S.E.2d 410 (1981), overruled on other grounds, in State v. Freeman, 314 N.C. 432, 333 S.E.2d 743 (1985).

Counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. State v. Alston, 272 N.C. 278, 158 S.E.2d 52 (1967).

The constitutional right to counsel does not justify forcing counsel upon an accused who wants none. State v. Alston, 272 N.C. 278, 158 S.E.2d 52 (1967).

Pro Se Appearance of Defendant in Criminal Case. —A party is entitled to appear in propria persona; hence, when a defendant insisted upon this right, notwithstanding his ability to employ counsel and the efforts of the trial judge to assign him counsel, it could not be successfully argued on appeal that he was prejudiced by the actions of the trial court in failing to provide him with counsel and in permitting him wide latitude in the introduction of evidence. State v. Pritchard, 227 N.C. 168, 41 S.E.2d 287 (1947).

Effect of Appearance Pro Se. — Where defendant appeared pro se, the trial court did not err in allowing the admission of evidence to which defendant offered no objection at the time of its admission and in failing to warn defendant of his right against self-incrimination when defendant offered to testify in his own behalf. State v. Lashley, 21 N.C. App. 83, 203 S.E.2d 71 (1974).

Party Must Appear When Specifically Ordered. — Trial court did not err by refusing to recognize defendant's appearance through counsel as sufficient to satisfy requirement of show cause order which required him to appear in court; party's personal presence is required if he is specifically ordered to appear. Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Absent Court Order Party to Civil Action Not Required to Appear. — No statute, rule of court or decision mandates the presence of a party to a civil action or proceeding at the trial or at a hearing in connection with the action or proceeding, unless the party is specifically ordered to appear. Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

Applied in State v. Grooms, 353 N.C. 50, 540 S.E.2d 713, 2000 N.C. LEXIS 895 (2000).

Cited in County of Buncombe v. Penland, 206 N.C. 299, 173 S.E. 609 (1934); In re Taylor, 229 N.C. 297, 49 S.E.2d 749 (1948); Henderson v. Henderson, 232 N.C. 1, 59 S.E.2d 227 (1950).

§ 1-12: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-13. Jurisdiction of clerk.

The clerk of the superior court has jurisdiction to hear and decide all questions of practice and procedure and all other matters over which jurisdiction is given to the superior court, unless the judge of the court or the court at a regular session is expressly referred to. (C.C.P., s. 108; Code, s. 251; Rev., s. 358; C.S., s. 403; 1971, c. 381, s. 12.)

Cross References. — As to construction of references to the superior court to refer to the clerk thereof, see G.S. 1-7.

Legal Periodicals. — For discussion of this section and its history, see 1 N.C.L. Rev. 199 (1923).

CASE NOTES

History. — This section was passed in 1868 as a part of the Code of Civil Procedure. It was a part of the scheme to simplify procedure and speed up litigation so that justice could be had much sooner and at less expense than was formerly possible. But due to the depressed financial conditions brought about by the Civil War, the people were not desirous of a more speedy system of procedure, for the reason that in actions for debts the unfortunate litigants might have more time in which to improve their financial conditions so that they might be able to discharge the judgments. Under pressure of such demand the legislature passed in the same year what is known as the "Bachelor Act," which suspended the operation of certain portions of the Code of Civil Procedure temporarily. The legislature of 1870 made the suspension more permanent by providing that the act should remain in force until otherwise provided. The suspension act became Chapter 18 of Battle's revisal, was incorporated in the Code of 1883 as Chapter 10 of the Code of Civil Procedure, was carried forward in subsequent revisals (see Bynum v. Powe, 97 N.C. 374, 2 S.E. 170 (1887), and remained in force until 1919, when the legislature passed what is known as the "Crisp Act," restoring the suspended provisions of the Code of Civil Procedure. See Campbell v. Campbell, 179 N.C. 413, 102 S.E. 737 (1920); 1 N.C.L. Rev. 199 (1923).

The suspension act was chiefly directed at the portions of the Code of Civil Procedure which gave the clerk of the superior court power to decide questions of practice, procedure and other such matter out of term time. Hence this section was modified by the act. To prevent this section from operating in the class of cases named above, the act provided that the summons in all civil actions should be made returnable to the court in term time and that questions of pleading, practice and procedure should be determined during term time only. Therefore in such cases the operation of this section was totally suspended. But the suspension act did not affect special proceedings, and in such cases the clerk continued to exercise the power hereby conferred upon him, except as such authority may have been modified or affected by subsequent statutes. Brittain v. Mull, 91 N.C. 498 (1884); Jones v. Desern, 94 N.C. 32 (1886); Warden v. McKinnon, 94 N.C. 378 (1886).

With the passage of the Crisp Act this section is in full force and effect. See Campbell v. Campbell, 179 N.C. 413, 102 S.E. 737 (1920).

Constitutionality of Suspension Act. — The constitutionality of the suspension act was attacked in McAdoo v. Benbow, 63 N.C. 461 (1869), upon the ground that the Constitution required the clerk to hear and decide all questions of practice and procedure, but it was held that the Constitution made no such provision and that the legislature had power thereunder to make such regulations. Although there was one dissent to the holding, it became universally recognized as law until the Crisp Act of 1919. Bynum v. Powe, 97 N.C. 374, 2 S.E. 170 (1887).

Nature of Clerk's Power. — In exercising the jurisdiction herein conferred, the clerk is no more than a servant of the court, subject to its supervision in the manner provided elsewhere by statute. Brittain v. Mull, 91 N.C. 498 (1884); Maxwell v. Blair, 95 N.C. 317 (1886); Turner v. Holden, 109 N.C. 182, 13 S.E. 731 (1891).

Jurisdiction is conferred upon the court, and not upon the clerk, who is merely an instrument in performing his functions. Thus there is no divided jurisdiction between the clerk and the judge, but they both function as officials of the same court exercising but one jurisdiction. McAdoo v. Benbow, 63 N.C. 461 (1869); Jones v. Desern, 94 N.C. 32 (1886).

Power as to Equitable Relief. — The Code of Civil Procedure does not give the clerk power to make an order granting affirmative equitable relief. Equitable relief must be set up in the answer as a defense and then the clerk has power to hear all questions herein permitted. See Bragg v. Lyon, 93 N.C. 151 (1885); Vance v. Vance, 118 N.C. 864, 24 S.E. 768 (1896).

Duties of Clerk. — Regularly, in special proceedings (and since the act of 1919 in all proceedings) the pleadings should be made up and perfected by the clerk, acting as and for the court. Indeed, he so makes all the orders and judgments in the course of the proceeding, except in some exceptional respects, otherwise expressly provided for. Brittain v. Mull, 91 N.C. 498 (1884); Wharton v. Wilkerson, 92 N.C. 407 (1885); Loftin v. Rouse, 94 N.C. 508 (1886).

The court in term should not do more than to direct the clerk to perfect the pleadings and to allow or disallow amendment according to law. If the clerk should proceed and make decisions of questions of law, with which a party should be dissatisfied, such party might appeal, and in that way the decision of the judge would become that of the court. It was the duty of the clerk to make all proper orders of reference, as well as other orders and judgments in the course of the proceeding. If he should err in such respect, an appeal might be taken as indicated above. Loftin v. Rouse, 94 N.C. 508 (1886).

It was not the duty of the judge in term, after the issues were tried, there being no question of law to be decided, to direct the clerk what to do, or to make an order remanding the case to the clerk. The latter ought to have proceeded without an order and heard and determined the case upon its merits, subject to the right of appeal to the judge. Brittain v. Mull, 94 N.C. 595 (1886).

Effect of Failure of Clerk to Decide Questions. — The Supreme Court was not authorized to decide the questions of law presented by the pleadings and the issues of fact found by the jury where they had not been decided by the clerk, acting for the court, and, upon appeal, by the judge, as it was the duty of the clerk, acting for the court, to decide whatever question might be presented, and to make all proper orders. Brittain v. Mull, 94 N.C. 595 (1886).

De Novo Appeal of Clerk's Rulings. — Upon appeal from the rulings of the clerk, in vacation, upon procedural motions in pending civil actions, the jurisdiction of the superior court is not derivative; rather, the judge hears the matter de novo. Cody v. Hovey, 219 N.C. 369, 14 S.E.2d 30 (1941).

Amendments After Joinder of Issues. — Where, in special proceedings, the pleadings are made up before the clerk, and upon joinder of issues are transferred to the court in term, the judge has power to allow amendments, or he may stay the trial and remand the papers to the clerk in order that he may consider a motion to amend. Loftin v. Rouse, 94 N.C. 508 (1886).

Order of Remand Not Appealable. — An order remanding the papers to the clerk, in order that he may hear a motion to amend the pleadings, to the end that an account should be taken, is interlocutory and does not impair a substantial right; hence, it cannot be appealed from. Loftin v. Rouse, 94 N.C. 508 (1886).

Proceedings to obtain partition, dower and the like are special proceedings. Jones v. Desern, 94 N.C. 32 (1886).

A proceeding by creditors to compel an administrator to an account and payment of the debts of the estate is a special proceeding. Brittain v. Mull, 91 N.C. 498 (1884); Warden v. McKinnon, 94 N.C. 378 (1886).

The granting of a warrant of attachment was a special proceeding. Cushing v. Styron, 104 N.C. 338, 10 S.E. 258 (1889).

SUBCHAPTER II. LIMITATIONS.

Article 3.

Limitations, General Provisions.

§ 1-14: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-15. Statute runs from accrual of action.

(a) Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.

(b) Repealed by Session Laws 1979, c. 654, s. 3.

(c) Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action. (C.C.P., s. 17; Code, s. 138; Rev., s. 360; C.S., s. 405; 1967, c. 954, s. 3; 1971, c. 1157, s. 1; 1975, 2nd Sess., c. 977, ss. 1, 2; 1979, c. 654, s. 3.)

Cross References. — For provision covering subject matter similar to that of repealed subsection (b) of this section, which related to accrual of causes of action for personal injury or physical damage to property in cases other than those covered by subsection (c) of this section, see G.S. 1-52(16). As to pleading of affirmative defenses, including statute of limitations, see G.S. 1A-1, Rule 8. As to the three-year limitations period during which any governmental agency entering into a contract which is or has been the subject of a conspiracy prohibited by G.S. 75-1 or G.S. 75-2 shall have a right of action for damages, see G.S. 133-28.

Legal Periodicals. — For case law survey as to replies and pleadings of statute of limitations, see 45 N.C.L. Rev. 829 (1967).

For note on when a cause of action accrues for limitations purposes in medical malpractice — the discovery rule, see 6 Wake Forest Intra. L. Rev. 532 (1970).

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For comment, "Medical Malpractice in North Carolina," see 54 N.C.L. Rev. 1214 (1976).

For survey of 1976 case law on torts, see 55 N.C.L. Rev. 1088 (1977).

For note on the interaction between North Carolina's wrongful death statute and its statute of limitations for not readily apparent personal injuries or product defects, see 13 Wake Forest L. Rev. 543 (1977).

For survey of 1978 law on taxation, see 57 N.C.L. Rev. 1142 (1979).

For survey of 1982 law relating to constitutional law, see 61 N.C.L. Rev. 1052 (1983).

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

For note on statute of limitations accrual in attorney malpractice actions, in light of Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692, aff'd per curiam, 312 N.C. 488, 322 S.E.2d 777 (1984), see 20 Wake Forest L. Rev. 1017 (1984).

For note, "Black v. Littlejohn: A New Discovery Formula for Non-apparent Injuries Under the Professional Malpractice Statute of Limitations," see 64 N.C.L. Rev. 1438 (1986).

For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

For survey of North Carolina construction law, with particular reference to statutes of limitation and repose, see 21 Wake Forest L. Rev. 633 (1986).

For note, "Stallings v. Gunter: The North Carolina Court of Appeals Bids Farewell to the Medical Malpractice Statute of Repose," see 69 N.C.L. Rev. 1399 (1991).

For comment, "Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action," see 26 Wake Forest L. Rev. 1245 (1991).

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

For survey, "Let Truth Be Their Devise: Hargett v. Holland and the Professional Malpractice Statute of Repose," see 73 N.C.L. Rev. 2209 (1995).

For note, "Do You Need 'Will Insurance?' Let the Testator Beware — Hargett v. Holland," see 21 N.C. Cent. L.J. 353 (1995).

For comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina", see 18 Campbell L. Rev. 121 (1996).

For note, "Rule 9(j) — Is Requiring a Plaintiff in a Medical Malpractice Action to Certify His or Her Claim Before Filing Unconstitutional?

— The Issue in Anderson v. Assimos," 25 Campbell L. Rev. 219 (2003).

CASE NOTES

I. In General.
II. Malpractice.

I. IN GENERAL.

Editor's Note. — *Some of the cases cited below were decided prior to enactment of former subsection (b) of this section, now replaced by G.S. 1-52(16), and subsection (c) of this section.*

Section Is Constitutional. — Square D. Co. v. C. J. Kern Contractors, 70 N.C. App. 30, 318 S.E.2d 527 (1984), aff'd, 76 N.C. App. 656, 334 S.E.2d 63 (1985).

This statute, as applied in legal malpractice case, does not violate the federal constitution or the state constitution. Garrett v. Winfree, 120 N.C. App. 689, 463 S.E.2d 411 (1995).

Constitutionality of Subsection (c). — Even if subsection (c) of this section may be vague as to certain classes of occupations because it fails to define "malpractice" or "professional services," it was not vague as to defendant doctor and hospital. Where a term such as "malpractice" or "professional service" has been used over such a lengthy period of time that its usage has given the term well-defined contours, such a term will not be found inadequate. Roberts v. Durham County Hosp. Corp., 56 N.C. App. 533, 289 S.E.2d 875 (1982), aff'd, 307 N.C. 465, 298 S.E.2d 384 (1983).

Subsection (c) of this section does not violate the federal constitutional guarantees of equal protection and the North Carolina Constitution's equal protection provision prohibiting exclusive emoluments contained in N.C. Const., Art. 1, § 32, because it is rationally related to maintaining sufficient medical treatment in this State. Roberts v. Durham County Hosp. Corp., 56 N.C. App. 533, 289 S.E.2d 875 (1982), aff'd, 307 N.C. 465, 298 S.E.2d 384 (1983).

Subsection (c) of this section is not unconstitutional. Walker v. Santos, 70 N.C. App. 623, 320 S.E.2d 407 (1984).

G.S. 1-50(5) and this section are not unconstitutional as being violative of the open courts provision of the State Constitution and the equal protection clauses of the state and federal Constitutions. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

Retroactivity of Section. — This section did not affect litigation pending when it was ratified. Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co., 18 N.C. App. 689, 198 S.E.2d 88 (1973).

The 1971 amendment, adding former subsection (b) of this section, and the 1975 amendment, adding subsection (c) of this section, did not apply retroactively to revive actions already barred at common law, nor affect pending litigation. They would, however, apply to those cases which had not yet accrued, or which accrued within three years immediately preceding the effective date of the amendments. Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978).

This section applies to actions wherein formal pleadings are required to be filed and not to proceedings in the nature of a controversy without action upon an agreed statement of facts for the distribution of funds arising from a foreclosure sale. In re Gibbs, 205 N.C. 312, 171 S.E. 55 (1933).

"Special Cases" Where Different Limitation Prescribed. — The only "special case" in respect to torts "where a different limitation is prescribed by statute" is contained in the three-year statute, G.S. 1-52. This "different limitation" relates only to actions grounded on allegations of fraud or mistake. Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952).

Section Not Statute of Presumptions. — Now we have no statute of presumptions. This section prescribes a statute of limitations only. George W. Helm Co. v. Griffin, 112 N.C. 356, 16 S.E. 1023 (1893).

The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Vested Right to Rely on Statute. — The statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970); Callahan v. Rodgers, 89 N.C. App. 250, 365 S.E.2d 717 (1988).

The court has no discretion when considering whether a claim is barred by the statute of limitations. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870

(1970); Callahan v. Rodgers, 89 N.C. App. 250, 365 S.E.2d 717 (1988).

Necessity of Pleading Statute. — A statute of limitations is not available as a defense or bar to an action unless it is pleaded, nor can it be raised, ordinarily, by motion to dismiss. Iredell County v. Crawford, 262 N.C. 720, 138 S.E.2d 539 (1964).

Unless a statute of limitations is annexed to the cause of action itself, the bar of limitation must be affirmatively pleaded in order to be available as a defense. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

As to necessity of pleading the statute of limitations, see also Pegram v. Stoltz, 67 N.C. 144 (1872); Guthrie v. Bacon, 107 N.C. 337, 12 S.E. 204 (1890); Randolph v. Randolph, 107 N.C. 506, 12 S.E. 374 (1890); Albertson v. Terry, 109 N.C. 8, 13 S.E. 713 (1891); King v. Powell, 127 N.C. 10, 37 S.E. 62 (1900); Pipes v. North Carolina Mica Mineral & Lumber Co., 132 N.C. 612, 44 S.E. 114 (1903); Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

For cases holding that the statute of limitations must be raised in the answer, see Green v. North Carolina R.R., 73 N.C. 524 (1875); Kahnweiler v. Anderson, 78 N.C. 133 (1878); Long v. Bank of Yanceyville, 81 N.C. 41 (1879); Bacon v. Berry, 85 N.C. 124 (1881); King v. Powell, 127 N.C. 10, 37 S.E. 62 (1900); Oldham v. Rieger, 145 N.C. 254, 58 S.E. 1091 (1907); Moody v. Wike, 170 N.C. 541, 87 S.E. 350 (1915); Logan v. Griffith, 205 N.C. 580, 172 S.E. 348 (1934); Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952); Reid v. Holden, 242 N.C. 408, 88 S.E.2d 125 (1955); Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959); Iredell County v. Crawford, 262 N.C. 720, 138 S.E.2d 539 (1964).

Burden of Proof on Plaintiff When Statute Pleaded. — Where the statute of limitations has been pleaded, the burden is on plaintiff to show that his cause of action against defendant accrued within three years prior to the institution of the suit. State v. Cessna Aircraft Corp., 9 N.C. App. 557, 176 S.E.2d 796 (1970).

In general a cause of action accrues as soon as the right to institute and maintain a suit arises. Thurston Motor Lines v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977), aff'd, 294 N.C. 73, 240 S.E.2d 345 (1978); Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

The statute of limitations cannot begin to run against an aggrieved party who under no circumstances could have maintained an action at the time the wrongful act was committed until that aggrieved party becomes entitled to maintain an action. Williams v. GMC, 393 F. Supp. 387 (M.D.N.C. 1975), aff'd, 538 F.2d 327 (4th Cir. 1976); Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

Generally, a cause of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue, being at that time under no disability. Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

A cause of action generally accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. In no event can a statute of limitations begin to run until plaintiff is entitled to institute an action. City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967).

In no event can a statute of limitations begin to run until plaintiff is entitled to institute an action. Ordinarily, the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), modified on other grounds, 306 N.C. 364, 293 S.E.2d 415 (1982).

An action based on personal injury must be commenced within three years of the date on which the claim accrued. For purposes of personal injury, the claim is deemed to have accrued when the injury became or should have become apparent to the claimant. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983), overruled on other grounds, Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

Plaintiff's complaint accrued as soon as the right to institute and maintain suit arose which was at the time of the 1994 conveyance between county and nonprofit hospital where the plaintiff sought (1) a declaratory judgment as to the constitutionality of legislation governing conveyances, (2) a declaratory judgment upon the validity of a conveyance between two other parties, and (3) to enjoin a conveyance between two other parties. Hamlet HMA, Inc. v. Richmond County, 138 N.C. App. 415, 531 S.E.2d 494, 2000 N.C. App. LEXIS 636 (2000).

Imprisonment Does Not Toll Statute. — Imprisonment is not a disability that tolls the running of the statute of limitations. Small v. Britt, 64 N.C. App. 533, 307 S.E.2d 771 (1983).

The cause of action ordinarily accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed. Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976); Bolick v. American Barmag Corp., 54 N.C. App. 589, 284 S.E.2d 188 (1981), modified on other grounds, 306 N.C. 364, 293 S.E.2d 415 (1982).

Exception for Fraud or Mistake. — A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. This rule is subject to certain exceptions, such as torts grounded on fraud or mistake. Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

Notice of Cause of Action. — Trial court erred by dismissing plaintiff's action on the grounds that it was barred by the statute of limitations where plaintiff argued that because of action accrued on the last date he was treated by defendant but defendant argued that plaintiff's cause of action accrued when the other doctor told plaintiff that defendant "should be hung up by the balls", and whether this statement was sufficient to charge plaintiff with notice that he had a cause of action was not so clear that it could be decided as a matter of law. Hatem v. Bryan, 117 N.C. App. 722, 453 S.E.2d 199 (1995).

Statute of limitations begins to run from discovery of fraud or from time it should have been discovered in the exercise of reasonable diligence. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

If there is no claim or cause of action, the statute will not run. This principle is recognized by this section and there is nothing in G.S. 1-49 which conflicts with it. Miller v. Shoaf, 110 N.C. 319, 14 S.E. 800 (1892).

When the statute starts to run, it continues until stopped by appropriate judicial process. Speas v. Ford, 253 N.C. 770, 117 S.E.2d 784 (1961); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Running of Statute Not Postponed by Mere Lack of Knowledge. — Mere lack of knowledge of the facts constituting a cause of action in tort, in the absence of fraudulent concealment of facts by the tort-feasor, does not postpone the running of the statute. Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952).

When Statute Begins to Run Against Remainderman. — Ordinarily the statute of limitations does not begin to run against the rights of a remainderman to maintain an action to recover possession of land until after the expiration of the life estate. However, a remainderman is not required to wait until after the expiration of the life estate to bring an action to quiet title or otherwise protect his interest. Walston v. Applewhite & Co., 237 N.C. 419, 75 S.E.2d 138 (1953).

Continuing or Recurring Damages. — When the basis of the cause of action produces continuing or recurring damages, the cause of action accrues at the time damages are first sustained, the subsequent damages being merely in aggravation of the original damages and not being essential to the cause of action. Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

Accrual of An Action Against An Ordinance and Enabling Statute. — Employer's cause of action for a declaratory judgment counterclaim accrued when the employer was sued under the employment provisions of a county discrimination ordinance and not when the enabling statute for the ordinance was passed; therefore, the employer's declaratory judgment counterclaim was not time-barred as the alleged wrong constituted a continuing violation and did not occur until the statute was enforced or applied. Williams v. Blue Cross Blue Shield, 357 N.C. 170, 581 S.E.2d 415, 2003 N.C. LEXIS 595 (2003).

Accrual of Cause of Action for Negligent Injury. — Unless tolled by disability or the fraudulent concealment of the cause of action, a cause of action for negligent injury ordinarily accrues when the wrong giving rise to the right to sue is committed, even though the damages at that time are nominal, without regard to the time when consequential injuries are discovered or should have been discovered. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); Ford Motor Credit Co. v. Minges, 473 F.2d 918 (4th Cir. 1973).

Promissory Note Payable on Demand. — The statute of limitations on an action on a promissory note payable on demand begins to run from the date of the execution of the note. Wells v. Barefoot, 55 N.C. App. 562, 286 S.E.2d 625 (1982).

Effect of Partial Payment on Promissory Note. — The limitations period on an action on a promissory note will begin anew when a partial payment is made by the debtor before the limitations period has expired, nothing else appearing. Wells v. Barefoot, 55 N.C. App. 562, 286 S.E.2d 625 (1982).

Agreement to Make Refund. — Where one pays another upon a debt which is uncertain in amount and takes an acknowledgment to a refund if overpaid, the statute does not begin to run against the agreement to refund until after the amount of overpayment is ascertained. Falls v. McKnight, 14 N.C. 421 (1832).

Where a party dies pending action, the statute of limitations begins to run from the date of the appointment of the administrator, and the plea of the statute must be set up in the answer. Lynn v. Lowe, 88 N.C. 478 (1883).

Section Not Applicable to Negligent Advice Rendered by Insurance Agent. — A cause of action based on negligent advice rendered by an insurance agent does not involve professional malpractice, and the appropriate statute of limitations is the three-year period of G.S. 1-52(5), not this section. Pierson v. Buyher, 330 N.C. 182, 409 S.E.2d 903 (1991).

Insurance agents who procured an insurance policy for a contractor were not providers of professional services for purposes of the extended statute of limitations under G.S. 1-15(c).

Therefore, the statute of limitations under G.S. 1-52 was applicable to the contractor's claims against the insurance agents for general negligence and breach of contract in failing to procure needed insurance coverage for the contractor's operations. Scott & Jones, Inc. v. Carlton Ins. Agency, Inc., — N.C. App. —, 677 S.E.2d 848, 2009 N.C. App. LEXIS 368 (2009).

Defendant administrator, assuming to act as plaintiff's agent in collection and application of rents, cannot plead the statute of limitations unless there was a demand and a refusal, and then only from the time thereof. Shuffler v. Turner, 111 N.C. 297, 16 S.E. 417 (1892).

Cause of action against the guarantor on a note accrues upon the maturity of the note and the failure of the maker to pay same according to its tenor. Hall v. Hood, 208 N.C. 59, 179 S.E. 27 (1935).

Accrual of Subrogation Action. — As plaintiff insured was not entitled to institute its subrogation action against defendant insurer until the Industrial Commission's final determination, its subrogation action against defendant accrued on that date. Nationwide Mut. Ins. Co. v. American Mut. Liab. Ins. Co., 89 N.C. App. 299, 365 S.E.2d 677 (1988).

Overflowing Sewage. — Where a municipal corporation constructed a sewer system which emptied quantities of raw sewage into a stream, which matter was periodically washed upon contiguous lands by freshets, in an action against the city by the owner of the land all damages to the land based on trespass occurring prior to three years before the institution of the action were barred by the three-year statute of limitations under this section and G.S. 1-52. Lightner v. City of Raleigh, 206 N.C. 496, 174 S.E. 272 (1934).

Where plaintiff alleged that a truck-tractor was equipped with a faulty and dangerous carburetor, likely to cause said truck-tractor to be "ignited with fire," when sold and delivered to plaintiff, and that defendants knew or by the exercise of due care should have known of such defective condition and failed to warn plaintiff thereof, plaintiff suffered injury and his rights were invaded immediately upon the sale and delivery of the truck-tractor to plaintiff, and a cause of action in favor of plaintiff and against defendants then accrued for which plaintiff was entitled to recover nominal damages at least. Thurston Motor Lines v. General Motors Corp., 258 N.C. 323, 128 S.E.2d 413 (1962).

In action to recover damages from dust and dirt injected into house by gas furnace and air conditioner purchased from defendant, where plaintiffs' allegations were to the effect that the defect was obvious from the beginning, that complaints were made to defendant, and that defendant's employees reported no defect could be found in the system but that they would continue to look, it was held that plaintiffs' cause of action accrued upon the occurrence of the first damage, and plaintiffs were not entitled to rely upon estoppel of defendant to plead the statute, since defendant consistently took the position that no defect existed and never made any representation that would have led plaintiffs to refrain from suing. Matthieu v. Piedmont Natural Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967).

When personal services are rendered with understanding that compensation is to be made in will of recipient, payment therefor does not become due until death, and the statutes of limitation do not begin to run until that time. Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947).

As to the effect of former subsection (b), relating to accrual of causes of action in cases involving bodily injury or a defect in or damage to property, where the injury was latent, see Quail Hollow E. Condominium Ass'n v. Donald J. Scholz Co., 47 N.C. App. 518, 268 S.E.2d 12, cert. denied, 301 N.C. 527, 273 S.E.2d 454 (1980).

Former subsection (b) of this section, providing that except where otherwise provided, a cause of action, other than one for wrongful death or one for malpractice, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, would be deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief, was not applicable to claims arising out of a disease. Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985).

Former subsection (b) had no application to claims arising out of disease. Leonard v. Johns-Manville Sales Corp., 316 N.C. 84, 340 S.E.2d 338 (1986).

Actions for fraud were not subject to the 10-year limitation of former subsection (b) of this section, since G.S. 1-52(9) is a statute that "otherwise provides" as to the time of accrual of an action for fraud, and under G.S. 1-52(9) the three-year limitation for an action for fraud accrues at the time of discovery, regardless of the length of time between the fraudulent act or mistake and discovery of it. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

A suit does not involve an "injury to the person or rights of another" until plaintiff is hurt. Stell v. Firestone Tire & Rubber Co., 306 F. Supp. 17 (W.D.N.C. 1969).

Liability of a manufacturer in a wrongful death case is not limited to 10 years. Williams v. GMC, 393 F. Supp. 387 (M.D.N.C. 1975), aff'd, 538 F.2d 327 (4th Cir. 1976).

Claim Barred by Statute. — There was no continuing duty on attorney to correct will; therefore, the attorney's last act giving rise to the claim was his supervision of the will's execution, since this was more than four years preceding the filing of the complaint, the four-year statute of repose barred the claim. Hargett v. Holland, 337 N.C. 651, 447 S.E.2d 784 (1994).

Dismissal Upheld. — The trial court properly dismissed action brought by doctors against accountants who had been engaged to advise them on business opportunities under G.S. 1A-1, Rule 12(b)(6), as doctors' complaint against accountants disclosed that its claims were either time-barred or lacked facts sufficient to state a claim for relief. Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002).

Partner's breach of fiduciary duty claim was properly dismissed under G.S. 1A-1, N.C. R. Civ. P. 12(b)(6), because the last act upon which the claim was based occurred more than six years before an attorney was sued; whether the three-year statute of limitations or the four-year statute of repose applied was immaterial as both had long since expired. Carlisle v. Keith, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

Application of Section to Automobile Accident Cases. — The statute of limitations for tort claims had no impact on the notification provisions of G.S. 20-279.21(b)(4), and the defendants, therefore, were not required to notify the plaintiff/insurer within that SOL. Liberty Mut. Ins. Co. v. Pennington, 141 N.C. App. 495, 541 S.E.2d 503, 2000 N.C. App. LEXIS 1441 (2000), aff'd, 356 N.C. 571, 573 S.E.2d 118 (2002).

Statute of Repose Not Tolled by Incompetency. — Statute of repose for a guardian's cause of action for professional malpractice was not tolled by incompetency as: (1) the claim that incompetency tolled the statute of repose had been rejected in *Livingston v. Adams Kleemeier Hagan Hannah & Fouts,* 163 N.C. App. 397, 594 S.E.2d 44 (2004); (2) there was no reason to overrule *Livingston*; and (3) there was a well-established judicial policy in North Carolina that decisions of the North Carolina Supreme Court were presumed to operate retroactively, and *Livingston* was applied retroactively. Wells v. Cumberland County Hosp. Sys., 181 N.C. App. 590, 640 S.E.2d 400, 2007 N.C. App. LEXIS 255 (2007).

Applied in Davis v. E.I. DuPont DeNemours & Co., 400 F. Supp. 1347 (W.D.N.C. 1974); Simpson v. Hurst Performance, Inc., 437 F. Supp. 445 (M.D.N.C. 1977); Shields v. Prendergast, 36 N.C. App. 633, 244 S.E.2d 475 (1978); Stanley v. Brown, 43 N.C. App. 503, 259 S.E.2d 408 (1979); Flippin v. Jarrell, 44 N.C. App. 518, 261 S.E.2d 257 (1980); Haislip v. Riggs, 534 F. Supp. 95 (W.D.N.C. 1981); Stokes v. Wilson & Redding Law Firm, 72 N.C. App. 107, 323 S.E.2d 470 (1984); Schneider v. Brunk, 72 N.C. App. 560, 324 S.E.2d 922 (1985); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986); Byrd v. Hancock, 86 N.C. App. 564, 358 S.E.2d 557 (1987); Webster v. Powell, 98 N.C. App. 432, 391 S.E.2d 204 (1990); Brittain v. Cinnoca, 111 N.C. App. 656, 433 S.E.2d 244 (1993); NCNB Nat'l Bank v. Deloitte & Touche, 119 N.C. App. 106, 458 S.E.2d 4 (1995); Little v. Hamel, 134 N.C. App. 485, 517 S.E.2d 901 (1999); Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000); PharmaResearch Corp. v. Mash, 163 N.C. App. 419, 594 S.E.2d 148, 2004 N.C. App. LEXIS 410 (2004); McCutchen v. McCutchen, 170 N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005); Foster v. Crandell, 181 N.C. App. 152, 638 S.E.2d 526, 2007 N.C. App. LEXIS 73 (2007); Wilkerson v. Christian, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 12744 (M.D.N.C. Feb. 19, 2008).

Cited in Commonwealth Mut. Fire Ins. Co. v. Edwards, 124 N.C. 116, 32 S.E. 404 (1899); McNeill v. Suggs, 199 N.C. 477, 154 S.E. 729 (1930); J.G. Dudley Co. v. Commissioner, 298 F.2d 750 (4th Cir. 1962); Bradley v. Lewis Motors, Inc., 12 N.C. App. 685, 184 S.E.2d 397 (1971); Employers Commercial Union Co. of Am. v. Westinghouse Elec. Corp., 15 N.C. App. 406, 190 S.E.2d 364 (1972); Hager v. Brewer Equip. Co., 17 N.C. App. 489, 195 S.E.2d 54 (1973); Raftery v. Wm. C. Vick Constr. Co., 29 N.C. App. 495, 224 S.E.2d 706 (1976); Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978); Troy's Stereo Ctr., Inc. v. Hodson, 39 N.C. App. 591, 251 S.E.2d 673 (1979); Feibus & Co. v. Godley Constr. Co., 44 N.C. App. 133, 260 S.E.2d 665 (1979); Preston v. Thompson, 53 N.C. App. 290, 280 S.E.2d 780 (1981); Collins v. Edwards, 54 N.C. App. 180, 282 S.E.2d 559 (1981); Black v. Littlejohn, 67 N.C. App. 211, 312 S.E.2d 909 (1984); Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986); Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180 (1986); Cheek v. Poole, 98 N.C. App. 158, 390 S.E.2d 455 (1990); Bockweg v. Anderson, 96 N.C. App. 660, 387 S.E.2d 59 (1990); Lowry v. Duke Univ. Medical Ctr., 109 N.C. App. 83, 425 S.E.2d 739 (1993); Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993); Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993); Aetna Cas. & Sur. Co. v. Anders, 116 N.C. App. 348, 447 S.E.2d 504 (1994); Ruff v. Reeves Bros., 122 N.C. App. 221, 468 S.E.2d 592 (1996); Barger v. McCoy Hillard & Parks, 346 N.C. 650, 488 S.E.2d 215 (1997); Liptrap v. City of High Point, 128 N.C. App.

353, 496 S.E.2d 817 (1998); Timour v. Pitt County Mem. Hosp., 131 N.C. App. 548, 508 S.E.2d 329 (1998); Friedland v. Gales, 131 N.C. App. 802, 509 S.E.2d 793 (1998); Sharp v. Gailor, 132 N.C. App. 213, 510 S.E.2d 702 (1999); RCDI Constr. v. Spaceplan/Architecture, Planning & Interiors, P.A., 148 F. Supp. 2d 607 (W.D.N.C. 2001); Shealy v. Lunsford, 355 F. Supp. 2d 820, 2005 U.S. Dist. LEXIS 2043 (M.D.N.C. 2005); Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C., 180 N.C. App. 257, 636 S.E.2d 835, 2006 N.C. App. LEXIS 2329 (2006).

II. MALPRACTICE.

Legislative Intent. — The General Assembly, by including separate discovery provisions for both nonapparent injury and foreign objects and retaining the 10-year outer limit for discovery of foreign objects rather than reducing it to four years intended that claimants be given the maximum opportunity in delayed discovery situations to pursue their cause of action subject to the outer time limits in the statute. Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

The legislature's adoption of an outer limit or repose of four years from the last act of the defendant giving rise to the cause of action for nonapparent injuries and 10-year period of repose for discovery of foreign objects clearly have the effect of granting a defendant an immunity to actions for malpractice after the applicable period of time has elapsed. Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

Bodily "injury," as used in the one-year-from-discovery provision of subsection (c), denotes bodily injury resulting from wrongful conduct in a legal sense. Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

The malpractice statutes of limitations provide an absolute statutory outer limit. This outer limit is more precisely referred to as a period of repose. Unlike an ordinary statute of limitations which begins running upon accrual of the claim, the period contained in the statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted. Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

Repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue, which is generally recognized as the point in time when the elements necessary for a legal wrong coalesce. Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

Subsection (c) of this section and G.S. 1-17(b) must be construed in pari materia. Osborne ex rel. Williams v. Annie Penn Mem. Hosp., 95 N.C. App. 96, 381 S.E.2d 794, cert. denied, 325 N.C. 547, 385 S.E.2d 500 (1989).

Purpose of Subsection (c). — Subsection (c) of this section was passed by the General Assembly in an attempt to preserve medical treatment and control malpractice insurance costs, both of which were threatened by the increasing number of malpractice claims. Roberts v. Durham County Hosp. Corp., 56 N.C. App. 533, 289 S.E.2d 875 (1982), aff'd, 307 N.C. 465, 298 S.E.2d 384 (1983).

The legislature passed subsection (c) specifically to address the question of when an action for medical malpractice would be barred by time. Lackey v. Bressler, 86 N.C. App. 486, 358 S.E.2d 560 (1987).

Effect of Subsection (c). — Subsection (c) of this section significantly altered the law of limitations applicable to professional malpractice actions. It changed the time of accrual of such actions from the date of discovery of injury to the date of defendant's last act which gave rise to the action. Flippin v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Although the statute of limitations set out in subsection (c) of this section begins to run at the time of the last negligent act or breach of some duty, and not the time actual damage is discovered or fully ascertained, this statute still requires, as an element of the cause of action for malpractice, that plaintiff suffer some loss or injury, whether it be apparent or hidden. Snipes v. Jackson, 69 N.C. App. 64, 316 S.E.2d 657, cert. denied and appeal dismissed, 312 N.C. 85, 321 S.E.2d 899 (1984).

Although subsection (c) extends the limitations period where the discovery of an injury is delayed, this extension was not intended to defeat the outer time limit of four years from the defendant's last act. Mathis v. May, 86 N.C. App. 436, 358 S.E.2d 94, cert. denied, 320 N.C. 794, 361 S.E.2d 78 (1987).

This section requires that a medical malpractice cause of action must be filed within three years of the date of the last act giving rise to the cause of action, and it also gives a period of repose of four years. Bowlin v. Duke Univ., 119 N.C. App. 178, 457 S.E.2d 757 (1995).

Applicability Contingent on Performance or Failure to Perform Professional Services. — Subsection (c) of this section applies to all claims of malpractice, not just medical malpractice. However, in order for this statute to apply, there must first be a performance of or failure to perform professional services. Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

Subsection (c) of this section establishes two separate grounds for malpractice: (1) malpractice arising out of the performance of professional services; and (2) the failure to perform professional services. Callahan v. Rodgers, 89 N.C. App. 250, 365 S.E.2d 717 (1988).

Subsection (c) is broad enough to encompass professionals other than those in health care. However, the statute does not mean that all persons labeled "professionals" necessarily fall within its ambit. The North Carolina Professional Liability Study Commission wanted the statute to include some, but not necessarily all, professionals other than "health care providers." The Legislature intended the statute to apply to malpractice claims against all professionals who are not dealt with more specifically by some other statute. Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., 313 N.C. 230, 328 S.E.2d 274 (1985).

Professional Services. — The rendering of "professional services" as that term is set forth in this section necessarily includes those services where a professional relationship exists between plaintiff and defendant, such as a physician-patient or attorney-client relationship. Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

Where the Red Cross did not treat or care for plaintiff in any way other than to initially take and process the blood which was transfused into him, no professional relationship existed. The Red Cross did not render professional services to him as that term is used in subsection (c) of this section. As such, the action was not one for malpractice, and as a result, the 4-year statute of repose in subsection (c) of this section did not apply to bar plaintiff's claim. Rather, the action was subject to the personal injury statutes of limitations found in G.S. 1-52(5), (16). Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992).

Applicability of Subsection (c) to Actions Already Accrued on Effective Date. — If a new statute, such as subsection (c) of this section, shortens the period of limitation, it must, to comport with due process, provide a reasonable time for filing sections which have accrued but which have not been filed when the new statute takes effect. Flippin v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Subsection (c) of this section, which changed the time of accrual of malpractice actions from the date of discovery of injury to the date of defendant's last act which gave rise to the action and shortened the limitation period from 10 years to four years for latent nonforeign object claims discovered two or more years after defendant's last negligent act, could not constitutionally be applied to bar plaintiff's claim for medical expenses and loss of services of her child, where the child's injury was discovered on November 22, 1976, and subsection (c) of this section became effective on January 1, 1977, as plaintiff's claim as it existed before January 1, 1977, did not accrue until November 22, 1976, and the statute thus provided plaintiff only 39 days in which to file her claim after she discovered it, and the statute as applied to plaintiff would thus not afford her a reasonable time within which to bring her action. Flippin v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Where the four-year period of limitation contained in subsection (c) of this section could not constitutionally be applied to plaintiff's claim for medical malpractice, the one-year-from-discovery clause of the statute which qualifies the limitation period could not be applied to the claim either, since the one-year qualification clause is not an independent, separable provision but must stand or fall with the time limitation which it qualifies. Flippin v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

As to retroactivity of subsection (c) of this section, see also Nationwide Mut. Ins. Co. v. Weeks-Allen Motor Co., 18 N.C. App. 689, 198 S.E.2d 88 (1973) and Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978), cited above.

Failure to make a proper disclosure of risks involved in medical procedure is in the nature of malpractice (negligence) and the three-year statute of limitations applies. Nelson v. Patrick, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

Accrual of Cause of Action for Actions and Omissions. — This section provides that for both actions and omissions, the cause of action accrues and the statute of limitations begins to run at the time of defendant's last act giving rise to the cause of action. Callahan v. Rodgers, 89 N.C. App. 250, 365 S.E.2d 717 (1988).

Where plaintiff suffered injury after falling from a gurney, the statute of limitations accrued on the date of the fall, although plaintiffs were told by hospital personnel that there was not and would not be any brain damage or injury. Hussey v. Montgomery Mem. Hosp., 114 N.C. App. 223, 441 S.E.2d 577, cert. denied, 336 N.C. 605, 447 S.E.2d 393 (1994).

A cause of action for malpractice arising out of the performance or failure to perform professional services accrues at the time of the occurrence of the last act of the defendant giving rise to the claim; from that date, plaintiff has a minimum of three years within which to bring a suit for medical malpractice, but must bring the suit within four years of the last act of the defendant giving rise to the cause of action. Horton v. Carolina Medicorp, Inc., 119 N.C. App. 777, 460 S.E.2d 567 (1995), rev'd on other grounds, 344 N.C. 133, 472 S.E.2d 778 (1996).

Substantial completion of service rendered by defendant attorney occurred when he failed to timely file a change of condition request in workers' compensation action; this omission was defendant's last act giving rise to plaintiff's claim. Garrett v. Winfree, 120 N.C. App. 689, 463 S.E.2d 411 (1995).

Legal malpractice action accrues at the time of the last act of the defendant giving rise to the cause of action, but if the claimant's loss is not readily apparent to the claimant at the time of its origin, and is discovered or should reasonably be discovered by the claimant two or more years after the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made. Bolton v. Crone, 162 N.C. App. 171, 589 S.E.2d 915, 2004 N.C. App. LEXIS 56 (2004).

Clients' legal malpractice action against their attorney and his law firm was time-barred under G.S. 1-15(c) because the last act of the attorney giving rise to the clients' cause of action occurred no later than when the clients signed a release prepared by their insurer and took possession of their settlement check; thereafter, the acts of mailing and filing a dismissal with prejudice following the settlement were duties that the attorney and his firm performed as officers of the court to comply with the terms of the settlement agreement previously signed by the clients. Ramboot Inc. v. Lucas, 181 N.C. App. 729, 640 S.E.2d 845, 2007 N.C. App. LEXIS 398 (2007).

Action Against Environmental Consultant. — A company seeking environmental cleanup of its property was required to commence its malpractice action against its cleanup consultant within four years after the last act giving rise to the action. Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 510 S.E.2d 690 (1999).

The continued course of treatment doctrine applies to situations in which the doctor continues a particular course of treatment over a period of time. When the injurious consequences arise from a continuing course of negligent treatment, the statute does not ordinarily begin to run until the injurious treatment is terminated. The malpractice in such cases is regarded as a continuing tort because of the persistence of the physician or surgeon in continuing and repeating the wrongful treatment. Callahan v. Rodgers, 89 N.C. App. 250, 365 S.E.2d 717 (1988).

Because the "continuing course of treatment" doctrine affects determination of the accrual date, and the accrual date under subsection (c) of this section is the starting date for the running of the statute of limitations and statute of repose, it is correct to use the "continuing course of treatment" doctrine to determine the starting date for the running of the statute of repose. It is only by using the doctrine that a court can determine defendant's relevant "last act." Stallings v. Gunter, 99 N.C. App. 710, 394 S.E.2d 212 (1990).

An exception to the rule that malpractice action accrues at the time of defendant's negligence is the continued course of treatment doctrine; under this doctrine, the action accrues at the conclusion of the physician's treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action. Horton v. Carolina Medicorp, Inc., 119 N.C. App. 777, 460 S.E.2d 567 (1995), rev'd on other grounds, 344 N.C. 133, 472 S.E.2d 778 (1996).

The continuing course of treatment doctrine in medical malpractice claims tolls the running of the statute of limitations for the period between the original negligent act and the ensuing discovery and correction of its consequences; however, the claim still accrues at the time of the original negligent act or omission. Horton v. Carolina Medicorp, Inc., 344 N.C. 133, 472 S.E.2d 778 (1996).

The continuing course of treatment doctrine applies to hospitals in the same manner that it does to other health care providers. Horton v. Carolina Medicorp, Inc., 344 N.C. 133, 472 S.E.2d 778 (1996).

Where a plaintiff shows a continuous relationship with a physician and subsequent treatment by the physician related to the original act or omission that gave rise to the claim, the continuing course of treatment doctrine tolls the running of the statute of limitations for the period between the original negligent act and the time the damage is discovered and corrected. Goins v. Puleo, 130 N.C. App. 28, 502 S.E.2d 621 (1998), rev'd on other grounds, 350 N.C. 277, 512 S.E.2d 748 (1999).

Where a genuine issue of material fact existed about whether to apply the continuing course of treatment doctrine in a dental negligence case summary judgment for defendant on the issue of the expiration of the statute of limitations period was precluded. Rissolo v. Sloop, 135 N.C. App. 194, 519 S.E.2d 766 (1999).

For case holding the continuing course of treatment exception applicable in a medical malpractice action alleging that defendant negligently caused and continued plaintiff's addiction to narcotics, see Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978).

Physician assistant's prescription refill constituted treatment under the continuing course of treatment doctrine where doctor not only performed surgery but also rendered post-operative corrective treatment approximately 17 times after the surgery and ordered original steroid prescription. Whitaker v. Akers, 137 N.C.App. 274, 527 S.E.2d 721, 2000 N.C. App. LEXIS 315 (2000).

Continued Course of Treatment Doctrine Not Applicable. — The "continuing course of treatment" doctrine is not a part of this section, but rather, is a construct of the courts that will not be expanded to encompass negligence arising from provision of professional engineering services between sophisticated corporate parties. Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 510 S.E.2d 690 (1999).

Jury Instruction on Effect of Discovery of Injury. — Defendant was entitled to a jury instruction on the effect of plaintiff's discovery of his injury vis-a-vis the continuous course of conduct doctrine and the running of the statute of limitations; plaintiff knew he was incontinent and impotent, but there was some question whether he knew or should have known that defendant's conduct was wrongful and whether that conduct caused his incontinence and impotence, prior to the running of the statute of limitations. Whitaker v. Akers, 137 N.C.App. 274, 527 S.E.2d 721, 2000 N.C. App. LEXIS 315 (2000).

Where, following surgery, defendant continued to provide treatment for the same injury over a period of six months, culminating in plaintiff's last visit on June 24, 1981, plaintiff had until June 24, 1984 in which to file an action for malpractice under the continued course of treatment rule. Callahan v. Rodgers, 89 N.C. App. 250, 365 S.E.2d 717 (1988).

Letter to Patient Did Not Qualify as Continuing Relationship. — Physician's letter to a patient upon whom he had performed surgery, indicating the need for the removal of a foreign object, did not qualify as a "continuing relationship" under the continuing treatment doctrine, when the letter was written five years after the last physician-patient contact and which letter was prompted by a chiropractor's suggestion of an abnormality in the surgical area. Hensell v. Winslow, 106 N.C. App. 285, 416 S.E.2d 426, cert. denied, 332 N.C. 344, 421 S.E.2d 148 (1992).

Neither Did Visits to Emergency Room. — Plaintiff's diversity-based medical malpractice action against a hospital for damages she suffered after the hospital allegedly withheld an X-ray report from plaintiff and her family physician was barred by the statute of limitations because plaintiff discovered the hospital's failure to report the X-ray within two years of the date the X-ray was made, such that plaintiff could not avail herself of the extension of the filing period conferred as a result of latent injuries. Furthermore, plaintiff failed to show how her unscheduled visits to the emergency room represented an ongoing relationship to advance the treatment of her asthma. Conner v. St. Luke's Hosp., 996 F.2d 651 (4th Cir. 1993).

Prescription Medication Not Continuing Course of Treatment. — Prescription medication, absent any other contact with a doctor, did not constitute a continuing course of treatment and, therefore, did not extend the statute of limitations period. Trexler v. Pollock, 135 N.C. App. 601, 522 S.E.2d 84, 1999 N.C. App. LEXIS 1184 (1999).

Applicability of Latent Injury Discovery Rule. — For a plaintiff to avail himself of the one year extension under the latent injury discovery rule, he must show that: (1) the injury of economic loss originated under circumstances making the injury or loss not readily apparent at the time of its origin; (2) the injury or loss was discovered or should reasonably have been discovered by the plaintiff two or more years after the occurrence of the last act of the defendant giving rise to the cause of action; (3) suit was commenced within one year from the date discovery was made; and (4) the statute of limitations may not, in any case, have been reduced to below three years or extended beyond four years. Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692, aff'd, 312 N.C. 488, 322 S.E.2d 777 (1984).

Plaintiff's discovery of defendant's failure to inform her of the availability of a drug as a less drastic alternative to the hysterectomy performed by defendant on plaintiff qualified as discovery of a nonapparent "injury" that comes within the one-year discovery provision of subsection (c). Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985).

If the injury suffered by a patient was not readily apparent to the patient at the time of its origin and the injury was not discovered by plaintiff for two or more years after the last act of the defendant giving rise to the claim, an action may be filed within one year of the date of such discovery, but must be filed within four years of the last alleged negligent act of the defendant. Teague v. Randolph Surgical Assocs., 129 N.C. App. 766, 501 S.E.2d 382 (1998).

Where plaintiff was shown an x-ray by her chiropractor which revealed the presence of a drain in her body left over from her prior plastic surgery, and where the chiropractor made plaintiff aware of the potential for severe illness or death if the drain remained, and he advised plaintiff to contact her plastic surgeon to have the drain removed, plaintiff was made aware, not only that a foreign object was present in her body, but that it was due to wrongful conduct, sufficient to run the one-year statute of limitations. Hensell v. Winslow, 106 N.C. App. 285, 416 S.E.2d 426, cert. denied, 332 N.C. 344, 421 S.E.2d 148 (1992).

Plaintiff's claim against health care provider for unauthorized disclosure of communications was one for malpractice, and the applicable statute of limitations was subsection (c) of this section, rather than G.S. 1-52. The cause of action accrued at the time of the last unauthorized discussion of the patient's case with another doctor. Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), rev'd on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986).

Malpractice Claim Barred. — A negligence action against attorneys by the liquidator of a life insurer was barred where more than three years elapsed since the last negligent act of defendants and, where the complaint did not allege "continuous representation" by defendants connected with the original negligent act, that doctrine did not apply to toll running of the statute. State ex rel. Long v. Petree Stockton, 129 N.C. App. 432, 499 S.E.2d 790 (1998), cert. granted, 349 N.C. 240, 516 S.E.2d 607 (1998).

Plaintiff's claim based on medical malpractice was barred by the three-year statute of limitations of subsection (c) of this section and by the provisions of G.S. 1-17(b) requiring an action for malpractice in the performance of professional services for a minor to be brought before the minor attains the full age of 19, where the last act of negligence by defendants allegedly occurred in 1962 when plaintiff was four years old and plaintiff filed his claim one day before his twentieth birthday, and there was no merit to plaintiffs' contention that G.S. 1-17(b) did not apply to an action brought by a plaintiff in his own behalf. Hohn v. Slate, 48 N.C. App. 624, 269 S.E.2d 307 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 229 (1981).

Malpractice complaint filed on November 20, 1992, was barred by the statute of repose where the last alleged negligent act of the defendants giving rise to this cause of action occurred in 1982 and plaintiff could not prove later treatment. Sidney v. Allen, 114 N.C. App. 138, 441 S.E.2d 561, petition denied as to additional issues, 338 N.C. 670, 453 S.E.2d 182 (1994), aff'd, 341 N.C. 190, 459 S.E.2d 237 (1995).

Malpractice action against attorney for alleged negligence in failing to procure the transfer of a lot was barred by subsection (c), where plaintiffs did not institute their action within three years of the negligence; action for a separate act of negligence in procuring a deed to the lot from individuals who had filed for bankruptcy, was filed within three years of the negligent act and was not barred. McGahren v. Saenger, 118 N.C. App. 649, 456 S.E.2d 852, 1995 N.C. App. LEXIS 333 (1995), cert. denied, 340 N.C. 568, 460 S.E.2d 318 (1995), appeal dismissed and cert. denied, 460 S.E.2d 319 (1995).

The patient's medical malpractice action was barred by the limitation of this subsection, where the last act giving rise to the patient's cause occurred more than three years before the patient filed her action. Jones v. Asheville Radiological Group, 129 N.C. App. 449, 500 S.E.2d 740 (1998).

Since plaintiff filed her medical malpractice claim more than three years from the last act giving rise to plaintiff's cause of action, the trial court did not err in granting defendants summary judgment. Jones v. Asheville Radiological Group, P.A., 134 N.C. App. 520, 518 S.E.2d 528 (1999).

This section barred the plaintiff bank's claims based on legal malpractice where the defendant closed the loan transaction more than six years before the amended complaint was filed and there were no allegations of an ongoing attorney-client relationship between plaintiff and defendant. NationsBank v. Parker, 140 N.C. App. 106, 535 S.E.2d 597, 2000 N.C. App. LEXIS 1092 (2000).

Causes of action by decedent's heirs against an attorney who drafted the decedent's will, codicil, and other documents, which transferred the decedent's property to a university, were subject to the three-year statute of limitations for legal malpractice despite the heirs' attempts to frame their suit as one for breach of fiduciary duty. Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 563 (2002).

As five years had passed before client brought a legal malpractice action it was barred by the statute of limitations; the allegations of fraud and constructive fraud were basically the same claims as the legal malpractice and, therefore, also failed. Fender v. Deaton, 153 N.C. App. 187, 571 S.E.2d 1, 2002 N.C. App. LEXIS 1244, cert. denied, 356 N.C. 612, 574 S.E.2d 680 (2002).

Ex-client's malpractice action was barred by the statute of limitations as the alleged acts of negligence related only to the representation at the trial court level and the ex-client did not appeal the equitable distribution judgment, which occurred more than three years prior to the commencement of the malpractice action in violation of subsection (c) of this section. Teague v. Isenhower, 157 N.C. App. 333, 579 S.E.2d 600, 2003 N.C. App. LEXIS 546 (2003), cert. denied, 357 N.C. 470, 587 S.E.2d 347 (2003).

Claims for medical malpractice and wrongful death which an administrator filed against a doctor in July 2001, alleging that the administrator's mother died in April 1999 because the doctor misread a chest x-ray in February 1997, were barred by G.S. 1-15(c) and 1-53(4), and the trial court properly granted a motion to dismiss the action. Udzinski v. Lovin, 159 N.C. App. 272, 583 S.E.2d 648, 2003 N.C. App. LEXIS 1508 (2003), aff'd, 358 N.C. 534, 597 S.E.2d 703 (2004).

A legal malpractice case alleging that the lawyers failed to advise the client of use restrictions on land purchased by the client was time barred, and the trial court's order dismissing the case was affirmed, where, in a separate case, the client had failed to specifically deny that he was notified of the land use restrictions approximately two months after closing on the purchase of the land, and over three years before filing the legal malpractice case. Bolton v. Crone, 162 N.C. App. 171, 589 S.E.2d 915, 2004 N.C. App. LEXIS 56 (2004).

Appellate court rejected plaintiff's claim that action, which she filed individually and as the administrator of her mother's estate alleging that attorneys who represented her mother while she was still alive committed malpractice, was not barred by G.S. 1-15 because the statute of limitations was tolled. Livingston v. Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., 163 N.C. App. 397, 594 S.E.2d 44, 2004 N.C. App. LEXIS 401 (2004), cert. denied, 359 N.C. 190, 607 S.E.2d 275 (2004).

Trial court properly dismissed an estate's medical malpractice suit against the hospital defendants, the medical practice defendants, and a doctor where a first complaint that was voluntarily dismissed did not contain a G.S. 1A-1, N.C. R. Civ. P. 9(j) certification, and the re-filed complaint was filed after the statute of limitations expired and the 120-day extension, if it had been sought, would have expired; there was no expert review prior to the commencement of the original action, which was contrary to the North Carolina legislature's intent in enacting Rule 9(j). Estate of Barksdale v. Duke Univ. Med. Ctr., 175 N.C. App. 102, 623 S.E.2d 51, 2005 N.C. App. LEXIS 2753 (2005).

Even assuming that a continuing doctor/patient relationship for treatment related to the patient's negligence action, there was no competent evidence to suggest that the patient's severed nerve could have been restored or repaired, and therefore the continuing course of treatment doctrine was inapplicable; thus, applying G.S. 1-52(16) and G.S. 1-15(c), the three-year statute of limitations began to run with the doctor's last act giving rise to the cause of action, i.e. the surgery in which he severed the nerve, and barred the patient's cause of action. Webb v. Hardy, 182 N.C. App. 324, 641 S.E.2d 754, 2007 N.C. App. LEXIS 575 (2007).

Client's professional negligence claim against an attorney was barred by the statute of repose, G.S. 1-15(c), because the client brought his professional malpractice action nearly seven years after the attorney's last act; because the attorney voluntarily dismissed without prejudice the client's claims in October 1997, the last opportunity for him to act on the claims occurred in October 1998, and the client brought his professional malpractice action in May 2006. Goodman v. Holmes & McLaurin, — N.C. App. —, 665 S.E.2d 526, 2008 N.C. App. LEXIS 1622 (2008).

Client's legal malpractice claim was properly dismissed under G.S. 1A-1, Rule 12(b)(6), as time barred, because the action was filed over three years after end of trial and, one count alleged negligence in trial strategy, response to pretrial stipulations, and discovery, all of which necessarily occurred before or during trial, while the second count alleged negligence in failure to challenge the validity of a prenuptial agreement on appeal, which was in adhering to the rules of court and thus, did not constitute malpractice. Ventriglia v. Deese, — N.C. App. —, 669 S.E.2d 817, 2008 N.C. App. LEXIS 2263 (2008).

Claims Were Time-Barred. — In an action by a principal against, inter alia, a developer and the developer's attorney, claiming entitlement to indemnification, and alleging breach of contract and negligent misrepresentation, summary judgment under Fed. R. Civ. P. 56(c) was granted for the developer's attorney where the developer's legal malpractice cross-claim, and the principal's claims were time-barred under G.S. 1-15(c) and G.S. 1-52(1), and (5), as their claims were filed after the three year limitations period. Cincinnati Ins. Co. v. Centech Bldg. Corp., 286 F. Supp. 2d 669, 2003 U.S. Dist. LEXIS 18585 (M.D.N.C. 2003).

Statute Not Tolled by Appeal of Underlying Actions in Legal Malpractice Case. — In a legal malpractice case, where lawyer's last act in the underlying action was when default judgment occurred, and another lawyer took over the case and appealed the judgment, subsection (c) barred plaintiff insurance company's action for legal malpractice since plaintiff's cause of action accrued and the limitations period began to run no later than the date of the default judgment and the statute was not tolled by the appeal of the underlying action. Nationwide Mut. Ins. Co. v. Winslow, 95 N.C. App. 413, 382 S.E.2d 872 (1989).

Statute Not Tolled by Equitable Doctrine of Adverse Domination. — The equitable doctrine of adverse domination did not toll the statute of repose which applied to bar a negligence action against attorneys by the liquidator of a life insurer. State ex rel. Long v. Petree Stockton, 129 N.C. App. 432, 499 S.E.2d 790 (1998), cert. granted, 349 N.C. 240, 516 S.E.2d 607 (1998).

Statute Tolled by Voluntary Dismissal Provisions. — Plaintiff's claims for medical malpractice were not barred by the three-year statute of limitations of subsection (c) where the refiling of the original state court action in a federal district court invoked the "savings" provision of G.S. 1A-1, Rule 41(a)(1), pertaining to voluntary dismissal, and thereby tolled the limitations period. Porter v. Groat, 713 F. Supp. 893 (M.D.N.C. 1989).

Ruling of Relation Back Not Required Prior to Voluntary Dismissal. — Plaintiff did not forfeit her right to prosecute medical malpractice lawsuit and obtain appellate review of previous court orders by failing to seek a ruling of relation back prior to seeking a voluntary dismissal. Bowlin v. Duke Univ., 119 N.C. App. 178, 457 S.E.2d 757 (1995).

Amended Complaint Related Back. — Because original malpractice complaint gave defendants sufficient notice, amended complaint which added only a Rule 9(j) certification related back to the filing of the original and, thus, fell within the statute of limitations. Brisson v. Santoriello, 134 N.C. App. 65, 516 S.E.2d 911, 1999 N.C. App. LEXIS 666 (1999).

In a medical malpractice case, the trial court erred in granting the doctor and hospital's motions for judgment on the pleadings and denying the injured party's motion to set aside the dismissal where the injured party filed the case on the last day of a 120-day extension, filed an amended complaint containing the expert testimony certification, voluntarily dismissed the case and later refiled the complaint; the statute of limitations for malpractice actions under subsection (c) of this section had not run because the original complaint was timely filed and the first action was properly dismissed without prejudice and properly re-filed within a year. Bass v. Durham County Hosp. Corp., 158 N.C. App. 217, 580 S.E.2d 738, 2003 N.C. App. LEXIS 1044 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

Nonsuit Upheld. — Where there was no evidence that a surgeon attempted to conceal from his patient the fact that a foreign substance had been left in his body at the conclusion of an operation, but to the contrary the surgeon frankly disclosed the facts upon their ascertainment by X-ray less than two years after the operation, nonsuit was properly entered in an action for malpractice instituted more than three years after the operation. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957), decided prior to enactment of subsection (c).

Fraud by Attorney Not Included. — Because claims arising out of the performance of or failure to perform professional services based on negligence or breach of contract are in the nature of malpractice claims, they are governed by subsection (c); however, fraud by an attorney is not within the scope of professional services and thus cannot be "malpractice" within the meaning of this statute. Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792, review improvidently granted, Sharp v. Teague, 339 N.C. 730, 456 S.E.2d 771 (1995).

This section did not apply to plaintiff financial institution's claim alleging constructive fraud against attorney, which fell under G.S. 1-56 instead, and failed because there was no evidence that the amount paid defendant for notarizing and witnessing loan documents would have been any different if the documents had not been forged. NationsBank v. Parker, 140 N.C. App. 106, 535 S.E.2d 597, 2000 N.C. App. LEXIS 1092 (2000).

For case holding that evidence negated fraudulent concealment of cause of action against surgeon for technical assault in performing an operation beyond the scope of the one authorized, see Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952), decided prior to enactment of subsection (c).

For application of subsection (c) in action against attorney for negligence in advising plaintiff to transfer his property to his children to avoid his second wife's claim against him for alimony, see Clodfelter v. Bates, 44 N.C. App. 107, 260 S.E.2d 672 (1979), cert. denied, 299 N.C. 329, 265 S.E.2d 394 (1980).

Limitation for Wrongful Death Action Not Extended. — Subsection (c) of this section would not apply to extend statute of limitations for plaintiff bringing action for wrongful death based on alleged acts of medical malpractice; plaintiff was required to bring her wrongful death claim within two years of deceased's death, pursuant to G.S. 1-53(4). King v. Cape Fear Mem. Hosp., 96 N.C. App. 338, 385 S.E.2d 812 (1989), cert. denied, 326 N.C. 265, 389 S.E.2d 114 (1990).

Four year statute of repose for medical malpractice actions, G.S. 1-15(c), applied to wrongful death cases; a wrongful death medical malpractice suit filed within two years of decedent's death, but more than four years after doctor's last act, was properly dismissed as untimely. Udzinski v. Lovin, 358 N.C. 534, 597 S.E.2d 703, 2004 N.C. LEXIS 658 (2004).

Appointment of Guardian Has No Effect on Tolling Provision. — Appointment of a guardian for a minor does not render the tolling provisions of G.S. 1-17(b) inapplicable to the minor; therefore, where guardian was appointed for minor, and action on behalf of minor for medical malpractice was filed more than five years after that appointment but before minor reached 19, the cause of action was not barred by the statute of limitations. Osborne ex rel. Williams v. Annie Penn Mem. Hosp., 95 N.C. App. 96, 381 S.E.2d 794, cert. denied, 325 N.C. 547, 385 S.E.2d 500 (1989).

Minor as Claimant in Malpractice Suit. — A claimant in a professional malpractice case must file the action within the time limitations contained in subsection (c), unless that period expires before the claimant reaches 19 years of age, in which case, claimant may bring the action at any time before he or she reaches age 19, pursuant to G.S. 1-17. Osborne ex rel. Williams v. Annie Penn Mem. Hosp., 95 N.C. App. 96, 381 S.E.2d 794, cert. denied, 325 N.C. 547, 385 S.E.2d 500 (1989).

Failure of Attorney to File Financing Statement. — An attorney who represents a party in the sale of some of its assets under a security agreement has a duty to file the financing statement after the transaction is closed, which duty continues so long as the filing of the financing statement would protect some interest of his client, and where the attorney fails to file such statement and his client therefore loses his lien upon debtor's bankruptcy, the statute of limitations begins to run on the date the petition in bankruptcy is filed. Sunbow Indus., Inc. v. London, 58 N.C. App. 751, 294 S.E.2d 409, cert. denied, 307 N.C. 272, 299 S.E.2d 219 (1982).

A cause of action involving malpractice in tax matters does not accrue until the I.R.S. assesses a deficiency. Snipes v. Jackson, 69 N.C. App. 64, 316 S.E.2d 657, appeal dismissed and cert. denied, 312 N.C. 85, 321 S.E.2d 899 (1984).

Summary Judgment Was Improper in Informed Consent Action. — Where in a patient's "informed consent" action, defendant doctor, who was the party moving for summary judgment, offered no evidence on the issue of when plaintiff discovered or should have discovered she was injured as a result of defendant's alleged act of negligently informing plaintiff of the risks of surgery, the plaintiff was not obligated to come forward with any evidence, and summary judgment for defendant was improper; if moving party fails in his burden of proof, summary judgment is inappropriate regardless of whether opponent responds. Foard v. Jarman, 93 N.C. App. 515, 378 S.E.2d 571 (1989), rev'd on other grounds, 326 N.C. 24, 387 S.E.2d 162 (1990).

Dismissal Improper in Legal Malpractice Action. — In plaintiff's action for legal negligence, question as to when last wrongful act of the defendant occurred was at issue; therefore, the action was improperly dismissed pursuant to Rule 12(b)(6). Southeastern Hosp. Supply Corp. v. Clifton & Singer, 110 N.C. App. 652, 430 S.E.2d 470 (1993).

Motion to Dismiss Denied. — Because the face of the complaint did not clearly reveal that plaintiff borrower's claims against defendant attorney and law firm accrued before January 30, 2004 (the cut-off date under the three-year statute of limitations), the attorney and law firm's request to dismiss the remaining claims based on the statute of limitations was denied. Higgins v. Spence & Spence, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 13096 (E.D.N.C. Feb. 21, 2008).

Continuing Professional Relationship Between Attorney and Client. — Absent a continuing duty imposed by the contractual relationship or the nature of the services, an attorney has no continuing duty or relationship to a client; thus, there was no on-going relationship between defendant attorney and client for whom he drafted deeds. Jordan v. Crew, 125 N.C. App. 712, 482 S.E.2d 735 (1997), cert. denied, 346 N.C. 279, 487 S.E.2d 548 (1997).

Because plaintiffs did not allege a continuing professional relationship directly related to the drafting of two deeds, they failed to show a continuing relationship between defendant attorney and plaintiffs' grandfather; therefore, defendant's last act, for purposes of the statute of repose, was the drafting and delivery of the deeds and not a later failure to correct the error so that the cause of action was barred under subsection (c). Jordan v. Crew, 125 N.C. App. 712, 482 S.E.2d 735 (1997), cert. denied, 346 N.C. 279, 487 S.E.2d 548 (1997).

§ 1-15.1. Statutes of limitation and repose for civil actions seeking to recover damages arising out of a criminal act.

(a) Notwithstanding any other provision of law, if a defendant is convicted of a criminal offense and is ordered by the court to pay restitution or restitution is imposed as a condition of probation, special probation, work release, or parole, then all applicable statutes of limitation and statutes of repose, except as established herein, are tolled for the period set forth in this subsection for purposes of any civil action brought by an aggrieved party against that defendant for damages arising out of the offense for which the defendant was convicted. Any statute of limitation or repose applicable in the civil action shall be tolled from the time of entry of the court order

(1) Requiring that restitution be made,
(2) Making restitution a condition of probation or special probation, or
(3) Recommending that restitution be made a condition of work release or parole,

and until the defendant has paid in full the amount of restitution ordered or imposed. Except as provided in G.S. 15B-34, an action to recover damages arising out of the criminal offense shall not be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

(b) In any civil action brought by an aggrieved party against the defendant for damages arising out of the offense for which the defendant was convicted:

(1) The defendant has the right to contest the amount of damages;
(2) The amount of any restitution ordered or imposed shall not be admissible into evidence; and
(3) All restitution paid by the defendant to the aggrieved party shall be credited against any judgment rendered in the action against that defendant.

(c) This section shall not apply if the offense of which the defendant was convicted was an offense established in Chapter 20 of the General Statutes.

(d) A plea of no contest shall be considered the same as a conviction for purposes of this section. (1989, c. 535, s. 1; 2004-159, s. 3.)

CASE NOTES

Statute of Limitation Tolled Even When Amount of Restitution Not Specified. — The statute of limitations was tolled for the plaintiff's civil action against the perpetrators of a criminal assault when the court decreed restitution for the victim with the amount unspecified but to be determined later. Whitley v. Kennerly, 132 N.C. App. 390, 512 S.E.2d 426, 1999 N.C. App. LEXIS 103 (1999), cert. denied, 350 N.C. 385, 536 S.E.2d 320 (1999).

§ 1-16: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-17. Disabilities.

(a) A person entitled to commence an action who is under a disability at the time the cause of action accrued may bring his or her action within the time limited in this Subchapter, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the real property, when the person must commence his or her action, or make the entry, within three years next after the removal of the disability, and at no time thereafter.

For the purpose of this section, a person is under a disability if the person meets one or more of the following conditions:

(1) The person is within the age of 18 years.
(2) The person is insane.
(3) The person is incompetent as defined in G.S. 35A-1101(7) or (8).

(a1) For those persons under a disability on January 1, 1976, as a result of being imprisoned on a criminal charge, or in execution under sentence for a criminal offense, the statute of limitations shall commence to run and no longer be tolled from January 1, 1976.

(b) Notwithstanding the provisions of subsection (a) of this section, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), except that if those time limitations expire before the minor attains the full age of 19 years, the action may be brought before the minor attains the full age of 19 years. (C.C.P., ss. 27, 142; Code, ss. 148, 163; 1899, c. 78; Rev., s. 362; C.S., s. 407; 1971, c. 1231, s. 1; 1975, c. 252, ss. 1, 3; 1975, 2nd Sess., c. 977, s. 3; 1987, c. 798; 2001-487, s. 1.)

Cross References. — As to the effect of lowering the age of majority from 21 to 18 upon the applicability of statute of limitations which has been tolled for infancy, see G.S. 48A-3.

Legal Periodicals. — For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1093 (1981).

CASE NOTES

I. In General.
II. Minors.
III. Insanity.
IV. Incompetency.
V. Malpractice.
VI. Adverse Possession.

I. IN GENERAL.

History. — In 1899 the legislature struck the provisions which made coverture a disability on a par with the others enumerated in this section. Weathers v. Borders, 124 N.C. 610, 32 S.E. 881 (1899); Berry v. Lumber Co., 141 N.C. 386, 54 S.E. 278 (1906). See also, Lafferty v. Young, 125 N.C. 296, 34 S.E. 444 (1899); Swift v. Dixon, 131 N.C. 42, 42 S.E. 458 (1902).

Constitutionality of Subsection (b). — The statute requiring an action for malpractice in the performance of professional services for a minor to be brought before the minor attains the age of 19 when the three-year limitation of G.S. 1-15(c) expires before the minor attains the age of 19 does not violate the equal protection clauses of the North Carolina or United States Constitutions on the ground that a person has three years after reaching the age of 18 in which to bring other types of tort actions, since there is a substantial distinction between persons who have malpractice claims and those with other types of tort claims. Hohn v. Slate, 48 N.C. App. 624, 269 S.E.2d 307 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 229 (1981).

Former Law Unchanged. — There is nothing in this section which changes the law as it formerly existed. Frederick v. Williams, 103 N.C. 189, 9 S.E. 298 (1889).

Applicability of Section to Other Chapters. — The applicability of this section is not limited to the statutes of limitation found in Chapter 1 of the North Carolina General Statutes. Jefferys v. Tolin, 90 N.C. App. 233, 368 S.E.2d 201 (1988).

The six-month period of limitation of former G.S. 30-2 for dissenting from a will in probate was a statute of limitations which could be tolled by this section for a disability. In re Estate of Owens, 117 N.C. App. 118, 450 S.E.2d 2 (1994).

The six-month limitation period in G.S. 29-19(b), relating to notice of the claim of an illegitimate child to take from his father's estate, is a statute of limitation which is subject to being tolled under the provisions of this section. Jefferys v. Tolin, 90 N.C. App. 233, 368 S.E.2d 201 (1988).

Applicability to Products Liability Actions. — The clear and explicit intent of the legislature, as evidenced by the statutory language of the Products Liability Act itself, is to allow the statute of repose to be tolled if this section applies. Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995).

G.S. 1-15(c) and subsection (b) of this section must be construed in pari materia. Osborne ex rel. Williams v. Annie Penn Mem. Hosp., 95 N.C. App. 96, 381 S.E.2d 794, cert. denied, 325 N.C. 547, 385 S.E.2d 500 (1989).

This section does not completely eviscerate the statute of repose in the case of minors and others under disability. If a product is over six years old at the time of injury, which would be the time that the claim accrues, than the statute of repose operates as a total bar on that claim; however, if a claim accrues before the six year statute of repose has expired, this section simply operates to extend the time period within which a minor or other with disability may bring suit under Chapter 99B. Therefore, claims accruing after six years will still be barred. Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995).

Once the period of limitation begins to run, the subsequent accession of a minor to a right of action cannot toll its running. Davis v. E.I. DuPont DeNemours & Co., 400 F. Supp. 1347 (W.D.N.C. 1974).

Tolling of Statute in Action by Beneficiary Against Trustee. — An action against a trustee for breach of fiduciary duty is a claim of the beneficiary, not the trust, and common provisions, such as this section, for the tolling of the statute of limitations are available to a beneficiary in an action against his trustee. Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987), rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

Applied in Simpson v. Hurst Performance, Inc., 437 F. Supp. 445 (M.D.N.C. 1977); Gibbs v. Gibbs, 59 N.C. App. 530, 297 S.E.2d 159 (1982).

Cited in Campbell v. Crater, 95 N.C. 156 (1886); County of Johnston v. Ellis, 226 N.C. 268, 38 S.E.2d 31 (1946); Franklin County v. Jones, 245 N.C. 272, 95 S.E.2d 863 (1957); Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); Rowland v. Beauchamp, 253 N.C. 231, 116 S.E.2d 720 (1960); Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965); Hanes Dye & Finishing Co. v. Caisson Corp., 309 F. Supp. 237 (M.D.N.C. 1970); Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971); Lane v. Aetna

Cas. & Sur. Co., 48 N.C. App. 634, 269 S.E.2d 711 (1980); Wilkins v. Whitaker, 714 F.2d 4 (4th Cir. 1983); Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983); Vaughan v. Moore, 89 N.C. App. 566, 366 S.E.2d 518 (1988).

II. MINORS.

Effect of Failure of Guardian to Sue. — Failure of the guardian to institute actions which he has the authority and duty to bring on behalf of his ward is the failure of the ward, entailing the same legal consequences with respect to the bar of the statutes of limitation. Johnson v. Pilot Life Ins. Co., 217 N.C. 139, 7 S.E.2d 475, 128 A.L.R. 1375 (1940).

The statute of limitations begins to run against an infant or an insane person who is represented by a guardian at the time the cause of action accrues. First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 125 S.E.2d 359 (1962).

It is the rule in this State that, except in suits for realty where the legal title is in the ward, the statute of limitations begins to run against an infant who is represented by a general guardian as to any action which the guardian could or should bring at the time the cause of action accrues. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

As to effect of failure of guardian having right to sue to do so, see also Cross v. Craven, 120 N.C. 331, 26 S.E. 940 (1897).

If an infant or insane person has no guardian at the time the cause of action accrues, then the statute begins to run upon the appointment of a guardian or upon the removal of the disability as provided by this section, whichever shall occur first. First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 125 S.E.2d 359 (1962); Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Effect of Mother's Suit as Next Friend for Daughter. — For purposes of the North Carolina law of limitations, the filing of a complaint in federal district court in West Virginia by mother as next friend for her minor daughter did not constitute the appointment of the mother as a guardian ad litem charged with the duty of bringing the suit, and therefore did not start the running of the statute of limitations. Genesco, Inc. v. Cone Mills Corp., 604 F.2d 281 (4th Cir. 1979).

Running of Statute Against Beneficiaries When It Runs Against Trustee. — Where a trust has a claim against a third party, and the trustee is competent to sue, a statute of limitations will be deemed to have run against all beneficiaries, regardless of minority, when it has run against the trustee. Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987), rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

Running of Statute Against Minor Beneficiaries When It Runs Against Administratrix. — Where the statute of limitation had run against the administratrix, it had also run against the minor beneficiaries of a wrongful death settlement. Boomer v. Caraway, 116 N.C. App. 723, 449 S.E.2d 215 (1994), aff'd in part, rev'd in part, per curiam, 342 N.C. 186, 463 S.E.2d 230 (1995).

Running of Statute Where No Final Account Filed. — When no final account has been filed, the statute begins to run from the arrival of the ward at age. Self v. Shugart, 135 N.C. 185, 47 S.E. 484 (1904).

Action on Judgment Secured During Infancy. — This section permits an individual to bring an action on a judgment secured during his infancy by a next friend within the time limited by G.S. 1-47(1), i.e., ten years after he becomes twenty-one years old. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Dismissal of Civil Rights Claim Denied. — Motion for dismissal of an action under 42 U.S.C. § 1983 would be denied where (1) juvenile was 14 years old when the alleged incident took place, (2) juvenile was now only 17 years of age, and (3) pursuant to subdivision (a)(1) of this section, the statute of limitations had not begun to run against the juvenile. Simmons v. Justice, 87 F. Supp. 2d 524, 2000 U.S. Dist. LEXIS 2945 (W.D.N.C. 2000).

Action Not Barred. — Summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c) was improperly granted in the youngest child's claim against the father alleging fraud, among other things, because the action was not barred by res judicata and collateral estoppel, and the youngest child filed the action within three years of when the child reached the age of majority, as required under G.S. 1-52 and G.S. 1-17(a). Beall v. Beall, 156 N.C. App. 542, 577 S.E.2d 356, 2003 N.C. App. LEXIS 188 (2003).

Action Held Barred. — Summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c) was properly granted in the older child's claim against the father alleging fraud, among other things; because the claim accrued when the child was a minor, the child was required under G.S. 1-17(a) and G.S. 1-52 to file the claim within three years of reaching majority, which the child failed to do, as the summons and complaint, which began the lawsuit pursuant to G.S. 1A-1, N.C. R. Civ. P. 3, were not issued until after the deadline had passed. Beall v. Beall, 156 N.C. App. 542, 577 S.E.2d 356, 2003 N.C. App. LEXIS 188 (2003).

III. INSANITY.

Detention in Asylum by Defendant's Wrongful Act. — Where plaintiff's cause of action was based upon alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum, as to defendant plaintiff was non sui juris for the period during which he was detained, and the statute of limitations did not run against plaintiff's cause of action during that period. Jackson v. Parks, 216 N.C. 329, 4 S.E.2d 873 (1939).

Test of Disability. — Although the disability statute which operates to toll the statute of limitations, subsection (a) of this section, provides for tolling for persons who are "insane" when their "cause of action" accrues, under the decisional and statutory law of this state, the appropriate test is one of mental competence to manage one's own affairs. Cox v. Jefferson-Pilot Fire & Cas. Co., 80 N.C. App. 122, 341 S.E.2d 608, cert. denied, 317 N.C. 702, 347 S.E.2d 38 (1986).

IV. INCOMPETENCY.

Post-Traumatic Stress Syndrome. — Plaintiff's repression of memories and post-traumatic stress syndrome suffered as a result of her grandmother's alleged sexual, physical, and emotional abuse rendered plaintiff "incompetent", thereby tolling the statute of limitations so that summary judgment for defendant was improper. Leonard v. England, 115 N.C. App. 103, 445 S.E.2d 50, cert. granted, 337 N.C. 801, 449 S.E.2d 571 (1994), cert. denied, 340 N.C. 113, 455 S.E.2d 663 (1995).

Test for whether incompetency exists. — The appropriate test for establishing an adult incompetent is one of mental competence to manage one's own affairs. State Farm Fire & Cas. Co. v. Darsie, 161 N.C. App. 542, 589 S.E.2d 391, 2003 N.C. App. LEXIS 2257 (2003), cert. denied, 358 N.C. 241, 594 S.E.2d 194 (2004), cert. dismissed, 358 N.C. 241, 594 S.E.2d 193 (2004).

Where defendants had sufficient notice from allegations in plaintiff's complaint that he may have been prevented from filing his clams due to mental disability as he alleged that he suffered several mental breakdowns, that he was diagnosed with post traumatic stress disorder, and that due to his mental illness he was rendered incompetent within the meaning of G.S. 35A-1101(7), the applicable statute of limitations was tolled. Soderlund v. North Carolina Sch. of Arts, 125 N.C. App. 386, 481 S.E.2d 336 (1997).

Education of Handicapped Act. — Where mentally handicapped woman reached age 18 on February 9, 1984, and her guardian ad litem filed suit against the Board of Education in 1986 seeking reimbursement for the depletion of her health insurance benefits used to pay for her education under the Education of the Handicapped Act, the handicapped woman's cause of action was not time barred as she timely filed after attaining her majority and having a guardian appointed; district court properly found G.S. 1-52(2) was tolled by handicapped woman's infancy and incompetency pursuant to this section. Shook ex rel. Shook v. Gaston County Bd. of Educ., 882 F.2d 119 (4th Cir. 1989), cert. denied, 493 U.S. 1093, 110 S. Ct. 1166, 107 L. Ed. 2d 1069 (1990).

Tolling of Statute for Incompetent Widow. — Where widow was incompetent and without a guardian at all times during the administration of her husband's estate all statutes of limitations for civil actions under Chapter 1 of the General Statutes applicable to her were tolled by this section until the removal of her disability or the appointment of a guardian. In re Estate of Owens, 117 N.C. App. 118, 450 S.E.2d 2 (1994).

Tolling of Statute for Incompetent Daughter. — The statute of limitations was tolled for woman who was not yet adjudicated incompetent although, in fact, she clearly was. Fox v. Health Force, Inc., 143 N.C. App. 501, 547 S.E.2d 83, 2001 N.C. App. LEXIS 298 (2001).

Incompetency Not Shown. — The plaintiff failed to establish that he was an "incompetent adult" within the meaning of the statute where his only allegation regarding his incompetency was that his mental condition "caused him to be incapable of understanding his legal rights, making or communicating important decisions about those rights or bringing a lawsuit," but he was able to arrange for places to live, signed leases, cooked, went shopping, held several jobs, attended college at two institutions, obtained and renewed driver's licenses from three states, drove vehicles, owned farmland, traveled and lived in foreign countries, produced a ballet, and created music. Soderlund v. Kuch, 143 N.C. App. 361, 546 S.E.2d 632, 2001 N.C. App. LEXIS 313 (2001), review denied, 353 N.C. 729, 551 S.E.2d 438 (2001).

While there was competent evidence that a wife of an insurance policyholder was extremely and unfortunately injured by the accident, in and out of hospitals, and on and off of many painkillers, there was also evidence that she was able to name an attorney-in-fact to handle her insurance claims; therefore, the wife did not show sufficient competent evidence that her injury made her incapable of managing her own affairs to allow a disability tolling of the fraud statute of limitations under G.S. 1-52(9). State Farm Fire & Cas. Co. v. Darsie, 161 N.C. App. 542, 589 S.E.2d 391, 2003 N.C. App. LEXIS 2257 (2003), cert. denied, 358 N.C. 241, 594 S.E.2d 194 (2004), cert. dismissed, 358 N.C. 241, 594 S.E.2d 193 (2004).

Pleading Not Required. — Plaintiff was not required to plead mental disability in avoidance of the affirmative defense of statute of limitations. Dunkley v. Shoemate, 121 N.C. App. 360, 465 S.E.2d 319 (1996).

V. MALPRACTICE.

Appointment of Guardian Has No Effect on Tolling Provision. — Appointment of a guardian for a minor does not render the tolling provisions of subsection (b) inapplicable to the minor; therefore, where guardian was appointed for minor and action on behalf of minor for medical malpractice was filed more than five years after that appointment but before minor reached 19, the cause of action was not barred by the statute of limitations. Osborne ex rel. Williams v. Annie Penn Mem. Hosp., 95 N.C. App. 96, 381 S.E.2d 794, cert. denied, 325 N.C. 547, 385 S.E.2d 500 (1989).

A claimant in a professional malpractice case must file the action within the time limitations contained in G.S. 1-15(c), unless that period expires before the claimant reaches 19 years of age, in which case claimant may bring the action at any time before he or she reaches age 19. Osborne ex rel. Williams v. Annie Penn Mem. Hosp., 95 N.C. App. 96, 381 S.E.2d 794, cert. denied, 325 N.C. 547, 385 S.E.2d 500 (1989).

Plaintiff's claim based on medical malpractice was barred by the three-year statute of limitations of G.S. 1-15(c) and the provisions of subsection (b) of this section where the last act of negligence by defendants allegedly occurred in 1962 when plaintiff was four years old and plaintiff filed his claim one day before his twentieth birthday, there being no merit to plaintiffs' contention that subsection (b) does not apply to an action brought by a plaintiff in his own behalf. Hohn v. Slate, 48 N.C. App. 624, 269 S.E.2d 307 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 229 (1981).

VI. ADVERSE POSSESSION.

Section Relates to True Title. — Adverse possession relates only to the true title, and the exemptions in the statute as to disability can apply only to one having, by virtue of this title, a right of entry or of action. Berry v. Lumber Co., 141 N.C. 386, 54 S.E. 278 (1906).

Disability Beginning After Commencement of Running of Statute. — Where the statute of limitations begins to run in favor of one in adverse possession against owner, and the owner thereafter dies leaving heirs who are minors, their disability of infancy does not affect the operation of the statute, since the disability is subsequent to commencement of the running of the statute. Battle v. Battle, 235 N.C. 499, 70 S.E.2d 492 (1952).

Effect of Disability Continuing Throughout Life. — If the disability continued during life, and for a period thereafter sufficient to complete the prescribed time of seven years, the title would be perfected in the occupant, subordinate only to a right in the heir to sue for the recovery of the land for the space of three years next after his death. The running of the statute against the action and to consummate the title would be concurrent after the decease of the grantor. Ellington v. Ellington, 103 N.C. 54, 9 S.E. 208 (1889).

Adverse Possession. — Seven years' adverse possession under color of title is no bar to an action of ejectment where the person entitled to commence the same is an infant at the time the title to the land descends to him and sues within three years next after full age. Clayton v. Rose, 87 N.C. 106 (1882).

If land is held adversely to an insane person for such length of time as would bar his recovery if sane, such insane person, or those claiming under him, must commence an action within three years after the disability of insanity is removed, or their rights to recover will be barred. Warlick v. Plonk, 103 N.C. 81, 9 S.E. 190 (1889).

A cause of action to set aside a deed executed by a person who is non compos mentis must be brought within seven years from the date of execution, or within three years next after the removal of the disability, whichever period expires later. Emanuel v. Emanuel, 78 N.C. App. 799, 338 S.E.2d 620 (1986).

§ 1-18. Disability of marriage.

In any action in which the defense of adverse possession is relied upon, the time computed as constituting such adverse possession shall not include any possession had against a feme covert during coverture prior to February 13, 1899. (1899, c. 78, ss. 2, 3; Rev., s. 363; C.S., s. 408.)

Cross References. — For constitutional provision concerning property of married women, see N. C. Const., Art. X, § 4. As to status of married women in civil actions and with reference to property in general, see G.S. 52-1.

Legal Periodicals. — For discussion of this section, see 2 N.C.L. Rev. 181 (1924).

CASE NOTES

Effect of Section. — Under the provisions of this section, and G.S. 52-1 et seq., passed in pursuance of Const. 1868, Art. X, § 6, husband and wife are authorized to contract and deal with their separate property, subject to specific exceptions, as if they were unmarried. Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9, 29 A.L.R. 1479 (1923).

Section Contemplates True Owner. — A possession cannot be adverse, within the meaning of this section, to anyone who has no title or right of entry or action. It cannot be adverse to one who is a mere stranger to the true title and who has no claim whatever to the land, for he has no right which may be barred by such a possession. It has sole reference to the owner of the title. Berry v. Lumber Co., 141 N.C. 386, 54 S.E. 278 (1906).

Since passage of this section coverture is not a defense in bar of the running of the statute of limitations. Carter v. Reaves, 167 N.C. 131, 83 S.E. 248 (1914).

Since passage of this section, if feme covert's right of entry and title were defeated by defendants' adverse possession for seven years under color of title before her action was commenced, the plea of coverture would not avail her. Bond v. Beverly, 152 N.C. 56, 67 S.E. 55 (1910).

In a suit to cancel deeds because of the mental incapacity of the grantor to make them, under which deeds defendant in possession claimed title by adverse possession under color, coverture of plaintiff would not avail her to repel the bar of the statute of limitations which had run in favor of defendant's title. Butler v. Bell, 181 N.C. 85, 106 S.E. 217 (1921).

Effect of Statute upon Proof. — Until twenty years had elapsed since the passage of this section, one claiming title by adverse possession had the burden of proving that the statute began to run prior to the disability of coverture. Holmes v. Carr, 172 N.C. 213, 90 S.E. 152 (1916).

Matter Not Moot Due to Collateral Consequences. — Although a father regained full custody of his child, since there were collateral legal consequences that could arise from a neglect adjudication, such as a determination of whether another child was neglected, the appeal from the adjudication of neglect should not have been dismissed as moot. In re A.K., 360 N.C. 449, 628 S.E.2d 753, 2006 N.C. LEXIS 44 (2006).

§ 1-19. Cumulative disabilities.

When two or more disabilities coexist at the time the right of action accrues, or when one disability supervenes an existing one, the limitation does not attach until they all are removed. (C.C.P., ss. 28, 49; Code, ss. 149, 170; Rev., s. 364; C.S., s. 409.)

CASE NOTES

Cumulative disabilities will only prevent running of statute before it has started. Any number, after the statute has once begun to run, will not suspend or arrest its operation. Holmes v. Carr, 172 N.C. 213, 90 S.E. 152 (1916).

This section can have no application when there is a clear running of the statute for the period fixed after the disability is removed, as when an infant attains his majority. Campbell v. Crater, 95 N.C. 156 (1886).

Length of Time of Disabilities Immaterial. — The length of time elapsing during cumulative disabilities, so long as the disabilities are continuous, is immaterial. Epps v. Flowers, 101 N.C. 158, 7 S.E. 680 (1888).

For cases in which the former disability of coverture supervened upon the disability of infancy, see Clayton v. Rose, 87 N.C. 106 (1882); Epps v. Flowers, 101 N.C. 158, 7 S.E. 680 (1888); Cross v. Craven, 120 N.C. 331, 26 S.E. 940 (1897); Lafferty v. Young, 125 N.C. 296, 34 S.E. 444 (1899).

§ 1-20. Disability must exist when right of action accrues.

No person may avail himself of a disability except as authorized in G.S. 1-19, unless it existed when his right of action accrued. (C.C.P., s. 48; Code, s. 169; Rev., s. 365; C.S., s. 410.)

CASE NOTES

Once the statute begins to run nothing stops it. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

When the statute of limitations commences to run, nothing stops it. When it begins to run against the ancestor, it continues to run against the heir, although the heir is under disability when the descent is cast. Frederick v. Williams, 103 N.C. 189, 9 S.E. 298 (1889). See also, Asbury v. Fair, 111 N.C. 251, 16 S.E. 467 (1892); Clendenin v. Clendenin, 181 N.C. 465, 107 S.E. 458 (1921).

The principle of this section applies where defendant leaves the State after the cause of action accrues. Blue v. Gilchrist, 84 N.C. 239 (1881). But see § 1-21.

Cited in Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957).

§ 1-21. Defendant out of State; when action begun or judgment enforced.

If when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced within the times herein limited after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action or the enforcement of the judgment. Provided, that where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State for the enforcement thereof, except where the cause of action originally accrued in favor of a resident of this State.

The provisions of this section shall not apply to the extent that a court of this State has or continues to have jurisdiction over the person under the provisions of G.S. 1-75.4. (C.C.P., s. 41; 1881, c. 258, ss. 1, 2; Code, s. 162; Rev., s. 366; C.S., s. 411; 1955, c. 544; 1979, c. 525, s. 1.)

Legal Periodicals. — For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 531 (1955).

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For comment discussing perceived conflict between G.S. 1-75.4 and this section prior to enactment of the second paragraph thereof, see 12 Wake Forest L. Rev. 1041 (1976).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

CASE NOTES

I. In General.
II. Causes of Action Arising Outside State.

I. IN GENERAL.

Effect of 1979 Amendment. — The addition in 1979 of the second paragraph to this section provides, in effect, that this section is not applicable to toll a statute of limitations if a defendant is amenable to long-arm jurisdiction under G.S. 1-75.4. Tierney v. Garrard, 124 N.C. App. 415, 477 S.E.2d 73 (1996), cert. granted, 345 N.C. 760, 485 S.E.2d 309 (1997), aff'd, 347 N.C. 258, 490 S.E.2d 237 (1997).

The plain language of the second paragraph of this section is unambiguous and does not limit the exemption from its tolling provisions to those defendants amenable only to personal process. Tierney v. Garrard, 124 N.C. App. 415, 477 S.E.2d 73 (1996), cert. granted, 345 N.C. 760, 485 S.E.2d 309 (1997), aff'd, 347 N.C. 258, 490 S.E.2d 237 (1997).

Purpose of Section. — One of the purposes of this section is to prevent defendants from having the benefit of the lapse of time, i.e., the statute of limitations, while they remain beyond the limits of the State and allow their debts to remain unpaid, it not being the policy of the State to drive its citizens to seek their legal remedies abroad. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, appeal dismissed, 289 N.C. 726, 224 S.E.2d 674 (1976).

The purpose of this section is to prevent defendants from having the benefit of the statute of limitation while they permit past due debts to remain unpaid or other causes of action against them to remain undischarged, and keep beyond the limits of the State and the jurisdiction of its courts, thus preventing the person having the right to sue from doing so. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953).

The general purpose of this section, taken in connection with the statute of limitation, is to give the person having an accrued cause of action or judgment, as prescribed, opportunity substantially during the whole of the lapse of the time against him to bring his action or enforce his judgment. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887).

The words "any person" are employed to designate the person to be affected and embraced by the section; they are very comprehensive, and there is nothing in the section's scope or purpose that excludes nonresidents. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887); Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953).

"The times herein limited" means the time prescribed elsewhere in the Code or in statutes amending or passed as substitutes therefor. The plain intent of the statute is to put nonresidents on the same footing as residents. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887); Williams v. Iron Belt Bldg. & Loan Ass'n, 131 N.C. 267, 42 S.E. 607 (1902); Hill v. Lindsay, 210 N.C. 694, 188 S.E. 406 (1936).

This statutory provision prescribes three distinct cases in which the statute will not operate as a bar because of the continuous lapse of the time prescribed next after the cause of action accrued or judgment was rendered or docketed: (1) Where the debtor was out of the State at the time the cause of action accrued or the judgment was rendered or docketed. This case may apply alike to a resident or nonresident debtor. In such a case time does not begin to lapse in his favor until he returns to the State, not simply on a hasty visit of a day or two, at long intervals, but for the purpose of residence. And if, after such returns, he departs from the State for the purpose of residence out of it, or to sojourn out of it for a year or more, the time of his absence will not be allowed in his favor; it will be subtracted from the time that would have been so allowed if he had remained in the State. (2) When, after the cause of action accrued or the judgment was rendered or docketed, the debtor, either a resident or nonresident of the State, departs from and resides out of it, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action or the enforcement of such judgment. (3) When, after the cause of action has accrued or judgment has been rendered or docketed, the debtor departs from the State, and remains continually absent for the space of one year or more, the time of his absence shall not be allowed in his favor. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887); Arthur v. Henry, 157 N.C. 393, 73 S.E. 206 (1911).

The statute of limitations is suspended in the following cases: (1) When the person against whom a cause of action exists becomes a nonresident, whether he remains continuously absent for a year or occasionally visits the State; (2) When such person retains his residence, but is absent from the State continuously for one year or more. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Effect of Absence of Debtor Before Accrual of Action. — Where a debtor is out of the State at the time the cause of action accrues, the statute of limitation does not begin to run until he returns to this State for the purpose of making it his residence. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887).

Nature of Return to State. — The "return to the State" specified by this section as necessary to put the statute in motion is a return with a view to residence, not a casual appearance in the State, passing through it, or even making a visit here. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

When a person becomes a nonresident it is not necessary that he remain continuously out of the State one year to stop the running of the statute, nor would occasional visits to the State put the statute in motion. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Short Annual Visits Held Insufficient to Start Statute. — Where debtor was a nonresident of this State but was here on a visit of a day or two each year, such visits would not have the effect of putting the statute in motion. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887).

This section is applicable to actions in rem as well as actions in personam, no exception being made. Love v. West, 169 N.C. 13, 84 S.E. 1048 (1915).

Fact that nonresident debtor has property within the State will not affect this section, which suspends the operation of the statute of limitations for the period during which the person against whom the demand is made is out of the State. Grist v. Williams, 111 N.C. 53, 15 S.E. 889 (1892).

This section is not applicable after the statute of limitation has run. Southern Ry. v. Mayes, 113 F. 84 (4th Cir. 1902), cert. denied, 186 U.S. 483, 22 S. Ct. 942, 46 L. Ed. 1260 (1902).

This section is not applicable if a defen-

dant is subject to long-arm jurisdiction. Stokes v. Wilson & Redding Law Firm, 72 N.C. App. 107, 323 S.E.2d 470 (1984), cert. denied, 313 N.C. 612, 332 S.E.2d 83 (1985).

The "borrowing provision" of this section is not applicable if a defendant is subject to long-arm jurisdiction under G.S. 1-75.4. Laurent v. USAIR, Inc., 124 N.C. App. 208, 476 S.E.2d 443 (1996), cert. denied, 346 N.C. 178, 486 S.E.2d 205 (1997).

Personal jurisdiction over defendants under G.S. 1-75.4, standing alone, is not sufficient to place plaintiff's action outside this section. Plaintiff must also be a resident of this State at the time his action originally accrued in order to maintain an action in the courts of this State which is barred by the laws of the jurisdiction in which it arose. Glynn v. Stoneville Furn. Co., 85 N.C. App. 166, 354 S.E.2d 552, cert. denied, 320 N.C. 512, 358 S.E.2d 518 (1987).

When a nonresident defendant is amenable to process there is no need for a tolling statute. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, appeal dismissed, 289 N.C. 726, 224 S.E.2d 674 (1976), decided prior to enactment of second paragraph of this section.

Application of a tolling statute such as this section when defendant has at all times been subject to the service of process under G.S. 1-75.4(5) is inimical to the general purposes of statutes of limitations. Such statutes exist to eliminate the injustice which may result from the assertion of stale claims by providing a reasonable but definite time within which a claim must be prosecuted in the courts or be forever barred. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, appeal dismissed, 289 N.C. 726, 224 S.E.2d 674 (1976), decided prior to enactment of second paragraph of this section.

No Conflict with Long-Arm Statute. — Fact that there is little need to give effect to a tolling statute when a nonresident is amenable to service that will confer personal jurisdiction over him does not place the tolling statute in hopeless conflict with the long-arm jurisdictional statute. Full effect can be given to both of the statutes. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, appeal dismissed, 289 N.C. 726, 224 S.E.2d 674 (1976), decided prior to enactment of second paragraph of this section.

G.S. 1-105 and 1-105.1 Not in Conflict with Section. — Sections 1-105 and 1-105.1, providing for substitute service of a nonresident motorist by service upon the Commissioner of Motor Vehicles, are not in conflict with and do not repeal this section, even though there is no need for a tolling statute when a nonresident defendant is amenable to process. Travis v. McLaughlin, 29 N.C. App. 389, 224 S.E.2d 243, cert. denied, 290 N.C. 555, 226 S.E.2d 513 (1976).

Right of Foreign Corporations to Plead Statute. — As to right of foreign corporations to plead the statute of limitations when required by statute to maintain an agent in the State for service of process, see Volivar v. Richmond Cedar Works, 152 N.C. 656, 68 S.E. 200 (1910).

A corporation can actually be present in the State by continuously doing business in North Carolina through its agents, even though place of incorporation and principal place of business are in foreign states. Bobbitt v. Tannewitz, 538 F. Supp. 654 (M.D.N.C. 1982).

Where the seller has continuously done business in North Carolina since plaintiff's claims accrued, the seller has been sufficiently "present" in the State to warrant the protection of the statutes of limitations. Bobbitt v. Tannewitz, 538 F. Supp. 654 (M.D.N.C. 1982).

As to general rule regarding application of statutes of this character to actions pending at the time they take effect, provided the actions have not been barred by a previous limitation, see Cox v. Brown, 51 N.C. 100 (1858).

Burden of proof is upon plaintiff to show that defendant comes within the purview of this section. Burkhimer v. Gealy, 39 N.C. App. 450, 250 S.E.2d 678, cert. denied, 297 N.C. 298, 254 S.E.2d 918 (1979). See also, Savage v. Currin, 207 N.C. 222, 176 S.E. 569 (1934).

Where plaintiff's affidavits did not even suggest that defendant left North Carolina at any time, this section could not apply. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Suspension of Operation of G.S. 1-53. — The existence of the conditions enumerated in this section will suspend the operation of G.S. 1-53. Williams v. Iron Belt Bldg. & Loan Ass'n, 131 N.C. 267, 42 S.E. 607 (1902).

Enforcement of Resulting Trust. — Where a cause of action to enforce a resulting trust existed for more than 10 years, but after subtracting the length of time the trustee thereof had been out of the State the elapsed time was less than 10 years, then under this section the cause of action was not barred by the 10-year statute. Miller v. Miller, 200 N.C. 458, 157 S.E. 604 (1931).

Proceedings against bail in civil actions are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meanwhile. Albemarle Steam Nav. Co. v. Williams, 111 N.C. 35, 15 S.E. 877 (1892).

Applied in Stokes v. Southeast Hotel Properties, Ltd., 877 F. Supp. 986 (W.D.N.C. 1994).

Cited in Williams v. Iron Belt Bldg. & Loan Ass'n, 131 N.C. 267, 42 S.E. 607 (1902); Love v.

West, 169 N.C. 13, 84 S.E. 1048 (1915); Bridger v. Mitchell, 187 N.C. 374, 121 S.E. 661 (1924); Osborne v. Board of Educ. ex rel. State, 207 N.C. 503, 177 S.E. 642 (1935); Miller v. Perry, 456 F.2d 63 (4th Cir 1972); Joyner v. Lucas, 42 N.C. App. 541, 257 S.E.2d 105 (1979); Ryan v. Brooks, 634 F.2d 726 (4th Cir. 1980); Deadwyler v. Volkswagen of Am., Inc., 134 F.R.D. 128 (W.D.N.C. 1991); Taylor v. Taylor, 143 N.C. App. 664, 547 S.E.2d 161, 2001 N.C. App. LEXIS 323 (2001).

II. CAUSES OF ACTION ARISING OUTSIDE STATE.

Purpose of Proviso in First Paragraph. — The legislature intended the proviso added by the 1955 amendment to be a limited borrowing statute, operating to bar prosecution in this State of all claims barred either in the state of their origin or in this State. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

The proviso in this section is not a limitation upon the tolling provisions of the statute, but is a limited borrowing statute, operating to bar prosecution in this State of all claims barred either in the state of their origin or in this State. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

The 1955 amendment was designed (1) to clarify the law and (2) to bar stale out-of-state claims. To treat the proviso merely as a limitation on the tolling portion of the statute would accomplish neither of these purposes. Giving the language of the proviso its ordinary meaning, it is a limited borrowing statute which bars all stale foreign claims. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

The second sentence of this section, the "borrowing statute" element, limits the effect of the first sentence by applying the foreign state's statute of limitation in those situations where the foreign statute would bar the action; in other words, the "borrowing statute" will prevent a plaintiff from retaining the right to sue indefinitely. Cochrane v. Turner, 582 F. Supp. 971 (W.D.N.C. 1983).

Certain Claims Barred by Proviso. — Treating the proviso as a limited borrowing statute, no action barred in the state of origin may be litigated here. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

Unless They Originally Accrued in Favor of Resident. — This section now bars all stale foreign claims unless they originally accrued in favor of a resident of North Carolina. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Ancillary Administrator Is Not Resident to Whom Wrongful Death Claim Accrues. — The fact that an action for wrongful death is brought by an ancillary administrator appointed in this State does not make the action one accruing to a resident of this State within the meaning of the proviso to this section. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Wrongful Death Claim Barred Where It Arose Is Also Barred in This State. — Where, at the time a wrongful death action was instituted here, it was barred in Pennsylvania where it arose, it was also barred in North Carolina. Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967).

Right to Maintain Action After Barred in Other Jurisdiction. — After a cause of action has been barred in the jurisdiction where it arose, only a plaintiff who was a resident of North Carolina at the time the cause of action originally accrued has the right to maintain an action in the courts of North Carolina. Laurent v. USAIR, Inc., 124 N.C. App. 208, 476 S.E.2d 443 (1996), cert. denied, 346 N.C. 178, 486 S.E.2d 205 (1997).

Right of Nonresident to Litigate Claim Not Barred Where It Arose. — The courts of this State are open to a nonresident plaintiff to enforce a claim on a cause of action that is not barred in the jurisdiction where such cause of action arose, where the debtor has not been a resident of this State for the statutory time necessary to bar the action. This section tolls the statute in such cases where neither the plaintiff nor the defendant is a resident of this State at the time of the institution of the action and never was, as well as where the obligation arose out of the State and the debtor has not resided in the State for a time sufficient to bar the action by the law of this State. Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953), decided prior to addition of proviso in 1955.

Action Based on Foreign Statute Which Itself Contains Limitation. — When an action is based on a foreign statute which creates a cause or right of action and the statute itself contains a limitation on the time within which the action may be brought, the life of the right of action is limited by that provision and not by local statutes of limitation. Rios v. Drennan, 209 F. Supp. 927 (E.D.N.C. 1962).

Claim Arising Out-of-State Against Nonresident. — This section has been construed to mean that if the cause of action arises in another state against an out-of-state defendant, then the statute of limitation does not begin to run until the nonresident defendant comes into this State so that he or she is subject to the personal jurisdiction of this State's courts. Cochrane v. Turner, 582 F. Supp. 971 (W.D.N.C. 1983).

§ 1-22. Death before limitation expires; action by or against personal representative or collector.

If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his personal representative or collector after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative or collector after the expiration of that time; provided, the action is brought or notice of the claim upon which the action is based is presented to the personal representative or collector within the time specified for the presentation of claims in G.S. 28A-19-3. If the claim upon which the cause of action is based is filed with the personal representative or collector within the time above specified, and its validity is admitted in writing by him, it is not necessary to bring an action upon such claim to prevent the bar, but no action shall be brought against the personal representative or collector upon such claim after his final settlement. (C.C.P., s. 43; 1881, c. 80; Code, s. 164; Rev., s. 367; C.S., s. 412; 1977, c. 446, s. 2.)

Cross References. — As to substitution of parties to action upon death of a party where the cause of action survives, see G.S. 1A-1, Rule 25. As to survival of actions to and against personal representatives, see G.S. 28A-18-1.

CASE NOTES

I. In General.
II. Claims in Favor of Estate.
III. Claims Against Estate.
IV. Filing and Admission of Claim.

I. IN GENERAL.

Section as Exception to General Rule. — This section is an exception to the general rule that when the statutes of limitation once begin to run nothing can stop them. Winslow v. Benton, 130 N.C. 58, 40 S.E. 840 (1902); Matthews v. Peterson, 150 N.C. 134, 63 S.E. 721 (1909); Hodge v. Perry, 255 N.C. 695, 122 S.E.2d 677 (1961).

This section is an enabling and not a disabling statute, and applies only in those cases where, but for its interposition, a claim would be barred. Benson v. Bennett, 112 N.C. 505, 17 S.E. 432 (1893); Redmond v. Pippen, 113 N.C. 90, 18 S.E. 50 (1893); Geitner v. Jones, 176 N.C. 542, 97 S.E. 494 (1918); Humphrey v. Stephens, 191 N.C. 101, 131 S.E. 383 (1926).

And Enlarges Time for Bringing Action. — This section is intended to enlarge and extend the time within which an action may be brought, and not to suspend the operation of the statute, which continues to run. Irvin v. Harris, 184 N.C. 547, 114 S.E. 818 (1922). See also, Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890); Benson v. Bennett, 112 N.C. 505, 17 S.E. 432 (1893).

But this section has no application where the bar attached before death. Daniel v. Laughlin, 87 N.C. 433 (1882); Vaughan v. Hines, 87 N.C. 445 (1882); Hughes v. Boone, 114 N.C. 54, 19 S.E. 63 (1894); Grady v. Wilson, 115 N.C. 344, 20 S.E. 518 (1894); Parker v. Harden, 121 N.C. 57, 28 S.E. 20 (1897); Copeland v. Collins, 122 N.C. 619, 30 S.E. 315 (1898); Winslow v. Benton, 130 N.C. 58, 40 S.E. 840 (1902); Humphrey v. Stephens, 191 N.C. 101, 131 S.E. 383 (1926).

If a personal representative is appointed to administer an estate before the expiration of the statute of limitations, G.S. 1-22 allows the time limit within which to file an action against the estate to be extended according to G.S. 28A-19-3. Shaw v. Mintz, 151 N.C. App. 82, 564 S.E.2d 593, 2002 N.C. App. LEXIS 674 (2002).

G.S. 1-22 will allow the time limit within which to file an action against the estate to be extended according to G.S. 28A-19-3. Wright v. Smith, 151 N.C. App. 121, 564 S.E.2d 613, 2002 N.C. App. LEXIS 681 (2002), cert. denied, 356 N.C. 696, 579 S.E.2d 106 (2003).

This section makes a distinction between claims in favor of a decedent's estate and claims against a decedent's es-

tate. Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

To What Limitations Section Is Applicable. — The section only applies to the limitations prescribed in the Code of Civil Procedure. Hall v. Gibbs, 87 N.C. 4 (1882).

Application to Wrongful Death Action. — This section is of no avail to a plaintiff in a wrongful death action where she does not qualify and file suit within that time limit. Johnson v. Wachovia Bank & Trust Co., 22 N.C. App. 8, 205 S.E.2d 353 (1974).

Application to Securities Action. — Since G.S. 78A-56 is a statute of limitations and not a statute of repose, in action seeking recession of purchase of securities the two-year statute of limitations provided for in G.S. 78A-56(f) was tolled by operation of this section, because plaintiffs brought their claim within the one year extension provided by this section. Walker v. Montclaire Hous. Partners, 736 F. Supp. 1358 (M.D.N.C. 1990).

Contract as to Time for Suit Not Suspended by Section. — A reasonable stipulation in a contract of carriage with a railroad company for an interstate shipment of goods as to the time wherein suit might be brought for loss or damage was a part of the contract between the parties, and being made without exception, was not suspended by this section. Thigpen v. East Carolina Ry., 184 N.C. 33, 113 S.E. 562 (1922).

As to former practice under which there was no extension of time to prevent the bar of the statutes from becoming complete as is provided in this section, see Hawkins v. Savage, 75 N.C. 133 (1876); Bruner v. Threadgill, 88 N.C. 361 (1883); Patterson v. Wadsworth, 89 N.C. 407 (1883).

Applied in Robertson v. Dunn, 87 N.C. 191 (1882); Simpson v. McConnell, 156 N.C. App. 424, 576 S.E.2d 419, 2003 N.C. App. LEXIS 104 (2003).

Cited in Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887); Redmond v. Pippen, 113 N.C. 90, 18 S.E. 50 (1893); Harris v. Davenport, 132 N.C. 697, 44 S.E. 406 (1903); Geitner v. Jones, 176 N.C. 542, 97 S.E. 494 (1918); Irvin v. Harris, 182 N.C. 647, 109 S.E. 867 (1921); Gelder & Assocs. v. Huggins, 52 N.C. App. 336, 278 S.E.2d 295 (1981); Strong v. Johnson, 53 N.C. App. 54, 280 S.E.2d 37 (1981); Lassiter v. Faison, 111 N.C. App. 206, 432 S.E.2d 373 (1993).

II. CLAIMS IN FAVOR OF ESTATE.

Effect of this section, following death of judgment creditor, was to give one year's time from such death to the decedent's representative to bring an action, if otherwise it would have been barred before such year had expired. Benson v. Bennett, 112 N.C. 505, 17 S.E. 432 (1893).

Where there was more than one year after death of creditor before time for the bringing of suit expired, this section had no place. Hughes v. Boone, 114 N.C. 54, 19 S.E. 63 (1894).

Time of Administrator's Appointment Is Immaterial. — Actions upon claims in favor of an estate of a decedent must be brought within one year of his death, without regard to when administrator was appointed. Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890).

Reason for Counting Time Period from Death of Decedent. — Time is counted from the death of the decedent, in respect to claims in favor of the estate, because the law does not encourage remission in those entitled to administrations. Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890); Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

III. CLAIMS AGAINST ESTATE.

Editor's Note. *— Some of the cases cited below were decided prior to the 1977 amendment to this section, which substituted the proviso in the second sentence for language therein limiting suit to a period within one year after the issuing of letters testamentary or of administration, provided the letters were issued within ten years of the death of decedent.*

As to construction and application of former provisions of the second sentence of this section prior to its amendment in 1977, see Mauney v. Holmes, 87 N.C. 428 (1882); Dunlap v. Hendley, 92 N.C. 115 (1885); Smith v. Brown, 101 N.C. 347, 7 S.E. 890 (1888); Brittain v. Dickson, 104 N.C. 547, 10 S.E. 701 (1889); Coppersmith v. Wilson, 107 N.C. 31, 12 S.E. 77 (1890); Brawley v. Brawley, 109 N.C. 524, 14 S.E. 73 (1891); Benson v. Bennett, 112 N.C. 505, 17 S.E. 432 (1893); Burgwyn v. Daniel, 115 N.C. 115, 20 S.E. 462 (1894); Winslow v. Benton, 130 N.C. 58, 40 S.E. 840 (1902); Matthews v. Peterson, 150 N.C. 134, 63 S.E. 721 (1909); Fisher v. Ballard, 164 N.C. 326, 80 S.E. 239 (1913); Irvin v. Harris, 182 N.C. 656, 109 S.E. 871 (1921), modified on rehearing, 184 N.C. 547, 114 S.E. 818 (1922); Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

A county's general claim against the estate of a recipient of old age assistance to recover for such assistance is governed by this section. Mecklenburg County v. Lee, 18 N.C. App. 239, 196 S.E.2d 814 (1973).

Action Not Barred. — Action filed on October 20, 2000, two days after qualification of deceased driver's personal representative, for personal injuries arising out of an automobile accident that occurred on June 27, 1997, was not barred by G.S. 1-52, where deceased died on November 7, 1997, at which time the three year limitations period had not yet expired, as under G.S. 28A-18-1 plaintiff's cause of action survived his death, and thus, pursuant to G.S. 1-22, plaintiff was permitted to commence a cause of action against deceased's personal representative, provided that either the action was brought within the time specified for the presentation of claims in G.S. 28A-19-3, or that notice of the claim upon which the action was based was presented to the personal representative within the time specified for the presentation of claims in G.S. 28A-19-3. The personal representative's failure to establish in the record that she complied with G.S. 28A-19-3(a) regarding general notice to creditors precluded her from relying upon the statute of limitations as a bar; moreover, under G.S. 28A-14-1(a), the absolute earliest "deadline" date which could have been specified by the personal representative in the general notice to creditors was January 18, 2001, three months from the day of the first publication or posting of such notice. Mabry v. Huneycutt, 149 N.C. App. 630, 562 S.E.2d 292, 2002 N.C. App. LEXIS 271 (2002).

IV. FILING AND ADMISSION OF CLAIM.

Editor's Note. *— The cases cited below were decided prior to enactment of the 1977 amendment to the final sentence of this section, which substituted "its validity is admitted in writing by him" for "admitted by him."*

Last Sentence of Section Not Retroactive. — The last sentence of this section (which was added in 1881) applied only to those claims that were filed at the time of the passage of the act and were not then barred. It could not apply to those barred when the act became effective. Whitehurst v. Dey, 90 N.C. 542 (1884).

Meaning of "Filed". — The term "filed" signifies that the claim is to be exhibited, for inspection, to the personal representative, for his admission or rejection. It is not required of the creditor to part with the possession of the evidence of his claim. Hinton v. Pritchard, 126 N.C. 8, 35 S.E. 127 (1900).

Notice to the executor for information is the prime purpose of the statute in requiring the claim to be filed, and seems to be all that is necessary for his purpose, until he is ready to make a final settlement. Hinton v. Pritchard, 126 N.C. 8, 35 S.E. 127 (1900).

Filing of Claim as Protection Against Running of Statute. — If a judgment creditor of a deceased judgment debtor wishes to protect himself against the running of the statute of limitations as against the debt, he must file his claim with the personal representative of the deceased. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

Application to Heirs. — Since the amendment of 1881, the heir is as much barred by the filing of the claim within the prescribed time and its admission by the personal representative as he would be by the latter submitting to a judgment. Hall v. Gibbs, 87 N.C. 4 (1882); Woodlief v. Bragg, 108 N.C. 571, 13 S.E. 211 (1891).

What Constitutes Sufficient Filing. — It is a sufficient "filing" when the claim is presented within the proper time to the personal representative and he acknowledges the validity of the debt. The creditor has done his part when he has presented it to the administrator with sufficient certainty as to the nature and amount of the debt. Stonestreet v. Frost, 123 N.C. 640, 31 S.E. 836 (1898); Justice v. Gallert, 131 N.C. 393, 42 S.E. 850 (1902).

Silence as Admission. — Where a claim was presented in the form of a bill of particulars, and the representative refused an explicit admission or denial, plaintiff had the right to deem its acceptance without remark as arresting the running of the statute. Flemming v. Flemming, 85 N.C. 127 (1881).

Filing of Petition to Make Assets as Indicative of Admission. — Where personal representative did not deny the correctness of the claim filed with him in proper time, but filed his petition to make assets to pay it, this was strong proof that he admitted it. Woodlief v. Bragg, 108 N.C. 571, 13 S.E. 211 (1891).

Partial payment by the personal representative, without objection was an unequivocal act from which an admission of the justice of the claim could be inferred. Hinton v. Pritchard, 126 N.C. 8, 35 S.E. 127 (1900).

Where plaintiff never presents his claim or any proof of it, but simply announces its amount, without response from the representative, the running of the statute is not arrested under this section. Flemming v. Flemming, 85 N.C. 127 (1881).

Effect of Admission. — The admission of the validity of a claim by an administrator, where presented within proper time, dispenses with any formal proof thereof. Justice v. Gallert, 131 N.C. 393, 42 S.E. 850 (1902).

Claims which are not barred and are presented to the administrator and admitted by him pursuant to this section need not be put in suit to prevent the bar of the statute pending the administration, nor can the heirs plead the statute as to them. Turner v. Shuffler, 108 N.C. 642, 13 S.E. 243 (1891).

Where notes matured less than three years prior to the date of death of the maker, so that an action on the notes was not then barred by the three-year statute of limitation, the filing of claim and the admission of it, in accordance with this section, prevented the claim from being barred. Lister v. Lister, 222 N.C. 555, 24 S.E.2d 342 (1943).

Filing and Admission of Claim Held Suf-

ficient. — Where an administrator, knowing that his appointment was at the instance and solicitation of judgment creditors so that they might make collection immediately upon appointment, with memorandum of the judgment in hand, investigated and ascertained that the judgment had not been paid, and thereafter instituted proceedings to sell the lands of intestate to pay the judgment, claim on the judgment was filed and admitted by the administrator within the meaning of this section. Rodman v. Stillman, 220 N.C. 361, 17 S.E.2d 336 (1941).

Mere notice to an executor of a claim against the decedent's estate, received without comment or approval by the executor, was not a filing of the claim within the meaning of this section, but where, after such notice, the executor carried the item as a debt on the books of the estate and reported it to the clerk as a debt owed by the estate, the executor's approval would be inferred, and the statute would not operate as a bar. Ashley Horne Corp. v. Creech, 205 N.C. 55, 169 S.E. 794 (1933).

Exhibition to the administrator by the sheriff, within one year of the date of administration, of an execution issued in favor of the county against the intestate, which the administrator admitted was correct but did not pay for want of assets, was a sufficient "filing" under this section, rendering unnecessary an action to prevent the bar of statute of limitations. Stonestreet v. Frost, 123 N.C. 640, 31 S.E. 836 (1898).

§ 1-23. Time of stay by injunction or prohibition.

When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action. (C.C.P., s. 46; Code, s. 167; Rev., s. 368; C.S., s. 413.)

CASE NOTES

This section affects only a litigant's right to prosecute an action in court as fixed by the statute, and does not as a rule operate to extend or prolong a time limit or a property right as determined by the contract of the parties. Gatewood v. Fry, 183 N.C. 415, 111 S.E. 712 (1922).

Effect of Irregularity in Granting Injunction. — Mere irregularity in the granting of an injunction will not render it a nullity, so as to prevent suspension of the statute of limitations under this section during the pendency of the injunction. Walton v. Pearson, 85 N.C. 34 (1881).

Evidence Held Sufficient to Overrule Motion to Nonsuit. — Where plaintiff showed that shortly after defendant's steamship collided with bridge, proceedings were instituted in federal district court, which ordered that all suits arising out of the collision be stayed, and that immediately after plaintiff's claim was dismissed in that court for want of jurisdiction it instituted the present action, plaintiff's evidence was sufficient to overrule motion to nonsuit on the ground of the bar of the statute of limitations. State Hwy. & Pub. Works Comm'n v. Diamond S.S. Transp. Corp., 226 N.C. 371, 38 S.E.2d 214 (1946).

Applied in First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

Cited in High v. Broadnax, 271 N.C. 313, 156 S.E.2d 282 (1967).

§ 1-24. Time during controversy on probate of will or granting letters.

In reckoning time when pleaded as a bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there is an administrator appointed during the pendency of the action, and it is provided that an action may be brought against him. (C.C.P., s. 47; Code, s. 168; Rev., s. 369; C.S., s. 414.)

CASE NOTES

This section applies only where there is no administrator or collector during the contest. Hughes v. Boone, 114 N.C. 54, 19 S.E. 63 (1894).

This section has no application where an administrator has been appointed. Hargrave v. Gardner, 264 N.C. 117, 141 S.E.2d 36 (1965).

Persons Protected. — This section applies only to protect creditors, there being no one for them to sue. Stelges v. Simmons, 170 N.C. 42, 86 S.E. 801 (1915).

This section does not apply to the heirs at law or devisees to nullify the protection given everyone in adverse possession of realty for seven years under color of title, nor to invalidate a judgment rendered against the heir or devisee determining that the title to the property is in another. Stelges v. Simmons, 170 N.C. 42, 86 S.E. 801 (1915).

Cited in Frederick v. Williams, 103 N.C. 189, 9 S.E. 298 (1889); Ex parte Smith, 134 N.C. 495, 47 S.E. 16 (1904).

§ 1-25: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-26. New promise must be in writing.

No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest. (C.C.P., s. 51; Code, s. 172; Rev., s. 371; C.S., s. 416.)

Cross References. — As to particular contracts requiring writing, see G.S. 22-1 et seq.

Legal Periodicals. — For comment on this section, see 13 N.C.L. Rev. 57 (1935).

For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

For article, "The Regulation of Contractual Change: A Guide to No Oral Modification Clauses for North Carolina Lawyers," see 81 N.C.L. Rev. 2239 (2003).

CASE NOTES

I. In General.
II. Acknowledgment or New Promise.
III. Effect of Partial Payment.
IV. Effect of Request Not to Sue.

I. IN GENERAL.

The English Statute. — The original statute of limitation (21 Jas. I, ch. 16) had no provision as to new promises and acknowledgments. The court made the law on this subject and made it apply to all causes of action that rested on a promise. Royster v. Farrell, 115 N.C. 306, 20 S.E. 475 (1894).

This section is mandatory. Fleming v. Staton, 74 N.C. 203 (1876).

Effect upon Prior Law. — This section does not change the character or quality of the acknowledgment or new promise theretofore required to repel the bar of the statute of limitations in an action on contract, except that the new promise should be "in some writing signed by the party to be charged." Phillips v. Giles, 175 N.C. 409, 95 S.E. 772 (1918); Peoples Bank & Trust Co. v. Tar River Lumber Co., 221 N.C. 89, 19 S.E.2d 138 (1942).

The substituted statute after a fixed time bars the cause of action itself, and does not, as before, obstruct the remedy merely. McDonald v. Dickson, 87 N.C. 404 (1882).

Retroactive Effect. — This section has no application where the cause of action had accrued upon the new as well as the old cause. Faison v. Bowden, 74 N.C. 43 (1876).

This section is merely a rule of evidence enacted to prevent fraud and perjury. Royster v. Farrell, 115 N.C. 306, 20 S.E. 475 (1894).

A judgment is not a "contract" within the meaning of this section, because a cause of action on contract or tort loses its identity when merged in a judgment, and thereafter a new cause of action arises out of the judgment. McDonald v. Dickson, 87 N.C. 404 (1882).

Hence This Section Is Not Applicable to Judgments. — The terms of this section as to written acknowledgments, etc., are confined to actions on contracts and are not applicable to judgments. McDonald v. Dickson, 87 N.C. 404 (1882).

Authorization or Ratification by Surety. — If the original borrower makes a new promise to pay the debt in writing or actually makes a partial payment after his or her original promise to pay is broken but before the statute of limitations has run, then the statute begins to run anew from the date of this payment or acknowledgment as against a surety who authorizes or ratifies it. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348

S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Cited in Taylor v. Hunt, 118 N.C. 168, 24 S.E. 359 (1896); Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977); Whitley's Elec. Serv., Inc. v. Sherrod, 32 N.C. App. 338, 232 S.E.2d 223 (1977).

II. ACKNOWLEDGMENT OR NEW PROMISE.

Statute Not Tolled Without a Writing. — The running of the statute of limitations is not tolled by the promise of defendant to pay where there is neither allegation nor evidence of any writing as is required by this section to repel the bar of the statute of limitations in an action on a contract. Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972).

A new promise to pay fixes a new date from which the statute of limitations runs, but such promise, to be binding, must be in writing as required by this section. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960); Norris v. Belcher, 86 N.C. App. 459, 358 S.E.2d 79 (1987).

A new promise to pay, if not in writing, cannot defeat the operation of the statute of limitation. Raby v. Stuman, 127 N.C. 463, 37 S.E. 476 (1900).

Absent Partial Payment. — The bar of the statute of limitations may be overcome by proof of a promise or acknowledgment, but the proof must be in writing, unless the new promise is one that the law implies from a part payment. Hill v. Hilliard & Co., 103 N.C. 34, 9 S.E. 639 (1889); Royster v. Farrell, 115 N.C. 306, 20 S.E. 475 (1894).

Oral Assertion of Claim Is Ineffectual. — The oral assertion of a claim to an administrator who remains silent, even if the silence should be construed an admission, is ineffectual because it is not in writing. Flemming v. Flemming, 85 N.C. 127 (1881).

As to exclusion of parol evidence that a new promise was made, see Christmas v. Haywood, 119 N.C. 130, 25 S.E. 861 (1896).

Elements Necessary for a Valid Promise. — The promise (1) must be in writing; (2) extend to the whole debt (but see Pope v. Andrews, 90 N.C. 401 (1884)); (3) must be to pay money and not something else of value; and (4) must be unconditional. Greenleaf v. Norfolk S.R.R., 91 N.C. 33 (1884); Edwin Bates & Co. v. E.B. Herren & Co., 95 N.C. 388 (1886); Taylor v. Miller, 113 N.C. 340, 18 S.E. 504 (1893); Wells v. Hill, 118 N.C. 900, 24 S.E. 771 (1896); Bryant v. Kellum, 209 N.C. 112, 182 S.E. 708 (1935).

In order to revive a debt which is barred by the statute of limitation, there must be an express unconditional promise to pay the same, in writing, or a written, definite and unqualified acknowledgment of the debt as a subsisting obligation, signed by the debtor, etc., and from which the law will imply a promise to pay. Phillips v. Giles, 175 N.C. 409, 95 S.E. 772 (1918).

The promise must be identical and must be between the original parties, by the same man; further, when the original contract is made with one person and the promise relied on to repel the statute is made with another, the plaintiff in the action, the cause of action is the new promise, and it must be declared on, and this new promise must be in writing. Fleming v. Staton, 74 N.C. 203 (1876); Pool v. Bledsoe, 85 N.C. 1 (1881).

The promise must be made to the creditor himself. Parker v. Shuford, 76 N.C. 219 (1877); Faison v. Bowden, 76 N.C. 425 (1877).

Or to an attorney or agent for the creditor. Kirby v. Mills, 78 N.C. 124 (1878); Hussey v. Kirkman, 95 N.C. 63 (1886).

The promise must be express. Cooper v. Jones, 128 N.C. 40, 38 S.E. 28 (1901).

And must be clear and positive. Hussey v. Kirkman, 95 N.C. 63 (1886).

And certain in its terms. Long v. Oxford, 104 N.C. 408, 10 S.E. 525 (1889).

Conditional Expressions of Willingness to Pay. — Where defendant sent to plaintiff supplier a letter which stated "we plan to pay" and "we expect to pay" the debt, these conditional expressions of defendant's willingness to pay the plaintiff were not sufficiently precise to amount to an unequivocal acknowledgement of the original amounts owed and were insufficient to repel the statute of limitations. American Multimedia, Inc. v. Freedom Distrib., Inc., 95 N.C. App. 750, 384 S.E.2d 32 (1989), cert. denied, 326 N.C. 46, 389 S.E.2d 84 (1990).

Promise Must Amount to New or Continuing Contract. — This section provides that the statute is only waived by acknowledgment or new promise, which amounts to "a new or continuing contract." George W. Helm Co. v. Griffin, 112 N.C. 356, 16 S.E. 1023 (1893).

Acknowledgment of Debt Is Insufficient. — The new promise must be distinct and specific, and a mere acknowledgment of the debt, though implying a promise to pay, is not sufficient. Faison v. Bowden, 76 N.C. 425 (1877); Riggs v. Roberts, 85 N.C. 151 (1881).

Intention to Renew Debt Must Be Manifest. — There must be such facts and circumstances as to show that the debtor recognized a present subsisting liability and manifested an intention to assume or renew the obligation. This means that the acknowledgment of a debt, which would be sufficient to repel the statute, must manifest an intention to renew the debt as strong and convincing as if there had been a direct promise to pay it. Simonton v. Clark, 65 N.C. 525 (1871); Wells v. Hill, 118 N.C. 900, 24 S.E. 771 (1896).

Letter to Creditor Referring to Principal Owed. — A letter to a creditor (plaintiff) written by a debtor (defendant), which did not state the amount owed but referred to the principal amount, constituted a new promise to pay the existing debt and tolled the statute of limitations for the plaintiff's claim pursuant to this section. Jones v. Arehart, 125 N.C. App. 89, 479 S.E.2d 254 (1996).

Promise Must Be Made Within Statutory Limit. — The three-year statute of limitations bars a simple action for debt, and where a letter relied on as arresting the running of the statute is written more than three years before the commencement of the action it is ineffective. Smith v. Gordon, 204 N.C. 695, 169 S.E. 634 (1933).

When Promise Implied. — Where the debtor has, by a signed written instrument, unqualifiedly and definitely acknowledged the debt as his subsisting obligation, the law will imply a promise to pay it, and it is sufficient to repel the bar of the statute of limitations, unless there is something in the writing to repel such implication. Phillips v. Giles, 175 N.C. 409, 95 S.E. 772 (1918). See also, Smith v. Leeper, 32 N.C. 86 (1849); McRae v. Leary, 46 N.C. 91 (1853); Cecil v. Henderson, 121 N.C. 244, 28 S.E. 481 (1897).

Instances in Which Promise Not Implied. — An unaccepted offer to pay a debt by a conveyance of land is not such a recognition of subsisting liabilities as in law will imply a promise to pay. Wells v. Hill, 118 N.C. 900, 24 S.E. 771 (1896).

An unaccepted offer to discharge a bond by a conveyance of land will not be held to imply a promise to pay. Riggs v. Roberts, 85 N.C. 151 (1881).

A promissory note that was barred by the statute of limitations would not be revived by an offer to pay in Confederate currency or bank bills. Simonton v. Clark, 65 N.C. 525 (1871).

Section Inapplicable to Action Based on Failure of Equipment to Conform to Original Warranty. — The statute providing that a new promise must be in writing and signed by the party to be charged in order to start the running of the statute of limitations was inapplicable where plaintiff's action was based upon failure of equipment to conform with original warranty and not upon any new promise by seller. Styron v. Loman-Garrett Supply Co., 6 N.C. App. 675, 171 S.E.2d 41 (1969).

Acknowledgment or Promise Held Sufficient to Remove Bar of Statute. — A written acknowledgment, or a new promise, certain in its terms, or which can be made certain, is sufficient to repel the operations of the statute of limitations under this section. It follows that a mere vague declaration of an intention to pay an undefined amount, without reference to anything that could make it certain, would not be sufficient, but an admission that "the parties are yet to account, and are willing to account and pay the balance then ascertained" would be. Long v. Oxford, 104 N.C. 408, 10 S.E. 525 (1889).

The words "I propose to settle," written in answer to a letter demanding payment of a note barred by the lapse of time, amounted to an acknowledgment or new promise sufficient to take the case out of the operation of the statute of limitations. Taylor v. Miller, 113 N.C. 340, 18 S.E. 504 (1893).

Where a suit had already been commenced to recover an amount alleged to be due upon account, and defendant set up the statutory bar as a defense, but wrote a letter to plaintiff's attorney stating that, if he would take $500.00 in satisfaction, judgment might go against him at court, the letter was an admission and assumption of the debt in the specified amount of $500.00, and operated to remove the bar to recovery. Pope v. Andrews, 90 N.C. 401 (1884). But see, Wells v. Hill, 118 N.C. 900, 24 S.E. 771 (1896).

A paper-writing signed by a parent, certifying that she owed her daughter a sum of money, in a stated amount, for moneys she had borrowed from her at various times, and stating that the daughter was to have a certain sum of money from her estate, giving her reasons, was sufficiently definite to imply a promise to pay the amount of the debt and to repel the bar of the statute of limitations. Phillips v. Giles, 175 N.C. 409, 95 S.E. 772 (1918).

A new note embracing an old indebtedness of the maker is a sufficient writing signed by the parties to be charged to bring the old indebtedness within the operation of this section. Irvin v. Harris, 182 N.C. 647, 109 S.E. 867, aff'd, 182 N.C. 656, 109 S.E. 871 (1921), modified on rehearing, 184 N.C. 547, 114 S.E. 818 (1922).

Acknowledgment or Promise Held Insufficient. — Where a debtor wrote to his creditors declining proffered credit because he was unable to pay what he already owed them, which was barred by the statute, but expressing his confidence in his ability to pay whatever he might contract for in the future, the bar of the statute was not removed. George W. Helm Co. v. Griffin, 112 N.C. 356, 16 S.E. 1023 (1893).

A writing stating "I am going to pay it as soon as I can" was conditioned upon ability to pay and was therefore insufficient. Cooper v. Jones, 128 N.C. 40, 38 S.E. 28 (1901).

In order for a letter signed by the debtor to remove the bar of the statute of limitations it must contain an express, unconditional promise to pay or a definite, unqualified acknowledgment of the debt as a subsisting obligation; and a letter acknowledging the debt at the time defendant left plaintiff's city, but claiming that it had been canceled by the creditor's action in selling the debtor's goods of a value greatly in excess of the debt, was not such an acknowledgment of a subsisting obligation as would repel the statutory bar. Smith v. Gordon, 204 N.C. 695, 169 S.E. 634 (1933).

Client was entitled to summary judgment based on the statute of limitations under G.S. 1-52(1) because a business consultant failed to show that the client in its e-mails to the consultant manifested a definite and unqualified intention to pay a contractual debt under G.S. 1-26 so that the time for the consultant to collect the contractual debt was extended by the e-mails. Andrus v. IQMax, Inc., 190 N.C. App. 426, 660 S.E.2d 107, 2008 N.C. App. LEXIS 900 (2008).

As to former law, see Hughes v. Edwards, 22 U.S. (9 Wheat.) 489, 6 L. Ed. 142 (1824); McBride v. Gray, 44 N.C. 420 (1853); Brown v. Becknall, 58 N.C. 423 (1860); Faison v. Bowden, 72 N.C. 405 (1875); Ray v. Pearce, 84 N.C. 485 (1881); Riggs v. Roberts, 85 N.C. 151 (1881); Simmons v. Ballard, 102 N.C. 105, 9 S.E. 495 (1889).

III. EFFECT OF PARTIAL PAYMENT.

History. — It should be observed that the effect of partial payment stopping the statute is not of statutory origin. It was not in the English statute of James I and 9 Geo. IV did nothing more than recognize the common-law right. Thus it originated with the courts and its application depends upon the reasoning in such decisions. This is equally true in North Carolina for this section merely recognizes the right, leaving the application of the principles to the courts as has always been the case. See Battle v. Battle, 116 N.C. 161, 21 S.E. 177 (1895).

Thus the effect of this section is to leave the law as it was prior to the adoption of the Code of Civil Procedure as regards the effect of a partial payment in removing the bar of the statute of limitations. See State Nat'l Bank v. Harris, 96 N.C. 118, 1 S.E. 459 (1887); Kilpatrick v. Kilpatrick, 187 N.C. 520, 122 S.E. 377 (1924).

The principle that making a payment on a note repels the statute is not altered by the provisions of this section, for it expressly provides that "this section does not alter the effect of any payment of principal or interest." The decisions treating of this provision hold that the effect of this clause is to leave the law as it was prior to the adoption of this section as regards the effect of a partial payment in removing the bar of the statute of limitations. Smith v. Davis, 228 N.C. 172, 45 S.E.2d 51, 174 A.L.R. 643 (1947).

This section dispenses with a writing where partial payment is made, because the payment is in effect a written promise. McDonald v. Dickson, 87 N.C. 404 (1882).

But Debtor Must Intend Thereby to Acknowledge Debt. — The general principle on which part payment takes a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment. Cashmar-King Supply Co. v. Dowd, 146 N.C. 191, 59 S.E. 685 (1907).

Partial payment starts the statute running anew only when it is made under such circumstances as will warrant the clear inference that the debtor recognizes the debt as existing and his willingness, or at least his obligation, to pay the balance. Battle v. Battle, 116 N.C. 161, 21 S.E. 177 (1895). See also, Lester Piano Co. v. Loven, 207 N.C. 96, 176 S.E. 290 (1934); Norris v. Belcher, 86 N.C. App. 459, 358 S.E.2d 79 (1987).

Payment made in contemplation of an agreed compromise will not repel the bar of the statute of limitations as to the balance of the debt. Cashmar-King Supply Co. v. Dowd, 146 N.C. 191, 59 S.E. 685 (1907).

Partial payment voluntarily made on judgment does not remove statutory bar. McDonald v. Dickson, 87 N.C. 404 (1882).

Application of Existing Liability to Debt. — The fact that the maker of a note had a claim against the holder, which the holder endorsed as a credit on the note without the assent of the maker, would not be such a partial payment as would rebut the statute of limitations, but an agreement to apply one existing liability to another would be such a partial payment as would stop the operation of the statute, even though the endorsement was never actually made on the note. State Nat'l Bank v. Harris, 96 N.C. 118, 1 S.E. 459 (1887).

An account of transactions between two persons, to be mutual, when kept by only one of them, must be with the knowledge and concurrence of the other, so as to make a credit given to such other repel the bar of the statute of limitations. Cashmar-King Supply Co. v. Dowd, 146 N.C. 191, 59 S.E. 685 (1907).

Where an assignment for the benefit of creditors conferred no power on the trustee, as agent of the debtor, to do any act to waive the statute or to express a willingness or intention to pay the debt after it became otherwise barred, a partial payment made by the trustee on a note of the debtor would not arrest the running or remove the bar of the statute of limitations. Battle v. Battle, 116 N.C. 161, 21 S.E. 177 (1895).

Burden of Proving Payment. — The burden is upon the plaintiff to show that a partial payment was made at such a time as to save the debt from the operation of the statute. Riggs v. Roberts, 85 N.C. 151 (1881).

Instruction Held Erroneous. — Where the running of the statute of limitations would have otherwise barred an action upon an account, and there was evidence tending to show that a credit thereon was agreed to by the creditor and debtor within the three-year period, the effect of this credit to repel the bar related to the time of the agreement made and effected, and an instruction that made it depend upon the time of the debt incurred for which the credit was given was reversible error to the plaintiff's prejudice. Kilpatrick v. Kilpatrick, 187 N.C. 520, 122 S.E. 377 (1924).

As to time for which statute starts anew, see Riggs v. Roberts, 85 N.C. 151 (1881); State Nat'l Bank v. Harris, 96 N.C. 118, 1 S.E. 459 (1887); Battle v. Battle, 116 N.C. 161, 21 S.E. 177 (1895); Cashmar-King Supply Co. v. Dowd, 146 N.C. 191, 59 S.E. 685 (1907); Kilpatrick v. Kilpatrick, 187 N.C. 520, 122 S.E. 377 (1924).

IV. EFFECT OF REQUEST NOT TO SUE.

Plea of Limitations Precluded After Delay Caused by Debtor's Request and Promise. — Where delay in bringing suit is caused by a request of defendant or his attorney and his promise to pay the debt and not to avail himself of the plea of the statute, he will not be allowed to plead the statute, as it would be against equity and good conscience. Joyner v. Massey, 97 N.C. 148, 1 S.E. 702 (1887). See also, Barcroft & Co. v. Roberts & Co., 91 N.C. 363 (1884), aff'd on rehearing, 92 N.C. 249 (1885).

Notwithstanding this section, when a creditor has delayed action at the request of the debtor, under his promise, express or implied, to pay the debt and not to plead the statute of limitations, the courts, in the exercise of their equitable jurisdiction, will not permit the debtor to plead the lapse of time, and the creditor may bring his action within the statutory time after such promise and request for delay even though they were not in writing. Cecil v. Henderson, 121 N.C. 244, 28 S.E. 481 (1897).

If plaintiff was prevented from bringing his action during the statutory period by such conduct on the part of the defendant as makes it inequitable to him to plead the statute, or by reason of any agreement not to do so, he will not be permitted to defeat plaintiff's action by interposing the plea. Tomlinson v. Bennett, 145 N.C. 279, 59 S.E. 37 (1907); State ex rel. Oliver v. United States Fid. & Guar. Co., 176 N.C. 598, 97 S.E. 490 (1918).

On Grounds of Equitable Estoppel. — In giving effect to requests not to sue and promises not to plead the statute, the courts proceed upon the idea of an equitable estoppel, holding that it would be against good conscience and encourage fraud to permit the debtor to repudiate them when by his contract he has lulled the creditor into a feeling of security and has induced him to delay bringing action. Daniel v. Board of Comm'rs, 74 N.C. 494 (1876); Haymore v. Commissioners of Yadkin, 85 N.C. 268 (1881).

Request Without Promise Not to Plead Insufficient. — It is essential not only that there shall be a new promise and a request for delay, but there must be a promise not to plead the statute if delay is given. Hill v. Hilliard & Co., 103 N.C. 34, 9 S.E. 639 (1889); Cecil v. Henderson, 121 N.C. 244, 28 S.E. 481 (1897).

A request not to sue will not stay the statute of limitation, but it must be an agreement not to plead it. Raby v. Stuman, 127 N.C. 463, 37 S.E. 476 (1900).

But Request and Promise Need Not Be in Writing. — The request not to sue and promises not to plead the statute of limitations need not be in writing. Cecil v. Henderson, 121 N.C. 244, 28 S.E. 481 (1897); State v. United States Fid. & Guar. Co., 176 N.C. 598, 97 S.E. 490 (1918).

Running of Statute Not Arrested. — A simple admission by executor of the correctness of a claim against testator's estate, and a verbal promise to pay same out of the assets, prior to the 1881 amendment of G.S. 1-22, would not arrest the running of the statute of limitations, where there was no proof that the creditor refrained from suing at the request of the executor or that there was any agreement for indulgence. Whitehurst v. Dey, 90 N.C. 542 (1884).

§ 1-27. Act, admission or acknowledgment by party to obligation, co-obligor or guarantor.

(a) After a cause of action has accrued on any obligation on which there is more than one obligor, any act, admission, or acknowledgment by any party to such obligation or guarantor thereof, which removes the bar of the statute of limitations or causes the statute to begin running anew, has such effect only as to the party doing such act or making such admission or acknowledgment, and shall not renew, extend or in any manner impose liability of any kind against other parties to such obligation who have not authorized or ratified the same.

(b) Nothing in this section shall be construed as applying to or affecting rights or obligations of partnerships or individual members thereof, due to acts, admissions or acknowledgments of any one partner but rights as between partners shall be governed by G.S. 59-39.1. (C.C.P., s. 50; Code, s. 171; Rev., s. 372; C.S., s. 417; 1953, c. 1076, s. 1.)

Legal Periodicals. — For comment on 1953 amendment, see 31 N.C.L. Rev. 397 (1953).

For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

CASE NOTES

Effect of Partial Payment on Promissory Note by One Defendant. — In an action to recover the balance due on a promissory note, a payment on the note by one defendant did not fix the date of payment as a new date from which the statute of limitations began to run against the second defendant unless such partial payment was agreed to, authorized or ratified by the second defendant. First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979), cert. denied, 299 N.C. 741, 267 S.E.2d 661 (1980).

Authorization or Ratification by Surety. — If the original borrower makes a new promise to pay the debt in writing or actually makes a partial payment after his or her original promise to pay is broken but before the statute of limitations has run, then the statute begins to run anew from the date of this payment or acknowledgment as against a surety who authorizes or ratifies it. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Cited in Wells v. Barefoot, 55 N.C. App. 562, 286 S.E.2d 625 (1982).

§ 1-28. Undisclosed partner.

The statutes of limitations apply to a civil action brought against an undisclosed partner only from the time the partnership became known to the plaintiff. (1893, c. 151; Rev., s. 373; C.S., s. 418.)

CASE NOTES

Cited in Pamlico Properties IV v. Seg Anstalt Co., 89 N.C. App. 323, 365 S.E.2d 686 (1988).

§ 1-29. Cotenants.

If in actions by tenants in common or joint tenants of personal property, to recover the same, or damages for its detention or injury, any of them are barred of their recovery by limitation of time, the rights of the others are not affected thereby, but they may recover according to their right and interest, notwithstanding such bar. (C.C.P., s. 52; Code, s. 173; Rev., s. 374; C.S., s. 419; 1921, c. 106.)

CASE NOTES

This section changes the rule in regard to personalty. It does not affect the law as to real property. Cameron v. Hicks, 141 N.C. 21, 53 S.E. 728 (1906).

As to elements of tenancy in common, see Powell v. Malone, 22 F. Supp. 300 (M.D.N.C. 1938).

§ 1-30. Applicable to actions by State.

The limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties. (C.C.P., s. 38; Code, s. 159; Rev., s. 375; C.S., s. 420.)

Legal Periodicals. — For note, "Reviving a Double Standard in Statutes of Limitations and Repose: Rowan County Board of Education v. United States Gypsum Company," see 71 N.C.L. Rev. 879 (1993).

For article, "A Morass of Confusion and Inconsistency: The Application of the Doctrine of Nullum Tempus Occurrit Regi" in North Carolina, see 28 Campbell L. Rev. 251 (2006).

CASE NOTES

Effect of Section on Common Law. — This section abrogated the common-law maxim "nullum tempus occurrit regi" protecting public property from the negligence of public officers. Furman v. Timberlake, 93 N.C. 66 (1885).

The maxim "nullum tempus occurrit regi" no longer obtains in this State, even in the case of collecting taxes, unless the statute applicable to or controlling the subject provides otherwise. City of Wilmington v. Cronly, 122 N.C. 388, 30 S.E. 9 (1898); Threadgill v. Town v. Wadesboro, 170 N.C. 641, 87 S.E. 521 (1916); Guilford County v. Hampton, 224 N.C. 817, 32 S.E.2d 606 (1945).

Nullum tempus occurrit regi is not totally abrogated in North Carolina; the ancient maxim, and its historic public policy of preserving the public rights, revenues and property, still has a limited place in the modern age. Rowan County Bd. of Educ. v. United States Gypsum Co., 87 N.C. App. 106, 359 S.E.2d 814, cert. denied, 321 N.C. 298, 362 S.E.2d 782 (1987).

Nullum tempus survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State. The General Assembly has acquiesced in this interpretation of this section. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

Applicability of Limitations to State Is Legislative Matter. — Whether there ought to be a statute of limitations applicable to suits by the State is a matter for the legislature, not the courts. State v. West, 293 N.C. 18, 235 S.E.2d 150 (1977).

Determining Factors as to Whether Limitations Apply. — Nullum tempus does not apply in every case in which the State is a party. If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly includes the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly excludes the State. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

When the State or one of its political arms acts in a governmental fashion, it does not act in the same manner as a private party. Thus, time limitations do not run against the State unless the statute at issue expressly includes the State. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

Proprietary Activity. — Pecuniary activity or activity of a type historically performed by private individuals, is proprietary in nature, therefore, the limitations statute applies. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

When Statute Runs Against State. — Notwithstanding the inclusive provisions of this section, it has been uniformly held that no statute of limitations runs against the State, unless it is expressly provided therein. City of Raleigh v. Mechanics & Farmers Bank, 223 N.C. 286, 26 S.E.2d 573 (1943); State v. West, 293 N.C. 18, 235 S.E.2d 150 (1977).

State Action as Governmental Function. — Given that the State (1) has undertaken the responsibility to provide free public schools, (2) has delegated day-to-day administration and operation of those schools to counties and local school boards, including the power to bring suit to recover money or property "which may be due to or should be applied to the support and maintenance of the schools" and (3) has retained the duty of providing those local entities with considerable operating funds from state revenues, the county board of education was acting as an arm of the State in pursuing the governmental function of constructing and maintaining its schools. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

The county board of education was acting in a governmental capacity when it brought suit to recover lost tax money expended in the construction of public schools — an activity incidental to and part of the State's constitutional duty to provide public education — and to abate a potential health hazard to students, teachers, staff, administrators, parents, and others using school buildings. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

Construction and maintenance of local public schools by a local school board is a governmental function. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

Limitations Statute Held Inapplicable. — Three-year statute of limitations pleaded by the defendant was not applicable in an action by the State to recover certain documents, namely indictments issued in 1967 and 1968, since nothing in the record indicated when the documents were taken from the possession of the State and hence when the cause of action arose, and since the statute pleaded was not made expressly applicable to the State. State v. West, 293 N.C. 18, 235 S.E.2d 150 (1977).

Three-year statute of limitations did not apply to an action by a municipality to enforce assessment liens for public improvements, since such statute did not apply to actions brought by the State or its political subdivisions in the capacity of its sovereignty. City of Charlotte v. Kavanaugh, 221 N.C. 259, 20 S.E.2d 97 (1942).

Where act authorizing collection of tax arrearages did not prescribe any limitation, the 10-year statute of limitations did not apply, and the unpaid taxes for any year could be recovered. City of Wilmington v. Cronly, 122 N.C. 388, 30 S.E. 9 (1898).

County school board's action to recover lost tax dollars expended in removing asbestos from school property was a governmental function exercised in pursuit of a sovereign purpose for the public good on behalf of the State, and the action was not barred by the statute of limitations. Rowan County Bd. of Educ. v. United States Gypsum Co., 87 N.C. App. 106, 359 S.E.2d 814, cert. denied, 321 N.C. 298, 362 S.E.2d 782 (1987).

Statutes of Repose. — Despite the fact that statutes of repose differ in some respects from statutes of limitation, they are still time limitations and therefore still subject to the doctrine that time does not run against the sovereign. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992).

Cited in City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967); State ex rel. State Art Museum Bldg. Comm'n v. Travelers Indem. Co., 111 N.C. App. 330, 432 S.E.2d 419 (1993).

OPINIONS OF ATTORNEY GENERAL

Statutes of Limitations Are Not Applicable Against the State in Escheats. — See opinion of Attorney General to Mr. Edwin Gill, State Treasurer, 42 N.C.A.G. 49 (1972).

§ 1-31. Action upon a mutual, open and current account.

In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action accrues from the time of the latest item proved in the account on either side. (C.C.P., s. 39; Code, s. 160; Rev., s. 376; C.S., s. 421; 1951, c. 837, s. 1.)

Cross References. — As to book accounts as evidence of last settlement between parties in actions for less than $60.00, see G.S. 8-42.

CASE NOTES

"Mutual Account" Defined. — An account may be "mutual" if there are reciprocal dealings so that each party extends credit to the other and the account is allowed to run with a view to an ultimate adjustment of the balance. Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977).

"Open Account" Defined. — An ordinary open account results where the parties intend that the individual transactions are to be considered as a connected series rather than as independent of each other, a balance is kept by adjustment of debits and credits, and further dealings between the parties are contemplated. Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977).

"Current Account" Defined. — An account is "running" or "current" where it continues with no time limitations fixed by express or implied agreement. Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977).

What Accounts Contemplated by Section. — The mere existence of disconnected and opposing demands between two parties will not take a case out of the statute of limitations. There must be mutual running accounts, having reference to each other, between the parties, for an item within time to have that effect. Green v. Caldcleugh, 18 N.C. 320 (1835).

In order that one item being in date shall have the effect of bringing the whole account within date, it must appear that there were mutual accounts between the parties, or an account of mutual dealings kept by one party with the knowledge and concurrence of the other. Hussey v. Burgwyn, 51 N.C. 385 (1859).

Extension of Credit Must Be Reciprocal. — A mutual account must be reciprocal as to the credit extended, so as to imply a promise to pay the balance due, upon whichever side it may fall; and an extension of credit upon the one side alone falls neither within the intent and meaning of case law nor the statute applicable. Hollingsworth v. Allen, 176 N.C. 629, 97 S.E. 625 (1918).

Mutuality of accounts may be the result of direct agreement or may be inferred from the dealings of the parties; if established, it renders unavailable the defense of the statute of limitations to both parties. Stancell v. Burgwyn, 124 N.C. 69, 32 S.E. 378 (1899).

When Mutuality May Be Inferred. — A mutual account may be inferred where each party keeps a running account of the debits and credits, or where one, with the knowledge of the other keeps it. Green v. Caldcleugh, 18 N.C. 320 (1835); Hussey v. Burgwyn, 51 N.C. 385 (1859); Robertson v. Pickerell, 77 N.C. 302 (1877); E. Mauney & Son v. Coit, 86 N.C. 464 (1882); Stokes v. Taylor, 104 N.C. 394, 10 S.E. 566 (1889).

Section Inapplicable to Credit Account. — The purchase of merchandise on credit, where the purchaser pays a certain sum in cash on the account each fall and the balance is carried forward into the next year and the next year's purchases are added thereto, is not a mutual, open and current account within the purview of this section, but is an account current. Richlands Supply Co. v. Banks, 205 N.C. 343, 171 S.E. 358 (1933).

This section does not apply to an ordinary store account, though open and continued, where the credit is all on one side and the only items of discharge consist in payments on account. Brock v. Franck, 194 N.C. 346, 139 S.E. 696 (1927).

An ordinary store account or any other account (though open and continued) where the credit is all on one side and the payments on account are on the other is not a "mutual, open and current account" under this section. Whitley's Elec. Serv., Inc. v. Sherrod, 32 N.C. App. 338, 232 S.E.2d 223, rev'd on other grounds, 293 N.C. 498, 238 S.E.2d 607 (1977).

An indefinite promise to pay intermittently from time to time for services rendered by one party to another is not a mutual, open and current account with reciprocal demands between the parties within the purview of this section. Phillips v. Penland, 196 N.C. 425, 147 S.E. 731 (1929).

Draft Not Referring to Account. — The bar of the statute of limitations was not repealed by the transmission of a draft by the debtor and its receipt by the creditor within the three years, where the former made no allusion to or recognition of the account or any debt whatever. Hussey v. Burgwyn, 51 N.C. 385 (1859).

When Statute Runs on Mutual Accounts. — Where there is a running account, all on one side, the statute of limitations begins to run on each item from its date, but where there are mutual accounts, the statute begins to run only from the last dealing between the parties. Robertson v. Pickerell, 77 N.C. 302 (1877).

Section Inapplicable to Oral Agreement for Rent. — Even if the cause of action to enforce an oral agreement for rent was not barred by the statute of frauds, this section did not apply to it, because the agreement was not a mutual account. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Action for Services Rendered to Decedent. — Where plaintiff instituted action against administratrix of deceased to recover for services rendered deceased, and it appeared that plaintiff alone kept the account of charges for such services and that he entered thereon from time to time credits for rent for decedent's land, the facts were insufficient to establish mutual, open and current accounts, and the statute of limitations began to run against plaintiff's claims for the date of each item. Tew v. Hinson, 215 N.C. 456, 2 S.E.2d 376 (1939).

In an action against decedent's administrator to recover for services rendered to decedent under an agreement that he would pay for services to be irregularly rendered from time to time as needed, without a definite time fixed for payment but under a general promise to pay for them, a payment made by decedent in 1925, intended by him to be made upon the debt, would have the effect of reviving the claim against the statute of limitations only for the three years next preceding his death in 1926, subject to the credit of the payment so made. Phillips v. Penland, 196 N.C. 425, 147 S.E. 731 (1929).

Conflicting Evidence for Jury. — Conflicting evidence as to whether last item entered was proper in mutual, open and current account was for the jury. Hammond v. Williams, 215 N.C. 657, 3 S.E.2d 437 (1939).

Directed Verdict Held Error. — Where there was conflicting evidence as to whether item sued on was to be related to other items upon which defendant relied, it was reversible error for the judge to direct a verdict thereon if the jury believed the evidence. McKinnie Bros. Co. v. Wester, 188 N.C. 514, 125 S.E. 1 (1924).

Effect of Part Payment. — While there is language in some of the decisions suggesting that a part payment on a current account revives only those items that accrued within three years preceding the payment, the Supreme Court has not so held in any case where (1) a current account was established, (2) the debtor made a partial payment, and (3) there were circumstances showing that in making the payment the debtor intended to acknowledge the entire account and thereby impliedly promised to pay the balance due. Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977).

A part payment operates to toll the statute if made under such circumstances as will warrant the clear inference that the debtor in making the payment recognized his debt as then existing and acknowledged his willingness, or at least his obligation, to pay the balance. Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977).

Where plaintiff sues on a current account, a part payment which constitutes an acknowledgment begins the statute running anew as to the entire amount that is acknowledged and not merely as to those items which accrued within three years of the payment. Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977).

Acknowledgment of Obligation. — Where suit is brought more than three years after claim arises on an account or other contractual debt, the bar of the statute of limitations may be avoided if the debtor has acknowledged his obligation within three years prior to the date the action is filed. Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977).

§ 1-32. Not applicable to bank bills.

The limitations prescribed by law do not affect actions to enforce the payment of bills, notes or other evidences of debt, issued or put in circulation as money by banking corporations incorporated under the laws of this State. (C.C.P., s. 53; 1874-5, c. 170; Code, s. 174; Rev., s. 377; C.S., s. 422.)

§ 1-33. Actions against bank directors or stockholders.

The limitations prescribed by law do not affect actions against directors or stockholders of any banking association incorporated under the laws of this State, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created. (C.C.P., s. 54; Code, s. 175; Rev., s. 378; C.S., s. 423.)

CASE NOTES

Cited in Houston v. Thornton, 122 N.C. 365, 29 S.E. 827 (1898).

§ 1-34. Aliens in time of war.

When a person is an alien subject, or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action. (C.C.P., s. 44; Code, s. 165; Rev., s. 379; C.S., s. 424.)

CASE NOTES

As to the right of alien enemy to sue in the courts of this State, see Krachanake v. Acme Mfg. Co., 175 N.C. 435, 95 S.E. 851 (1918).

ARTICLE 4.

Limitations, Real Property.

§ 1-35. Title against State.

The State will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the State to the same—

(1) When the person in possession thereof, or those under whom he claims, has been in the adverse possession thereof for thirty years, this possession having been ascertained and identified under known and visible lines or boundaries; which shall give a title in fee to the possessor.

(2) When the person in possession thereof, or those under whom he claims, has been in possession under color of title for twenty-one years, this possession having been ascertained and identified under known and visible lines or boundaries. (R.C., c. 65, s. 2; C.C.P., s. 18; Code, s. 139; Rev., s. 380; C.S., s. 425.)

Cross References. — As to validity of possession described in this section against claimants under the State, see G.S. 1-37.

Legal Periodicals. — For article discussing the doctrine of color of title in North Carolina, see 13 N.C. Cent. L.J. 123 (1982).

For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

CASE NOTES

History. — Before the Code of Civil Procedure, to prevent the uncertainty of titles, the courts of this State had adopted the arbitrary rule that from the adverse possession of land for 30 years a grant from the State should be presumed, a rule so arbitrary that a jury was not permitted to find the fact against the presumption; nor was it necessary that the party in adverse possession should connect himself with those who had preceded him in the possession; nor was it necessary that the adverse possession should have been held up to known and visible boundaries, but only to the extent of the title claimed by the persons in possession, which might be shown by any of those ways which the law permits in the absence of metes and bounds set forth in deeds, or known and visible boundaries, as for instance, by the declarations of old men now dead, the deeds of neighboring tracts of land calling for the land in question by the name by which it was known, upon the principle, id certum est quod certum reddi potest. Fitzrandolph v. Norman, 4 N.C. 564 (1817); Candler v. Lunsford, 20 N.C. 542 (1839); Price v. Jackson, 91 N.C. 11 (1884).

As to the nature of the presumption of a grant from adverse possession under former law, see Melvin v. Waddell, 75 N.C. 361 (1876).

Effect of Section on Prior Law. — But the law is now changed, and the 30 years' adverse possession which was formerly held to be a presumption of a grant, is now by statute made, under certain circumstances, an absolute bar against the State. Price v. Jackson, 91 N.C. 11 (1884).

As to the nonretroactive effect of this section, see Johnson v. Parker, 79 N.C. 475 (1878).

Section Applies Only to Adverse Possession. — This section is confined to cases where, by reason of adverse possession of land for the time mentioned in the section, the State is willing to forego her title thereto, and agrees not to sue for the same nor for any of the issues or profits thereof. It was not intended by this section that the State should not be barred from recovering except by the lapse of 30 years or 21 years on personal actions after the State has parted with the title to the lands, for those periods relate only to the adverse possession, without or with color, which will be sufficient to bar the title. This section does not mean that the time limited for bringing any suit for the rents, issues or profits of land should be lengthened so that instead of being three years, as already specially prescribed by the statute, it should be 30 or 21 years. Tillery v. Whiteville Lumber Co., 172 N.C. 296, 90 S.E. 196 (1916).

The State is deemed to have surrendered its right where it permits adverse occupation of land under colorable title without interruption for 21 years, and a title vests in the occupant which can only be divested by a subsequent adverse possession by another till his right in turn ripens in the same way. Walker v. Moses, 113 N.C. 527, 18 S.E. 339 (1893).

As to the elements of adverse possession, see Hedrick v. Gobble, 61 N.C. 348 (1867); Malloy v. Bruden, 86 N.C. 251 (1882); State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Showing of Privity Required. — In case of a reliance upon 30 years' adverse possession, the plaintiff must show a privity between himself and those who preceded him in the possession, and must also show that the possession was held up to known and visible boundaries. Price v. Jackson, 91 N.C. 11 (1884).

As to necessity of continuity and privity under former law, see Fitzrandolph v. Norman, 4 N.C. 564 (1817); Candler v. Lunsford, 20 N.C. 542 (1839); Reed v. Earnhart, 32 N.C. 516 (1849); Melvin v. Waddell, 75 N.C. 361 (1876); Davis v. McArthur, 78 N.C. 357 (1878); Cowles v. Hall, 90 N.C. 330 (1884); Mallett v. Simpson, 94 N.C. 37 (1886); Bryan v. Spivey, 109 N.C. 57, 13 S.E. 766 (1891); Hamilton v. Icard, 114 N.C. 532, 19 S.E. 607 (1894); Walden v. Ray, 121 N.C. 237, 28 S.E. 293 (1897); May v. Manufacturing & Trading Co., 164 N.C. 262, 80 S.E. 380 (1913).

Connection of Occupation with Boundaries. — Where there is a physical occupation with the claim extending to certain marked boundaries, there must be some evidence tending to connect such occupation with the boundaries claimed, or some exclusive control or dominion over the unoccupied portions of the land. May v. Manufacturing & Trading Co., 164 N.C. 262, 80 S.E. 380 (1913).

As to adverse possession against municipality, see Crump v. Mims, 64 N.C. 767 (1870); State v. Long, 94 N.C. 896 (1886); Moore v. Meroney, 154 N.C. 158, 69 S.E. 838 (1910); Threadgill v. Town of Wadesboro, 170 N.C. 641, 87 S.E. 521 (1916). See also, G.S. 1-45.

As to controversies between titles of different dates which lap, see Hedrick v. Gobble, 61 N.C. 348 (1867).

Effect on Running of Statute Where Overlapping Grant Is Made. — Where an occupant is seated on the interference when overlapping grant is issued, and is claiming colorable title adversely to the State under this section, the statute still continues to run in his favor as to the whole lappage unless the grantee, or those claiming under him, enter upon and occupy some portion of the lappage or bring an action. If, on the contrary, the occupant of the lappage wishes to use his adversary's grant to show that the title is out of the State in order to establish it in himself, by virtue of G.S. 1-38, he must prove an adverse occupation for seven years after the grantee's right of action accrued on receiving his grant. Hamilton v. Icard, 114 N.C. 532, 19 S.E. 607 (1894).

The constructive possession of one claiming under color of title for 21 years, the period necessary to give title against the State, is not interrupted by the mere issuance to another of a patent including part of the land claimed by him, where his actual possession is within the lappage. Hamilton v. Icard, 114 N.C. 532, 19 S.E. 607 (1894).

The party asserting title by adverse possession must carry the burden of proof on that issue. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Upon the principle that the plaintiff in an action for possession must show title good against the world, including the State under whom all lands are held, it has become a settled rule that where no grant is introduced the burden of proof cannot be shifted to the defendant in such actions without prima facie proof of possession under colorable title for 21 years under subdivision (2) of this section. Hamilton v. Icard, 114 N.C. 532, 19 S.E. 607 (1894).

Questions for Jury. — Where the evidence established 30 years' possession, questions as to whether such possession was adverse and as to whether such possession was held up to known and visible lines and boundaries, as required by this section, were still left for the jury's determination. McKay v. Bullard, 207 N.C. 628, 178 S.E. 95 (1935).

Application of G.S. 1-38 After Running of Statute Against State. — When a title was shown out of the State by adverse possession, G.S. 1-38 applied where one thereafter acquired title under a sheriff's deed and held possession thereunder for seven years. Walker v. Moses, 113 N.C. 527, 18 S.E. 339 (1893).

Evidence of Possession Held Insufficient. — Possession is insufficient to constitute the basis of adverse possession against the State or a private individual where the plaintiff merely shows that the agent of plaintiff's grantor raked and hauled straw one or two years and that plaintiff's father cultivated an acre or two of the land one year. Prevatt v. Harrelson, 132 N.C. 250, 43 S.E. 800 (1903).

The evidence was sufficient to support a directed verdict for the holder of a paper title on the theory that defendants did not establish title by adverse possession as contemplated by this section and G.S. 1-42. Peterson v. Sucro, 101 F.2d 282 (4th Cir. 1939).

Evidence of Possession Held Sufficient. — The evidence was held sufficient to be submitted to the jury on the issue of plaintiffs' actual, open, continuous, notorious and adverse possession of the lands sufficient to ripen title in plaintiffs under the provisions of this section, and defendants' motion to nonsuit was erroneously granted. Owens v. Blackwood Lumber Co., 210 N.C. 504, 187 S.E. 804 (1936).

Applied in State v. West, 31 N.C. App. 431, 229 S.E.2d 826 (1976); Lancaster v. Maple St. Homeowners Ass'n, 156 N.C. App. 429, 577 S.E.2d 365, 2003 N.C. App. LEXIS 194 (2003).

Cited in Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889); Ware v. Knight, 199 N.C. 251, 154 S.E. 35 (1930); Virginia-Carolina Tie & Wood Co. v. Dunbar, 106 F.2d 383 (4th Cir. 1939); United States v. Burnette, 103 F. Supp. 645 (W.D.N.C. 1952); State v. Taylor, 60 N.C. App. 673, 300 S.E.2d 42, appeal dismissed and cert. denied, 308 N.C. 547, 303 S.E.2d 823

(1983), appeal dismissed, 465 U.S. 1075, 104 S. Ct. 1432, 79 L. Ed. 2d 756 (1984).

§ 1-36. Title presumed out of State.

In all actions involving the title to real property title is conclusively deemed to be out of the State unless it is a party to the action, but this section does not apply to the trials of protested entries laid for the purpose of obtaining grants, nor to actions instituted prior to May 1, 1917. (1917, c. 195; C.S., s. 426.)

CASE NOTES

Purpose of Section. — The legislature enacted this section to remove the burdensome and untoward condition growing out of the difficulty of proving title out of the State. The section provides that, in actions between individual litigants, title shall be conclusively presumed to be out of the State. But there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. Moore v. Miller, 179 N.C. 396, 102 S.E. 627 (1920); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); McDonald v. McCrummen, 235 N.C. 550, 70 S.E.2d 703 (1952); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953).

Power of Legislature to Enact Section. — This section affects the remedy, the mode of procedure, and is within the power of the General Assembly to pass. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

Section Not Retroactive. — This section, having no retrospective effect, is applicable only to actions commenced since May 1, 1917. Riddle v. Riddle, 176 N.C. 485, 97 S.E. 382 (1918); Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

Under this section neither party is required to show title out of the State though either may do so. Pennell v. Brookshire, 193 N.C. 73, 136 S.E. 257 (1927); Dill-Cramer-Truitt Corp. v. Downs, 195 N.C. 189, 141 S.E. 570 (1928). See also, Ward v. Smith, 223 N.C. 141, 25 S.E.2d 463 (1943).

Under this section, it is not necessary to prove that the sovereign has parted with its title when it is not a party to the action. Cothran v. Akers Motor Lines, 257 N.C. 782, 127 S.E.2d 578 (1962); King v. Lee, 9 N.C. App. 369, 176 S.E.2d 394 (1970), modified on other grounds, 279 N.C. 100, 181 S.E.2d 400 (1971).

Plaintiff Must Rely upon Strength of Own Title. — In actions involving title to real property, where the State is not a party, title is conclusively presumed out of the State, without a presumption in favor of either party, and plaintiff must rely upon the strength of his own title. Smith v. Benson, 227 N.C. 56, 40 S.E.2d 451 (1946).

Sources of Title Available. — Where plaintiff has sufficiently alleged general ownership of the locus in quo, he is not confined to the location of the adjoining boundary line under his grant, for he may avail himself of any source of title that he may be able to establish by his testimony. Stewart v. Stephenson, 172 N.C. 81, 89 S.E. 1060 (1916).

No Presumption in Favor of One Party or the Other. — Under this section, in all actions involving title to real property title is conclusively presumed to be out of the State unless it is a party to the action, but there is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself. Moore v. Miller, 179 N.C. 396, 102 S.E. 627 (1920); Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); McDonald v. McCrummen, 235 N.C. 550, 70 S.E.2d 703 (1952); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953); Norman v. Williams, 241 N.C. 732, 86 S.E.2d 593 (1955); Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957); Tripp v. Keais, 255 N.C. 404, 121 S.E.2d 596 (1961); Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

In an action to recover lands by 20 years' adverse possession under G.S. 1-40, it is not required that the plaintiff should show title out of the State, except in cases of protested entries, etc., when the State is not a party to the action. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

Title Out of State Presumed. — In a condemnation proceeding, where the question of ownership was essentially an action between individual litigants, and the State, although a party for purposes of condemnation, claimed title only by virtue of the condemnation and not otherwise, the presumption was that title was out of the State. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

Applied in Berry v. Coppersmith, 212 N.C. 50, 193 S.E. 3 (1937); Sessoms v. McDonald, 237 N.C. 720, 75 S.E.2d 904 (1953).

Cited in Ware v. Knight, 199 N.C. 251, 154

S.E. 35 (1930); Owens v. Blackwood Lumber Co., 210 N.C. 504, 187 S.E. 804 (1936); Ramsey v. Ramsey, 224 N.C. 110, 29 S.E.2d 340 (1944); Vance v. Guy, 224 N.C. 607, 31 S.E.2d 766 (1944); Shingleton v. North Carolina Wildlife Resources Comm'n, 248 N.C. 89, 102 S.E.2d 402 (1958); Lachmann v. Baumann, 22 N.C. App. 160, 205 S.E.2d 805 (1974).

§ 1-37. Such possession valid against claimants under State.

All such possession as is described in G.S. 1-35, under such title as is therein described, is hereby ratified and confirmed, and declared to be good and legal bar against the entry or suit of any person, under the right or claim of the State. (C.C.P., s. 19; Code, s. 140; Rev., s. 381; C.S., s. 427.)

CASE NOTES

This section does not apply where proof of possession is insufficient under G.S. 1-35. Prevatt v. Harrelson, 132 N.C. 250, 43 S.E. 800 (1903).

For application of this section and G.S. 1-30 against municipality under law prior to enactment of G.S. 1-45, see Threadgill v. Town of Wadesboro, 170 N.C. 641, 87 S.E. 521 (1916).

Cited in United States v. Burnette, 103 F. Supp. 645 (W.D.N.C. 1952).

§ 1-38. Seven years' possession under color of title.

(a) When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability: Provided, that commissioner's deeds in judicial sales and trustee's deeds under foreclosure shall also constitute color of title.

(b) If

(1) The marking of boundaries on the property by distinctive markings on trees or by the implacement of visible metal or concrete boundary markers in the boundary lines surrounding the property, such markings to be visible to a height of 18 inches above the ground, and

(2) The recording of a map prepared from an actual survey by a surveyor registered under the laws of North Carolina, in the book of maps in the office of the register of deeds in the county where the real property is located, with a certificate attached to said map by which the surveyor certifies that the boundaries as shown by the map are those described in the deed or other title instrument or proceeding from which the survey was made, the surveyor's certificate reciting the book and page or file number of the deed, other title instrument or proceeding from which the survey was made,

then the listing and paying of taxes on the real property marked and for which a survey and map have been certified and recorded as provided in subdivisions (1) and (2) above shall constitute prima facie evidence of possession of real property under known and visible lines and boundaries. Maps recorded prior to October 1, 1973 may be qualified under this statute by the recording of certificates prepared in accordance with subdivision (b)(2) above. Such certificates must contain the book and page number where the map is filed, in addition to the information required by subdivision (b)(2) above, and shall be recorded and indexed in the deed books. When a certificate is filed to qualify such a recorded map, the register of deeds shall make a marginal notation on the map in the following form: "Certificate filed pursuant to G.S. 1-38(b), book ________ (enter book where filed), page ________".

(c) Maps recorded prior to October 1, 1973 shall qualify as if they had been certified as herein provided if said maps can be proven to conform to the boundary lines on the ground and to conform to instruments of record conveying the land which is the subject matter of the map, to the person whose name is indicated on said recorded map as the owner thereof. Maps recorded after October 1, 1973 shall comply with the provisions for a certificate as hereinbefore set forth. (C.C.P., s. 20; Code, s. 141; Rev., s. 382; C.S., s. 428; 1963, c. 1132; 1973, c. 250; 1975, c. 207.)

Cross References. — As to title against the State, see G.S. 1-35. As to title being presumed out of State, see G.S. 1-36. As to adverse possession of 20 years, see G.S. 1-40.

Legal Periodicals. — For article, "Adverse Possession — Color of Title," see 16 N.C.L. Rev. 149 (1933).

For note on tacking successive adverse possessions of a strip of land not included in a deed, see 31 N.C.L. Rev. 478 (1953).

For note on intent as a requisite in mistaken boundary cases, see 33 N.C.L. Rev. 632 (1955).

For note on tax foreclosure deed to property held by tenants in common as color of title, see 36 N.C.L. Rev. 526 (1958).

For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

For article discussing the doctrine of color of title in North Carolina, see 13 N.C. Cent. L.J. 123 (1982).

For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

For comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

I. In General.
II. Possession, Generally.
III. Hostile or Adverse Nature of Possession.
IV. Continuity of Possession.
V. Boundaries of Land Possessed.
VI. Color of Title.
  A. In General.
  B. Documents Held to Be Color of Title.
  C. Documents Held Not Color of Title.
VII. Procedure and Proof.

I. IN GENERAL.

Editor's Note. — *Many of the cases cited below may also have application to the 20 year statute, G.S. 1-40.*

This section has no reference to titles good in themselves, but is intended to protect apparent titles void in law. Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946).

Section Applies to State and Its Agencies. — The General Assembly intended that this section and G.S. 1-40 should apply to any legal entity, including the State and its agencies, capable of adversely possessing land and of acquiring title thereto. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

Limitations for Ejectment Actions. — This section and G.S. 1-40 are the applicable statutes of limitation for ejectment actions. These statutes prescribe the period of time beyond which the owner of land is not privileged to bring an action for the recovery of his land from a person in possession thereof. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' action was not in essence one for ejectment, controlled by this section and G.S. 1-40; rather, plaintiffs' action was one to remove a cloud upon title, which was not barred by any statute of limitations. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Adverse possession and prescription may be had against a trustee, even if the cestui que trust is under a disability and out of the State. Blake v. Allman, 58 N.C. 407 (1860).

And where title is lost by the trustee, the cestui que trust is also concluded. King v. Rhew, 108 N.C. 696, 13 S.E. 174 (1891); Cameron v. Hicks, 141 N.C. 21, 53 S.E. 728 (1906).

Joint tenants and tenants in common may lose property by adverse possession, and what is sufficient against one is sufficient against all. Cameron v. Hicks, 141 N.C. 21, 53 S.E. 728 (1906).

As to effect of disability on adverse possession, see Clayton v. Rose, 87 N.C. 106 (1882); Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760 (1980).

A cause of action to set aside a deed executed by a person who is non compos mentis must be brought within seven years from the date of execution, or within three years next after the removal of the disability, whichever period expires later. Emanuel v. Emanuel, 78 N.C. App. 799, 338 S.E.2d 620 (1986).

Compulsory Reference. — An action in ejectment in which defendants pleaded the twenty and the seven-year statutes of limitation was not subject to compulsory reference pursuant to former G.S. 1-189. Williams v. Robertson, 233 N.C. 309, 63 S.E.2d 632 (1951).

Effect on Lien of Judgment Creditor. — Adverse possession against a judgment debtor for a period of seven years under color of title does not affect the lien of a judgment creditor, the judgment creditor having no right of entry or cause of action for possession, but only a lien enforceable according to the prescribed procedure, and as to him the possession is not adverse. Moses v. Major, 201 N.C. 613, 160 S.E. 890 (1931).

Landowner with Good Title Cannot Ignore Duly Recorded Easement. — When it is shown that landowner has a good title based on a connected chain of title to a common source, such landowner will not be permitted to ignore a duly recorded easement granted by his predecessors in title by the fiction of treating his valid deed merely as color of title and thereby defeat an outstanding valid easement by adverse possession for a period of seven years. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

This section is applicable to prescriptive easements. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

The doctrine of color of title is applicable to acquisition of title to an easement by prescription. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Town satisfied the requirements for a prescriptive easement in a road over defendant's land which had been used by the public and as a mail and school bus route since 1956 or at least since 1963 until 1985, and which had been maintained, however poorly, by the town. Town of Sparta v. Hamm, 97 N.C. App. 82, 387 S.E.2d 173 (1990), cert. denied, 326 N.C. 366, 389 S.E.2d 819 (1990).

The period for acquiring an easement by prescription is now seven years where the claim is under color of title pursuant to this section. The burden is on defendants to show that they used the easement more or less frequently according to the nature of the easement and that they used the easement for seven years. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Where one can acquire fee simple title to the greater interest under color of title pursuant to this section, common sense dictates that, in the absence of statutes to the contrary, one should also be able to acquire title to easements appurtenant to that interest in the same statutory period. To hold otherwise would require the grantee to wait 20 years to gain title to an easement he had bargained for in the deed from his grantor, when he would be required to wait only seven years for the real property itself, if the grantor had not in fact had title to convey. This is not logically consistent and would produce harsh results. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

The following legal principles relating to easements by prescription have evolved in North Carolina appellate decisions: (1) The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement; (2) the law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears; (3) the use must be adverse, hostile, and under a claim of right; (4) the use must be open and notorious; (5) the adverse use must be continuous and uninterrupted for a period of 20 years and (6) there must be substantial identity of the easement claimed. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

G.S. 1-56 Inapplicable to Recovery of Realty. — This section and G.S. 1-40 apply to actions for the recovery of real estate, to the exclusion of G.S. 1-56. Williams v. Scott, 122 N.C. 545, 29 S.E. 877 (1898).

Section Held Tolled by Federal Law. — This section, the seven-year statute of limitations for adverse possession under color of title, was automatically and unconditionally tolled by 50 U.S.C.A. App. § 525 of the Soldiers' and Sailors' Civil Relief Act until plaintiff's retirement from military service in June, 1983. Taylor v. North Carolina DOT, 86 N.C. App. 299, 357 S.E.2d 439 (1987).

Applied in Betts v. Gahagan, 212 F. 120 (4th Cir. 1914); Nichols v. York, 219 N.C. 262, 13 S.E.2d 565 (1941); Layden v. Layden, 228 N.C. 5, 44 S.E.2d 340 (1947); Hughes v. Oliver, 228 N.C. 680, 47 S.E.2d 6 (1948); Grady v. Parker, 230 N.C. 166, 52 S.E.2d 273 (1949); Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402 (1953); Newkirk v. Porter, 240 N.C. 296, 82 S.E.2d 74 (1954); Lachmann v. Baumann, 22 N.C. App. 160, 205 S.E.2d 805 (1974); Kennedy v. Whaley, 55 N.C. App. 321, 285 S.E.2d 621 (1982); Foreman v. Sholl, 339 N.C. 593, 453 S.E.2d 162 (1995); Spears v. Moore, 145 N.C. App. 706, 551 S.E.2d 483, 2001 N.C. App. LEXIS 736 (2001).

Cited in Atwell v. Shook, 133 N.C. 387, 45 S.E. 777 (1903); Clendenin v. Clendenin, 181 N.C. 465, 107 S.E. 458 (1921); Virginia-Carolina Power Co. v. Taylor, 191 N.C. 329, 131 S.E. 646 (1926); Dill-Cramer-Truitt Corp. v. Downs, 195 N.C. 189, 141 S.E. 570 (1928); Owens v. Blackwood Lumber Co., 210 N.C. 504, 187 S.E. 804 (1936); McKay v. Bullard, 219 N.C. 589, 14 S.E.2d 657 (1941); Parham v. Henley, 224 N.C. 405, 30 S.E.2d 372 (1944); Perry v. Alford, 225 N.C. 146, 33 S.E.2d 665 (1945); Ramsey v. Nebel, 226 N.C. 590, 39 S.E.2d 616 (1946); Smith v. Benson, 227 N.C. 56, 40 S.E.2d 451 (1946); Venus Lodge No. 62 v. Acme Benevolent Ass'n, 231 N.C. 522, 58 S.E.2d 109, 15 A.L.R.2d 1446 (1950); United States v. Burnette, 103 F. Supp. 645 (W.D.N.C. 1952); Wilson v. Chandler, 235 N.C. 373, 70 S.E.2d 179 (1952); Chambers v. Chambers, 235 N.C. 749, 71 S.E.2d 57 (1952); Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957); Morehead v. Harris, 255 N.C. 130, 120 S.E.2d 425 (1961); Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961); Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964); Patterson v. Buchanan, 265 N.C. 214, 143 S.E.2d 76 (1965); Scott Poultry Co. v. Graves, 272 N.C. 22, 157 S.E.2d 608 (1967); McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971); Rice v. Randolph, 96 N.C. App. 112, 384 S.E.2d 295 (1989); Rudisail v. Allison, 108 N.C. App. 684, 424 S.E.2d 696 (1993); Marlowe v. Clark, 112 N.C. App. 181, 435 S.E.2d 354 (1993); Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995); Pegg v. Jones, 187 N.C. App. 355, 653 S.E.2d 229, 2007 N.C. App. LEXIS 2457 (2007).

II. POSSESSION, GENERALLY.

Mere possession does not necessarily amount to adverse possession in law. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953).

Adverse possession is actual possession in the character of owner, evidenced by making the ordinary uses and taking the usual profits of which the property is susceptible in its present state, to the exclusion of all others, including the true owner. Carswell v. Creswell, 217 N.C. 40, 7 S.E.2d 58 (1940).

Elements of Adverse Possession, Generally. — Adverse possession consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to the right or claim of any other person, and not merely as an occasional trespasser. It must be as decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that one is exercising the dominion of owner. Locklear v. Savage, 159 N.C. 236, 74 S.E. 347 (1912); Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964); Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969); Wilson County Bd. of Educ. v. Lamm, 276 N.C. 487, 173 S.E.2d 281 (1970); Barringer v. Weathington, 11 N.C. App. 618, 182 S.E.2d 239 (1971).

In order for adverse possession to ripen title in the possessor, the possession must be actual, open, hostile, exclusive and continuous. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

Possession of real property, to be adverse, must be actual possession, and must be open, decided and as notorious as the nature of the property will permit, indicating assertion of exclusive ownership, and of intention to exercise dominion over it against all other claimants. The possession must be continuous, though not necessarily unceasing, for the statutory period, and of such character as to subject the property to the only use of which it is susceptible. Vance v. Guy, 223 N.C. 409, 27 S.E.2d 117 (1943).

Such adverse possession as will ripen into title must be for the prescribed period of time and must be clear, definite, positive and notorious. It must be continuous, adverse, hostile and exclusive during the whole statutory period, and under a claim of title to the land occupied. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

Under either this section or G.S. 1-40, in order to bar the true owner of land from recovering it from an occupant in adverse possession, the possession relied on must have been actual, open, visible, notorious, continuous and hostile to the true owner's title and to all persons for the full statutory period. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953); Watson v. Chilton, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

The adverse possession for seven years under color which bars the entry of the true owner, must be open, continuous, uninterrupted and manifested by distinct and unequivocal acts of ownership, the burden being upon him who asserts that he has thus acquired the title to show such actual adverse possession. Monk v. Wilmington, 137 N.C. 322, 49 S.E. 345 (1904); Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907); Stewart v. McCormick, 161 N.C. 625, 77 S.E. 761 (1913).

In order to prevail on claim of adverse possession, evidence must show both actual and adverse possession for the full seven-year period prescribed in this section. Phipps v. Paley, 90 N.C. App. 170, 368 S.E.2d 21, cert. denied, 323 N.C. 175, 373 S.E.2d 114 (1988).

Acts of Possession Must Give Owner Cause of Action. — The claim must be adverse and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. It is the occupation with the intent to claim against the true owner which renders the entry and possession adverse. Snowden v. Bell, 159 N.C. 497, 75 S.E. 721 (1912).

And Make Claimant Liable to Action of Ejectment. — In order to ripen a colorable title into a good title, there must be such possession and acts of dominion by the colorable claimant as will make him liable to an action of ejectment. Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953).

To convert the shadow of color of title into perfect title, possession must be continuous, open, notorious, as well as adverse. It must be of such character as to put the true owner on notice of the adverse claim. It must suffice to subject the occupant to an action in ejectment as distinguished from a mere trespass quare clausum fregit. Bowers v. Mitchell, 258 N.C. 80, 128 S.E.2d 6 (1962).

Owner's Knowledge of Possession Not Required. — Although the possession must always be so notorious as to be visible, it is not necessary that the true owner have actual knowledge. It is sufficient if the possession would be notice of its adverse character to the ordinary person if he should make the observation that the ordinary owner would make of his own property. The owner is bound to ascertain the nature of the claim after notice has been given him. Kennedy v. Maness, 138 N.C. 35, 50 S.E. 450 (1905).

The operation of the statute of limitations depends upon two things: The one is possession continued for seven years; and the other the character of that possession — that it should be adverse. It has never been held that the owner should actually know of the fact of possession, nor have actual knowledge of the nature or extent of the possessor's claim. It is presumed, indeed, that he will acquire the knowledge, and it is intended that he should. Green v. Harman, 15 N.C. 158 (1833); Blue Ridge Land Co. v. Floyd, 171 N.C. 543, 88 S.E. 862 (1916).

But Possession Must Be So Notorious as to Put True Owner on Notice of Adverse Claim. — The rule requiring physical possession so notorious as to put the true owner on notice of the adverse claim in order to mature claimant's title is as well settled as the rule requiring plaintiff to establish his title. Cothran v. Akers Motor Lines, 257 N.C. 782, 127 S.E.2d 578 (1962).

The possession of one under color is sufficient notice of his claim of title to the lands. Butler v. Bell, 181 N.C. 85, 106 S.E. 217 (1921).

Test for Determining Sufficiency of Acts of Possession. — A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible, or it must be an actual and continuous occupation of a house or the cultivation of a field, however small, according to the usages of husbandry. The test is involved in the question whether the acts of ownership were such as to subject the claimant continually during the whole statutory period to an action in the nature of trespass in ejectment instead of to one or several actions of trespass quare clausum fregit for damages. Shaffer v. Gaynor, 117 N.C. 15, 23 S.E. 154 (1895); Mallet v. Huske, 262 N.C. 177, 136 S.E.2d 553 (1964).

Paying taxes is not enough to constitute adverse possession. The payment of taxes is an assertion of a mere claim of title and therefore is insufficient, because it is not an actual, open, visible occupation begun and continued under a claim of right. Malloy v. Bruden, 86 N.C. 251 (1882) (decided prior to enactment of subsections (b) and (c) of this section).

Listing and payment of taxes would not suffice to support an action in ejectment or trespass, which is the test of possession referred to in this section and G.S. 1-40. Chisholm v. Hall, 255 N.C. 374, 121 S.E.2d 726 (1961) (decided prior to subsections (b) and (c) of this section).

The payment of property taxes is evidence of the adverse nature of a claim, but it is not evidence of actual possession. Phipps v. Paley, 90 N.C. App. 170, 368 S.E.2d 21, cert. denied, 323 N.C. 175, 373 S.E.2d 114 (1988).

However, payment of taxes constitutes a relevant fact in establishing a claim of title and may be considered along with evidence of possession in proving adverse possession. Austin v. King, 97 N.C. 339, 2 S.E. 678 (1887); Christman v. Hilliard, 167 N.C. 4, 82 S.E. 949 (1914) (decided prior to enactment of subsections (b) and (c) of this section).

The fact that defendants listed and paid taxes was evidence of the character of their claim, but it was no evidence of actual possession. Chisholm v. Hall, 255 N.C. 374, 121 S.E.2d 726 (1961) (decided prior to enactment of subsections (b) and (c) of this section).

Giving permission to hunt, like the payment of taxes, is evidence of an adverse claim, but is not possession. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

Cutting Timber or Pulpwood. — When cutting timber or pulpwood is relied upon to show adverse possession it must be kept up with such frequency and regularity as to give notice to the public that the party cutting or having it cut is claiming the land as his own. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

Use of Way over Another's Land. — In North Carolina there is a presumption that the use of a way over another's land is permissive unless evidence appears to the contrary. Potts v. Burnette, 46 N.C. App. 626, 265 S.E.2d 504 (1980), rev'd on other grounds, 301 N.C. 663, 273 S.E.2d 285 (1981).

Possession for Over a Century. — Where defendant State of North Carolina and the North Carolina Diocese had possessed the property in question for over a century, to the extent plaintiffs' allege that defendants held the property under color of title, plaintiffs' claim was barred by the applicable seven year statutory period. Majeed v. North Carolina, 520 F. Supp. 2d 720, 2007 U.S. Dist. LEXIS 74441 (E.D.N.C. Oct. 4, 2007).

Acts of Possession Held Sufficient. — Continuously cutting timber and making shingles in a swamp which was unfit for cultivation, for seven years, was a good possession. Tredwell v. Reddick, 23 N.C. 56 (1840), cited in Loftin v. Cobb, 46 N.C. 406 (1854).

Maintaining fish traps, erecting and repairing dams and using the property every year during the fishing season for a sufficient number of years is sufficient possession of a nonnavigable stream. Locklear v. Savage, 159 N.C. 236, 74 S.E. 347 (1912).

For additional cases in which acts of possession were found sufficient, see Andrews v. Mulford, 2 N.C. 311 (1796); Burton v. Carruth, 18 N.C. 2 (1834); Wallace v. Maxwell, 32 N.C. 110 (1849); Smith v. Bryan, 44 N.C. 180 (1852); Moore v. Thompson, 69 N.C. 120 (1873); Gudger v. Hensley, 82 N.C. 482 (1880); Staton v. Mullis, 92 N.C. 623 (1885); Wall v. Wall, 142 N.C. 387, 55 S.E. 283 (1906); LaRoque v. Kennedy, 156 N.C. 360, 72 S.E. 454 (1911).

Acts of Possession Held Insufficient. — Cutting trees and feeding hogs upon land susceptible of other uses is insufficient. Loftin v. Cobb, 46 N.C. 406 (1854).

Payment of taxes and the employment of agents in respect to land were insufficient acts to constitute possession. Ruffin v. Overby, 88 N.C. 369 (1883), decided prior to enactment of subsections (b) and (c) of this section.

Possession by a tenant of defendant's ancestor for one year, under his deed, and occasional entry upon the land by his heirs at law after his death, for the purpose of cutting a few logs, was insufficient evidence of adverse possession in character and continuity to be submitted to the jury. Blue Ridge Land Co. v. Floyd, 167 N.C. 686, 83 S.E. 687 (1914).

Posting land and keeping away trespassers is insufficient because it is not a visible and notorious possession. Berry v. Richmond Cedar Works, 184 N.C. 187, 113 S.E. 772 (1922).

For additional cases in which acts of possession were held insufficient, see Ward v. Herrin, 49 N.C. 23 (1856); Bartlett v. Simmons, 49 N.C. 295 (1857); Hamilton v. Icard, 114 N.C. 532, 19 S.E. 607 (1894); State v. Suttle, 115 N.C. 784, 20 S.E. 725 (1894); Shaffer v. Gaynor, 117 N.C. 15, 23 S.E. 154 (1895); Hamilton v. Icard, 117 N.C. 476, 23 S.E. 354 (1895); Prevatt v. Harrelson, 132 N.C. 250, 43 S.E. 800 (1903); Campbell v. Miller, 165 N.C. 51, 80 S.E. 974 (1914); Blue Ridge Land Co. v. Floyd, 167 N.C. 686, 83 S.E. 687 (1914).

Posts which were erected less than seven years before action was commenced could not be used to establish possession. Phipps v. Paley, 90 N.C. App. 170, 368 S.E.2d 21, cert. denied, 323 N.C. 175, 373 S.E.2d 114 (1988).

III. HOSTILE OR ADVERSE NATURE OF POSSESSION.

As to requirement that possession be hostile to the true owner, see Gwyn v. Stokes, 9 N.C. 235 (1822); Rogers v. Mabe, 15 N.C. 180 (1833); Foscue v. Foscue, 37 N.C. 321 (1842); Johnson v. Farlow, 35 N.C. 84 (1851); Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

In order to establish that a use is hostile, it is not necessary to show a heated controversy, but it is necessary to show that the use was of a nature that would give the owner of the land notice that the use was being made under a claim of right. Potts v. Burnette, 46 N.C. App. 626, 265 S.E.2d 504 (1980), rev'd on other grounds, 301 N.C. 663, 273 S.E.2d 285 (1981).

To establish that a use is hostile rather than permissive, it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate. A hostile use is simply a use of such nature and exercise under circumstances which manifest and give notice that the use is being made under a claim of right. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

There must be some evidence accompanying the use which tends to show that the use is hostile in character and tends to repel the inference that the use is permissive and with the owner's consent. A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Exercise of Dominion Required. — The adverse possession must constitute an exercise of dominion over the land, making the ordinary use and taking the ordinary profits of which it is susceptible, and must subject the claimant during the whole statutory period to an action in ejectment. Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983).

Title Must Be Claimed Against All the World. — Possession must be adverse; that is, title must be claimed against all the world. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962), aff'd in part and rev'd in part, 323 F.2d 95 (4th Cir. 1963).

Hostile Act Does Not Start Running of Statute Against Owner in Possession. — In determining when the owner of real estate must assert his rights against an adverse claim, the rule is that an owner in possession is not required to take notice of a hostile claim. Accordingly, the hostile act or claim of a person not in possession ordinarily does not start the running of the statute of limitations against an owner in possession and occupancy. The foregoing rule applies to an equitable owner in possession of land; so long as he retains possession, nothing else appearing, the statute of limitations does not run against him. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Possession of one tenant in common is presumed to be the possession of all tenants. Watson v. Chilton, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

Until Actual Ouster or a Sole Adverse Possession. — The possession of one tenant in common is in law the possession of all his cotenants, unless and until there is an actual ouster or a sole adverse possession for 20 years. Winstead v. Woolard, 223 N.C. 814, 28 S.E.2d 507 (1944).

Ouster and Possession by Tenant in Common Against Cotenants. — There may be an entry or possession of one tenant in common which may amount to an actual ouster, so as to enable his cotenant to bring ejectment against him, but it must be by some clear, positive and unequivocal act equivalent to an open denial of his right and to putting him out of the seizin. Such an actual ouster, followed by possession for the requisite time, will bar the cotenant's entry. Dobbins v. Dobbins, 141 N.C. 210, 53 S.E. 870 (1906). See also, Tharpe v. Holcomb, 126 N.C. 365, 35 S.E. 608 (1900).

Where a mortgage is made to one tenant in common by the other tenants therein, it is an ouster that puts them to their action and commences the running of the statute of limitations, either under seven years' color or under 20 years otherwise. Hence, where plaintiffs sought to be let into possession of lands as tenants in common, and it appeared without conflicting evidence that defendants had been in peaceful possession under a mortgage from ancestor for more than 30 years after ouster, no issue of fact was raised for the determination of the jury, the title being complete in the adverse possessors. Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926).

When Statute Runs Against Remaindermen. — Title by adverse possession cannot be had against remaindermen before life estate has ended, because no actual possession of the remainder may be had, but title to the life estate may be gained at such time. Brown v. Brown, 168 N.C. 4, 84 S.E. 25 (1915).

The statutes cannot begin to run against remaindermen until expiration of the particular estate. Huneycutt v. Brooks, 116 N.C. 788, 21 S.E. 558 (1895); Roe v. Journigan, 181 N.C. 180, 106 S.E. 680 (1921).

The statute will not ordinarily begin running against a remainderman until the falling in of the life estate. Roe v. Journigan, 181 N.C. 180, 106 S.E. 680 (1921).

Possession of real property cannot be adverse to remaindermen until the death of the life tenant, even though during the lifetime of the life tenant he gave a deed purporting to convey a fee. Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760 (1980).

Possession by the grantee of a life tenant is not adverse to the rights of the remaindermen during the life of the life tenant. The seven-year statute of limitation prescribed by this section does not begin to run against the remaindermen until the life tenant dies. Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952).

Grantee in a deed conveying only the life estate of the grantor cannot hold adversely to the remaindermen until the death of the grantor. Lovett v. Stone, 239 N.C. 206, 79 S.E.2d 479 (1954).

Possession by Parent Against Child or Vice Versa. — In order that a possession by a parent against a child, or vice versa, may become adverse, the owner must have had some clear, definite and unequivocal notice of the adverse claimant's intention to assert an exclusive ownership in himself. Watson v. Chilton, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

Claim Under Void Devise Is Not Adverse. — Where one enters into possession of lands claiming as a devisee under a will, and the devise is void, he does not claim adversely, but rather permissively or mistakenly. Watson v. Chilton, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

Possession Held to Be Adverse to Owner. —After abandonment, wife's possession as purchaser at execution sale of a judgment obtained against her husband was adverse to the husband, and her possession for the period required by this section would bar him. Campbell v. Campbell, 221 N.C. 257, 20 S.E.2d 53 (1942).

Possession Held Not to Be Adverse. — Where plaintiffs claimed under foreclosure of a tax sale certificate in a proceeding instituted solely against the life tenant, in which the remaindermen were neither parties nor brought before the court in any manner sanctioned by law, while commissioner's deed of foreclosure did not affect the interest of the remaindermen, it did convey the interest of the life tenant; hence, plaintiffs were entitled to possession during the continuance of the life estate, but their possession could not be adverse to the remaindermen until the death of the life tenant gave them legal power to sue. Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950).

Persons in possession pursuant to foreclosure of tax sale certificate conveying only title of life tenant could not maintain that their possession was adverse to the remaindermen on the ground that the life tenant's failure to pay taxes forfeited her estate to the remaindermen and thus gave them immediate right to possession, since such forfeiture under former G.S. 105-410 was not automatic but had to be judicially determined in an appropriate proceeding. Eason v. Spence, 232 N.C. 579, 61 S.E.2d 717 (1950).

Where two persons owned adjoining lands, and one ran a fence so near the line as to induce the jury to believe that any slight encroachments were inadvertently made and that it was the design to run on the line, the possession constituted by the enclosure would be regarded as permissive, and could not be treated as adverse, even for the land within the fence, except as it furnished evidence of the line in a case of disputed boundary. The line being admitted, it would not make a title, where a naked adverse possession would have had that effect, because there was no intention to go beyond the deed, but an intention to keep within it. Currie v. Gilchrist, 147 N.C. 648, 61 S.E. 581 (1908); Blue Ridge Land Co. v. Floyd, 171 N.C. 543, 88 S.E. 862 (1916).

Institution of Torrens Proceeding as Ouster Permitting Defendants to Ripen Title. — Where defendants, who held deeds to land which were color of title, and plaintiffs, who had superior chain of title to same property, were tenants in common as to the property, and after certain incidents, plaintiff's predecessor in interest brought a Torrens proceeding to establish sole ownership of the property, institution of that action gave plaintiffs actual notice that defendants were claiming the property to the exclusion of plaintiffs and their predecessors, and an actual ouster had occurred. Once plaintiffs were ousted, defendants could ripen title in seven years under this section. Willis v. Mann, 96 N.C. App. 450, 386 S.E.2d 68 (1989), cert. denied, 326 N.C. 367, 389 S.E.2d 820 (1990).

IV. CONTINUITY OF POSSESSION.

Occasional acts of ownership, no matter how adverse, do not constitute a possession that will mature title. Sessoms v. McDonald, 237 N.C. 720, 75 S.E.2d 904 (1953).

Continuous and Uninterrupted Possession Is Required. — Continuity of possession being one of the essential elements of adverse possession, in order that title may be ripened thereby, such possession must be shown to have been continuous and uninterrupted for the full statutory period. This is because if the possession of the adverse claimant is broken, the constructive possession of the true owner intervenes and destroys the effectiveness of the prior possession. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

While the possession need not be unceasing, the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has from time to time continuously subjected the disputed land to the only use of which it was susceptible. Locklear v. Savage, 159 N.C. 236, 74 S.E. 347 (1912); Cross v. Seaboard Air Line Ry., 172 N.C. 119, 90 S.E. 14 (1916).

And Must Be Proved. — In proving continuous adverse possession nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period, either in plain terms or by necessary implication. Ruffin v. Overby, 105 N.C. 78, 11 S.E. 251 (1890).

The reason for the rule of continuity is that at all times there is a presumption in favor of the true owner, and he is deemed by law to have possession coextensive with his title except during the periods he is actually ousted by the personal occupation of another, so that whenever the occupation of another actually ceases, the title again draws to it the possession, and the seizin of the owner is restored. A subsequent entry even by the same wrongdoer and under the same claim of title constitutes a new disseizin from the date of which the statute takes a fresh start. Malloy v. Bruden, 86 N.C. 251 (1882).

Occasional Entries Are Not Sufficient. — To claim adverse possession, there must be a continuous possession of public notoriety. Occasional entries upon the land will not serve, for they may not be observed, or if observed, they may not be considered as the assertion of rights. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

Adverse possession is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

Occasional trespasses are not sufficient, for the possession must be of such character as to continually expose the party to suit by the true owner. Alexander v. Richmond Cedar Works, 177 N.C. 137, 98 S.E. 312, petition for new trial dismissed, 177 N.C. 536, 98 S.E. 780 (1919).

It is not to be understood that possession is interfered with sufficiently to defeat title by the causal entry of a trespasser. Hayes v. Williamson-Brown Lumber Co., 180 N.C. 252, 104 S.E. 527 (1920).

But Occupation and Use Need Not Be Unceasing. — Whereas the occupation and use by the adverse claimant must be continuous, it need not be unceasing. Helton v. Cook, 27 N.C. App. 565, 219 S.E.2d 505 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976).

Time Gaps Held to Destroy Continuity. — A gap occurring during the period of a suspension of the statute is sufficient to destroy the continuity. Malloy v. Bruden, 86 N.C. 251 (1881).

An intervening period of five months was a sufficient interval to defeat adverse possession. Holdfast v. Shepard, 28 N.C. 361 (1846).

An intervening period of one year was sufficient to defeat title by adverse possession. Ward v. Herrin, 49 N.C. 23 (1856); Malloy v. Bruden, 86 N.C. 251 (1882).

Continuity May Be Shown by Tacking Where Privity Exists. — In order to fulfill requirements as to continuity of possession, it is not necessary that an adverse possession be maintained for the entire statutory period by one person. Continuity may be shown by the tacking of successive possessions of two or more persons between whom the requisite privity exists. The privity referred to is only that of possession and may be said to exist whenever one holds the property under or for another or in subordination to his claim and under an agreement or arrangement recognized as valid between themselves. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

It is not necessary that the adverse claimant hold possession for the statutory period, provided he can establish a privity in claim, possession, etc., with the prior possessors which, when taken together, will constitute the period of time necessary to give title. Campbell v. Everhart, 139 N.C. 503, 52 S.E. 201 (1905).

And several successive possessions may be tacked to show continuous adverse possession where there is privity of estate or connection of title between several successive occupants. Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957).

Privity means privity of possession and not privity in blood. Trustees of Univ. v. Blount, 4 N.C. 455 (1816); Alexander v. Gibbon, 118 N.C. 796, 24 S.E. 748 (1896); Barrett v. Brewer, 153 N.C. 547, 69 S.E. 614 (1910).

Reason for Privity Requirement. — Privity is necessary where the claimant has not had possession for the statutory period, for he cannot derive any benefit from the possession of a third party, or of others claiming under the third party, where he fails to connect himself with such third party's title. Johnston v. Case, 131 N.C. 491, 42 S.E. 957 (1902), modified on rehearing, 132 N.C. 795, 44 S.E. 617 (1903).

Rule of privity applies alike to adverse possession against State and private individuals, whether with or without color of title. Johnston v. Case, 131 N.C. 491, 42 S.E. 957 (1902), modified on rehearing, 132 N.C. 795, 44 S.E. 617 (1903); May v. Manufacturing & Trading Co., 164 N.C. 262, 80 S.E. 380 (1913).

Possession of Grantor or Ancestor May Be Tacked. — A grantee claiming land within the boundaries called for in the deed or other instrument constituting color of title may tack his grantor's possession of such land to his own for the purpose of establishing adverse possession for the requisite statutory period. Similarly, the adverse possession of an ancestor may be cast by descent upon his heirs and tacked to their possession for the purpose of showing title by adverse possession. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

But a deed does not of itself create privity between grantor and grantee as to land not described in the deed but occupied by the grantor in connection therewith, even though grantee enters into possession of the land not described and uses it in connection with that conveyed. Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

Where claimant is holding possession under color of title, he cannot tack his possession of land not covered by his color to the possession of his grantor. Blackstock v. Cole, 51 N.C. 560 (1859); Jennings v. White, 139 N.C. 23, 51 S.E. 799 (1905).

Possession of a grantor who had no color of title cannot be tacked to that of his grantee in order to make up the seven years' possession under color of title as required by this section. Morrison v. Craven, 120 N.C. 327, 26 S.E. 940 (1897).

A widow may tack her possession to that of her husband where she immediately possesses the property as a part of her homestead or dower. Atwell v. Shook, 133 N.C. 387, 45 S.E. 777 (1903); Jacobs v. Williams, 173 N.C. 276, 91 S.E. 951 (1917).

Possession by the legal representative is a continuation of deceased's possession. Trustees of Univ. v. Blount, 4 N.C. 455 (1816).

Possession of a tenant is the possession of the landlord and is to be added to that of the landlord in person. Alexander v. Gibbon, 118 N.C. 796, 24 S.E. 748 (1896).

Tacking Not Permitted. — Where heir went into adverse possession of a tract of land, but ancestor died before such possession had been held for 20 years, such possession prior to the ancestor's death could not be tacked to the heir's possession subsequent to the ancestor's death, and such heir's possession for less than 20 years subsequent to the ancestor's death did not ripen title in him. Wilson v. Wilson, 237 N.C. 266, 74 S.E.2d 704 (1953).

The fact that the plaintiff admitted that she never actually possessed the property at issue was fatal to her claim of adverse possession, notwithstanding her contention that she should be able to tack onto the possession of her direct ancestors. Merrick v. Peterson, 143 N.C. App. 656, 548 S.E.2d 171, 2001 N.C. App. LEXIS 342 (2001).

Where parties brought action for the recovery of land as heirs at law of their ancestor, and judgment was rendered adverse to them, such judgment adjudicated want of title in their ancestor and was binding upon them, and they could not in a subsequent action in which they asserted title by adverse possession tack the possession of their ancestor or contend that their separate acts of ownership were done in the character of heirs at law claiming under known and definite boundaries. Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957).

Where the purchase was of part of a tract of land, the vendee's possession would not inure to the benefit of the vendor as to the remainder of the tract for the purpose of showing possession of the tract by the vendor. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

Adverse Possession Not Interrupted by Occasional Entries. — The occasional going onto the property by one of the plaintiffs, claiming title to the property under a will, to cut a Christmas tree or to rake pinestraw for a dog house, did not interrupt continued adverse possession by defendants and their predecessors in title. Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760 (1980).

Effect of Voluntary Dismissal of Torrens Proceeding. — Effect of plaintiffs' voluntary dismissal of Torrens proceeding was to toll the limitations period on defendants' adverse claim to the disputed property for the subsequent 12 months; when plaintiffs failed to bring a new action within that period, however, the limitations period continued to run from the point at which it had been tolled. Willis v. Mann, 96 N.C. App. 450, 386 S.E.2d 68 (1989), cert. denied, 326 N.C. 367, 389 S.E.2d 820 (1990).

Clear Indicators of Open, Notorious, and Exclusive Possession of Lands by Government. — Summary judgment was appropriate under G.S. 1-38(a) as marked lines, marked corners, road construction, timber cuttings, road maintenance, and activities related thereto, were clear indicators of open, notorious and exclusive possession of the lands by the government and these activities and undisputed boundary markings and monumentations existed for a minimum period of 19 plus years, or a minimum period of 14 years. United States v. Kubalak, 365 F. Supp. 2d 677, 2005 U.S. Dist. LEXIS 10732 (W.D.N.C. Apr. 15, 2005).

V. BOUNDARIES OF LAND POSSESSED.

Editor's Note. — *The case of Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985), annotated below, overruled Price v. Whismant, 236 N.C. 381, 72 S.E.2d 851 (1952); Gibson v. Dudley, 233 N.C. 255, 63 S.E.2d 630 (1951); Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 470 (1979); and Garris v. Butler, 15 N.C. App. 268, 189 S.E.2d 809 (1972) to the extent that they applied a different rule.*

Possession Must Be Actual. — There can be no adverse possession without an actual possession of the locus in quo. Cutler v. Blackman, 4 N.C. 368 (1816).

No constructive possession will ripen into good title. Williams v. Wallace, 78 N.C. 354 (1878).

Possession Must Be Under Known and Visible Boundaries. — A party claiming under adverse possession must show possession under known and visible boundaries. Barringer v. Weathington, 11 N.C. App. 618, 182 S.E.2d 239 (1971).

Adverse possession must be possession under known and visible lines and boundaries, and under colorable title. Berry v. Coppersmith, 212 N.C. 50, 193 S.E. 3 (1937).

So as to Show Extent of Possession Claimed. — There must be known and visible boundaries such as may apprise the true owner and the world of the extent of the possession claimed. Barfield v. Hill, 163 N.C. 262, 79 S.E. 677 (1913); McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Possession Extended to Outer Bounds of Deed Where Land Is Held Under Colorable Title. — Where one enters into possession of land under a colorable title which describes the land by definite lines and boundaries, and occupies and holds adversely a portion of the land within the bounds of his deed, by construction of law his possession is extended to the outer bounds of his deed, and possession so held adversely for seven years ripens his title to all the land embraced in his deed which is not actually occupied by another. Vance v. Guy, 223 N.C. 409, 27 S.E.2d 117 (1943); Wachovia Bank & Trust Co. v. Miller, 243 N.C. 1, 89 S.E.2d 765 (1955).

Where one, or his predecessor in title, enters upon land and asserts ownership of the whole under an instrument constituting color of title, the law will extend his occupation of a portion of the land to the outer bounds of his deed. Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

Provided That No Part of Premises Is Held Adversely by Another. — When one enters upon a tract of land and asserts his ownership of the whole under an instrument which constitutes color of title, the law will extend his occupation of a portion thereof to the outer bounds of his deed, provided that no part of the premises is held adversely by another. His exclusive possession, if continued uninterruptedly for seven years, will ripen title to all the land embraced within the deed. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969); Willis v. Johns, 55 N.C. App. 621, 286 S.E.2d 646 (1982).

Possession Not Extended to Other Tracts Conveyed by Separate Descriptions. — When one enters into possession under colorable title which describes the land by definite lines and boundaries, his possession is extended, by operation of law, to the outer boundaries of his deed. But where two or more adjoining tracts of land are conveyed in one deed, or in separate deeds, by separate and distinct descriptions, the actual possession by grantee of one of the tracts for seven years is not constructively extended to the other tract or tracts so as to ripen title thereto by adverse possession. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

Possession of a single tract is not constructively extended to a separate and distinct tract even though both tracts are described in the same conveyance. Bowers v. Mitchell, 258 N.C. 80, 128 S.E.2d 6 (1962).

Nor to Additional Land in Subsequent Deeds in Chain of Title. — Where description in a deed from a common source of title is enlarged in descriptions in subsequent deeds in the chain of title, the party claiming the additional land by adverse possession under color of title must show actual possession of the additional land, since possession under the deed from the common source could not be constructively extended to include the additional land. Bumgarner v. Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957).

Actual possession of one tract cannot be constructively extended to an adjoining tract. Phipps v. Paley, 90 N.C. App. 170, 368 S.E.2d 21, cert. denied, 323 N.C. 175, 373 S.E.2d 114 (1988).

Where the title deeds of two rival claimants lap upon each other, and neither claimant is in actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title. If one is seated on the lappage and the other is not, the possession of the whole interference is in the former. If both have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other. Vance v. Guy, 224 N.C. 607, 31 S.E.2d 766 (1944); Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969). See also, Whiteheart v. Grubbs, 232 N.C. 236, 60 S.E.2d 101 (1950).

When a portion of a boundary of a junior grant laps on a superior title, to mature a title under the junior grant there must be shown adverse and exclusive possession of the lappage, or the law will presume possession to be in the true owner as to all that portion of the lappage not actually occupied by the junior claimant. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

When a junior grant incorporates a portion of a senior grant it is not necessary for the junior grantee claiming title by seven years' adverse possession under color to show that the boundaries of the lappage were visible on the ground, although the claimant must establish the required adverse possession within those lines. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969); Allen v. Morgan, 48 N.C. App. 706, 269 S.E.2d 753 (1980).

When a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake. Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

The case of Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985), holding that when one, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own, his possession is adverse, would be applied to a case which was pending on appeal when the decision was announced. Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

No Evidence of Bad Faith. — Where there was no evidence and no claim by plaintiffs that defendants exchanged their deeds in bad faith, defendants' deeds were color of title. Willis v. Mann, 96 N.C. App. 450, 386 S.E.2d 68 (1989), cert. denied, 326 N.C. 367, 389 S.E.2d 820 (1990).

VI. COLOR OF TITLE.

A. In General.

Adverse possession, to ripen into title after seven years, must be under color of title; otherwise a period of 20 years is required under G.S. 1-40. Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953); Williams v. Weyerhaeuser Co., 378 F.2d 7 (4th Cir. 1967); Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

The possession has to be under color of title. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962), aff'd in part and rev'd in part, 323 F.2d 95 (4th Cir. 1963).

One can acquire a prescriptive easement by adverse use for seven years under color of title pursuant to this section. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

In those cases where the other elements of prescription are present, adverse possession of an easement under written color of title for seven years shall give title to the easement by prescription. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Trial court improperly granted summary judgment to defendants, adjoining - property owners and a water company, under G.S. 1A-1-56, holding that they held an underground easement for a waterline on plaintiff property owner's land because, inter alia: (1) defendants did not satisfy the requisite period for an easement by prescription and were not entitled to rely upon the shorter period provided by the doctrine of color of title, which would have reduced the period of adverse possession from 20 to seven years under G.S. 1-38(a); and (2) defendants failed to forecast sufficient evidence that they were entitled to an easement by estoppel. Woodring v. Swieter, 180 N.C. App. 362, 637 S.E.2d 269, 2006 N.C. App. LEXIS 2387 (2006).

When Title Is Out of State. — When title to land is out of the State, seven years' adverse possession under color of title is sufficient to ripen title in ordinary cases. Virginia-Carolina Tie & Wood Co. v. Dunbar, 106 F.2d 383 (4th Cir. 1939).

Title is deemed to be out of the State where the State is not a party to the action. Duke Power Co. v. Toms, 118 F.2d 443 (4th Cir. 1941).

Plaintiff may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those under whom he claims, for seven years before the action was brought. Blair v. Miller, 13 N.C. 407 (1830); Isler v. Dewey, 84 N.C. 345 (1881); Christenbury v. King, 85 N.C. 229 (1881); Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889).

Color of Title Defined. — Color of title is a paper writing which purports to convey land but fails to do so. First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Carrow v. Davis, 248 N.C. 740, 105 S.E.2d 60 (1958).

Color of title is generally defined as a written instrument which purports to convey the land described therein but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969); Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973); Adams v. Severt, 40 N.C. App. 247, 252 S.E.2d 276 (1979); General Greene Inv. Co. v. Greene, 48 N.C. App. 29, 268 S.E.2d 810, cert. denied, 301 N.C. 235, 283 S.E.2d 132 (1980).

Color of title is generally defined as a written instrument which purports to convey the land described in the written instrument, but fails to do so because of (1) want of title in the grantor, or (2) some defect in the mode of conveyance. If these defects do not exist, title is actually passed by the instrument and there can be no color of title. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Adverse possession under color of title is occupancy under a writing that purports to pass title to the occupant but which does not actually do so either because the person executing the writing fails to have title or capacity to transfer the title or because of the defective mode of the conveyance used. Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

An instrument is nonetheless color of title because of defects discoverable from the record, the purport of this section being to afford protection to apparent titles, void in law, and to supply a defense where none existed without its aid. Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365 (1941).

If an instrument on its face purports to convey land by definite lines and boundaries and the grantee enters into possession claiming under it and holds adversely for seven years, it is sufficient to vest title to the land in the grantee. No exclusive importance is to be attached to the ground of the invalidity of the colorable title if entry thereunder has been made in good faith and possession held adversely. Though the grantor may have been incompetent to convey the true title or the form of conveyance may be defective, it will constitute color of title which will draw to the possession of the grantee thereunder the protection of the statute. First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952);

Johnson v. McLamb, 247 N.C. 534, 101 S.E.2d 311 (1958).

If an instrument actually passes the title, it is not color of title. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

A deed is color of title. King v. Lee, 9 N.C. App. 369, 176 S.E.2d 394 (1970), modified on other grounds, 279 N.C. 100, 181 S.E.2d 400 (1971).

But Good Faith Required. — In order for a deed to constitute color of title, the grantee must enter the land under the deed in good faith. State v. Taylor, 60 N.C. App. 673, 300 S.E.2d 42, appeal dismissed and cert. denied, 308 N.C. 547, 303 S.E.2d 823 (1983), appeal dismissed, 465 U.S. 1075, 104 S. Ct. 1432, 79 L. Ed. 2d 756 (1984).

Exchange of deeds cannot constitute color of title. State v. Taylor, 60 N.C. App. 673, 300 S.E.2d 42, appeal dismissed and cert. denied, 308 N.C. 547, 303 S.E.2d 823 (1983), appeal dismissed, 465 U.S. 1075, 104 S. Ct. 1432, 79 L. Ed. 2d 756 (1984).

Color of title is not sufficient to make a prima facie case of title. Cothran v. Akers Motor Lines, 257 N.C. 782, 127 S.E.2d 578 (1962); King v. Lee, 9 N.C. App. 369, 176 S.E.2d 394 (1970), modified on other grounds, 279 N.C. 100, 181 S.E.2d 400 (1971).

The color of title must be strengthened by possession, which must be open, notorious, and adverse for a period of seven years. Cothran v. Akers Motor Lines, 257 N.C. 782, 127 S.E.2d 578 (1962); King v. Lee, 9 N.C. App. 369, 176 S.E.2d 394 (1970), modified on other grounds, 279 N.C. 100, 181 S.E.2d 400 (1971).

Color of Title Affords No Protection Where Requisites of Adverse Possession Are Not Present. — A deed which is color of title does not draw to the grantee-occupant of the land described therein the protection of the statute of limitations where the requisites of adverse possession are not present. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

A deed which is color of title without adverse possession does not afford the grantee protection of the statute. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

Actual Possession of Part of Land. — When a person claims ownership through color of title, as long as that person has some actual possession of a part of the land, he or she is deemed the constructive possessor of the remainder of the land described in the instrument constituting color of title. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

To constitute color of title a deed must contain a description identifying the land or referring to something that will identify it with certainty. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

A deed offered as color of title is such only for the land designated and described in it. Davidson v. Arledge, 88 N.C. 326 (1883); Smith v. Fite, 92 N.C. 319 (1885); Barker v. Southern Ry., 125 N.C. 596, 34 S.E. 701 (1899); Johnston v. Case, 131 N.C. 491, 42 S.E. 957 (1902), modified on rehearing, 132 N.C. 795, 44 S.E. 617 (1903); Smith v. Benson, 227 N.C. 56, 40 S.E.2d 451 (1946); Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953); Norman v. Williams, 241 N.C. 732, 86 S.E.2d 593 (1955); McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965); Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 470 (1979); Phipps v. Paley, 90 N.C. App. 170, 368 S.E.2d 21, cert. denied, 323 N.C. 175, 373 S.E.2d 114 (1988); Rudisill v. Icenhour, 92 N.C. App. 741, 375 S.E.2d 682 (1989).

And the description in the deed must by proof be made to fit the land it covers. Smith v. Fite, 92 N.C. 319 (1885); Smith v. Benson, 227 N.C. 56, 40 S.E.2d 451 (1946); Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953); McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Deed Which Fails to Identify Land Conveyed Cannot Be Color of Title. — A deed which is inoperative because the land intended to be conveyed thereby is incapable of identification from the description therein is inoperative as color of title. Dickens v. Barnes, 79 N.C. 490 (1878); Barker v. Southern Ry., 125 N.C. 596, 34 S.E. 701 (1899); Fincannon v. Sudderth, 144 N.C. 587, 57 S.E. 337 (1907); Katz v. Daughtrey, 198 N.C. 393, 151 S.E. 879 (1930); Thomas v. Hipp, 223 N.C. 515, 27 S.E.2d 528 (1943); Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953); Carrow v. Davis, 248 N.C. 740, 105 S.E.2d 60 (1958).

Deed Must Be Shown to Cover Land in Dispute. — Where a party introduces into evidence a deed which he intends to use as color of title, he must prove that its boundaries cover the land in dispute. It is error to allow a jury, on no evidence, to locate the land described in a deed. Stuart v. Bryant, 40 N.C. App. 206, 252 S.E.2d 286 (1979).

Proof Required Where Commissioner's Deed Used as Color. — While a commissioner's deed in a judicial sale constitutes color of title, a party who uses a deed to establish color of title must prove that the boundaries in the deed cover the land in dispute. Willis v. Johns, 55 N.C. App. 621, 286 S.E.2d 646 (1982).

Where jury determined that defendants'

deed did not embrace disputed area, defendants could not contend that they obtained title to the disputed area by adverse possession for seven years under color of title under this section. Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 470 (1979).

Color of Title Does Not Relate Back to Time of Entry. — Though a person originally entering without color of title may on subsequent acquisition of color be deemed to have held adversely under color from the latter date, still his color of title does not relate back to the time of his entry. Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953).

This section is applicable to prescriptive easements. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

The doctrine of color of title is applicable to acquisition of title to an easement by prescription. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

The period for acquiring an easement by prescription is now seven years where the claim is under color of title pursuant to this section. The burden is on defendants to show that they used the easement more or less frequently according to the nature of the easement and that they used the easement for seven years. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Where one can acquire fee simple title to the greater interest under color of title pursuant to this section, common sense dictates that, in the absence of statutes to the contrary, one should also be able to acquire title to easements appurtenant to that interest in the same statutory period. To hold otherwise would require the grantee to wait 20 years to gain title to an easement he had bargained for in the deed from his grantor, when he would be required to wait only seven years for the real property itself, if the grantor had not in fact had title to convey. This is not logically consistent and would produce harsh results. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

As to color of title generally, see also Neal v. Nelson, 117 N.C. 393, 23 S.E. 428 (1895); Smith v. Proctor, 139 N.C. 314, 51 S.E. 889 (1905); Norwood v. Totten, 166 N.C. 648, 82 S.E. 951 (1914); Whitten v. Peace, 188 N.C. 298, 124 S.E. 571 (1924); Best v. Utley, 189 N.C. 356, 127 S.E. 337 (1925); Barbee v. Bumpass, 191 N.C. 521, 132 S.E. 275 (1926); Garner v. Horner, 191 N.C. 539, 132 S.E. 290 (1926); Booth v. Hairston, 193 N.C. 278, 136 S.E. 879 (1927), petition for rehearing dismissed, 195 N.C. 8, 141 S.E. 480 (1928); Ennis v. Ennis, 195 N.C. 320, 142 S.E. 8 (1928); Stuart v. Bryant, 40 N.C. App. 206, 252 S.E.2d 286 (1979).

B. Documents Held to Be Color of Title.

Deed Regular upon Its Face. — Where deed was regular upon its face and purported to convey title without limitation, reservation or exception, it was at least color of title to the entire interest in the land it purported to convey, so that grantee and those claiming under her, who immediately went into possession and remained in exclusive possession thereof for 12 or 15 years, acquired title by their adverse possession under color, if not by their deed. Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946).

Deed When Person Does Not Have Title. — A color-of-title situation can arise when the person executing the writing does not actually have title. A deed may constitute color of title for the land therein described. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

Fraudulent Deed. — A fraudulent deed may be color of title and become a good title if the fraudulent grantee holds actual adverse possession for the statutory period against the owner. First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Johnson v. McLamb, 247 N.C. 534, 101 S.E.2d 311 (1958).

Void Deed. — A void deed constitutes color of title. Bond v. Beverly, 152 N.C. 56, 67 S.E. 55 (1910). See also, Potts v. Payne, 200 N.C. 246, 156 S.E. 499 (1931).

Voidable Deed. — A voidable deed is sufficient color, although it is a distinct and separate source of title from the one under which entry was first made. Butler v. Bell, 181 N.C. 85, 106 S.E. 217 (1921).

Valid Deed. — A valid deed — a muniment of title — may also serve as color of title. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969); Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

Deed Describing Contiguous Land Not Owned by Vendor. — When the description in a deed embraces not only land owned by the grantor, but also contiguous land which he does not own, the instrument conveys the property to which grantor had title and constitutes color of title to that portion which he does not own. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

Champertous Deed. — Regardless of whether a deed which conveyed to grantor's son certain described lands, reserving to grantor and his wife a life estate, given in consideration of grantee's successfully maintaining a suit to clear title to the lands conveyed, was champertous, it was sufficient color of title after registration and after the falling in of the reserved life estate to ripen the title in grantee under this section. Ennis v. Ennis, 195 N.C. 320, 142 S.E. 8 (1928).

Registered Deed Where Grantor Therein Held Under Unregistered Deed. — While an unregistered deed is not color of title as against subsequent grantees under registered deeds and creditors of the grantor, where the grantee in the unregistered deed conveyed by registered deed, and mesne conveyances from him were duly registered, such registered deeds were color of title under this section, and where the land was held by actual possession successively by the grantees in such chain of title continuously for over seven years prior to the filing of a judgment against the grantor in the unrestricted deed, the grantor in the unregistered deed was divested of title by adverse possession prior to the filing of the judgment, and the judgment did not constitute a lien against the land. Glass v. Lynchburg Shoe Co., 212 N.C. 70, 192 S.E. 899 (1937).

Deed from Purchase of Land at Mortgage Foreclosure Sale. — A deed obtained from the purchase of land at a mortgage foreclosure sale constitutes color of title, even though the foreclosure sale is defective or void. Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967).

Deed of Person Non Compos. — The deed of a person non compos is color of title, and possession under it for seven years ripens into title against those not under disability. Ellington v. Ellington, 103 N.C. 54, 9 S.E. 208 (1889).

Commissioner's Deed. — Where land devised to testator's children with remainder to testator's grandchildren was sold under order of court by a commissioner to one of the life tenants, and defendants were the purchasers by mesne conveyances from the life tenant, the deed executed by the commissioner, being similar to a deed from a stranger, constituted color of title. Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365 (1941).

Commissioner's deed in tax foreclosure proceedings instituted against one tenant in common was color of title as against the cotenants who were not parties to the foreclosure. Johnson v. McLamb, 247 N.C. 534, 101 S.E.2d 311 (1958).

Sheriff's Deed After Judgment Against Nonresident. — A sheriff's deed at an execution sale under a judgment obtained against nonresident owner by his wife to recover for maintenance and necessaries furnished by her to their minor children, in which action attachment was levied on the land, was at least color of title under this section, the judgment not being void. Campbell v. Campbell, 221 N.C. 257, 20 S.E.2d 53 (1942).

Deed Made in Defective Partition Proceedings. — Where, in a partition proceeding to sell land, less than the whole number of tenants in common were made parties, a deed made pursuant to an order of court to the purchaser was color of title and seven years adverse possession thereunder would bar those tenants in common who were not made parties. First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Johnson v. McLamb, 247 N.C. 534, 101 S.E.2d 311 (1958).

Where a sale was made pursuant to court order in a partition proceeding, and some of the cotenants are not parties, or there is an actual partition among those parties, the deed or the decree of partition is not the act of a cotenant, but is the act of a stranger, and seven years' possession under the deed or decree confirming the partition suffices to ripen title. Yow v. Armstrong, 260 N.C. 287, 132 S.E.2d 620 (1963).

Deed by grantee in deed of partition by heirs of the deceased owner to a third person of the land conveyed to the grantee in the partition was color of title within this section where the third person had no interest in the land outside of the deed. Betts v. Gahagan, 212 F. 120 (4th Cir. 1914).

Bond for Title. — After payment of the purchase money, a bond for title is color of title to support adverse possession even against the vendor. Avent v. Arrington, 105 N.C. 377, 10 S.E. 991 (1890); Betts v. Gahagan, 212 F. 120 (4th Cir. 1914).

Where a bond for title was unconditional and called for no future payment, the presumption, in the absence of any evidence to the contrary, was that the price was paid before or at the time of the signing, so that it was color of title to support adverse possession within this section. Betts v. Gahagan, 212 F. 120 (4th Cir. 1914).

Defectively Probated Will. — Where a will was defectively probated, but the defect in the probate was not so obvious that it might mislead a man of ordinary capacity, it was color of title for the land disposed of therein. Watson v. Chilton, 14 N.C. App. 7, 187 S.E.2d 482 (1972).

C. Documents Held Not Color of Title.

Deed by Mortgagor in Possession. — A deed by the mortgagor in possession to a third party, with notice of the mortgage, conveys only the equity of redemption, and does not pass such a colorable title as may ripen by possession into an absolute legal estate. Parker v. Banks, 79 N.C. 480 (1878).

Valid Deed. — A valid deed is not color of title. When one gives a deed for lands for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title. Justice v. Mitchell, 238 N.C. 364, 78

S.E.2d 122 (1953). But see, Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969); Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973), cited above.

Unregistered Deed. — An unregistered deed ordinarily is not color of title, except as between the original parties. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

An unregistered deed is not color of title as against judgment creditors of the grantor. Eaton v. Doub, 190 N.C. 14, 128 S.E. 494 (1925).

Where the probate of a deed to lands was fatally defective, it was not color of title against the grantor in a later registered deed, under sufficient probate, from a common grantee. McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929).

Description in Deed. — The trial court did not err in granting summary judgment for defendants where plaintiffs could not prove that the deed upon which they relied contained an adequate description of the property. Foreman v. Sholl, 113 N.C. App. 282, 439 S.E.2d 169 (1994), cert. improvidently granted and appeal dismissed, 339 N.C. 593, 453 S.E.2d 162 (1995).

Deed for Partition. — A deed by the heirs of a deceased owner of land for partition thereof was not color of title within this section. Betts v. Gahagan, 212 F. 120 (4th Cir. 1914).

VII. PROCEDURE AND PROOF.

As to this section being a proper plea in bar to action in ejectment under former practice, see Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967).

Generally speaking, a claim of title by adverse possession must be pleaded under North Carolina law. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962), aff'd in part and rev'd in part, 323 F.2d 95 (4th Cir. 1963).

But This Applies Only When Adverse Possession Is Used as Defense. — The requirement that a claim of title by adverse possession must be pleaded applies only when adverse possession is set up as a defense to an action. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962), aff'd in part and rev'd in part, 323 F.2d 95 (4th Cir. 1963).

And Not Where Claim Is Based on Adverse Possession Under Color of Title. — The requirement that a claim of adverse possession must be pleaded does not apply when a claim of title is based upon adverse possession under color of title. United States v. Chatham, 208 F. Supp. 220 (W.D.N.C. 1962), aff'd in part and rev'd in part, 323 F.2d 95 (4th Cir. 1963).

Methods of Proving Title. — Plaintiffs, in order to recover, had the burden of proving their title to the disputed area by any one of the various methods set out in Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889); Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

The identity or location of the land may be shown by documentary evidence, such as plats, surveys and filed notes. A map made by a surveyor of the premises sued for and of other tracts, adjacent thereto, when proved to be correct, is admissible to illustrate other testimony in the case and throw light on the location of the land in controversy; and a draft of a survey, proved to be correct, is admissible in evidence as explanatory of what the surveyor testified he had done in making the survey. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

Nothing Must Be Left to Conjecture. — In proving title by continuous, open and adverse possession of land under color of title for seven years, nothing must be left to conjecture. Price v. Tomrich Corp., 275 N.C. 385, 167 S.E.2d 766 (1969).

Burden of Proof When Adverse Possession Is Claimed. — When the title is claimed by adverse possession, the burden is on him who relies upon such claim to show continuous possession. There is no presumption that the possession of real estate is adverse. Monk v. Wilmington, 137 N.C. 322, 49 S.E. 345 (1904); Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

The party claiming title by adverse possession has the burden of proof on that issue. Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983).

Adverse Possession Is a Jury Question. — Conflicting evidence as to the character or extent of the possession under color of title by adverse possession raises the issue for the determination of the jury. Bumgarner v. Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957).

Where plaintiff in an action to quiet title established a prima facie case, defendant's plea of title by adverse possession under color for seven years did not justify nonsuit of plaintiff's cause, since the plea of adverse possession raised an issue of fact for the jury upon which defendant had the burden of proof. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953).

Mere Admission of Possession Does Not Amount to Admission of Adverse Possession. — Plaintiff's admission that he gave a certain person possession more than seven years prior to the institution of the action did not justify nonsuit of plaintiff's cause of action to quiet title, since mere admission of possession, without evidence in respect to the nature or character of such possession, does not amount to an admission of adverse possession in law, even if defendant is given the benefit of presumptions arising from mesne conveyances from such person. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953).

Testimony Held Competent. — In an action to quiet title, fact that as a result of the impounding of water some of the boundaries were submerged and could not be located did not destroy value of testimony as to their location at the time of the adverse possession relied on, and it was clearly competent for a witness to testify that he knew the land described in the deed and the acts of possession occurring on that land. Duke Power Co. v. Toms, 118 F.2d 443 (4th Cir. 1941).

§ 1-39. Seizin within twenty years necessary.

No action for the recovery or possession of real property shall be maintained, unless it appears that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within 20 years before the commencement of the action, unless he was under the disabilities prescribed by law. (C.C.P., s. 22; Code, s. 143; Rev., s. 383; C.S., s. 429.)

Legal Periodicals. — For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

CASE NOTES

Section Not Retroactive. — This salutary provision did not extend to actions already commenced or rights of action already accrued at the ratification of the Code. Covington v. Stewart, 77 N.C. 148 (1877).

This section and G.S. 1-42 are to be construed together. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959); Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971); Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760 (1980).

Presumption of Possession from Legal Title Under G.S. 1-42. — This section and G.S. 1-42 are to be construed together. When so construed, the rule is as follows: It is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within 20 years before action brought, for if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967); Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760 (1980). See also, Johnston v. Pate, 83 N.C. 110 (1880); Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

In cases where there is no tenancy in common this section must be construed with G.S. 1-42, for this section is explained in G.S. 1-42 by the further declaration that the person who establishes a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, etc. Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

How Presumption of Possession Rebutted. — The pleading by a defendant of this section does not shift upon plaintiff the burden of showing that he has been in the possession 20 years before the commencement of the action; rather, the presumption created by G.S. 1-42 can only be rebutted by proof on the part of defendant that defendant had been in adverse possession of the premises for 20 years. Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

Deed as Evidence of Possession. — The offer of a deed dated 1935, together with evidence identifying the land described therein, constituted prima facie evidence of plaintiff's possession of the described lands within the time required by law to maintain an action for recovery or possession of real property. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Where one tenant in common claims sole seizin and adverse possession under a void judgment, his status as to any title by adverse possession must be determined by this section, rather than the seven-year statute, G.S. 1-38. Ange v. Owens, 224 N.C. 514, 31 S.E.2d 521 (1944).

Where plaintiffs acquired title by adverse possession under color for more than 30 years, they had at least constructive seizin or possession within 20 years before suit was brought, which would satisfy the requirement, as seizin follows the title, if there is no actual possession, and it was not incumbent on them to show an actual seizin or possession of the premises in question for 20 years before the commencement of the action. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907); Stewart v. McCormick, 161 N.C. 625, 77 S.E. 761 (1913).

Notwithstanding the fact that a judgment was rendered against a party in an action to recover lands, if he subsequently entered, enclosed and used the lands for the statutory period he would acquire a new estate by disseizin and acquiescence and would be presumed to have been in possession within the past 20 years. Moore v. Curtis, 169 N.C. 74, 85 S.E. 132 (1915).

This section does not apply when plaintiffs have shown legal title and defendants' possession has not been for 20 continuous years. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

Stipulation That Plaintiff Possessed Premises Does Not Concede That Plaintiff Has Good Title. — A defendant may stipulate that a plaintiff is entitled to prosecute his action to recover realty because he has been possessed of the premises in question within 20 years before the commencement of the action without conceding that the plaintiff has good title to the property or is presently entitled to possession. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

Failure to Allege Seizin Not Ground for Demurrer. — In an action for possession of land, failure to affirmatively allege that plaintiff had been seized or possessed of the premises within 20 years prior to the institution of the action was not ground for demurrer. Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

State statutes of limitation neither bind nor have any application to the United States, when suing to enforce a public right or to protect interests of its Indian wards. United States v. 7,405.3 Acres of Land, 97 F.2d 417 (4th Cir. 1938).

Applied in Tripp v. Keais, 255 N.C. 404, 121 S.E.2d 596 (1961); Kennedy v. Whaley, 55 N.C. App. 321, 285 S.E.2d 621 (1982).

Cited in Dean v. Gupton, 136 N.C. 141, 48 S.E. 576 (1904); Clendenin v. Clendenin, 181 N.C. 465, 107 S.E. 458 (1921); Rutledge v. A.T. Griffin Mfg. Co., 183 N.C. 430, 111 S.E. 774 (1922); Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928); Reid v. Reid, 206 N.C. 1, 173 S.E. 10 (1934); Williams v. Robertson, 233 N.C. 309, 63 S.E.2d 632 (1951); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952); Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402 (1953); McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971); Barringer v. Weathington, 11 N.C. App. 618, 182 S.E.2d 239 (1971).

§ 1-40. Twenty years adverse possession.

No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for 20 years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability. (C.C.P., s. 23; Code, s. 144; Rev., s. 384; C.S., s. 430.)

Cross References. — As to adverse possession for seven years under color of title, see G.S. 1-38.

Legal Periodicals. — For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970).

For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

CASE NOTES

I. In General.
II. Possession, Generally.
III. Hostile or Adverse Nature of Possession.

I. IN GENERAL.

Editor's Note. — *Many of the cases cited in the case notes to G.S. 1-38 may also have application to this section.*

Actual Title in Fee Now Given Under This Section. — The possession for 20 years which under prior law raised a presumption of title now has the force and effect of giving an actual title in fee by the provisions of this section. Covington v. Stewart, 77 N.C. 148 (1877).

Section Prescribes Maximum Time Required. — It is error to charge that the adverse claimant must maintain open and continuous possession without a break for 30 years before the bringing of his action, as only 20 years' adverse possession is required to give a title in fee to the possessor, as against all persons not under disability, except the State. Walden v. Ray, 121 N.C. 237, 28 S.E. 293 (1897).

G.S. 1-40 Inapplicable to Easement. — Defendant property owners were entitled to partial summary judgment in plaintiff property owners' action, which asked for a preliminary and permanent injunction prohibiting defendants from obstructing or interfering with plaintiffs' right to a thirty-foot easement, because (1) G.S. 1-50(a)(3) was the applicable statute of limitations, not G.S. 1-40, because an injury to an incorporeal hereditament was at issue, rather than a continuous trespass or a prescriptive easement to property held in fee; and (2) the parties agreed that all encroachments, except the fences installed in 2004 and 2005, were planted or installed approximately nine to eleven years before the commencement of plaintiffs' action. Pottle v. Link, 187 N.C. App. 746, 654 S.E.2d 64, 2007 N.C. App. LEXIS 2557 (2007).

G.S. 1-56 Inapplicable to Recovery of Realty. — This section and G.S. 1-38 apply to actions for the recovery of real estate, to the exclusion of G.S. 1-56. Williams v. Scott, 122 N.C. 545, 29 S.E. 877 (1898).

Color of Title Under G.S. 1-38 Immaterial When This Section Applies. — Where title by adverse possession can be established under this section, the question of whether color of title is sufficient under G.S. 1-38 is immaterial. Atwell v. Shook, 133 N.C. 387, 45 S.E. 777 (1903). See also, May v. Atlantic Coast Line R.R., 151 N.C. 388, 66 S.E. 310 (1909).

One can acquire a prescriptive easement by adverse use for seven years under color of title pursuant to G.S. 1-38. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

In those cases where the other elements of prescription are present, adverse possession of an easement under written color of title for seven years pursuant to G.S. 1-38 shall give title to the easement by prescription. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

When a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake. Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

For case applying the holding of Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985) to a case which was pending on appeal when the decision was announced, see Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

Limitations for Ejectment Actions. — This section and G.S. 1-38 are the applicable statutes of limitation for ejectment actions. These statutes prescribe the period of time beyond which the owner of land is not privileged to bring an action for the recovery of his land from a person in possession thereof. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Where defendant State of North Carolina and the North Carolina Diocese had possessed the property in question for over a century, to the extent plaintiffs' allege that defendants held the property under color of title, plaintiffs' claim was barred by the applicable seven year statutory period, and even if plaintiffs alleged that defendants do not hold title at all, the 20 year statute of limitations period for actions to recover property held in adverse possession still barred plaintiffs' claim. Majeed v. North Carolina, 520 F. Supp. 2d 720, 2007 U.S. Dist. LEXIS 74441 (E.D.N.C. Oct. 4, 2007).

Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' actions was not in essence one for ejectment controlled by G.S. 1-38 and this section; rather, plaintiffs' action was one to remove a cloud upon title which was not barred by any statute of limitations. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Plaintiffs' unregistered deed did not prevent their setting up adverse possession for 20 years. Sessoms v. McDonald, 237 N.C. 720, 75 S.E.2d 904 (1953).

Application of Section to State and Its Agencies. — The General Assembly intended that this section and G.S. 1-38 should apply to any legal entity, including the State of North Carolina and its agencies, capable of adversely possessing land and of acquiring title thereto. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

Assertion of Claim Where United States Is Nominal Party. — The principle that the United States is not bound by any statute of limitations, nor barred by any laches of its officers, however gross, did not apply where the United States is a mere nominal party, so as to preclude an adverse possessor from asserting an adverse claim against Indians, who were the real parties in interest. United States v. Rose, 20 F. Supp. 350 (W.D.N.C. 1937).

Effect of Appointment of Receiver. — When a statute of limitations has begun to run, no subsequent disability will stop it, and ordinarily the mere appointment of a receiver will not toll the statute unless the circumstances are such that such appointment precludes the institution of suit. Thus, when a receiver has full authority to institute suit, his appointment will not suspend the running of limitations under this section. Nicholas v. Salisbury Hdwe. & Furn. Co., 248 N.C. 462, 103 S.E.2d 837 (1958).

Where judgment debtor had lost title by adverse possession prior to acquisition and registration of judgment, the judgment creditor under G.S. 1-234 was not entitled to execution on the locus in quo, as the judgment debtor had no title at the time of the judgment; this result was not affected by the giving of a deed by the debtor to the claimant which was not registered until after the judgment. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

Presumption of Deed to Possessor. — There was no error in a charge that where title was out of the State and the evidence showed possession for 20 years the jury might presume a deed to the possessor from any person having title. This is settled law. Melvin v. Waddell, 75 N.C. 361 (1876).

Deed Held Inoperative to Fix "Known and Visible Lines and Boundaries". — Where the deed relied on by plaintiffs was inoperative as color of title, the description therein was equally inoperative to fix "known and visible lines and boundaries" as the basis for a claim of adverse possession for 20 years. Powell v. Mills, 237 N.C. 582, 75 S.E.2d 759 (1953).

Recovery of Right-of-Way Not Used for Railroad Purposes. — The owner of the fee is not barred from maintaining an action in ejectment against a railroad company or its lessee to recover for that part of right-of-way no longer used for railroad purposes until the expiration of 20 years. Sparrow v. Dixie Leaf Tobacco Co., 232 N.C. 589, 61 S.E.2d 700 (1950).

For case holding that court erred in determining that defendants established adverse possession under color where disputed area was a lappage, see Allen v. Morgan, 48 N.C. App. 706, 269 S.E.2d 753 (1980).

Adverse Possession as Question for Jury. — Where there is evidence that title has been acquired under 20 years' adverse possession, this question should be submitted to the jury. McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929).

Effect of Purchase of Adverse Claim. — A party is not bound to admit, and does not necessarily admit, title in another because he prefers to get rid of that other's claim by purchasing it. He has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable. The acts and declarations of the possessor may be given in evidence with a view of showing the character of his claim, but whether the possession is adverse or not is a question for the jury to determine upon all the evidence. Wilson County Bd. of Educ. v. Lamm, 276 N.C. 487, 173 S.E.2d 281 (1970).

As to absence due to imprisonment, see Helton v. Cook, 27 N.C. App. 565, 219 S.E.2d 505 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976).

Action for damages incident to construction in 1975 of an apartment building which encroached approximately one square foot on plaintiff's land involved a continuing trespass, and for damages incident to the original wrong, i.e., the construction of the building itself, no recovery could be had. However, action to permanently redress defendant's unauthorized taking of the land was subject to the 20-year statute of limitations for adverse possession. Williams v. South & S. Rentals, Inc., 82 N.C. App. 378, 346 S.E.2d 665 (1986).

Applied in Reid v. Reid, 206 N.C. 1, 173 S.E. 10 (1934); Caskey v. West, 210 N.C. 240, 186 S.E. 324 (1936); Owens v. Blackwood Lumber Co., 210 N.C. 504, 187 S.E. 804 (1936); Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953); Chisholm v. Hall, 255 N.C. 374, 121 S.E.2d 726 (1961); Kennedy v. Whaley, 55 N.C. App. 321, 285 S.E.2d 621 (1982); Walls v. Grohman, 74 N.C. App. 448, 324 S.E.2d 874 (1985).

Cited in Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1789); Dean v. Gupton, 136 N.C. 141, 48 S.E. 576 (1904); Stewart v. Stephenson, 172 N.C. 81, 89 S.E. 1060 (1916); Rutledge v. A.T. Griffin Mfg. Co., 183 N.C. 430, 111 S.E. 774 (1922); Dill-Cramer Truitt Corp. v. Downs, 195 N.C. 189, 141 S.E. 570 (1928); Glass v. Lynchburg Shoe Co., 212 N.C. 70, 192 S.E. 899 (1937); Nichols v. York, 219 N.C. 262, 13 S.E.2d 565 (1941); Whiteheart v. Grubbs, 232 N.C. 236, 60 S.E.2d 101 (1950); Wilson v. Chandler, 235 N.C. 373, 70 S.E.2d 179 (1952); Chambers v. Chambers, 235 N.C. 749, 71 S.E.2d 57 (1952); Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d 402 (1953); Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953); Everett v. Sanderson, 238 N.C. 564, 78 S.E.2d 408 (1953); Newkirk v. Porter, 240 N.C. 296, 82 S.E.2d 74 (1954); Jenkins v. Trantham, 244 N.C. 422, 94 S.E.2d 311 (1956); Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957); Morehead v. Harris, 255 N.C. 130, 120 S.E.2d 425 (1961); Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961); Patterson v. Buchanan, 265 N.C. 214, 143 S.E.2d 76 (1965); Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970); McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971); Canady v. Cliff, 93 N.C. App. 50, 376 S.E.2d 505 (1989); Rudisail v. Allison, 108 N.C. App. 684, 424 S.E.2d 696 (1993).

II. POSSESSION, GENERALLY.

Editor's Note. — *See the Editor's note above under analysis line I. In General.*

Exclusivity. — Where defendants claimed adverse possession of a cemetery lot under G.S. 1-40, plaintiffs' motions for a directed verdict and for JNOV were properly denied; evidence that defendants had been farming the lot since the 1960's and that there had not been a burial in the lot in nearly 60 years provided more than a scintilla of evidence that defendants had made exclusive use of the lot as farmland for the requisite period; there was no evidence that plaintiffs had used the lot. Jernigan v. Herring, 179 N.C. App. 390, 633 S.E.2d 874, 2006 N.C. App. LEXIS 1901 (2006).

Requisites of Adverse Possession. — In order for adverse possession to ripen title in the possessor, the possession must be actual, open, hostile, exclusive and continuous. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

There must be an actual possession of the real property claimed; the possession must be hostile to the true owner; the claimant's possession must be exclusive; the possession must be open and notorious; the possession must be continuous and uninterrupted for the statutory period; and the possession must be with an intent to claim title to the land occupied. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975); Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760, cert. denied, 301 N.C. 105 (1980).

Adverse possession is as the actual, open, notorious, exclusive, continuous and hostile occupation and possession of the land of another for the statutory period. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

To acquire title to land through adverse possession, plaintiff must show actual, open, hostile, exclusive, and continuous possession of the land claimed for 20 years under known and visible lines and boundaries. Curd v. Winecoff, 88 N.C. App. 720, 364 S.E.2d 730 (1988).

The following legal principles relating to easements by prescription have evolved in North Carolina appellate decisions: (1) The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement; (2) the law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears; (3) the use must be adverse, hostile, and under a claim of right; (4) the use must be open and notorious; (5) the adverse use must be continuous and uninterrupted for a period of 20 years and (6) there must be substantial identity of the easement claimed. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Establishment of Easement by Prescription. — An easement by prescription is created by adverse possession. To establish an easement by prescription, defendants must prove: (1) that their use of roadway was adverse, hostile or under claim of right; (2) that this use was open and notorious such that plaintiff had notice of the claim; (3) that this use has been continuous and uninterrupted for a period of at least 20 years; and (4) that there was substantial identity of the easement claimed throughout the 20-year period. Furthermore, defendants must rebut the presumption that their use of the road was made with the plaintiff's permission, since a permissive use of a roadway can never ripen into a prescriptive easement. Curd v. Winecoff, 88 N.C. App. 720, 364 S.E.2d 730 (1988).

Adverse possession sufficient to ripen title is the exclusive use of the claimant for 20 years, continuously taxing such exclusive benefits as the land is capable of yielding, under known and visible metes and bounds. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

Actual Possession and Intent Required. — In order to establish title by adverse possession there must be actual possession with an intent to hold solely for the possessor to the exclusion of others. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

The claimant must exercise acts of dominion over the land in making the ordinary use and taking the ordinary profits of which the land is susceptible, with such acts being so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

So as to Subject Himself to Action in Ejectment. — A possession that ripens into title must be such as continually subjects some portion of the disputed land to the only use of which it is susceptible. The test involved is whether the acts of ownership were such as to subject the claimant continually during the whole statutory period to an action in the nature of trespass in ejectment instead of to one or several actions of trespass quare clausam fregit for damages. Mizzell v. Ewell, 27 N.C. App. 507, 219 S.E.2d 513 (1975).

No Constructive Possession Absent

Color of Title. — There can be no constructive possession by one holding land adversely unless he holds under color of title. Carswell v. Town of Morganton, 236 N.C. 375, 72 S.E.2d 748 (1952).

Adverse possession, to ripen into title after seven years, must be under color of title. Otherwise, a period of 20 years is required. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

Adverse Possessor Without Color Cannot Enlarge Rights Beyond Limits of Actual Possession. — An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period. He cannot enlarge his rights beyond the limits of his actual possession by a claim of title to other land abutting that which he actually occupies, even though such other land may be defined by marked boundaries. Carswell v. Town of Morganton, 236 N.C. 375, 72 S.E.2d 748 (1952).

Where plaintiffs rely upon adverse possession alone, without color of title, title acquired under such circumstances is confined to the lands actually occupied. An adverse possessor of land without color of title cannot acquire title to any greater amount of land than that which he has actually occupied for the statutory period. Sessoms v. McDonald, 237 N.C. 720, 75 S.E.2d 904 (1953).

Several successive possessions may be tacked for the purpose of showing a continuous adverse possession where there is privity of estate or connection of title between several occupants. Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952).

But a grantee cannot tack adverse possession of predecessor as to land not embraced in his deed; therefore, where he has been in possession for less than 20 years, he cannot establish title by adverse possession to land lying outside the boundaries of his deed. Ramsey v. Ramsey, 229 N.C. 270, 49 S.E.2d 476 (1948); Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949).

Possession by Mistake May Be Tacked to Intentional Possession. — Where adverse possession originates in mistake but then, upon discovery of the mistake by the adverse possessor, is perpetuated by conscious intent, the uninterrupted periods of adverse possession may be tacked together and considered as one for the purpose of satisfying the prescriptive period set out in this section. Enzor v. Minton, 123 N.C. App. 268, 472 S.E.2d 376 (1996).

And a Deed Does Not Create Privity as to Land Not Described Therein But Occupied in Connection Therewith. — Although a grantee claiming land within the boundaries called for in a deed or other instrument constituting color of title may tack his grantor's possession of such land to that of his own for the purpose of establishing adverse possession for the requisite period, the rule is that a deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, and this is so even though the grantee enters into possession of the land not described and uses it in connection with that conveyed. Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 470 (1979), overruled on other grounds, Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

The adverse possession of an ancestor may be cast by descent upon his heirs and tacked to their possession for the purpose of showing title by adverse possession, where there was no hiatus or interruption in the possession. International Paper Co. v. Jacobs, 258 N.C. 439, 128 S.E.2d 818 (1963).

But Not Where Heir Was Never in Possession. — The fact that the plaintiff admitted that she never actually possessed the property at issue was fatal to her claim of adverse possession, notwithstanding her contention that she should be able to tack onto the possession of her direct ancestors. Merrick v. Peterson, 143 N.C. App. 656, 548 S.E.2d 171, 2001 N.C. App. LEXIS 342 (2001).

One may assert title to land embraced within another's deed by showing adverse possession of the portion claimed for 20 years under known and visible lines and boundaries, but his claim is limited to the area actually possessed, and the burden is upon the claimant to establish his title to the land in that manner. Wallin v. Rice, 232 N.C. 371, 61 S.E.2d 82 (1950); Scott v. Lewis, 246 N.C. 298, 98 S.E.2d 294 (1957).

Where the owner of a lot encroaches upon an adjacent lot and builds structures partly thereon, the owner of the adjacent lot is not estopped by his silence and failure to object from asserting his title thereto in an action in ejectment, and he does not lose his title thereto until the adverse user has continued for the 20 years necessary to ripen title by adverse possession under this section, the user not being under color of title. Ramsey v. Nebel, 226 N.C. 590, 39 S.E.2d 616 (1946).

Effect of Exclusive Dominion After Dedication to Public. — Where landowner platted and sold the land by deeds referring to streets, parks, etc., according to a registered map, so that the grantees had an easement therein, but later fenced off a part of the land so offered for dedication to the public and under known metes and bounds exercised exclusive and adverse dominion over the enclosed lands, asserting absolute title, the statute of limitations would begin to run against the easements of the grantees thus acquired, which would ripen title to the enclosed lands in favor of the owner or his grantee under the provisions of this section by 20 years' adverse possession. Gault v. Town of Lake Waccamaw, 200 N.C. 593, 158 S.E. 104 (1931).

Mines and Mineral Rights. — Plaintiff claiming mineral rights by adverse possession without color of title must show such possession under known and visible lines and boundaries for 20 years. Mere prospecting does not constitute possession of such rights. Davis v. Federal Land Bank, 219 N.C. 248, 13 S.E.2d 417 (1941).

For case holding sheriff's deed to grantor of plaintiff in ejectment not to be evidence of possession, see Prevatt v. Harrelson, 132 N.C. 250, 43 S.E. 800 (1903).

The "continuity" necessary for a party to establish a prescriptive easement depends on the nature of the easement asserted. The use simply has to be often enough for the true owner to have notice that a party is asserting an easement. Vandervoort v. McKenzie, 117 N.C. App. 152, 450 S.E.2d 491 (1994).

Evidence Held Sufficient. — Sufficient evidence was presented to show that defendant acquired title to property by adverse possession. Marlowe v. Clark, 112 N.C. App. 181, 435 S.E.2d 354 (1993).

Evidence Held Insufficient. — Where plaintiff claimed that his predecessor in title went into possession of two tracts of land through a tenant who possessed both tracts of land for at least 20 years without color of title, but his evidence tended to show that the tenant actually occupied only a few acres of one of the tracts, and he had no evidence tending to describe, identify or locate the particular land actually occupied, nonsuit was properly entered. Carswell v. Town of Morganton, 236 N.C. 375, 72 S.E.2d 748 (1952).

Putative adverse possessors did not prove their claim to a parcel because they did not show, as to 6 of 12 lots surrounding the parcel, the existence of known and visible boundaries for the requisite 20 years, particularly as one boundary of the disputed parcel was not established until a relatively recent real estate transfer. Dockery v. Hocutt, 357 N.C. 210, 581 S.E.2d 431, 2003 N.C. LEXIS 596 (2003).

Possessor of real property did not acquire title to the property through adverse possession under G.S. 1-40 because competent evidence supported the finding that he failed to satisfy the required 20 year time period under G.S. 1-40 even though his late parents, who were predecessors in interest, occupied the property as tenants with a life estate. Pegg v. Jones, 187 N.C. App. 355, 653 S.E.2d 229, 2007 N.C. App. LEXIS 2457 (2007).

III. HOSTILE OR ADVERSE NATURE OF POSSESSION.

Editor's Note. *— See the Editor's Note above under analysis line I. In General.*

In order to establish that a use is hostile, it is not necessary to show a heated controversy, but it is necessary to show that the use was of a nature that would give the owner of the land notice that the use was being made under a claim of right. Potts v. Burnette, 46 N.C. App. 626, 265 S.E.2d 504 (1980), rev'd on other grounds, 301 N.C. 663, 273 S.E.2d 285 (1981).

To establish that a use is hostile rather than permissive, it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate. A hostile use is simply a use of such nature and exercise under circumstances which manifest and give notice that the use is being made under a claim of right. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Requisite hostility to support adverse possession existed, and the time of adverse possession prior to 1992 could tack to that adverse possession after 1992 where the families never asked permission to use the disputed land or make improvements and excluded others from parking on the property, and following the resolution by a town council in 1992 that the town did not own the disputed property, before transferring the disputed property to a homeowners association that the families formed. Lancaster v. Maple St. Homeowners Ass'n, 156 N.C. App. 429, 577 S.E.2d 365, 2003 N.C. App. LEXIS 194 (2003), cert. denied, 357 N.C. 251, 582 S.E.2d 272 (2003).

When a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake. Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

For case applying the holding of Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985) to a case which was pending on appeal when the decision was announced, see Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

There must be some evidence accompanying a use which tends to show that the use is hostile in character and tends to repel the inference that the use is permissive and with the owner's consent. A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription. Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984), rev'd on other grounds, 315 N.C. 208, 337 S.E.2d 543 (1985).

Entry into Possession with Permission of Owner. — If a person enters into possession of a piece of land with the permission of the owner, such possession would not be adverse unless and until he disclaimed such arrangement and made the owner aware of such disclaimer or disclaimed the arrangement in such manner as to put the owner on notice that he was no longer using the land by permission but was claiming it as absolute owner. Wilson County Bd. of Educ. v. Lamm, 276 N.C. 487, 173 S.E.2d 281 (1970).

Remaindermen did not meet the requisite requirements for adverse possession where their possession of the property was not adverse in that it was with the acquiescence and permission of the life tenant; the parties stipulated that the property was partitioned "with the knowledge of" the life tenant; and there was no record evidence that the trust had been terminated. Cassada v. Cassada, 103 N.C. App. 129, 404 S.E.2d 491, cert. denied, 329 N.C. 786, 408 S.E.2d 516 (1991).

Whether Acts Sufficient to Establish An Easement. — Evidence at trial that party claiming an easement maintained and repaired the roadway, that he went onto the property at least once each year to clear out the roadway and that as far as he knew, he was the only person who did so on a regular basis, was sufficient to create a jury question of whether his use of the roadway was adverse, hostile or under claim of right. Vandervoort v. McKenzie, 117 N.C. App. 152, 450 S.E.2d 491 (1994).

Permissive Use. — Where neighbors' driveway and shrubbery encroached onto adjacent property, the neighbors could not establish a claim for adverse possession, because they did not possess the disputed tract in a hostile manner for a continuous 20-year period since their use of the disputed tract was permissive following a conversation with the owner, who gave the neighbors permission to use the disputed tract. Jones v. Miles, 189 N.C. App. 289, 658 S.E.2d 23, 2008 N.C. App. LEXIS 545 (2008).

Once possession becomes hostile, a grant of permission from the true owner will not defeat such hostility if the possessor either rejects the grant of permission or otherwise takes some affirmative step to put the true owner on notice that the possessor's use of the land remains hostile. However, a true owner's grant of permission will defeat a possessor's hostile use if the possessor takes no further action to reassert the possessor's claim over the land; in such cases, the possessor has not put the true owner on notice that the possessor still intends to claim the disputed land as the possessor's own. Jones v. Miles, 189 N.C. App. 289, 658 S.E.2d 23, 2008 N.C. App. LEXIS 545 (2008).

Presumption of Permissive Use of Way over Another's Land. — In North Carolina, unlike the majority of other jurisdictions, there is a presumption that the use of a way over another's land is permissive, unless evidence appears to the contrary. Potts v. Burnette, 46 N.C. App. 626, 265 S.E.2d 504 (1980), rev'd on other grounds, 301 N.C. 663, 273 S.E.2d 285 (1981).

Use of a way over another's land is presumed permissive or with the owner's consent unless the contrary is shown by competent evidence. Clifton v. Fesperman, 50 N.C. App. 178, 272 S.E.2d 624 (1980).

Possession Against Tenant in Common. — Respondent's answer to petitioner's prior partition claim amounted to an open, unequivocal denial of petitioner's rights to any part of the subject property; thus, for purposes of this section, the advent of respondent's adverse possession was the date of respondent's actual ouster of petitioner. Beck v. Beck, 125 N.C. App. 402, 481 S.E.2d 317 (1997).

Possession of one tenant in common is presumed to be possession of all. Tharpe v. Holcomb, 126 N.C. 365, 35 S.E. 608 (1900); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952).

Absent Actual Ouster or Sole Adverse Possession. — Possession of one tenant in common is the possession of all his cotenants unless and until there has been an actual ouster or sole adverse possession for 20 years. Parham v. Henley, 224 N.C. 405, 30 S.E.2d 372 (1944); Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

Where plaintiff and defendants were tenants in common, possession of defendants, not having been adverse for 20 years, was the possession of plaintiff. Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

Before a person can adversely possess land held in cotenancy, there must be an ouster of his cotenants. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

Constructive Ouster. — North Carolina adheres to the rule of constructive ouster. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

The rule of constructive ouster presumes the requisite ouster and is as follows: where one tenant in common and those under who he claims have been in sole and undisturbed possession and use of the land for 20 years and where there has been no demand for rents, profits or possession. Casstevens v. Casstevens, 63 N.C. App. 169, 304 S.E.2d 623 (1983).

Upon completion of the statutory period, the constructive ouster relates back to the initial taking of possession. Casstevens v. Casstevens,

63 N.C. App. 169, 304 S.E.2d 623 (1983).

Possession Pursuant to Agreement Between Cotenants Insufficient. — Where the possession of one cotenant is pursuant to an agreement of all cotenants, his possession for more than 20 years is insufficient to bar his cotenants or their privies. Stallings v. Keeter, 211 N.C. 298, 190 S.E. 473 (1937).

Adverse possession will not ripen title as against a tenant in common short of 20 years, even under color of title. Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952).

And to ripen title under a deed from a tenant in common 20 years' adverse possession is necessary, and this applies to one to whom the alienee of a tenant has attempted to convey the entire estate. Bradford v. Bank of Warsaw, 182 N.C. 225, 108 S.E. 750 (1921).

In the absence of an actual ouster, the ouster of one tenant in common by a cotenant will not be presumed from an exclusive use of the common property and the appropriation of its profits to his own use for a less period than 20 years, and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. Morehead v. Harris, 262 N.C. 330, 137 S.E.2d 174 (1964).

Parol Partition Among Cotenants. — Allegations that defendant's predecessor in title went into possession of the locus in quo pursuant to a parol partition between him and his cotenants in common, and that each tenant thereafter held his share so allotted in severalty and hostilely to his cotenants for more than 20 years, were sufficient to raise the issue of title by adverse possession in the tenant in common, and it was error for the trial court to disregard the plea of title by adverse possession and refuse to submit the case to the jury. Martin v. Bundy, 212 N.C. 437, 193 S.E. 831 (1937).

Life Tenant's Assent to Partition. — Even though a trust may be voluntarily terminated by act or agreement of all the beneficiaries, the life tenant's assent to the partitioning of the property alone is not sufficient to terminate a trust. Cassada v. Cassada, 103 N.C. App. 129, 404 S.E.2d 491, cert. denied, 329 N.C. 786, 408 S.E.2d 516 (1991).

Where parties have stipulated in the record that the property was divided with the permission of the life tenant, there is no reason to infer that her assent to partitioning the property should be equated with assent to terminating the trust. Cassada v. Cassada, 103 N.C. App. 129, 404 S.E.2d 491, cert. denied, 329 N.C. 786, 408 S.E.2d 516 (1991).

In an action to establish a resulting trust instituted shortly after guardian's death, upon evidence that lands were conveyed to the guardian personally but were paid for with guardianship funds, it was error to enter nonsuit upon the plea of laches and the statutes of limitation upon evidence that the guardian remained in possession for over 40 years and devised same to plaintiffs by will when defendants offered evidence that the guardian acknowledged the existence of the trust some six years prior to his death, and there was no evidence of disavowal of the trust or adversary holding during the life of the guardian. Cassada v. Cassada, 230 N.C. 607, 55 S.E.2d 77 (1949).

§ 1-41. Action after entry.

No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action is commenced thereupon within one year after the making of the entry, and within the time prescribed in this Chapter. (C.C.P., s. 24; Code, s. 145; Rev., s. 385; C.S., s. 431.)

CASE NOTES

Cited in Clayton v. Cagle, 97 N.C. 300, 1 S.E. 523 (1887); Taylor v. Taylor, 143 N.C. App. 664, 547 S.E.2d 161, 2001 N.C. App. LEXIS 323 (2001).

§ 1-42. Possession follows legal title; severance of surface and subsurface rights.

In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action. Provided that a record chain of title to the premises for a period of thirty years next preceding the commencement of the action, together with the identification of the lands described therein, shall be prima facie evidence of possession thereof within the time required by law.

In all controversies and litigation wherein it shall be made to appear from the public records that there has been at some previous time a separation or severance between the surface and the subsurface rights, title or properties of an area, no holder or claimant of the subsurface title or rights therein shall be entitled to evidence or prove any use of the surface, by himself or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said surface rights or title; and likewise no holder or claimant of the surface rights shall be entitled to evidence or prove any use of the subsurface rights, by himself, or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said subsurface rights, unless, in either case, at the time of beginning such allegedly adverse use and in each year of the same, said party or his predecessor in title so using shall have placed or caused to be placed upon the records of the register of deeds of the county wherein such property lies and in a book therein kept or provided for such purposes, a brief notice of intended use giving (i) the date of beginning or recommencing of the operation or use, (ii) a brief description of the property involved but sufficiently adequate to make said property readily locatable therefrom, (iii) the name and, if known, the address of the claimant of the right under which the operation or use is to be carried on or made and (iv) the deed or other instrument, if any, under which the right to conduct such operation or to make such use is claimed or to which it is to be attached. (C.C.P., s. 25; Code, s. 146; Rev., s. 386; C.S., s. 432; 1945, c. 869; 1959, c. 469; 1965, c. 1094.)

Cross References. — As to title against the State, see G.S. 1-35. As to adverse possession of seven years under color of title, see G.S. 1-38. As to adverse possession of 20 years, see G.S. 1-40.

Legal Periodicals. — For note on the relationship of this section to the acquisition of easements by prescription, see 32 N.C.L. Rev. 483 (1954).

For article concerning the quest for clear land titles in North Carolina, see 44 N.C.L. Rev. 89 (1965).

For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

For article discussing the doctrine of color of title in North Carolina, see 13 N.C. Cent. L.J. 123 (1982).

For note, "Walls v. Grohman: Adverse Possession in Mistaken Boundary Cases," see 64 N.C.L. Rev. 1496 (1986).

CASE NOTES

This section and G.S. 1-39 are to be construed together. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959); Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971); Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760, cert. denied, 301 N.C. 105 (1980).

Effect of Construing This Section and G.S. 1-39 Together on Burden of Proof. — This section, when construed with G.S. 1-39, simply means that proof of a connected chain of title to real estate for a period of 30 years by a party seeking possession thereof is prima facie evidence that such party has been in possession of the real estate within 20 years next preceding the institution of the action, as required by G.S. 1-39, and thus has standing to maintain his action. It does not mean that a party may meet the burden of proving title simply by basing his claim on an instrument recorded at least 30 years before the institution of his action. That burden must still be met. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

G.S. 1-39 and this section are to be construed together. When so construed, the rule is as follows: It is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within 20 years before the action was brought, for if he establishes at trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966), commented on in 45 N.C.L. Rev. 964 (1967).

Where plaintiff, by proving legal title, has raised the presumption under this section that he has been in possession within 20 years, such presumption operates to satisfy the requirements of G.S. 1-39, so that plaintiff does not have to prove such possession. Then defendant must show that he himself has been in possession adversely for 20 years. Johnston v. Pate, 83 N.C. 110 (1880); Conkey v. John L. Roper Lumber Co., 126 N.C. 499, 36 S.E. 42 (1900).

Statutory Presumption Dependent on Showing of Legal Title. — Statutory presumption as to possession and occupation of land in favor of the true owner, from the express language of the provision, will arise and exist only in favor of a claimant who has shown "a legal title"; until this is made to appear, the presumption is primarily in favor of the occupant, that he is in possession asserting ownership. Moore v. Miller, 179 N.C. 396, 102 S.E. 627 (1920).

Presumption Inapplicable Where Rebutted by Admission. — It is not necessary to consider the effect of this section where, conceding the presumption raised thereby, it is rebutted by admission in the case. Kirkman v. Holland, 139 N.C. 185, 51 S.E. 856 (1905).

Presumption Not Rebutted. — The presumption that one who proves legal title in himself has been in possession within 20 years was not rebutted by proof that an adverse claimant had been in possession where the claimant held under a deed from a tenant in common with the devisor of the holder of the legal title. Roscoe v. John L. Roper Lumber Co., 124 N.C. 42, 32 S.E. 389 (1899).

Occupancy in Subordination to Title Acquired by Adverse Possession. — Title acquired by adverse possession is legal title, and occupancy of the land thereafter will be presumed to be in subordination to such title, unless held adversely to such title for the statutory period. Purcell v. Williams, 220 N.C. 522, 17 S.E.2d 652 (1941).

There is no presumption that possession in subordination to the legal title is adverse, and when the title is thus claimed by adverse possession, or for seven years under color, the burden is upon him who relies thereon to prove possession. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

Showing Required to Avoid Presumption of Subordination. — When defendant relied on a deed made to his ancestor as color of title, and on the adverse possession of others thereunder to ripen his title, it was necessary to show that their occupancy was under or connected with the deed under which he claimed, or the presumption would obtain that they were under the true title shown by plaintiff. Blue Ridge Land Co. v. Floyd, 167 N.C. 686, 83 S.E. 687 (1914).

When plaintiff in ejectment shows title to the locus in quo, and defendant claims title by adverse possession, the latter must establish such affirmative defense by the greater weight of the evidence; otherwise, under this section, defendants' occupation will be deemed to be under and in subordination to the legal title. Hayes v. Cotton, 201 N.C. 369, 160 S.E. 453 (1931).

Operation of Section Where Neither Party in Possession. — Where neither party is in possession, and defendants have not shown 20 years' possession, while the plaintiffs have shown the legal title, the law carries the seizin to the party having the legal title. Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

Burden of Establishing Title. — When both parties claim title to land, and each seeks an adjudication that he is the owner and is entitled to possession of the disputed property, each has the burden of establishing his title. Campbell v. Mayberry, 12 N.C. App. 469, 183 S.E.2d 867, cert. denied, 279 N.C. 726, 184 S.E.2d 883 (1971).

For additional cases as to burden and sufficiency of proof under this section, see Ruffin v. Overby, 105 N.C. 78, 11 S.E. 251 (1890); Bryan v. Spivey, 109 N.C. 57, 13 S.E. 766 (1891); Monk v. Wilmington, 137 N.C. 322, 49 S.E. 345 (1904); Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907); Fraley v. Fraley, 150 N.C. 501, 64 S.E. 381 (1909); State v. McDonald, 152 N.C. 802, 67 S.E. 762 (1910); Steward v. McCormick, 161 N.C. 625, 77 S.E. 761 (1913); Blue Ridge Land Co. v. Floyd, 171 N.C. 543, 88 S.E. 862 (1916); Virginia-Carolina Power Co. v. Taylor, 194 N.C. 231, 139 S.E. 381 (1927).

Where the parties claimed title from a common source, plaintiff's deed being the older but defendant's having been recorded first, and possession for many years was in defendant, there being no evidence of the plaintiff ever having had possession, this section did not apply. Mintz v. Russ, 161 N.C. 538, 77 S.E. 851 (1913).

Claim of Title Under Paper Writing More Than 30 Years Old. — This section does not declare that one who claims title relying merely on a paper writing more than 30 years old thereby acquires title to the land described in the instrument, nor does it establish title prima facie. Bowers v. Mitchell, 258 N.C. 80, 128 S.E.2d 6 (1962).

Deed as Evidence of Possession. — The offer of a deed dated 1935, together with evidence identifying the land described therein, constituted prima facie evidence of plaintiff's possession of the described lands within the time required by law to maintain an action for the recovery or possession of real property. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Disability Exception Limited to Persons Having Right of Entry or Action. — Adverse possession relates only to the true title; hence, the exceptions in this statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. Berry v. Lumber Co., 141 N.C. 386, 54 S.E. 278 (1906).

Applied in Johnston v. Pate, 83 N.C. 110 (1880).

Cited in Monk v. Wilmington, 137 N.C. 322, 49 S.E. 345 (1904); Peterson v. Sucro, 101 F.2d 282 (4th Cir. 1939); Ownbey v. Parkway Properties, Inc., 222 N.C. 54, 21 S.E.2d 900 (1942); DeBruhl v. L. Harvey & Son Co., 250 N.C. 161, 108 S.E.2d 469 (1959); Walker v. Story, 253 N.C. 59, 116 S.E.2d 147 (1960).

§ 1-42.1. Certain ancient mineral claims extinguished in certain counties.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record title holder of any such oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of ten (10) years prior to January 1, 1965, any person, having the legal capacity to own land in this State, who has on September 1, 1965 an unbroken chain of title of record to such surface estate of such area of land for fifty (50) years or more, and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded fifty (50) years or more prior to September 1, 1965, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two (2) years after September 1, 1965, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) All oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.1(b) and recorded in the local registry in the book provided by G.S. 1-42 within two years from September 1, 1967, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to September 1, 1967.

The provisions of this subsection shall apply to the following counties: Anson, Buncombe, Durham, Franklin, Guilford, Hoke, Jackson, Montgomery, Person, Richmond, Swain, Transylvania, Union, Wake and Warren. (1965, c. 1072, s. 1; 1967, c. 905.)

Legal Periodicals. — For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

§ 1-42.2. Certain additional ancient mineral claims extinguished; oil, gas and mineral interests to be recorded and listed for taxation.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record titleholder of any such oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of 10 years prior to January 1, 1971, any person, having the legal capacity to own land in this State, who has on September 1, 1971, an unbroken chain of title of record to such surface estate of such area of land for at least 50 years and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 but not more than 56 years prior to September 1, 1971, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1971, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from November 1, 1971, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.2(b) and recorded in the local registry in the book provided by G.S. 1-42, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1971.

The provisions of this subsection shall apply to the following counties: Rowan, Anson, Buncombe, Catawba, Davidson, Durham, Franklin, Guilford, Haywood, Hoke, Iredell, Jackson, Madison, Montgomery, Moore, Person, Richmond, Robeson, Scotland, Swain, Transylvania, Union, Wake, Warren and Yancey. (1971, c. 235, s. 1; c. 855.)

§ 1-42.3. Additional ancient mineral claims extinguished in certain counties; oil, gas and mineral interests to be recorded and listed for taxation in such counties.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record titleholder of any such oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of 10 years prior to January 1, 1974, any person having the legal capacity to own land in this State, who has on September 1, 1974, an unbroken chain of title of record to such surface estate of such area of land for at least 50 years and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interest in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 years or more prior to September 1, 1974, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1974, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from November 1, 1974, all oil, gas or mineral interest in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.3(b) and recorded in the local registry in the book provided by G.S. 1-42, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1974.

The provisions of this subsection shall apply to the following counties: Alleghany, Burke, Caldwell, Cherokee, Clay, Cleveland, Gaston, Gates, Graham, Halifax, Henderson, Macon, McDowell, Mitchell, Polk, Randolph, Stanly, Surry, Watauga, and Wilkes. (1973, c. 1435; 1981, c. 329, s. 2.)

§ 1-42.4. Additional ancient mineral claims extinguished in Ashe County; oil, gas and mineral interests to be recorded and listed for taxation.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interest in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record titleholder of any such oil, gas or mineral interest has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of 10 years prior to January 1, 1977, any person having the legal capacity to own land in this State, who has on September 1, 1977, an unbroken chain of title of record to such surface estate of such area of land for at least 50 years, and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 years or more prior to September 1, 1977, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1977, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from November 1, 1977, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interests must be filed in writing in the manner provided by G.S. 1-42.4(b) and recorded in the local registry in the book provided by G.S. 1-42, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1977. The provisions of this subsection shall apply to the following county: Ashe. (1977, c. 751.)

§ 1-42.5. Additional ancient mineral claims extinguished in Avery County; oil, gas and mineral interests to be recorded in such county.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interest in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, any person having legal capacity to own land in this State, who has an unbroken chain of title of record to such surface estate of such area of land for at least 30 years and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interest in such area of land, the existence of which depends upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was recorded prior to such 30-year period, and such oil, gas or mineral interests are hereby declared null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within such 30-year period, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land, or any part thereof lies, and in the book thereof kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant, and the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) The board of county commissioners shall publish a notice of this section within 90 days after the ratification date, and within 90 days prior to June 30, 1982. Such notice shall be published once per week for four consecutive weeks in a newspaper published in the counties of Avery, Burke, Mitchell and Watauga, or a newspaper having general circulation in those counties.

The provisions of this section shall apply to the following county: Avery. (1981, c. 329, s. 1.)

§ 1-42.6. Additional ancient oil, gas or mineral interests extinguished in Alleghany County; recording interests; listing interests for taxation.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and this interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record titleholder of any oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which it is located for a period of 10 years prior to February 1, 1981, any person having the legal capacity to own land in this State who has on July 1, 1981, an unbroken chain of title of record to the surface estate of the area of land for at least 50 years, and provided the surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to the surface estate as provided in the succeeding subsections of this section, subject to any interests and defects as are inherent in the provisions and limitations contained in the muniments that form the chain of record title.

(b) This marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all fee simple oil, gas or mineral interests in the area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple that was executed or recorded at least 50 years or more prior to July 1, 1981, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after July 1, 1981, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of the oil, gas or mineral interest and gives the book and page where recorded. This notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein the area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make the property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. The notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from July 1, 1981, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.3(b) and recorded in the local registry in the book provided by G.S. 1-42 to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this section within 180 days after May 6, 1981. Such notice shall be published once per week for four consecutive weeks in a newspaper published in the county, or a newspaper of general circulation in the county.

This section applies only to Alleghany County. (1981, c. 333, ss. 1, 2.)

§ 1-42.7. Additional amount mineral claims extinguished in Chatham County; oil, gas and mineral interests to be recorded and listed for taxation.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interest in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record titleholder of any such oil, gas or mineral interest has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of 10 years prior to January 1, 1979, any person having the legal capacity to own land in this State, who has on September 1, 1979, an unbroken chain of title of record to such surface estate of such area of land for at least 50 years, and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 years or more prior to September 1, 1979, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1979, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from November 1, 1979, all oil, gas or mineral interests in land severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interests must be filed in writing in the manner provided by G.S. 1-42.5(b) and recorded in the local registry in the book provided by G.S. 1-42, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1979.

This section shall apply to Chatham County only. (1979, c. 343, ss. 1, 2.)

Editor's Note. — This section was enacted as G.S. 1-42.5 by Session Laws 1979, c. 343.

§ 1-42.8. Ancient mineral claims extinguished in Rutherford County; oil, gas and mineral interests to be recorded and listed for taxation.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land, and this interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another; or that the record titleholder of any oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which it is located for a period of 10 years prior to February 1, 1982, any person having the legal capacity to own land in this State who has on September 1, 1982, an unbroken chain of title of record to the surface estate of the area of land for at least 50 years, and provided the surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to the surface estate as provided in the succeeding subsections of this section, subject to any interests and defects as are inherent in the provisions and limitations contained in the muniments that form the chain of record title.

(b) This marketable title shall be held by such persons and shall be taken by his successors in interest free and clear of any and all fee simple, oil, gas or mineral interests in the area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple that was executed or recorded at least 50 years or more prior to September 1, 1982, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any fee simple oil, gas or mineral interest not already extinguished by existing laws may be preserved and kept effective by recording within two years after September 1, 1982, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of the oil, gas or mineral interest and gives the book and page where recorded. This notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein the area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner, and shall also contain either a sufficient description of the area of land involved as to make the property readily located or due incorporation by reference of the recorded instrument containing the reservation or exception of the oil, gas or mineral interest. The notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing the notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished include those of persons whether within or without the State, and whether natural or corporate, but do not include governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from September 1, 1982, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes, and notice of this interest must be filed in writing in the manner provided by G.S. 1-42.3(b) and recorded in the local registry in the book provided by G.S. 1-42 to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina.

(e) The board of county commissioners shall publish a notice of this section in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to September 1, 1982.

(f) This act applies only to Rutherford County. (1981 (Reg. Sess., 1982), c. 1391, s. 1.)

§ 1-42.9. Ancient mineral claims extinguished in certain counties; oil, gas and mineral interests to be recorded and listed for taxation.

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, and that the record titleholder of any such oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of five years prior to January 1, 1986, any person, having the legal capacity to own land in this State, who has on January 1, 1986, an unbroken chain of title of record to the surface estate of the area of land for at least 30 years and provided the surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to the fee estate as provided in the succeeding subsections of this section, subject to the interests and defects as are inherent in the provisions and limitations contained in the muniments of which the chain of record is formed.

(b) This marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all fee simple oil, gas or mineral interests in the area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple that was executed or recorded at least 30 years or more prior to January 1, 1986, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity. Provided, however, that any fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after January 1, 1986, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of the oil, gas or mineral interest and gives the book and page where recorded. This notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein the area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make the property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. The notice may be made and recorded by the claimant, by any person authorized by the claimant to act on his behalf, or by any person acting on behalf of any claimant who is under a disability, unable to assert a claim on his own behalf, or one of a class whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral leases.

(d) Within two years from January 1, 1986, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership and forfeitable under the terms of G.S. 1-42.9(b) must be listed for ad valorem taxes, and notice of this interest must be filed in writing in the manner provided by G.S. 1-42.9(b) and recorded in the local registry in the book provided by G.S. 1-42 to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina.

(e) The board of county commissioners shall publish a notice of this section in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to January 1, 1986.

(f) This section applies to a county that failed to publish a notice as required by subsection (e) but that published a notice of this section in a newspaper having general circulation in the county once a week for four consecutive weeks prior to January 1, 1986. In applying this section to that county, however, the date “1984” shall be substituted for the date “1983” each time it appears in this section. (1983, c. 502; 1983 (Reg. Sess., 1984), c. 1096, ss. 1-3; 1985, c. 160; c. 573, s. 1.)

Cross References. — As to railway corridor preservation, see G.S. 136-44.36A.

Editor’s Note. — Session Laws 1985, c. 573, s. 2, provided for the non-revival of any interest previously extinguished under the provisions of G.S. 1-42.1 through 1-42.8 and 1-42.9, and did not extend the time established in Session Laws 1983, c. 502, for preserving and keeping effective certain fee simple interests in oil, gas, or minerals. Session Laws 1983, c. 502, s. 2, also contained similar non-revival language.

§ 1-43. Tenant's possession is landlord's.

When the relation of landlord and tenant has existed, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that the tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited. (C.C.P., s. 26; Code, s. 147; Rev., s. 387; C.S., s. 433.)

Cross References. — As to provisions concerning landlords and tenants generally, see G.S. 42-1 et seq.

CASE NOTES

Presumption Limited to Statutory Period. — The presumption which attaches to the possession of a tenant following the termination of tenancy is only a presumption for the periods limited in the statute, and after the expiration of such periods, the presumption no longer exists. Melvin v. Waddell, 75 N.C. 361 (1876); Virginia-Carolina Power Co. v. Taylor, 191 N.C. 329, 131 S.E. 646 (1926).

Section Does Not Apply Where Tenant's Claim Is Based on Landlord's Title. — The rule that the possession of the tenant is possession of the landlord, precluding adverse possession by the tenant without first surrendering the possession he has under the lease, obtains only when the tenant seeks to assert a title adverse to that of the landlord or assumes an attitude of hostility to his title or claim of title. Such rule does not obtain where the tenant, or those claiming under him, do not assert title hostile to that of the landlord, but are acknowledging, asserting and relying upon that title, as acquired by them in due course. The strength of the landlord's title is the foundation of their claim. Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946).

Loyalty Is to Title and Not to Landlord. — The rule that a tenant's possession is the possession of the landlord and that a tenant under a lease may not maintain an action against his landlord involving title during the period of the lease without first surrendering the possession he has under the lease does not apply where, after the renting, the title of the landlord has terminated or has been transferred either to a third person or to the tenant himself, for under the doctrine as it now prevails, the loyalty required is to the title, not to the person of the landlord. Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946).

Where tenant acquired the title of his landlord, the tenant's leasehold estate was merged in the greater estate conveyed by his deed, and thereafter he was under no obligation to recognize his former landlord as such or to surrender possession to him before asserting the title thus acquired. Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946).

Parol Gift as Rebuttal of Tenancy. — A parol gift of land will not convey title, but it will rebut the idea of tenancy, so that possession under it will ripen into title if continued for 20 years. Wilson v. Wilson, 125 N.C. 525, 34 S.E. 685 (1897); Dean v. Gupton, 136 N.C. 141, 48 S.E. 576 (1904).

As to effect of eviction under legal process and reentry, see Pate v. Turner, 94 N.C. 47 (1886).

Surrender of Possession by Tenant Prior to Maintaining Action Involving Title. — A tenant under a lease may not maintain an action against his lessor involving title during the period of the lease without first surrendering the possession he has under the lease. Abbott v. Cromartie, 72 N.C. 292 (1875); Lawrence v. Eller, 169 N.C. 211, 85 S.E. 291 (1915).

Judgment Where Landlord Fails to Prove Title. — Where plaintiff landlord fails to show any title in himself, and relies entirely on estoppel by this section, the judgment should be limited to a recovery of the possession, leaving the tenant free to assert any title he may have in another action. Benton v. Benton, 95 N.C. 559 (1886).

Competency of Evidence Respecting Tenancy. — Where a defendant in partition proceedings claims title by adverse possession, evidence that defendant entered as a tenant is competent. Alexander v. Gibbon, 118 N.C. 796, 24 S.E. 748 (1896); Shannon v. Lamb, 126 N.C. 38, 35 S.E. 232 (1900); Hatcher v. Hatcher, 127 N.C. 200, 37 S.E. 207 (1900); Bullock v. Bullock, 131 N.C. 29, 42 S.E. 458 (1902).

Evidence Held Insufficient to Show Entry Under Title of Another. — Evidence that a tenant in common with defendant in ejectment claiming the locus in quo by adverse possession paid rent to another, prior to the existence of the cotenancy, was not evidence that defendant entered into possession under the title of such other person. Virginia-Carolina Power Co. v. Taylor, 191 N.C. 329, 131 S.E. 646 (1926).

Cited in Day v. Howard, 73 N.C. 1 (1875); Melvin v. Waddell, 75 N.C. 361 (1876); Conwell v. Mann, 100 N.C. 234, 6 S.E. 782 (1888); Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889); McNeill v. Fuller, 121 N.C. 209, 28 S.E. 299 (1897); Roscoe v. John L. Roper Lumber Co., 124 N.C. 42, 32 S.E. 389 (1899); Prevatt v. Harrelson, 132 N.C. 250, 43 S.E. 800 (1903); Moore v. Miller, 179 N.C. 396, 102 S.E. 627 (1920); Pitman v. Hunt, 197 N.C. 574, 150 S.E. 13 (1929); Nichols v. York, 219 N.C. 262, 13 S.E.2d 565 (1941); Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1952).

§ 1-44. No title by possession of right-of-way.

No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right-of-way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right-of-way, depot, station house or place of landing, by any statute of limitation or by occupation of the same by any person whatever. (R.C., c. 65, s. 23; C.C.P., s. 29; Code, s. 150; Rev., s. 388; C.S., s. 434.)

Legal Periodicals. — For comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

Purpose of Section. — The provisions of this section are justified upon the ground that the right-of-way is dedicated to a public use and for this reason is protected against loss by adverse possession. One using the right-of-way is at most a permissive licensee. Carolina Cent. R.R. v. McCaskill, 94 N.C. 746 (1886); Railroad v. Olive, 142 N.C. 257, 55 S.E. 263 (1906); Muse v. Seaboard Air Line Ry., 149 N.C. 443, 63 S.E. 102 (1908).

Plain words of this section do not require that a railroad actually use land; the railroad need only have "obtained for its use" the land for a railroad purpose. McLaurin v. Winston-Salem Southbound Ry., 323 N.C. 609, 374 S.E.2d 265 (1988).

Loss of Railroad Right-of-Way by Occupation Precluded. — When a railroad has acquired and entered upon the enjoyment of its easement, the further appropriation and use by it of the right-of-way for necessary railroad business may not be destroyed or impaired by reason of the occupation of it by the owner or any other person. Keziah v. Seaboard Air Line R.R., 272 N.C. 299, 158 S.E.2d 539 (1968).

Once title of railroad to a right-of-way is acquired, it cannot be lost by occupancy as to any part of it by the lapse of time. Carolina Cent. R.R. v. McCaskill, 94 N.C. 746 (1886); Purifoy v. Richmond & D.R.R., 108 N.C. 100, 12 S.E. 741 (1891).

Under this section, possession by defendants of land covered by right-of-way could not operate as a bar to or be the basis for any presumption of abandonment by the railroad of its right-of-way. Railroad v. Olive, 142 N.C. 257, 55 S.E. 263 (1906).

Section Inapplicable Until Right-of-Way Is Acquired. — Before this section can apply, the company must have secured or acquired the right-of-way either by condemnation or otherwise, and an executory contract to convey is not sufficient to meet the requirement. Even if an instrument is drawn for the purpose of making the conveyance, it must meet the formalities required of such an instrument or it will be deemed insufficient for the purpose of bringing it within the purview of this section. Beattie v. Carolina Cent. R.R., 108 N.C. 425, 12 S.E. 913 (1891). See also, May v. Atlantic C.L.R.R., 151 N.C. 388, 66 S.E. 310 (1909).

Loss of Executory Grant of Right-of-Way. — The grant to a railroad company of an undefined or "floating" right-of-way is of an executory nature, and where no consideration has been paid by the company, the right may be lost by lapse of 10 years upon failure of entry and of location by the company. Willey v. Norfolk S.R.R., 96 N.C. 408, 1 S.E. 446 (1887); Hemphill v. Annis, 119 N.C. 514, 26 S.E. 152 (1896); May v. Atlantic C.L.R.R., 151 N.C. 388, 66 S.E. 310 (1909).

Allegation that railroad forfeited the protection of this section by not using or planning to use land for purposes set forth in the statute was without merit. McLaurin v. Winston-Salem Southbound Ry., 323 N.C. 609, 374 S.E.2d 265 (1988).

Railroad Company Not Estopped From Closing Crossing. — Trial court did not err in granting a railroad company summary judgment in a landowner's trespass action because the continued use of a crossing by the landowners and its predecessor in interest since the 1940's could not estop the company from closing the crossing after it determined that the crossing interfered with the use of the railroad; a railroad has the authority and ability to expand its use of a right-of-way to manage safety risks. Schwarz & Schwarz, LLC v. Caldwell County R.R. Co., — N.C. App. —, 677 S.E.2d 546, 2009 N.C. App. LEXIS 758 (2009).

Application of Section Where Grant Presumed by Charter. — Where a company acquired an easement by a provision of its charter and not by condemnation or purchase, it would seem that the principle of this section applies, so that although a part of its right-of-way might be used by the owner it has a right of entry whenever it needs the property for its use. Carolina Cent. R.R. v. McCaskill, 94 N.C. 746 (1886); Raleigh & Augusta Air Line R.R. v. Sturgeon, 120 N.C. 225, 26 S.E. 779 (1897); Railroad v. Olive, 142 N.C. 257, 55 S.E. 263 (1906); Earnhardt v. Southern Ry., 157 N.C. 358, 72 S.E. 1062 (1911).

No Effect on Power of State or Municipality to Require Grade Change. — This section does not affect the State or a municipality in the assertion of its right to require a railroad company to change the grade of its roadbed where it is crossed by streets, so that public travel and drainage may not be impeded. Atlantic C.L.R.R. v. City of Goldsboro, 155 N.C. 356, 71 S.E. 514 (1911), aff'd, 232 U.S. 548, 34 S. Ct. 364, 58 L. Ed. 721 (1914).

Section Not Applicable to Condemnation by Municipalities. — An incorporated city or town may obtain title to streets located upon the right-of-way of a railroad company by long and continuous, open, and adverse use thereof for such purpose, and where the city has so used the land for a long period of time there is a presumption of an original condemnation by the city, and this section has no application as to the rights of municipalities to acquire the land. In re Assessment Against Property of S. Ry., 196 N.C. 756, 147 S.E. 301 (1929).

Fact that others own the fee in the right-of-way and that such ownership is indicated by deed or map appearing in the public registry presents no evidence of probative force that the right-of-way does not belong to the railroad, since it only has an easement which it may exercise to the full extent when in its judgment the necessities of its business so require. Keziah v. Seaboard Air Line R.R., 272 N.C. 299, 158 S.E.2d 539 (1968).

As to effect of permitting improvements, see Carolina Cent. R.R. v. McCaskill, 94 N.C. 746 (1886).

Applied in Withers v. Long Mfg. Co., 259 N.C. 139, 129 S.E.2d 886 (1963).

Cited in Town of Durham v. Richmond & D.R.R., 104 N.C. 261, 10 S.E. 208 (1889); Purifoy v. Richmond & D.R.R., 108 N.C. 100, 12 S.E. 741 (1891); Bass v. Roanoke Nav. & Water-power Co., 111 N.C. 439, 16 S.E. 402 (1892); Loven v. Parson, 127 N.C. 301, 37 S.E. 271 (1900).

§ 1-44.1. Presumption of abandonment of railroad right-of-way.

Any railroad which has removed its tracks from a right-of-way and has not replaced them in whole or in part within a period of seven (7) years after such removal and which has not made any railroad use of any part of such right-of-way after such removal of tracks for a period of seven (7) years after such removal, shall be presumed to have abandoned the railroad right-of-way. (1955, c. 657.)

Legal Periodicals. — For comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

Construction. — Court declined to expand the law of railroad easement abandonment in North Carolina to include conveyance of part or all of the easement to another party, even another railroad operator, under G.S. 1-44.1. City of Charlotte v. BMJ of Charlotte. LLC, — N.C. App. —, 675 S.E.2d 59, 2009 N.C. App. LEXIS 647 (Apr. 7, 2009).

State and Federal Interrelationships. — Even if a railroad's right of way were to be considered abandoned according to G.S. 1-44.1, current federal law mandates that an abandonment of a railroad line that is part of an interstate rail network may be carried out only as authorized under Chapter 109 of the United States Code, 49 U.S.C.S. § 10903. City of Charlotte v. BMJ of Charlotte. LLC, — N.C. App. —, 675 S.E.2d 59, 2009 N.C. App. LEXIS 647 (Apr. 7, 2009).

This section refers to abandonment of easements; it has no application to land owned in fee simple. McLaurin v. Winston-Salem Southbound Ry., 323 N.C. 609, 374 S.E.2d 265 (1988).

§ 1-44.2. Presumptive ownership of abandoned railroad easements.

(a) Whenever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituting the abandoned easement shall be presumed to be vested in those persons, firms or corporations owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner extending to the centerline of the abandoned easement. In cases where the railroad easement adjoins a public road right-of-way, the adjacent property owner's right, title and interest in the abandoned railroad easement shall extend to the nearest edge of the public road right-of-way.

The side boundaries of each parcel so presumptively vested in the adjacent property owner shall be determined by extending the side property lines of the adjacent parcels to the centerline of the abandoned easement, or as the case may be, the nearest edge of the public road right-of-way. In the event the side property lines of two adjacent property owners intersect before they meet the centerline or nearest edge of the public road right-of-way, as the case may be, such side property lines shall join and run together from the point of intersection to the centerline of the easement or nearest edge of the public road right-of-way, as the case may be, perpendicular to said centerline or edge.

(b) The presumption established by this section is rebuttable by showing that a party has good and valid title to the land.

(c) Repealed by Session Laws 1987 (Reg. Sess., 1988), c. 1071, s. 6. (1987, c. 433, s. 1; 1987 (Reg. Sess., 1988), c. 1071, s. 6; 2004-203, s. 14.)

Cross References. — As to railway corridor preservation, see G.S. 136-44.36A.

Legal Periodicals. — For comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

Constitutionality. — This section is unconstitutional as it applies to fee simple landowners in possession of disputed property, in that it fails to provide them with adequate notice, an opportunity to be heard, and with just compensation. McDonald's Corp. v. Dwyer, 111 N.C. App. 127, 432 S.E.2d 165, aff'd, 338 N.C. 445, 450 S.E.2d 888 (1994).

The first sentence of subsection (b) of this section is unconstitutional because it does not provide sufficient notice, an opportunity to be heard, and just compensation before divesting owner of a valuable property interest. The remaining portions of this section were not challenged and remain in full force and effect. McDonald's Corp. v. Dwyer, 338 N.C. 445, 450 S.E.2d 888 (1994).

Conclusive Presumption. — The first sentence of subsection (b) of this section that provides that persons claiming contrary to the presumption of subsection (a) must bring a lawsuit within one year of the enactment of the statute or the abandonment of the easement, whichever later occurs, or lose their right to rebut the presumption, turns a rebuttable presumption into a conclusive presumption which effectively takes a defendants' property without affording notice, an opportunity to be heard and just compensation. McDonald's Corp. v. Dwyer, 338 N.C. 445, 450 S.E.2d 888 (1994).

Public Road Right-of-Way Easement. — A public road right-of-way that was wholly within an abandoned railroad easement did not adjoin the easement and the second sentence of subsection (a) of this section did not apply. To adjoin, a tract must be "close to or in contact," "next to" or "touching." None of the definitions include a tract that is encompassed within another tract. Nelson v. Battle Forest Friends Meeting, 335 N.C. 133, 436 S.E.2d 122 (1993).

Applicable Only to Easements. — The Abandoned Railroad Easement Act applies only to easements, and not to fee interests. Love v. United States, 889 F. Supp. 1548 (E.D.N.C. 1994).

§ 1-45. No title by possession of public ways.

No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations. (1891, c. 224; Rev., s. 389; C.S., s. 435.)

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

Adverse Possession Ineffective Against Public Way, Square or Common. — Where there is a dedication and acceptance by the municipality or other governing body of public ways or squares and commons in this jurisdiction, the statute of limitations does not now run against the municipality or governing body. Steadman v. Pinetops, 251 N.C. 509, 112 S.E.2d 102 (1960).

Possession of a street by one claiming it adversely cannot divest or destroy the right of the public therein. State v. Godwin, 145 N.C. 461, 59 S.E. 132 (1907).

Adverse use of a part of a street dedicated to and accepted by the public cannot ripen title in the user when there has been an acceptance of the dedication of the street and no abandonment thereof on the part of the public. City of Salisbury v. Barnhardt, 249 N.C. 549, 107 S.E.2d 297 (1959).

It was error to find that landowners owned an unused part of a public street by adverse possession because, inter alia, the landowners were not permitted, under G.S. 1-45, to acquire possession of the property by adverse possession, as the property remained dedicated to public use. Town of Oriental v. Henry, — N.C. App. —, 678 S.E.2d 703, 2009 N.C. App. LEXIS 1057 (July 7, 2009).

But Municipality Must Have Title or Rights Therein. — The rule that individuals may not acquire title to any part of a municipal street by encroaching upon or obstructing the same in any way does not apply when the evidence fails to show that the municipality had any title or rights therein. Hall v. City of Fayetteville, 248 N.C. 474, 103 S.E.2d 815 (1958).

Section Inapplicable Where Dedication Not Accepted. — The principle of law of this section applies only to such streets as the municipality has acquired and not to land offered to be dedicated by a private citizen for use as streets when such offer of dedication has not been accepted by the municipality before the offer has been unequivocally withdrawn. Gault v. Town of Lake Waccamaw, 200 N.C. 593, 158 S.E. 104 (1931).

Or Where Streets, etc., Are Abandoned. — This section does not apply to streets, alleys and parks that have been offered for dedication if the offer has not been accepted, or if the offer has been accepted but the streets, alleys or parks have been abandoned. Lee v. Walker, 234 N.C. 687, 68 S.E.2d 664 (1952); City of Salisbury v. Barnhardt, 249 N.C. 549, 107 S.E.2d 297 (1959).

Section Not Applicable to Property Conveyed to Trustees for Municipal Purposes. — Where property was conveyed to trustees for the benefit of members of the community for use as a community house or playground, this section did not apply. Carswell v. Creswell, 217 N.C. 40, 7 S.E.2d 58 (1940).

Effect of Adverse Possession Prior to Enactment of Section. — When sufficient adverse possession of a street of an unincorporated town by the present owners and those claiming under them had been shown for 35 years prior to the enactment of this section, the right of the town to the use of the street was barred by the statute of limitations. Tadlock v.

Mizell, 195 N.C. 473, 142 S.E. 713 (1928).

Right to maintain a building on a navigable stream which obstructed operation of a county bridge could not be acquired by adverse user by virtue of this section. Lenoir County v. Crabtree, 158 N.C. 357, 74 S.E. 105 (1912).

Where county entered into possession of a square for the public use before enactment of this section, this section would not permit plaintiff to acquire title thereto by adverse possession under a deed purporting to convey a part thereof. Gates County v. Hill, 158 N.C. 584, 73 S.E. 804 (1912).

Acquisition of Right Superior to All Except State Not Prevented. — While this section prevents a person from acquiring an exclusive right to land, it does not prevent a person from acquiring a right superior to that of all other persons save the State. Saddle Club, Inc. v. Gibson, 9 N.C. App. 565, 176 S.E.2d 846 (1970).

Stipulation that certain land was within a right-of-way of the Highway Department indicated only that the State had a superior right, if it chose to exercise it, to the land. Saddle Club, Inc. v. Gibson, 9 N.C. App. 565, 176 S.E.2d 846 (1970).

Rights of the State do not preclude a person from acquiring actual, lawful possession, if the evidence is sufficient to support a finding of fact to that effect. Saddle Club, Inc. v. Gibson, 9 N.C. App. 565, 176 S.E.2d 846 (1970).

For cases decided under prior law, see Crump v. Mims, 64 N.C. 767 (1870); State v. Long, 94 N.C. 896 (1886); Moose v. Carson, 104 N.C. 431, 10 S.E. 689 (1889); Turner v. Commissioners of Hillsboro, 127 N.C. 153, 37 S.E. 191 (1900); Threadgill v. Town of Wadesboro, 170 N.C. 641, 87 S.E. 521 (1916).

Cited in Atlantic Coast Line R.R. v. Town of Dunn, 183 N.C. 427, 111 S.E. 724 (1922); Guilford County v. Hampton, 224 N.C. 817, 32 S.E.2d 606 (1945).

§ 1-45.1. No adverse possession of property subject to public trust rights.

Title to real property held by the State and subject to public trust rights may not be acquired by adverse possession. As used in this section, "public trust rights" means those rights held in trust by the State for the use and benefit of the people of the State in common. They are established by common law as interpreted by the courts of this State. They include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches. (1985, c. 277, s. 1.)

Legal Periodicals. — For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

For article, "North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century," see 83 N.C. L. Rev. 1427 (2005).

CASE NOTES

Public Trust Rights. — The legislature recognized public trust rights in its legislative finding that the undeveloped natural areas on the North Carolina coast are vital to public trust rights such as hunting, fishing, navigation and recreation. Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

Cited in Hyatt v. Town of Lake Lure, 191 N.C. App. 386, 663 S.E.2d 320, 2008 N.C. App. LEXIS 1322 (2008).

OPINIONS OF ATTORNEY GENERAL

Public Trust Rights Not Violated by Dam Reconstruction. — A proposed amendment of an existing conservation easement for Bass Lake to authorize the local town to reconstruct the breached dam and allow use of the recreated lake as a public park would not operate to adversely affect any public trust rights under G.S. 113-131 and this section. See opinion of Attorney General to Mr. Thomas Ashe Lockhart, Jr., The Sanford Holshouser Law Firm, 1998 N.C.A.G. 51 (12/12/98).

Citizens have the right to travel by "useful vessels" such as canoes and kayaks, "in the usual and ordinary mode" on waters which are in their natural condition capable of such use, without the consent of the owners of the shore. See opinion of Attorney General to Richard B. Whisnant, General Counsel, N. C. Department of Environment and Natural Resources, 1998 N.C.A.G. 5 (1/20/98).

ARTICLE 5.

Limitations, Other Than Real Property.

§ 1-46. Periods prescribed.

The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this Article. (C.C.P., s. 30; Code, s. 151; Rev., s. 390; C.S., s. 436.)

CASE NOTES

The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Statutes of limitations are affirmative defenses available only to persons against whom an action is brought; they are not available to volunteers who intervene to assert some claimed right of their own. Northampton County Drainage Dist. No. 1 v. Bailey, 92 N.C. App. 68, 373 S.E.2d 560 (1988), rev'd in part and aff'd in part, 326 N.C. 742, 392 S.E.2d 352 (1990).

The court has no discretion when considering whether a claim is barred by the statute of limitations. A judge may not, in his discretion, interfere with the vested rights of a party where pleadings are concerned. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Right of Defendant to Rely on Statute as a Defense. — The statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Waiver of Right to Plead Statute of Limitations. — Defendant intervenor waived his right to plead the statute of limitations as a matter of law by failing to assert that defense in a former action in which he paid assessments he subsequently claimed were barred. Northampton County Drainage Dist. No. 1 v. Bailey, 92 N.C. App. 68, 373 S.E.2d 560 (1988), rev'd in part and aff'd in part, 326 N.C. 742, 392 S.E.2d 352 (1990).

The statute of limitations relates only to the remedy, and the defendant is never afforded an opportunity of relying upon it until the plaintiff resorts to his remedy. Berry v. Corpening, 90 N.C. 395 (1884).

Statute of limitations does not run when there is no one in esse capable of suing. Grant v. Hughes, 94 N.C. 231 (1886).

As to the time for commencing an action when the period of limitation is changed by amendment, see Culbreth v. Downing, 121 N.C. 205, 28 S.E. 294 (1897). See also, Nichols v. Norfolk & C.R.R., 120 N.C. 495, 26 S.E. 643 (1897).

Actions to Which No Statutes of Limitations Apply. — There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. Jones v. Commissioners of Person County, 107 N.C. 248, 12 S.E. 69 (1890).

There is no statute applicable to the probate of wills. In re Will of Dupree, 163 N.C. 256, 79 S.E. 611 (1913).

Where a partner received firm money in winding up affairs of the partnership in pursuance of an agreement that he receive such funds, he held them in trust for the other partners and the statutes did not run. McNair v. Ragland, 7 N.C. 139 (1819).

Burden of Proof. — Where defendant sufficiently pleads the statute of limitations, the burden is upon plaintiff to show that his action was commenced within the time permitted by the statute. Jennings v. Morehead City, 226 N.C. 606, 39 S.E.2d 610 (1946).

Pleading of Statute Held Sufficient. — Defendant's allegations that plaintiff's cause of action on bond coupons had accrued more than 10 years prior to institution of the action and was barred under this section was a sufficient pleading of statute of limitations, even though no specific reference was made to the particular sections of the statute applicable. Jennings v. Morehead City, 226 N.C. 606, 39 S.E.2d 610 (1946).

Interaction with Other Statutes in Bail Case. — Trial court erred in ruling that G.S. 1-52 and 1-46 establish a statute of limitations of three years for an action involving bail and in failing to apply the "extraordinary cause" standard of former G.S. 15A-544(h) (see now G.S. 15A-544.1 et seq.) when petitioner sought remission of bonds. State v. Harkness, 133 N.C. App. 641, 516 S.E.2d 166 (1999).

Applied in Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

Cited in Campbell v. Brown, 86 N.C. 376 (1882); Copley v. Scarlett, 214 N.C. 31, 197 S.E. 623 (1938); Guilford County v. Hampton, 224 N.C. 817, 32 S.E.2d 606 (1945); Henderson v. Henderson, 232 N.C. 1, 59 S.E.2d 227 (1950); Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); Thurston Motor Lines, Inc. v. GMC, 258 N.C. 323, 128 S.E.2d 413 (1962); Clardy v. Duke Univ., 299 F.2d 368 (4th Cir. 1962); Hager v. Brewer Equip. Co., 17 N.C. App. 489, 195 S.E.2d 54 (1973); Collins v. Edwards, 54 N.C. App. 180, 282 S.E.2d 559 (1981); Wells v. Barefoot, 55 N.C. App. 562, 286 S.E.2d 625 (1982); Matthews v. Johnson Publishing Co., 89 N.C. App. 522, 366 S.E.2d 525 (1988).

§ 1-46.1. Twelve years.

Within 12 years an action —

(1) No action for the recovery of damages for personal injury, death, or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than 12 years after the date of initial purchase for use or consumption.

(2) Reserved for future codification purposes. (2009-420, s. 2.)

Editor's Note. — The section as enacted by Session Laws 2009-420, s. 2, contained a subsection (a), but no subsection (b), and a subdivision (a)(1), but no subdivision (a)(2). The subsection (a) designation was deleted and subdivision (2) was set out as reserved at the direction of the Revisor of Statutes.

Session Laws 2009-420, s. 3, provides: "This act becomes effective October 1, 2009, and applicable to causes of action that accrue on or after that date. This act shall not affect the application of G.S. 1-50(a)(5). Nothing in this act is intended to change existing law relating to product liability actions based upon disease."

§ 1-47. Ten years.

Within ten years an action —

(1) Upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its entry. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.

(1a) Upon a judgment rendered by a justice of the peace, from its date.

(2) Upon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto. Provided, however, that if action on an instrument is filed, the defendant or defendants in such action may file a counterclaim arising out of the same transaction or transactions as are the subject of plaintiff's claim, although a shorter statute of limitations would otherwise apply to defendant's counterclaim. Such counterclaim may be filed against such parties as provided in G.S. 1A-1, Rules of Civil Procedure.

(3) For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture

of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

(4) For the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him has been in possession, within ten years after the right of action accrued.

(5) Repealed by Session Laws 1959, c. 879, s. 2.

(6)a. Against any registered land surveyor as defined in G.S. 89C-3(9) or any person acting under his supervision and control for physical damage or for economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting, within 10 years after the last act or omission giving rise to the cause of action.

b. For purposes of this subdivision, "surveying and platting" means boundary surveys, topographical surveys, surveys of property lines, and any other measurement or surveying of real property and the consequent graphic representation thereof.

c. The limitation prescribed by this subdivision shall apply to the exclusion of G.S. 1-15(c) and G.S. 1-52(16). (C.C.P., ss. 14, 31; Code, s. 152; Rev., s. 391; C.S., s. 437; 1937, c. 368; 1959, c. 879, s. 2; 1961, c. 115, s. 2; 1969, c. 810, s. 1; 1991, c. 268, s. 2; 1995 (Reg. Sess., 1996), c. 742, s. 1(a); 1997-456, s. 27; 1999-221, s. 3; 2004-203, s. 15(a).)

Cross References. — As to three year limitation against registered land surveyor, see G.S. 1-52(18). As to counterclaims and cross-claims, see G.S. 1A-1, Rule 13. As to limitations period for unknown and certain other claims against a dissolved corporation, see G.S. 55-14-07.

Legal Periodicals. — For comment on this section, see 11 N.C.L. Rev. 220 and 22 N.C.L. Rev. 146 (1944).

For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

For article "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 1914 (1977).

For survey of 1978 commercial law, see 57 N.C.L. Rev. 919 (1979).

For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

For survey of North Carolina construction law, with particular reference to statutes of limitation and repose, see 21 Wake Forest L. Rev. 633 (1986).

CASE NOTES

I. In General.
II. Judgments and Decrees.
III. Judgments Rendered by Justices.
IV. Sealed Instruments.
  A. In General.
  B. Counterclaims.
V. Mortgage Foreclosure.
VI. Redemption of Mortgages.

I. IN GENERAL.

Statute of limitation may be characterized as a right not to be sued beyond the time limited. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

A limitation is inflexible and unyielding; it ceases to operate only in the way and for the cause prescribed by the statute. Brown v. Harding, 171 N.C. 686, 89 S.E. 222 (1916).

This section has taken the place of the former statute of presumptions, Revised Code, c. 65, § 18, in respect to judgments. Brown v. Harding, 171 N.C. 686, 89 S.E. 222 (1916).

Section Not Retroactive. — This statute did not apply to actions commenced before August, 1868, or where the right of action accrued before that date. Gaither v. Sain, 91 N.C. 304 (1884).

Applicability of Section to Actions. — The legislature has prescribed ten years as the limitation to an action upon a judgment, but it has made no provision for a party to avail himself of its protection when there is no action or proceeding in the nature of an action taken against him. Berry v. Corpening, 90 N.C. 395 (1884).

Proceeding for leave to issue execution on judgment charging lands with owelty in partition is an "action" within the meaning of the statute of limitations. Ex parte Smith, 134 N.C. 495, 47 S.E. 16 (1904).

Plea of Statute Held Sufficient. — An answer alleging that the plaintiff had not brought his action within the time prescribed by law, and that the same was barred by the statute of limitations, was a sufficient plea of the statute of limitations. Pemberton v. Simmons, 100 N.C. 316, 6 S.E. 122 (1888).

Equitable estoppel applied to bar a shareholder from denying the validity of certain corporate debts because the shareholder had asserted that the debts were valid in various ways, and the directors lacked knowledge of the facts at issue. Crisp v. E. Mortg. Inv. Co., 179 N.C. App. 213, 632 S.E.2d 814, 2006 N.C. App. LEXIS 1833 (2006).

Duty to Consider Unsatisfactory Plea. — Although the plea of this section was indefinite and unsatisfactory, it was the duty of the court below to have considered and determined it, and a failure to do so was error. Proctor v. Proctor, 105 N.C. 222, 10 S.E. 1036 (1890).

Burden of Proof. — Upon defendant's plea of the statute of limitations, the burden devolved upon plaintiffs to show that their action was not barred, but was instituted within the time permitted by statute. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Where a plaintiff brought an action to prevent the 10-year statute of limitations from barring his recovery on a prior judgment, the action was in the nature of an independent action on the judgment, the only procedure in this state by which a judgment can be renewed. As it was a separate and distinct action, the plaintiff could request, in his complaint, interest at the legal rate of 8%, and the trial court could award interest at that rate from the date the present action was instituted until the judgment is satisfied. Speros Constr. Co. v. Musselwhite, 103 N.C. App. 510, 405 S.E.2d 785 (1991).

Effect of Voluntary Partial Payment. — A partial payment voluntarily made does not remove the statutory bar. McDonald v. Dickson, 87 N.C. 404 (1882).

Plea of Statute Held Available to Distributee. — In an action by plaintiff to recover his distributive share of an estate, where defendant administrator set up and pleaded debts of plaintiff's due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable setoff had no application and the plea of the statute of limitations was available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. Perry v. First-Citizens Bank & Trust Co., 223 N.C. 642, 27 S.E.2d 636 (1943).

As to law prior to enactment of this section, see Hamlin v. Mebane, 54 N.C. 18 (1853); Hodges v. Council, 86 N.C. 181 (1882); Headen v. Womack, 88 N.C. 468 (1883); Rogers v. Clements, 98 N.C. 180, 3 S.E. 512 (1887); Ex parte Walker, 107 N.C. 340, 12 S.E. 136 (1890).

Applied in Woody v. Jones, 113 N.C. 253, 18 S.E. 205 (1893); Geitner v. Jones, 176 N.C. 542, 97 S.E. 494 (1918); Serls v. Gibbs, 205 N.C. 246, 171 S.E. 56 (1933); Town of Farmville v. Paylor, 208 N.C. 106, 179 S.E. 459 (1935); Davis v. Cockman, 211 N.C. 630, 191 S.E. 322 (1937); Allsbrook v. Walston, 212 N.C. 225, 193 S.E. 151 (1937); Bell v. Chadwick, 226 N.C. 598, 39 S.E.2d 743 (1946); Layden v. Layden, 228 N.C. 5, 44 S.E.2d 340 (1947); Hughes v. Oliver, 228 N.C. 680, 47 S.E.2d 6 (1948); North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949); McCollum v. Smith, 233 N.C. 10, 62 S.E.2d 483 (1950); Hanson v. Yandle, 235 N.C. 532, 70 S.E.2d 565 (1952); Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Jordan v. Chappel, 246 N.C. 620, 99 S.E.2d 778 (1957); Larsen v. Sedberry, 54 N.C. App. 166, 282 S.E.2d 551 (1981); Square D. Co. v. C.J. Kern Contractors, 70 N.C. App. 30, 318 S.E.2d 527 (1984); Stephens v. Hamrick, 86 N.C. App. 556, 358 S.E.2d 547 (1987); Griffin v. Griffin, 96 N.C. App. 324, 385 S.E.2d 526 (1989).

Cited in Broyles v. Young, 81 N.C. 315 (1879); Hall v. Gibbs, 87 N.C. 4 (1882); Usry v. Suit, 91 N.C. 406 (1884); Wilcoxon v. Logan, 91 N.C. 449 (1884); Sikes v. Parker, 95 N.C. 232 (1886); Rogers v. Clements, 98 N.C. 180, 3 S.E. 512 (1887); Williams v. McNair, 98 N.C. 332, 4 S.E. 131 (1887); Houck v. Adams, 98 N.C. 519, 4 S.E. 502 (1887); Frederick v. Williams, 103 N.C. 189, 9 S.E. 298 (1889); Brittain v. Dickson, 104 N.C. 547, 10 S.E. 701 (1889); Owen v. Paxton, 122 N.C. 770, 30 S.E. 343 (1898); Ferrell v. Hinton, 161 N.C. 348, 77 S.E. 224 (1913); Hyman v. Jones, 205 N.C. 266, 171 S.E. 103 (1933); In re Gibbs, 205 N.C. 312, 171 S.E. 55 (1933); Furr v. Trull, 205 N.C. 417, 171 S.E. 641 (1933); Merrimon v. Postal Telegraph-Cable Co., 207 N.C. 101, 176 S.E. 246 (1934); Davis v. Alexander, 207 N.C. 417, 177 S.E. 417 (1934); Ritter v. Chandler, 214 N.C. 703, 200 S.E. 398

(1939); Ownbey v. Parkway Properties, Inc., 221 N.C. 27, 18 S.E.2d 710 (1942); City of Raleigh v. Mechanics & Farmers Bank, 223 N.C. 286, 26 S.E.2d 573 (1943); Lee v. Rhodes, 231 N.C. 602, 58 S.E.2d 363 (1950); First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955); State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959); Scott Poultry Co. v. Graves, 272 N.C. 22, 157 S.E.2d 608 (1967); Walker Mfg. Co. v. Dickerson, Inc., 560 F.2d 1184 (4th Cir. 1977); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 240 S.E.2d 345 (1978); Mobil Oil Corp. v. Wolfe, 297 N.C. 36, 252 S.E.2d 809 (1979); Bank of N.C. v. Cranfill, 297 N.C. 43, 253 S.E.2d 1 (1979); Walker Mfg. Co. v. Dickerson, Inc., 619 F.2d 305 (4th Cir. 1980); Bruce v. North Carolina Nat'l Bank, 62 N.C. App. 412, 303 S.E.2d 561 (1983); Blue Cross & Blue Shield v. Odell Assocs., 61 N.C. App. 350, 301 S.E.2d 459 (1983); Kennon v. Kennon, 72 N.C. App. 161, 323 S.E.2d 741 (1984); HFC v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992); Fitch v. Fitch, 115 N.C. App. 722, 446 S.E.2d 138 (1994); United States v. Pierce, 214 Bankr. 550 (Bankr. E.D.N.C. 1997); State ex rel. George v. Bray, 130 N.C. App. 552, 503 S.E.2d 686 (1998).

II. JUDGMENTS AND DECREES.

Statute to Be Strictly Construed. — A statute so entirely in derogation of common right as is the statute of limitations should be strictly construed, and under it a judgment should not be treated as a contract. McDonald v. Dickson, 87 N.C. 404 (1882).

Statute as the statute of limitations should be strictly construed and is a complete bar to a motion for leave to issue execution of a judgment, when such motion is made more than 10 years after the rendition of such judgment. Powles v. Kandrasiewicz, 886 F. Supp. 1261 (W.D.N.C. 1995).

There is no analogy which makes decisions under former precedents applicable to present law in effect since the Code of Civil Procedure in 1868, inasmuch as such decisions relate entirely to rules of evidence, and not to the removal of a statutory bar where the action is upon a bond or judgment. McDonald v. Dickson, 87 N.C. 404 (1882).

As to prior law, see Ex parte Walker, 107 N.C. 340, 12 S.E. 136 (1890).

Section Not Retroactive. — A decree in proceedings for partition had in 1861, adjudging owelty of partition against certain shares of the land divided, was subject to the statute of presumptions, because this section is not retroactive. Herman v. Watts, 107 N.C. 646, 12 S.E. 437 (1890).

A judgment rendered before, though docketed after, the adoption of the Code of Civil Procedure was subject only to a presumption of satisfaction, and not to the statute of limitations as prescribed in the Code. Johnston v. Jones, 87 N.C. 393 (1882).

The words "any state" must be taken to mean the judgment of a court of any state, including North Carolina. But even if they are not construed to include this State, it would make no material difference, since under G.S. 1-56 every action for relief not specially provided for must be commenced within the same period of ten years after the cause of action shall have accrued. McDonald v. Dickson, 85 N.C. 248 (1881), aff'd on rehearing, 87 N.C. 404 (1882).

It makes no difference whether subdivision (1) of this section or G.S. 1-56 applies. The result will be the same in either case. Ex parte Smith, 134 N.C. 495, 47 S.E. 16 (1904). See also, McDonald v. Dickson, 85 N.C. 248 (1881), aff'd on rehearing, 87 N.C. 404 (1882).

A child support order is a judgment directing payment of a sum of money and falls within the 10-year statute of limitations of this section. Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986); State ex rel. Pruitt v. Pruitt, 94 N.C. App. 713, 380 S.E.2d 809 (1989).

This section applies to foreign judgments. Arrington v. Arrington, 127 N.C. 190, 37 S.E. 212 (1900).

This section is applicable to foreign judgments because North Carolina applies the lex fori in an action in this State on a judgment obtained in another state; accordingly, even though judgment had an effective life of 20 years under Alabama law, the 10-year statute of limitations imposed by North Carolina law barred plaintiff from enforcing such judgment in this State. Powles v. Kandrasiewicz, 886 F. Supp. 1261 (W.D.N.C. 1995).

The Constitution of the United States permits courts of this state to bar enforcement of foreign judgments upon expiration of the ten year period specified in this section under circumstances where a lengthier limitation period for enforcement of judgments has been effected by the foreign jurisdiction rendering the judgment. Wener v. Perrone & Cramer Realty, Inc., 137 N.C. App. 362, 528 S.E.2d 65, 2000 N.C. App. LEXIS 331 (2000).

Foreign Judgment Properly Enforced. — Trial court properly granted motion to enforce Texas judgment as a North Carolina judgment where the Texas judgment was well within the time limitation for enforcement of foreign judgments and the Texas judgment merely apportioned damages between parties and was not a separate action for contribution.

In re Aerial Devices, Inc., 126 N.C. App. 709, 486 S.E.2d 463 (1997).

In an action to recover a periodic alimony award entered by a California court, G.S. 1-47 barred recovery only of those sums accruing within 10 years of the filing of the former wife's action against the ex-husband's estate. Elliott v. Estate of Elliott, 163 N.C. App. 577, 596 S.E.2d 819, 2004 N.C. App. LEXIS 512 (2004), cert. denied, 358 N.C. 731, 601 S.E.2d 530 (2004).

Section Not Applicable to Award by Industrial Commission. — Conceding an award of compensation by the Industrial Commission has certain characteristics of a judgment, such award is not a judgment of a court within the meaning of subdivision (1) of this section. Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

United States Not Barred from Enforcing Judgment on Unpaid Criminal Fine. — No limitation period, state or federal, bars the United States from enforcing a judgment on an unpaid criminal fine. United States v. Welborn, 495 F. Supp. 833 (M.D.N.C. 1980).

Effect of Section on Judgments. — This section fixes the current period of ten years as that which terminates the lien of a judgment, and operates as a bar to a new action upon it. McDonald v. Dickson, 85 N.C. 248 (1881), aff'd on rehearing, 87 N.C. 404 (1882).

Statute of limitations is a complete bar to a motion for leave to issue execution on a judgment, when such motion is made more than ten years after the rendition of such judgment. McDonald v. Dickson, 85 N.C. 248 (1881), aff'd on rehearing, 87 N.C. 404 (1882).

The issuing of an execution on a decree charging owelty in partition is barred within 10 years. Ex parte Smith, 134 N.C. 495, 47 S.E. 16 (1904).

Effect of Judgment upon Cause of Action on Contract or Tort. — A cause of action on contract or tort loses its identity when merged in a judgment, and thereafter a new cause of action arises out of the judgment. McDonald v. Dickson, 87 N.C. 404 (1882).

Specialties, when reduced to judgments, are merged, and the statute barring judgments will then apply. Brittain v. Dickson, 104 N.C. 547, 10 S.E. 701 (1889).

A cause of action on a judgment accrues from the date of its rendition. Rodman v. Stillman, 220 N.C. 361, 17 S.E.2d 336 (1941).

Partial payment on a judgment does not arrest the running of the statute of limitations. Hughes v. Boone, 114 N.C. 54, 19 S.E. 63 (1894); McCaskill v. McKinnon, 121 N.C. 192, 28 S.E. 265 (1897).

Running of Statute — On Judgment for Devastavit Against Executor. — When an action is brought against an executor or administrator for a devastavit, and a judgment is obtained against him, the cause of action accrues at the time of the qualification, and the law in force at the time governs, but when an action is brought after the death of the executor, the cause of action accrues as against his real and personal representative when such representative qualifies and gives notice to creditors. Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887), overruled on other grounds, Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Same — On Judgment in Favor of Infant. — The statute limiting the time to bring an action on a judgment to 10 years from the date of its rendition does not begin to run as against an infant where the judgment was procured on his behalf by a next friend appointed for that purpose. Section 1-17 permits the bringing of an action on such judgment within the time limited by subdivision (1) of this section, i.e., 10 years, after he became 21 (now 18) years old. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Same — On Alimony and Child Support Payable Periodically. — Periodic sums of alimony and child support which became due more than 10 years before the institution of a motion in a cause for a judicial determination of the amount due are barred by the 10-year limitation of this section. Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

In an action on a judgment for alimony, payable annually, the annual sums are barred within 10 years from the time they become due, under this section. Arrington v. Arrington, 127 N.C. 190, 37 S.E. 212 (1900).

The statute of limitations begins to run against each support payment as it becomes overdue, not from the date the decree ordering support was entered; accordingly, there is no bar to recovery of unpaid child support payments which came due during the ten years immediately prior to the filing of a claim for past due support. State ex rel. Pruitt v. Pruitt, 94 N.C. App. 713, 380 S.E.2d 809 (1989).

Application of Child Support Arrearages. — Trial judge properly applied father's child support payments to earlier arrearages first and then to later arrearages; therefore, the arrearages supporting mother's child support claim were within the ten year statute of limitations and were not time-barred under this section. Belcher v. Averette, 136 N.C. App. 803, 526 S.E.2d 663, 2000 N.C. App. LEXIS 166 (2000).

Subsequent Adoption of Children Without Affect on Statute of Limitations for Support Payments. — In the absence of evidence that mother waived her right to past due payments, nothing about childrens' subsequent adoption affected father's pre-adoption obligation to provide support for his children, and nothing about the subsequent adoption affected the applicable statute of limitations. State ex rel. Pruitt v. Pruitt, 94 N.C. App. 713, 380 S.E.2d 809 (1989).

Arrearages Reduced to Judgment. — Once the amount of arrearages is reduced to judgment, however, as occurred when the out of state court entered its order, that judgment is entitled to full enforcement in North Carolina for a period of ten years after its entry. Silvering v. Vito, 107 N.C. App. 270, 419 S.E.2d 360 (1992).

Where an action was instituted to recover amount due on a note and foreclose mortgage securing the same, and judgment was rendered on the debt, an order being made for the sale of the land, which sale was later reported and confirmed, the statute of limitations began to run at the date of the money judgment and not from the date of the confirmation of the sale. McCaskill v. McKinnon, 121 N.C. 192, 28 S.E. 265 (1897).

Action to enforce judgment lien by condemning land of the judgment debtor to be sold was not an action upon a judgment within the purview of subdivision (1) of this section, but even if the statute were applicable it would not have the effect of continuing the lien of the judgment beyond the 10-year period prescribed by G.S. 1-234. Lupton v. Edmundson, 220 N.C. 188, 16 S.E.2d 840 (1941).

New Action Starts Limitations Period Anew. — Creditor's 2006 motion under the Uniform Enforcement of Foreign Judgments Act (UEFJA) to register a 2005 Florida judgment against the debtors in North Carolina was timely filed within the 10-year period under G.S. 1-47 because the creditor timely filed a new action in Florida in 2005 in accordance with the 20-year period under Fla. Stat. § 95.11(1) to start the limitation period anew, the creditor's 1990 judgment was extinguished by the 2005 judgment, and the UEFJA action was based on the 2005 judgment and not the 1990 judgment. Palm Coast Recovery Corp. v. Moore, 184 N.C. App. 550, 646 S.E.2d 438, 2007 N.C. App. LEXIS 1466 (2007).

Judgment Held Barred. — Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, which motion was denied, upon which appeal was taken to the judge, and the clerk ordered that execution should not issue until the adjournment of the August, 1931, term of court, and the appeal to the judge was never heard, the order of the clerk and the appeal to the judge did not have the effect of stopping the statute, and the judgment was barred in 1939 by the 10-year statute of limitations. Exum v. Carolina R.R., 222 N.C. 222, 22 S.E.2d 424 (1942).

The statute of limitations may be set up as a defense by an administrator to a motion for leave to issue execution after 10 years from the date of docketing a judgment against his intestate, even though executions have regularly been issued within each successive period of three years after the judgment was docketed. Berry v. Corpening, 90 N.C. 395 (1884).

Trial court did not err in dismissing a judgment assignee's complaint to enforce a judgment entered against individuals pursuant to G.S. 1-47 because the assignee failed to assert his claim within the ten-year statute of limitations, G.S. 1-47(1), which required him to file his complaint within ten years of the judgment; the ten-year period referred to in G.S. 1-234 governs judgment liens on real property, and nothing in the plain language of G.S. 1-234 indicates that the limitations on the duration of a judgment lien should apply to the statutory period set forth in G.S. 1-47(1). Fisher v. Anderson, — N.C. App. —, 667 S.E.2d 292, 2008 N.C. App. LEXIS 1806 (2008).

Trial court did not err in dismissing a judgment assignee's complaint to enforce a judgment pursuant to G.S. 1-47 because the assignee failed to assert his claim within the ten-year statute of limitations, G.S. 1-47(1), and the ten-year limitations period on the duration of a judgment lien, G.S. 1-234, did not apply to the statutory period set forth in G.S. 1-47(1); even assuming arguendo, that the legislature intended the limitation for the duration of a judgment lien outlined in G.S. 1-234 to apply to the ten-year statute of limitations in G.S. 1-47, the assignee failed to demonstrate G.S. 1-234 applied to the facts because he did not allege that enforcement of the judgment was restrained by an injunction, order, appeal, or statutory prohibition. Fisher v. Anderson, — N.C. App. —, 667 S.E.2d 292, 2008 N.C. App. LEXIS 1806 (2008).

Trial court did not err in dismissing a judgment assignee's complaint to enforce a judgment entered because the assignee failed to assert his claim within the ten-year statute of limitations, G.S. 1-47(1), and nothing in the plain language of G.S. 1A-1, N.C. R. Civ. P. 62(a), indicated that the legislature intended the automatic stay from execution to add thirty days to the ten-year statute of limitations on commencing an action to enforce a judgment; because the issuance of an execution does not prolong the life of a judgment lien, the thirty-day stay on the issuance of an execution or proceedings to enforce the judgment will also not operate to toll the statute of limitations for commencement of an action to enforce a judgment. Fisher v. Anderson, — N.C. App. —, 667 S.E.2d 292, 2008 N.C. App. LEXIS 1806 (2008).

Land is not relieved under this section of a judgment lien by the mere transfer of the debtor's title. Osborne v. Board of Educ., 207 N.C. 503, 177 S.E. 642 (1935).

III. JUDGMENTS RENDERED BY JUSTICES.

Limitation Is Now 10 Years. — The period not prescribed for the commencement of an action on a judgment rendered in a justice's court is 10 years from its date. Bryant v. Poole, 261 N.C. 553, 135 S.E.2d 629 (1964).

IV. SEALED INSTRUMENTS.

A. In General.

Subdivision (2) Applies Only to Principals. — By its express terms, subdivision (2) of this section is applicable only to principals. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

Notwithstanding Seal. — Affixing a seal to an instrument does not make this section applicable. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

And Does Not Apply to Actions Against Sureties. — Subdivision (2) of this section is not applicable to actions against sureties. The use of the word "principal" and the omission of the word "sureties" clearly indicates this to be the intention of the legislature. Subdivision (1) of G.S. 1-52 is applicable to sureties, and action against them is limited to three years. Welfare v. Thompson, 83 N.C. 276 (1880); Redmond v. Pippen, 113 N.C. 90, 18 S.E. 50 (1893); Barnes v. Crawford, 201 N.C. 434, 160 S.E. 464 (1931); North Carolina Bank & Trust Co. v. Williams, 208 N.C. 243, 180 S.E. 81 (1935); North Carolina Bank & Trust Co. v. Williams, 209 N.C. 806, 185 S.E. 18 (1936).

The statute of limitations barring actions against defendants as sureties is G.S. 1-52, and not subdivision (2) of this section, notwithstanding the seal appearing after their names. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Suit by Surety on Note Under Seal. — G.S. 26-3.1 allows a surety to sue a principal on the original instrument or for reimbursement on the surety agreement. After three years, a suit on the latter theory would be barred by G.S. 1-52. Where a surety elects to sue on the underlying note under seal, he has the same rights the bank had on the original note. Thus, this section, the 10-year statute of limitations, applies. Adams v. Bass, 88 N.C. App. 599, 364 S.E.2d 194 (1988).

Action against endorser on a note under seal is ordinarily barred after three years from maturity of the note, by subdivision (1) of G.S. 1-52, even though the endorsement is itself also under seal, an endorser not being a principal to the note so as to come within the provisions of this section. Howard v. White, 215 N.C. 130, 1 S.E.2d 356 (1939).

Purchase Money Security Agreements Under Seal Governed by Subdivision (2). — The 10-year limitation of subdivision (2) of this section, and not the four-year limitation of G.S. 25-2-725, is applicable to purchase money security agreements executed under seal. North Carolina Nat'l Bank v. Holshouser, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

In an action to recover a deficiency remaining after repossession and sale of collateral security, where defendant has purchased a motor vehicle on credit, executing a purchase money security agreement giving the seller a purchase money security interest in the vehicle and retaining title in the seller or its assignees until the purchase price was fully paid, and immediately thereafter defaulted, the 10-year limitation of subdivision (2) of this section was applicable, rather than the four-year limitation of G.S. 24-2-725. North Carolina Nat'l Bank v. Holshouser, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

Effect of Assignment of Sealed Contract. — Where assignor had a right not to be sued after 10 years from the accrual of a cause of action under sealed contract, by assigning this contract, assignor could not confer upon defendant assignee a greater immunity to suit than assignor itself possessed. Hence, when defendant assignee impliedly assumed its assignor's contractural obligations under the general assignment of a contract under seal, it exposed itself for 10 years to suit on the sealed contract. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

Section Operates upon Remedy. — This section limits the time within which actions may be brought, and thus operates upon the remedy and not the right. The bar of the statute on a sealed promissory note is of that character, and while it takes away the forum for the enforcement of the note, it does not destroy the debt. Demai v. Tart, 221 N.C. 106, 19 S.E.2d 130 (1942).

What Plaintiff Must Show. — The burden is upon plaintiff to prove that the action accrued within the time limited by this section, by showing that the corporate defendant adopted the seal appearing on the contract for the special occasion or for all similar occasions, or that such seal became the seal of the corporation by reason of some other rule of law, or that the regular corporate seal was impressed or attached to the original of the contract, or that there were facts and circumstances which excluded the operation of the three-year statute, G.S. 1-52, other than the matter of a seal. Security Nat'l Bank v. Educators Mut. Life Ins. Co., 265 N.C. 86, 143 S.E.2d 270 (1965).

When Statute Begins to Run — Breach of Warranty. — In an action for breach of a covenant of warranty, the statute of limitation begins to run when there is an ouster of the grantee. Shankle v. Ingram, 133 N.C. 254, 45 S.E. 578 (1903).

Same — Breach of Covenant of Seizin. — In an action for damages for breach of covenant of seizin, the statute of limitations begins to run upon delivery of the deed. Shankle v. Ingram, 133 N.C. 254, 45 S.E. 578 (1903).

Same — Coupons of Bonds. — The statute of limitations begins to run against coupons of bonds at the maturity, not of the bonds, but of the coupons. Threadgill v. Commissioners of Anson County, 116 N.C. 616, 21 S.E. 425 (1895).

Where bond coupons, negotiable in form and payable to the bearer, had been detached from the bonds and the bonds had been sold, the statute of limitations began to run against each of them from their respective dates of maturity, and in such instance a contention that the coupons were incident to the principal obligation of the bond and were valid during the life of the bond was untenable. Jennings v. Morehead City, 226 N.C. 606, 39 S.E.2d 610 (1946), distinguishing Knight v. Braswell, 70 N.C. 709 (1874).

Same — Guaranty Under Seal. — An action upon a guaranty under seal is not barred until 10 years after the cause of action accrues. Coleman v. Fuller, 105 N.C. 328, 11 S.E. 175 (1980).

Effect of Partial Payment on Running of Statute. — The limitations period on an action on a promissory note will begin anew when a partial payment, nothing else appearing, is made by the debtor before the limitations period has expired. Wells v. Barefoot, 55 N.C. App. 562, 286 S.E.2d 625 (1982).

Where action was instituted on note under seal on 10 February, 1943, and the last payment had been made upon the note on 1 October, 1933, the action was not barred by this section, as the statute commenced again to run from the day when the last payment was made. Sayer v. Henderson, 225 N.C. 642, 35 S.E.2d 875 (1945), citing Green v. Greensboro Female College, 83 N.C. 449, 35 Am. St. R. 579 (1880).

Setoff Does Not Repel Statute. — A setoff in favor of the obligor is not a part payment as to an endorser and does not repel the statute. Woodhouse v. Simmons, 73 N.C. 30 (1875).

Determination of whether an instrument is a sealed instrument, commonly referred to as a specialty, is question for the court. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

When Contract Under Seal Is a Matter of Law. — If it appears without ambiguity, on the face of the contract, that a party signed under seal, it is held as a matter of law that the contract is under seal. Central Sys. v. General Heating & Air Conditioning Co., 48 N.C. App. 198, 268 S.E.2d 822, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

When Question of Seal Is for the Jury. — If a contract is ambiguous as to whether a party adopted a seal, it is a jury question as to whether the party signed under seal. Central Sys. v. General Heating & Air Conditioning Co., 48 N.C. App. 198, 268 S.E.2d 822, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

Presence of the word "seal" was sufficient to qualify contract for the sale of land as a sealed instrument for which the ten-year statute of limitations would apply. Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990).

Evidence of the word "seal" in brackets is sufficient to overcome the three-year statute of limitations; thereby qualifying the contract as a sealed instrument. Biggers v. Evangelist, 71 N.C. App. 35, 321 S.E.2d 524 (1984), cert. denied, 313 N.C. 327, 329 S.E.2d 384 (1985).

Ordinarily, proof that the obligation creating the indebtedness is a written instrument under seal repeals the three-year statute of limitations, and the rights of the parties would then be governed by the 10-year period of limitations under this section. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, rev'd on other grounds, 313 N.C. 320, 327 S.E.2d 878 (1984).

The inclusion of a seal in a lease agreement neither creates a duty between the parties nor shifts a pre-existing duty from one party to the other. It merely extends, by operation of law, the period of time in which the parties expose themselves to suit on the particular sealed instrument from three years to 10 years. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, rev'd on other grounds, 313 N.C. 320, 327 S.E.2d 878 (1984).

Instrument Held Under Seal as Matter of Law. — Defendant executed a contract under seal as a matter of law, and the 10-year statute of limitations applied to an action on the contract, where the contract stated that the parties "have executed this agreement under seal," and the word "seal" appeared under the names of the attesting witnesses who were not parties to the contract and close to the place where defendant executed the contract. Central Sys. v. General Heating & Air Conditioning Co., 48 N.C. App. 198, 268 S.E.2d 822, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

While ordinarily the bar of the statute of limitations is a mixed question of law and fact, where, in an action on a note, the plea of the statute was based upon defendant's contention that the note was not under seal, but defendant offered no evidence in support of his contention that he did not adopt the printed word "seal" appearing on the note after his name as maker, the question of the statute became a matter of law, and the court properly refused to submit an issue as to whether the action was barred.

Currin v. Currin, 219 N.C. 815, 15 S.E.2d 279 (1941).

Intent of Parties as to Seal Held Question of Fact. — In an action to recover the balance due on a promissory note, where a corporate seal appeared but there was no seal after defendants' names, a material issue of fact was raised as to the intent of the parties to enter into a sealed instrument, and the statute of limitations of subdivision (2) of this section would not necessarily be applicable. First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979), cert. denied, 299 N.C. 741, 267 S.E.2d 661 (1980).

Section Held Controlling. — Where note contained the word "seal" opposite the signature it was conclusive as to the nature of the instrument, and this section controlled as to the time within which an action might be brought. Federal Reserve Bank v. Kalin, 81 F.2d 1003 (4th Cir. 1936).

Where plaintiff offered in evidence a note, apparently executed by defendant and another as joint obligors, with the word "seal" in brackets opposite the name of each, nothing else appearing, this would repel the three-year statute of limitations, as sealed instruments against principals are not barred until lapse of 10 years. Lee v. Chamblee, 223 N.C. 146, 25 S.E.2d 433 (1943).

Where the contract sued upon was an original agreement executed on an independent consideration and the defendant promisor was a principal, the 10-year statute of limitations was controlling. New Amsterdam Cas. Co. v. Waller, 233 N.C. 536, 64 S.E.2d 826 (1951).

Where contract for the management and division of profits of a business was held to be an instrument as that term is used in subdivision (2) of this section, and there was no ambiguity in the wording of the contract as to the intent of the parties that it be under their respective seals, plaintiff's right to bring his action was governed by the provisions of this section, not G.S. 1-52. Hutchinson v. Hutchinson, 49 N.C. App. 687, 272 S.E.2d 146 (1980).

A bond for the payment of money executed prior to this section by the principal and his sureties was exempted from the operation of the statute of limitations as contained in this section. Knight v. Braswell, 70 N.C. 709 (1874).

"Declaration of Covenants and Restrictions" for condominium project, which contained several restrictive covenants including defendant's covenant to pay annual, per-unit maintenance assessments, while technically not a deed, did affect an interest in land and, by its very nature, evidenced an intention that it constitute an instrument under seal subject to 10-year statute of limitations. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

Corporate Seal. — The fact that a corporate seal was impressed on a contract, without more, is not sufficient to convert the contract into a sealed instrument, i.e., specialty. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

The question to be answered in order to determine whether a corporate seal transforms a party's contract into a sealed instrument, i.e., a specialty, is whether the body of the contract contains any language that indicates that the parties intended that the instrument be a specialty or whether extrinsic evidence would demonstrate such an intention. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

Absent any evidence that would tend to indicate that the parties intended that construction contract to which corporate seal of contractor had been affixed was to be a sealed instrument, the contract was not a specialty and the 10-year period of limitation contained within subdivision (2) would be inapplicable to plaintiff's action for breach of same. Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

A corporation may adopt a seal different from its corporate seal for a special occasion. Central Sys. v. General Heating & Air Conditioning Co., 48 N.C. App. 198, 268 S.E.2d 822, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

B. Counterclaims.

Purpose of 1969 Amendment. — The 1969 amendment, allowing persons sued under sealed instruments to assert any claims or defenses they might have by joinder of third parties as allowable under the Rules of Civil Procedure (G.S. 1A-1), even though those claims might otherwise be barred by other limiting statutes, ameliorated the potential for harsh results in the situation where a financial institution could wait to sue for deficiency after repossession and sale of collateral security until after the buyer's rights of action against sellers for any breach of warranty were barred. The potential for abuse of the 10-year limitation was apparent in the situation where sellers and lenders were closely or inseparably related; the legislature chose to remedy this problem, not by reducing the length of time in which a lender or his assignee could sue on a sealed purchase money security agreement, but by increasing the period of time in which a buyer so sued could assert claims against his seller for breach, so that the time available to parties for either type of action is equal and concurrent when the holder of security interest sues first. North Carolina Nat'l Bank v. Holshouser, 38 N.C. App. 165, 247 S.E.2d 645 (1978).

Failure to denominate a claim as a counterclaim does not preclude its treatment as such. Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984).

Counterclaim Under Truth-in-Lending Act. — In an action to recover under an installment sales contract, subdivision (2) of this section cannot be utilized to allow a counterclaim under the Federal Truth-in-Lending Act, 15 U.S.C. 1601, after the one-year limitation on actions under 15 U.S.C. 1640(e) has expired, since it is inconsistent with the new amendment to the federal act, 15 U.S.C. 1681. Ken-Lu Enters., Inc. v. Neal, 29 N.C. App. 78, 223 S.E.2d 831, cert. denied, 290 N.C. 308, 225 S.E.2d 829, cert. denied, 429 U.S. 1002, 97 S. Ct. 533, 50 L. Ed. 2d 614 (1976).

V. MORTGAGE FORECLOSURE.

This section is the only limitation upon mortgagee's right of action for foreclosure or sale. Parker v. Banks, 79 N.C. 480 (1878).

Prerequisites to Bar. — In order to bar an action for relief under this section, two things must occur, namely, the lapse of 10 years after the forfeiture or after the power of sale became absolute or after the last payment, and the possession of the mortgagor during that period. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904); Ownbey v. Parkway Properties, Inc., 222 N.C. 54, 21 S.E.2d 900 (1942).

In order for a foreclosure to be barred under this section, two events must occur: (1) The lapse of 10 years after the forfeiture or after the power of sale became absolute or after the last payment, and (2) the possession of the mortgagor during the entire 10-year period. These two requirements must be coexistent. In addition, possession for the 10-year period must be actual possession. In re Lake Townsend Aviation, Inc., 87 N.C. App. 481, 361 S.E.2d 409 (1987), cert. denied, 321 N.C. 473, 364 S.E.2d 922 (1988).

Constructive Possession Not Intended. — It is impossible to suppose that the legislature intended a constructive possession, for the "mortgagor or grantor" could never have such possession as against a mortgagee. The latter has the right of possession by construction of law, as he has the legal title, and if a constructive possession was intended, there was no use in requiring possession at all, as if neither party was in actual possession, the constructive possession would always be in the mortgagee. Dobbs v. Gullidge, 20 N.C. 197 (1838); Williams v. Wallace, 78 N.C. 354 (1878); London v. Bear, 84 N.C. 266 (1881); Deming v. Gainey, 95 N.C. 528 (1886); Simmons v. Ballard, 102 N.C. 105, 9 S.E. 495 (1889); Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904); Ownbey v. Parkway Properties, Inc., 222 N.C. 54, 21 S.E.2d 900 (1942).

Where there is no possession by either party, there can be no running of the statute, and G.S. 1-56 would not apply in such a case. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

Actual possession of the life tenant does not inure to the remainderman. Thus, during the continuance of the life estate the remainderman cannot avail himself of that actual possession as against one who holds a mortgage on his interest for the purpose of barring his right under the mortgage. Malloy v. Bruden, 86 N.C. 251 (1882); Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

Where a remainderman, not being in possession, executes a mortgage, the foreclosure of the mortgage is not barred after 10 years from the forfeiture thereof or from the last payment, such action being brought within 10 years from the time of the acquisition of the possession by the remainderman. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

When Holding of Mortgagor Becomes Adverse. — When the mortgagor of property is left in possession, he or his vendee holds it for the mortgagee, and his possession does not become adverse so as to set the statute in motion until the condition is broken. Woody v. Jones, 113 N.C. 253, 18 S.E. 205 (1893).

For cases decided under G.S. 1-56, holding that a party who remains in possession is not barred of any equity by lapse of time, and that the statute runs only where the other party has had possession, see Stith v. McKee, 87 N.C. 389 (1882); Mask v. Tiller, 89 N.C. 423 (1883); Thornburg v. Mastin, 93 N.C. 258 (1885); Norton v. McDevit, 122 N.C. 755, 122 N.C. 756, 30 S.E. 24, 30 S.E. 24 (1898). See also, Menzel v. Hinton, 132 N.C. 660, 44 S.E. 385, 95 Am. St. R. 647 (1903), explained in Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

Extent of Protection Offered by Subdivision (3). — The protection offered by subdivision (3) of this section is not limited to the original mortgagor or grantor, but also extends to subsequent purchasers. In re Lake Townsend Aviation, Inc., 87 N.C. App. 481, 361 S.E.2d 409 (1987), cert. denied, 321 N.C. 473, 364 S.E.2d 922 (1988).

Subdivision (3) Inapplicable to Executory Contracts. — While the relation of vendor and vendee is in many respects similar to that existing between mortgagor and mortgagee, subdivision (3) of this section does not embrace actions arising out of executory contracts for sales of land. Overman v. Jackson, 104 N.C. 4, 10 S.E. 87 (1889).

Running of Statute. — Where note holder did not accelerate the maturity of the note even though he could have, the statute of limitations did not begin to run until the day the last payment on the note was due. In re Lake

Townsend Aviation, Inc., 87 N.C. App. 481, 361 S.E.2d 409 (1987), cert. denied, 321 N.C. 473, 364 S.E.2d 922 (1988).

Institution of suit to foreclose by mortgagee in possession tolls operation of this section, and the right of the mortgagor to demand an accounting for the rents and profits is not barred during the pendency of the foreclosure suit. Anderson v. Moore, 233 N.C. 299, 63 S.E.2d 641 (1951).

Absence from State as Suspending Section. — An action to foreclose a mortgage comes within the purview of G.S. 1-21, and absence of the mortgagor from the State suspends the running of the statute. Love v. West, 169 N.C. 13, 84 S.E. 1048 (1915).

Effect of Bar of Debt upon Foreclosure. — The fact that a note is barred by the three-year statute does not prevent the mortgagee from foreclosing his mortgage securing it, this section being applicable. Jenkins v. Griffin, 175 N.C. 184, 95 S.E. 166 (1918). See also, Capehart v. Dettrick, 91 N.C. 344 (1884).

Although an action upon the debt secured by a mortgage may be barred by the lapse of time, the remedy appertaining to the security may be enforced. Overman v. Jackson, 104 N.C. 4, 10 S.E. 87 (1889).

Where a note has not been barred, foreclosure of a deed in trust securing it may be ordered. Geitner v. Jones, 176 N.C. 542, 97 S.E. 494 (1918).

A mortgage is an incident of the note it secures, and the statute of limitations will not run against its foreclosure when it has not run against the note. Humphrey v. Stephens, 191 N.C. 101, 131 S.E. 383 (1926).

Action to Recover Debt Not Barred by Subdivision (3). — Subdivision (3) of this section only bars an action to foreclose the mortgage, and does not bar an action to recover the debt secured by the mortgage. Fraser v. Bean, 96 N.C. 327, 2 S.E. 159 (1887).

For cases holding that subdivision (3) is not applicable to powers of sale, see Menzel v. Hinton, 132 N.C. 660, 44 S.E. 385, 95 Am. St. R. 647 (1903); Cone v. Hyatt, 132 N.C. 810, 44 S.E. 678 (1903); Miller v. Coxe, 133 N.C. 578, 45 S.E. 940 (1903); Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904); Spain v. Hines, 214 N.C. 432, 200 S.E. 25 (1938). But see G.S. 45-21.12.

As to the bar now obtaining against exercise of a power of sale when foreclosure is barred, pursuant to G.S. 45-21.12 (formerly G.S. 45-26), see Jenkins v. Griffin, 175 N.C. 184, 95 S.E. 166 (1918); Humphrey v. Stephens, 191 N.C. 101, 131 S.E. 383 (1926).

Effect of Payment of Interest. — This section will not bar foreclosure on a deed of trust when, although the debt was due more than 10 years ago, interest has been paid on the debt within 10 years. Dixie Grocery Co. v. Hoyle, 204 N.C. 109, 167 S.E. 469 (1933).

Effect of Partial Payment. — Payment on a bond secured by a mortgage before it goes out of date and within 10 years before suit is brought will prevent the bar of the statute of limitations, and a purchaser of the land at a mortgage sale will not be barred. Williams v. Kerr, 113 N.C. 306, 18 S.E. 501 (1893).

Where partial payment is made on a note secured by a deed of trust, action to foreclose the instrument is not barred until 10 years from date of such payment. Smith v. Davis, 228 N.C. 172, 45 S.E.2d 51, 174 A.L.R. 643 (1947).

Part payment operating to start the running of the statute of limitations anew against the right of action to foreclose a mortgage or deed of trust is any payment on the debt secured by the instrument, and the action to foreclose is not barred within 10 years from such payment, notwithstanding that the part payment is applied to only one of the notes secured, resulting in the bar of the statute as to an action on the other note. Demai v. Tart, 221 N.C. 106, 19 S.E.2d 130 (1942).

Where a surety executes a mortgage on his own land, an action to foreclose the same is not barred until the expiration of 10 years. Miller v. Coxe, 133 N.C. 578, 45 S.E. 940 (1903).

Foreclosure Held Only Remedy in Absence of Signed Note. — Where plaintiff did not sign note and was not bound thereby, having executed only a deed of trust on her land as additional security for the debt, in the event of default in payment foreclosure of the deed of trust was the only action maintainable against her. This section, therefore, prescribed the time within which an action might be brought. Carter v. Bost, 209 N.C. 830, 184 S.E. 817 (1936).

Sale While Foreclosure Suit Was Pending. — Where a suit to foreclose a duly registered deed of trust was instituted prior to the bar of this section against the trustee, the cestuis and the assigns of the cestuis, and while the suit was pending but after expiration of the 10-year period prescribed by statute, the assigns of the cestuis sold the property, and upon discovering the transfer plaintiff had the purchasers made parties, the purchasers were chargeable with notice of the suit and acquired only that interest which their grantors then had, and they could not assert the bar of the statute. Massachusetts Bonding & Ins. Co. v. Knox, 220 N.C. 725, 18 S.E.2d 436, 138 A.L.R. 1438 (1942).

Relationship of Mortgagor and Mortgagee Established by Consent Judgment. — A consent judgment providing that defendant had an equity to redeem the land upon payment of a certain sum on or before a certain day, and that if this payment was timely made plaintiff would convey said land to defendant, but that in case of failure to pay within the time limited, defendant would stand absolutely debarred and foreclosed of and from any and all equity or other estate, established relationship of mortgagor and mortgagee, and notwithstanding the provision of strict foreclosure that relationship continued to exist after the day of forfeiture, so that under subdivision (3) of this section 10 years' possession by defendant, after default, barred plaintiff. Bunn v. Braswell, 139 N.C. 135, 51 S.E. 927 (1905).

Remedy of Mortgagor for Sale Under Barred Mortgage. — A sale under a mortgage barred by the statute would carry no title to the purchaser. The mortgagor, being in possession, would have a full defense to an action for ejectment when brought by the purchaser. Capehart v. Biggs & Co., 77 N.C. 261 (1877); Fox v. Kline, 85 N.C. 173 (1881); Hutaff v. Adrian, 112 N.C. 259, 17 S.E. 78 (1893).

Where a mortgagor in possession had a full defense to an action for ejectment brought by a purchaser at a sale under a mortgage barred by the statute of limitations, the court would not interfere by injunction to prevent a sale threatened by the mortgagee; however, it would be otherwise if there were a contest as to the amount due under the mortgage. Hutaff v. Adrian, 112 N.C. 259, 17 S.E. 78 (1893).

Section Must Be Specifically Pleaded. — In an action to foreclose a mortgage, the 10-year statute of limitations must be specially pleaded. Stancill v. Spain, 133 N.C. 76, 45 S.E. 466 (1903).

Power of Grantees to Plead. — In a foreclosure action, the grantees of a mortgagor are entitled to plead the statute of limitations. Stancill v. Spain, 133 N.C. 76, 45 S.E. 466 (1903).

As to prior law, see Pemberton v. Simmons, 100 N.C. 316, 6 S.E. 122 (1888).

VI. REDEMPTION OF MORTGAGES.

When Redemption Barred. — Where mortgagee has actual possession, either when the cause of action for redemption accrues or when he thereafter goes into and remains continuously in such possession for more than 10 years, before an action to redeem is commenced, the statute of limitations, where pleaded and relied upon in the answer, is a complete defense. Bernhardt v. Hagamon, 144 N.C. 526, 57 S.E. 222 (1907); Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926).

Bar of Right to Redeem Bars Right to Accounting. — When the right to redeem is barred by this section, the right to enforce an accounting is likewise barred. Anderson v. Moore, 233 N.C. 299, 63 S.E.2d 641 (1951).

As to necessity that possession be in the mortgagee, see Simmons v. Ballard, 102 N.C. 105, 9 S.E. 495 (1889); Cauley v. Sutton, 150 N.C. 327, 64 S.E. 3 (1909).

It is not required that mortgagee's possession be adverse in order to bar mortgagor's action in 10 years under this section. Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926).

But the possession required by this statute must be actual and not merely constructive. Weathersbee v. Goodwin, 175 N.C. 234, 95 S.E. 491 (1918); Stevens v. Turlington, 186 N.C. 191, 119 S.E. 210 (1923); Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926).

Possession presumed by virtue of G.S. 1-42 is not sufficient to meet the requirements of subdivision (4) of this section, for even if more than 10 years have passed since the cause of action accrued, an action for redemption under subdivision (4) is not barred unless the mortgagee has during said time been in the actual possession of the land conveyed by the mortgage. Simmons v. Ballard, 102 N.C. 105, 9 S.E. 495 (1889); Cauley v. Sutton, 150 N.C. 327, 64 S.E. 3 (1909); McNair v. Boyd, 163 N.C. 478, 79 S.E. 966 (1913); Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926).

Redemption of Mortgage Held Barred. — Where mortgagee had been in possession more than 30 years since execution of the mortgage, the right of redemption was barred. Gray v. Williams, 130 N.C. 53, 40 S.E. 843 (1902).

Where, in accordance with agreement expressed in instrument, mortgagee entered at once into possession of lands, mortgagor's right for an accounting arose when the bond which the instrument secured had matured and remained unpaid; and his right of action and that of those claiming under him accrued then, and the mortgagor's right of action was barred by a continued peaceful possession by the mortgagee for 10 years therefrom. Section 1-42 did not apply. Crews v. Crews, 192 N.C. 679, 135 S.E. 784 (1926).

Where mortgagee was permitted to remain in actual possession of mortgaged land, as mortgagee, for a period of 10 years, and in the meantime the mortgage debt was not paid and no action to foreclose or redeem was instituted, title to the premises would be deemed to be in him, and the 10-year statute of limitations, if properly pleaded and relied upon, would be a complete defense to an action to redeem. Anderson v. Moore, 233 N.C. 299, 63 S.E.2d 641 (1951).

§ 1-48: Transferred to § 1-54, subdivision (6), by Session Laws 1951, c. 837, s. 2.

§ 1-49. Seven years.

Within seven years an action —

(1) Repealed by Session Laws 1961, c. 115, s. 1.

(2) By a creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor. A creditor thus barred of a recovery against the representative of any principal debtor is also barred of a recovery against any surety to the debt. (C.C.P., s. 32; Code, s. 153; Rev., s. 392; C.S., s. 438; 1961, c. 115, s. 1.)

Cross References. — As to notice to creditors of decedent, see G.S. 28A-14-1 et seq. As to claims against estate, see G.S. 28A-19-1 et seq.

CASE NOTES

Purpose of Section. — The present limitations in favor of estates of deceased persons are unconnected with assets and are intended to stimulate the vigilance of creditors and give repose to the estates of deceased debtors. Lawrence v. Norfleet, 90 N.C. 533 (1884).

This section must be construed with G.S. 1-52. Joyner v. Massey, 97 N.C. 148, 1 S.E. 702 (1887).

And with G.S. 1-22. Redmond v. Pippen, 113 N.C. 90, 18 S.E. 50 (1893).

Statute as Absolute Bar. — After the time prescribed in this section, the statute is an absolute bar to creditors. Lawrence v. Norfleet, 90 N.C. 533 (1884); Worthy v. McIntosh, 90 N.C. 536 (1884).

Regardless of Whether There Are Assets in Hands of Representatives. — This statute is an absolute bar unless suit is brought within the time specified, whether or not there be assets in the hands of the representative. Lawrence v. Norfleet, 90 N.C. 533 (1884).

This section contemplates claims upon which right of action had accrued at the time of qualification; as to those upon which the right of action subsequently accrues, the statute begins to run from the date of such accrual. Miller v. Shoaf, 110 N.C. 319, 14 S.E. 800 (1892).

The language of the statute is confined to actions by a creditor, whereas the duty to subject the land rests primarily on the personal representative. It would be anomalous to bar the creditor in seven years under this section and the personal representative in 10 years under G.S. 1-56. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Section Applies to Actions Against Representatives. — This section applies to an action against a personal, and where necessary, the real representatives, to compel the performance of some right of which the debt itself is the foundation. Lister v. Lister, 222 N.C. 555, 24 S.E.2d 342 (1943).

The statute was intended to be restricted to cases where the creditor's action lies against the personal representative as such, e.g., the right to enforce specific performance or some lien or trust not covered by other provisions of the Code. Smith v. Brown, 101 N.C. 347, 7 S.E. 890 (1888).

Application of Section to Suit Between Administrators. — Where a suit is brought by one administrator against another, it must be commenced within seven years next after the right of action vests in the plaintiff under his appointment. Lawrence v. Norfleet, 90 N.C. 533 (1884).

Prerequisites to Running of Statute. — The mere lapse of seven years does not create the bar; it must be coupled with the advertisement, or personal notice, and when these have been made, the statute will begin to run from the date of the qualification of the executor or administrator. Love v. Ingram, 104 N.C. 600, 10 S.E. 77 (1889).

The executor or administrator must show that seven years have transpired after his qualification before commencement of the action, and that he has advertised as required by law. Without proof of the advertisement, the plea of the statute of limitations cannot avail him. Cox v. Cox, 84 N.C. 138 (1881).

Time to Be Computed from Qualification of Representative. — While the advertisement is an indispensable prerequisite to the operation of the statute, it is incidental, and the time must be computed from qualification of the representative. Cox v. Cox, 84 N.C. 138 (1881); Lawrence v. Norfleet, 90 N.C. 533 (1884).

Conditions Preventing Running of Statute. — Nothing will defeat the operation of the statute except the disabilities mentioned in the Code or such fraud or other matter of equitable nature as would make it against conscience to rely on the statute. Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887), overruled on other grounds, Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Pendency of Suit as Suspension of Statute. — If an action is brought by a creditor against the personal representative of deceased debtor within seven years, etc., but by reason of delays the court's judgment is not obtained until after seven years, the real representative is not protected by the statute of limitations when it is sought to subject the decedent's lands to the payment of such debt. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896), overruling Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887) insofar as it holds to the contrary. See also, Smith v. Brown, 101 N.C. 347, 7 S.E. 890 (1888); Woodlief v. Bragg, 108 N.C. 571, 13 S.E. 211 (1891).

Creditor Who Is Not Barred Against Representative Not Barred Against Land. — When creditor, seeking merely to collect his debt, is not barred as against the personal representative, he cannot be barred as against the land which that representative is to subject. The liability is that of the land, and not that of the heir as such. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Proceedings Which Were Not Barred Against Representative Not Barred Against Heirs. — Where proceedings against administratrix were instituted within the seven years after her qualification and making advertisement, though the heirs at law were not made parties to the proceedings until after the lapse of seven years, the proceedings, not being barred as to the personal representative, could not be barred as to the heirs at law by this section. Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Necessity for Full Administration. — Creditors of a deceased person whose claims were due at the death of the debtor are barred after seven years next after letters are granted, provided the estate has been fully administered. Morris v. Syme, 88 N.C. 453 (1883).

As to what must be pleaded and proved by the administrator, see Little v. Duncan, 89 N.C. 416 (1883).

Heirs as Parties. — In order to save circumlocution the heirs at law may be made parties to the proceedings against the personal representative. Lilly v. Wooley, 94 N.C. 412 (1886); Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887), overruled on other grounds in Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896); Brittain v. Dickson, 104 N.C. 547, 10 S.E. 701 (1889); Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Death of surety and lapse of time longer than that prescribed before qualification of personal representative did not suspend the operation of the statute, if during that time the wards could have proceeded against the guardian. Williams v. McNair, 98 N.C. 332, 4 S.E. 131 (1887).

Section Held Inapplicable. — This section did not apply to an action brought to obtain possession of land bought for plaintiff's mother with plaintiff's money but conveyed to the former, the action being brought against the husband of the grantee after her death. Norton v. McDevit, 122 N.C. 755, 30 S.E. 24 (1898).

Action Barred by Laches. — Where, in an action instituted 14 years after testator's death, plaintiff claimed the proceeds of an insurance policy payable to testator's estate, and contended that the policy was taken out by him to secure him for funds advanced to the testator, it was held that the rights of creditors having intervened, the record disclosed conduct on the part of the plaintiff barring the action for laches. Strayhorn v. Aycock, 215 N.C. 43, 200 S.E. 912 (1939).

As to prior law, see Godley v. Taylor, 14 N.C. 178 (1831); Cooper v. Cherry, 53 N.C. 323 (1861); McKeithan v. McGill, 83 N.C. 517 (1880); Morris v. Syme, 88 N.C. 453 (1883); Syme v. Badger, 96 N.C. 197, 2 S.E. 61 (1887), overruled on other grounds, Lee v. McKoy, 118 N.C. 518, 24 S.E. 210 (1896).

Cited in Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955).

§ 1-50. Six years.

(a) Within six years an action —

(1) Repealed by Session Laws 1997-297, s. 1.

(2) Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law.

(3) For injury to any incorporeal hereditament.

(4) Against a corporation, or the holder of a certificate or duplicate certificate of stock in the corporation, on account of any dividend, either a cash or stock dividend, paid or allotted by the corporation to

the holder of the certificate or duplicate certificate of stock in the corporation.

(5)a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

b. For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

1. Actions to recover damages for breach of a contract to construct or repair an improvement to real property;
2. Actions to recover damages for the negligent construction or repair of an improvement to real property;
3. Actions to recover damages for personal injury, death or damage to property;
4. Actions to recover damages for economic or monetary loss;
5. Actions in contract or in tort or otherwise;
6. Actions for contribution indemnification for damages sustained on account of an action described in this subdivision;
7. Actions against a surety or guarantor of a defendant described in this subdivision;
8. Actions brought against any current or prior owner of the real property or improvement, or against any other person having a current or prior interest therein;
9. Actions against any person furnishing materials, or against any person who develops real property or who performs or furnishes the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

c. For purposes of this subdivision, "substantial completion" means that degree of completion of a project, improvement or specified area or portion thereof (in accordance with the contract, as modified by any change orders agreed to by the parties) upon attainment of which the owner can use the same for the purpose for which it was intended. The date of substantial completion may be established by written agreement.

d. The limitation prescribed by this subdivision shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition.

e. The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of fraud, or willful or wanton negligence in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property, or to a surety or guarantor of any of the foregoing persons, or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence.

f. This subdivision prescribes an outside limitation of six years from the later of the specific last act or omission or substantial completion, within which the limitations prescribed by G.S. 1-52 and 1-53 continue to run. For purposes of the three-year limitation prescribed by G.S. 1-52, a cause of action based upon or arising out of the defective or unsafe condition of an improvement to real property shall not accrue until the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant. However, as provided in this subdivision, no action may be brought more than six years from the later of the specific last act or omission or substantial completion.

g. The limitation prescribed by this subdivision shall apply to the exclusion of G.S. 1-15(c), G.S. 1-52(16) and G.S. 1-47(2).

(6) Repealed by Session Laws 2009-420, s. 1, effective October 1, 2009, and applicable to causes of action that accrue on or after that date.

(7) Recodified as G.S. 1-47(6) by Session Laws 1995 (Regular Session, 1996), c. 742, s. 1.

(b) This section applies to actions brought by a private party and to actions brought by the State or a political subdivision of the State. (C.C.P., s. 33; Code, s. 154; Rev., s. 393; C.S., s. 439; 1931, c. 169; 1963, c. 1030; 1979, c. 654, s. 2; 1981, c. 644, s. 1; 1991, c. 268, s. 2; 1995, c. 291, s. 1; 1995 (Reg. Sess., 1996), c. 742, s. 1(a); 1997-297, s. 1; 2009-420, s. 1.)

Cross References. — For three-year limitation applicable to actions upon the official bond of a public officer, see now G.S. 1-52(1a). For three-year limitation applicable to actions against sureties of executors, etc., on their principal's official bond, see G.S. 1-52(6). As to bond of personal representative, see G.S. 28A-8-1 et seq. As to limitations period for unknown and certain other claims against a dissolved corporation, see G.S. 55-14-07. As to product liability actions, see G.S. 99B-1 et seq.

Editor's Note. — Session Laws 2009-420, s. 3, provides in part: "This act shall not affect the application of G.S. 1-50(a)(5). Nothing in this act is intended to change existing law relating to product liability actions based upon disease."

Effect of Amendments. — Session Laws 2009-420, s. 1, effective October 1, 2009, and applicable to causes of action that accrue on or after that date, deleted subdivision (a)(6), which read: "No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption."

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For article discussing product liability as affected by statutes of repose, see 61 N.C.L. Rev. 33 (1982).

For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

For comment on the effect of Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983), on future cases determining the constitutionality of subdivision (6) of this section, see 19 Wake Forest L. Rev. 1049 (1983).

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

For note on six year statutory bar to products liability actions, in light of Tetterton v. Long Manufacturing Co., 314 N.C. 44, 332 S.E.2d 67 (1985), see 64 N.C.L. Rev. 1157 (1986).

For survey of North Carolina construction law, with particular reference to statutes of limitation and repose, see 21 Wake Forest L. Rev. 633 (1986).

For survey, "Contract Warranties and Remedies: A Comprehensive Survey of the Creation, Modification and Exclusion of Contract Warranties and Remedies for Attorneys and Contracting Professionals," see 14 Campbell L. Rev. 323 (1993).

For note, "Do You Need 'Will Insurance'? Let the Testator Beware — Hargett v. Holland," see 21 N.C. Cent. L.J. 353 (1995).

CASE NOTES

I. In General.
II. Bonds of Executors, Administrators, Collectors or Guardians.
III. Incorporeal Hereditaments.
IV. Defective Condition of Improvements to Real Property.
V. Defective Products.

I. IN GENERAL.

This section and G.S. 1-15(c) are not unconstitutional as being violative of the open courts provision of the State Constitution and the equal protection clauses of the state and federal Constitutions. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985); Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985).

Subdivision (6) does not grant "exclusive or separate emoluments or privileges" to the persons it protects in violation of N.C. Const., Art. I, § 32. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

This section does not distinguish between manufacturers and retail sellers of products who are protected from liability beyond the six-year period of repose and does not violate the equal protection clauses of the state or federal Constitutions. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

Statute of Repose Properly Applied Under Lex Loci Delicti. — Application of G.S. 1-50(a)(5) to a case for damages arising from a bridge collapse in North Carolina alleging resulting from defective concreted double tees manufactured in South Carolina, and dismissal of the case, were proper because a statute of repose created a substantive right, and the substantive law governing tort claims was determined the lex loci delicti doctrine; further, public policy was not violated by the two year difference in South Carolina's statute of repose, S.C. Code Ann. § 15-3-640 and North Carolina's statute of repose, and therefore the case was time-barred. Nash v. Tindall Corp., 375 S.C. 36, 650 S.E.2d 81, 2007 S.C. App. LEXIS 162 (Aug. 2, 2007).

This section must be affirmatively pleaded. Humble v. Mebane, 89 N.C. 410 (1883).

Burden on Plaintiff When Statute Is Pleaded. — Upon defendant's plea of the statute of limitations, the burden devolved upon plaintiffs to show that their action was not barred, but was instituted within the time permitted by statute. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

As to the time for bringing actions on bonds under prior law, see Humble v. Mebane, 89 N.C. 410 (1883).

Applied in Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980); Martin v. Smith, 534 F. Supp. 804 (W.D.N.C. 1982); Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985); Oates v. Jag, Inc., 314 N.C. 276, 333 S.E.2d 222 (1985); Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993); Bryant v. Don Galloway Homes, Inc., 147 N.C. App. 655, 556 S.E.2d 597, 2001 N.C. App. LEXIS 1236 (2001); Hodge v. Harkey, 178 N.C. App. 222, 631 S.E.2d 143, 2006 N.C. App. LEXIS 1310 (2006).

Cited in Commissioners of Moore County v. MacRae, 89 N.C. 95 (1883); J.G. Dudley Co. v. Commissioner, 298 F.2d 750 (4th Cir. 1962); Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965); State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975); Shuler v. Gaston County Dyeing Mach. Co., 30 N.C. App. 577, 227 S.E.2d 634 (1976); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977); Earls v. Link, Inc., 38 N.C. App. 204, 247 S.E.2d 617 (1978); Feibus & Co. v. Godley Constr. Co., 44 N.C. App. 133, 260 S.E.2d 665 (1979); Town of Scotland Neck v. Western Sur. Co., 46 N.C. App. 124, 264 S.E.2d 917 (1980); Moore v. Moody, 304 N.C. 719, 285 S.E.2d 811 (1982); Tyson v. North Carolina Nat'l Bank, 305 N.C. 136, 286 S.E.2d 561 (1982); Tetterton v. Long Mfg. Co., 67 N.C. App. 628, 313 S.E.2d 250 (1984); Pembee Mfg. Corp. v. Cape Fear Constr. Co., 69 N.C. App. 505, 317 S.E.2d 41 (1984); Lowe v. Tarble, 312 N.C. 467, 323 S.E.2d 19 (1984); Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985); Terry v. Pullman Trailmobile, 92 N.C. App. 687, 376 S.E.2d 47 (1989); State ex rel. State Art Museum Bldg. Comm'n v. Travelers Indem. Co., 111 N.C. App. 330, 432 S.E.2d 419 (1993); Cage v. Colonial Bldg. Co, 111 N.C. App. 828, 433 S.E.2d 827 (1993); Rudd v. Electrolux Corp., 982 F. Supp. 355 (M.D.N.C. 1997); Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

II. BONDS OF EXECUTORS, ADMINISTRATORS, COLLECTORS OR GUARDIANS.

Purpose of Section. — This section is intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and after reasonable time, to give quiet and repose to the estate of dead men. Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887).

This Section and G.S. 1-52(6) and 1-56 Distinguished. — Subdivision (2) of this section expressly applies to actions on the "official bond," while G.S. 1-52(6) applies to sureties only, and G.S. 1-56, insofar as executors, administrators and guardians are concerned, is applicable only when there has been a settlement, either by acts of the parties or a decree of court. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Persons Against Whom Section Is Absolute Bar. —An action must be brought against an executor or administrator by a creditor, legatee or next of kin of the decedent within six years after the filing of the final account, or it will be barred by the statute. Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887). See also, Spruill v. Sanderson, 79 N.C. 466 (1878); Vaughan v. Hines, 87 N.C. 445 (1882); Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

This statute protects the surety as well as the principal. Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887); Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891).

Additional Protection of Sureties Under G.S. 1-52(6). — In addition to the protection of this section, the sureties on the bond are exonerated unless action is brought within three years after breach of the bond under subdivision (6) of G.S. 1-52. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Where the cause of action against an executor, administrator or guardian is for a breach of the bond, it is barred as to the sureties after three years from the breach complained of under subdivision (6) of G.S. 1-52. Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891).

When Applicable to Action for Distributive Shares. — The statute does not run in favor of administrators against the suit of the next of kin for their distributive shares, unless the action is on the bond to recover the amount of such share. Vaughan v. Hines, 87 N.C. 445 (1882). See also, Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

When Applicable to Action for Balance Due. — No statute of limitations is a bar to an action to recover a balance admitted by a personal representative to be due legatees or distributees on his final account, unless he can show that he has disposed of such balance in some way authorized by law, or unless three years have elapsed since a demand and refusal to pay such admitted balance. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

The final account is the initial point at which the statute begins to run, to actions upon the bond for a breach of its obligations, but leaves the representative, in his fiduciary capacity, exposed to the demand of the fiduciary or creditor, the latter losing his remedy under the condition set out in G.S. 1-49. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

After the final account the statute runs against the next of kin, and an action against the administrator upon his official bond is barred after six years from the auditing of his final account. Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887).

And until a final account is filed and audited there can be no bar; nor is there any as to a balance admitted to be due by such final account, unless the executor or administrator can show that he has disposed of it in some way authorized by law, or unless there has been a demand and a refusal to pay such admitted balance, in which case the action is barred in three years after such demand and refusal. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

The bar is unavailable under this section unless there has been an account audited for the guardian, or unless there has been a lapse of three years from the breach of the bond in favor of the surety. Humble v. Mebane, 89 N.C. 410 (1883).

Action must be brought within six years after auditing and filing of the account. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

As to effect of failure to make final settlement, see Self v. Shugart, 135 N.C. 185, 47 S.E. 484 (1904).

Significance of Demand Irrespective of Final Account. — Whether or not final account is filed, if there is a demand and refusal the action is barred as to both the principal and sureties on the bond in three years under subdivision (6) of G.S. 1-52. Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891).

Action by ward against sureties on guardian's bond is barred after three years from the time the ward becomes of age if the guardian makes no final settlement, and within six years if the guardian makes a final settlement. Self v. Shugart, 135 N.C. 185, 47 S.E. 484 (1904).

Where there was no one in esse who could sue upon the bond from the death of the first administrator until the qualification of the administrator de bonis non, that time should not be counted in applying the statute of limitations in an action against the sureties. Brawley v. Brawley, 109 N.C. 524, 14 S.E. 73 (1891).

Action Not Barred. — An action against a guardian for failure to pay ward the balance of the estate due him after the ward attained his majority was not barred by the six-year statute of limitations where the guardian had not filed a final account as required under this section, the statute not applying to such action. State ex rel. Finn v. Fountain, 205 N.C. 217, 171 S.E. 85 (1933).

Action Held Barred. — Where guardian qualified in July, 1872, his ward came of age the following September, and the guardian died without having settled his trust or making any of the returns required, when in 1887 the ward made a demand upon and brought suit against the sureties on the bond, it was held that his action was barred. Norman v. Walker, 101 N.C. 24, 7 S.E. 468 (1888).

Where distributees, who until they became of age had a guardian, did not bring suit for an alleged balance due under testator's will for 15 years after the executor filed his final account, the action was barred by either this section or G.S. 1-56. Culp v. Lee, 109 N.C. 675, 14 S.E. 74 (1891).

Section Held Inapplicable. — Where an action was not brought upon official bond as administrator of the testator of the defendant, but it was brought to compel an account and settlement of the estate of the intestate of the plaintiff in his hands in his lifetime, defendant was a trustee of an express trust, and the statute of limitations did not apply. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

III. INCORPOREAL HEREDITAMENTS.

Restrictive Covenant Governed by Subdivision (3). — An action to enforce a restrictive covenant is governed by subdivision (3) of this section. A restrictive covenant is a servitude, commonly referred to as a negative easement, and an easement is an incorporeal hereditament. This section requires that an action for injury to any incorporeal hereditament be brought within six years. Hawthorne v. Realty Syndicate, Inc., 43 N.C. App. 436, 259 S.E.2d 591 (1979), aff'd, 300 N.C. 660, 268 S.E.2d 494, rehearing denied, 301 N.C. 107, 273 S.E.2d 442 (1980).

Six year statute of limitations applies to a restrictive covenant as a contract under seal. Allen v. Sea Gate Ass'n, 119 N.C. App. 761, 460 S.E.2d 197 (1995).

In case involving residential restrictive covenant rather than an encroachment and/or prescriptive easement, the court applied six-year statute of limitations to bar case, rather than 20 year "prescriptive period." Karner v. Roy White Flowers, Inc., 134 N.C. App. 645, 518 S.E.2d 563 (1999), rev'd, 351 N.C. 433, 527 S.E.2d 40 (2000).

Where the court found conflicting evidence as to whether plaintiffs were aware or should have reasonably been aware of the violation of residential restrictive covenant, continually for six years, on three of four lots at issue, a directed verdict was inappropriate. Karner v. Roy White Flowers, Inc., 134 N.C. App. 645, 518 S.E.2d 563 (1999), rev'd, 351 N.C. 433, 527 S.E.2d 40 (2000).

Subsection (3) Applicable to Easement. — Defendant property owners were entitled to partial summary judgment in plaintiff property owners' action, which asked for a preliminary and permanent injunction prohibiting defendants from obstructing or interfering with plaintiffs' right to a thirty-foot easement, because (1) G.S. 1-50(a)(3) was the applicable statute of limitations, not G.S. 1-40, because an injury to an incorporeal hereditament was at issue, rather than a continuous trespass or a prescriptive easement to property held in fee; and (2) the parties agreed that all encroachments, except the fences installed in 2004 and 2005, were planted or installed approximately nine to eleven years before the commencement of plaintiffs' action. Pottle v. Link, 187 N.C. App. 746, 654 S.E.2d 64, 2007 N.C. App. LEXIS 2557 (2007).

IV. DEFECTIVE CONDITION OF IMPROVEMENTS TO REAL PROPERTY.

Editor's Note. — *Many of the cases cited below were decided under subdivision (5) of this section as it read prior to the 1981 amendment.*

Constitutionality of Subdivision (5). — The class created by subdivision (5) of this section as it stood prior to the 1981 amendment had a rational basis, and such subdivision did not violate U.S. Const., Amend. XIV, or the law of the land clause of N.C. Const., Art. I, § 19. Lamb v. Wedgewood S. Corp., 55 N.C. App. 686, 286 S.E.2d 876 (1982), modified and aff'd, 308 N.C. 419, 302 S.E.2d 868 (1983).

Subdivision (5) of this section as it read prior to the 1981 amendment did not impermissibly distinguish between architects, engineers, and contractors, who are protected from liability beyond the six-year period, and materialmen, suppliers, manufacturers and persons in actual possession and control of the property, who are not. Therefore, it did not violate the equal protection provisions of either the federal or State Constitutions. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

The legislature has not, in subdivision (5) of this section, absolutely abolished all claims against builders and designers arising out of improvements they built or designed. Rather, it has established a time period beyond which such claims may not be brought even if the injury giving rise to the claim does not occur until the time period has elapsed. This condition to the legal cognizability of a claim does not violate the constitutional guarantee under N.C. Const., Art. I, § 18, that for every "injury done" there shall be a "remedy." Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

The classification under subdivision (5) of this section, as it read prior to the 1981 amendment, did not create a special emolument or privilege within the meaning of N.C. Const., Art. I, § 32. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

Subdivision (5) Is Substantive. — Subdivision (5) of this section, like many others enacted throughout the nation, is a statute of repose, which constitutes a substantive definition of, rather than a procedural limitation on, rights. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

Paragraph a of subdivision (5) of this section is substantive in nature and imposes, as a condition precedent to a cause of action, that plaintiff establish that the action is brought within six years of the completion of the improvement or last negligent act of the defendant, whichever occurs later, even though the injury or damage may not have occurred before the expiration of the time limitation. Sink v. Andrews, 81 N.C. App. 594, 344 S.E.2d 831 (1986).

Purpose of Subdivision (5). — Subdivision (5) of this section is designed to limit the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

Purpose of subdivision (a)(5) was to protect from liability those persons who made improvements to real property. Bryant v. Don Galloway Homes, Inc., 147 N.C. App. 655, 556 S.E.2d 597, 2001 N.C. App. LEXIS 1236 (2001).

Subdivision (5) of this section is to be interpreted in conjunction with G.S. 1-52(5) so that both statutes may be given effect. Smith v. American Radiator & Std. San. Corp., 38 N.C. App. 457, 248 S.E.2d 462 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 33 (1979), overruled on other grounds in Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1981).

Subdivision (5) of this section provides an outside limit of six years from the bringing of an action coming within the terms thereof. Within that outside limit, G.S. 1-52(5) continues to operate, and subdivision (5) of this section does not serve to extend the time for bringing an action otherwise barred by the three-year statute. Smith v. American Radiator & Std. San. Corp., 38 N.C. App. 457, 248 S.E.2d 462 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 33 (1979), overruled on other grounds in Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

Outside Limit of Six Years. — Subdivision (5) provides an outside limit of six years after the performance of construction services. Bonestell v. North Topsail Shores Condominiums, Inc., 103 N.C. App. 219, 405 S.E.2d 222 (1991).

A special provision for latent defects in subdivision (5) states explicitly that its limited discovery rule falls within the outside restriction of the six-year period. Bonestell v. North Topsail Shores Condominiums, Inc., 103 N.C. App. 219, 405 S.E.2d 222 (1991).

Subdivision (5) was intended to apply to all actions against architects, and others therein described, where the plaintiff seeks damages resulting from the architect's faulty design or supervision, whether those damages are sought merely to correct the defect or as a result of some further injury caused by the defect. Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., 313 N.C. 230, 328 S.E.2d 274 (1985).

Subdivision (5) of this section is a statute specifically applicable to architects and others who plan, design or supervise construction, or who construct improvements to real property; therefore it and not G.S. 1-15(c) should govern a claim for breach of contract, breach of warranties, and negligence in failing to properly design and construct buildings. Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., 313 N.C. 230, 328 S.E.2d 274 (1985).

Meaning of "Last Act." — Where defendant substantially completed construction on house, the statute of repose began running, and subsequent repairs neither qualified as a "last act" under this section nor reset statute of repose. Monson v. Paramount Homes, Inc., 133 N.C. App. 235, 515 S.E.2d 445 (1999).

In order to constitute a last act or omission under G.S. 1-50(a)(5), the act or omission must give rise to the cause of action. Mitchell v. Mitchell's Formal Wear, Inc., 168 N.C. App. 212, 606 S.E.2d 704, 2005 N.C. App. LEXIS 145 (2005).

G.S. 1-50(a)(5) barred a customer's suit against a construction company to recover for injuries sustained when a bench installed by the company in a store's dressing room collapsed due to allegedly defective construction because the construction invoice indicated that the bench was completed more than six years before the customer filed the suit; while there was an indication in the record that the company performed work on the "punch list" items listed in its renovation contract with the store within six years of the customer's suit, there was no indication that any of the items related to the bench that allegedly injured the customer, and thus, the work on the punch list did not give rise to the action and did not constitute the company's last act or omission. Mitchell v. Mitchell's Formal Wear, Inc., 168 N.C. App. 212, 606 S.E.2d 704, 2005 N.C. App. LEXIS 145 (2005).

"Substantial Completion" Defined. — Where house could be utilized for its intended purposes upon issuance of certificate of compliance, it was "substantially completed" for purposes of this section, even though seller/builder did not complete work designated on punch list for plaintiff/purchaser until many months later. Nolan v. Paramount Homes, Inc., 135 N.C. App. 73, 518 S.E.2d 789 (1999).

Court rejected customer's contention that a store renovation project performed by a construction company was not substantially complete under G.S. 1-50(a)(5) until the city issued a permanent certificate of occupancy to the store less than six years before the customer's personal injury suit was brought because the affidavit of the company's representative established (1) that the store received a temporary certificate of occupancy more than six years before suit was brought and (2) that the permanent certificates of occupancy were not issued until the mall's renovation work of the mall in which the store was located was completed; the customer and the store failed to offer any evidence tending to show that the allegedly defective bench, which caused the customer's injuries, was incapable of being used for its intended purpose on the date that the temporary certificate was issued. Mitchell v. Mitchell's Formal Wear, Inc., 168 N.C. App. 212, 606 S.E.2d 704, 2005 N.C. App. LEXIS 145 (2005).

Remote Manufacturers. — If defendant were only a remote manufacturer whose materials found their way to plaintiffs' jobsite indirectly through the commerce stream, then defendant would not be a materialman and would not have furnished materials on the jobsite within the meaning of subsection (5)(b)(9), and the products liability, statute in subsection (6) would apply, rather than the real property improvement statute of repose. Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 336 N.C. 438, 444 S.E.2d 423 (1994).

Defendant was not a materialman for purposes of the statute of repose, subdivision (5)(b)(9), because plaintiff and defendant had no contract, and defendant's only intent was that of a manufacturer, to place its product into the stream of commerce, without ever intending that its product be particularly delivered to plaintiff. Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 122 N.C. App. 413, 470 S.E.2d 826 (1996).

Where Court of Appeals and Supreme Court previously decided that the statute of repose governing action was found in subsection (5), trial court properly granted defendant summary judgment where defendant produced evidence to show it was not a materialman. Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 122 N.C. App. 413, 470 S.E.2d 826 (1996).

Elements Required for Applicability of Subdivision (5) Prior to 1981 Amendment. — In order for subdivision (5) of this section, as it existed prior to the 1981 amendment, to apply, three circumstances had to exist: (1) The action had to be for recovery of damages to real or personal property; (2) The damages had to arise out of the defective and unsafe condition of an improvement to real property; and (3) The party sued must have been involved in the designing, planning or construction of the defective or unsafe improvement. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Subdivision (5) of this section is not a discovery statute but runs from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Subdivision (5) of this section is a statute of repose and not a statute of limitation. Olympic Prods. Co. v. Roof Systems, 79 N.C. App. 436, 339 S.E.2d 432, cert. denied and appeal dismissed, 316 N.C. 553, 344 S.E.2d 8 (1986).

Subdivision (5) of this section is a statute of repose which bars actions for personal injuries or property damages allegedly caused by defects in design, construction or repairs to real property unless the action is brought within six years from the completion of the work. Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986).

Statute Runs from Date of Construction, Not Sale. — The real property improvements statute of repose designated by this section began to run the last day that defendant performed construction relating to the harm alleged and not on the day of the sale, regardless of the later completion of items on a punch list. Nolan v. Paramount Homes, Inc., 135 N.C. App. 73, 518 S.E.2d 789 (1999).

The injury contemplated by subdivision (5) of this section is obviously not the defective and unsafe condition itself; the statutory language indicates that the injury is something subsequent to and caused by the defective condition and must mean the temporal damage caused by the condition. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Subdivision (5) Not Applicable to Property Severed from Realty. — In an action by an insurer for damages for defendant's alleged breach of warranty and negligent failure to properly repair a furnace transformer, where the transformer was not part of the realty at any time defendant was repairing it, but had been severed and removed from its plant by the insured and sent to defendant's plant by railroad flatcar for repair, subdivision (5) of this section clearly was not applicable. Employers Com. Union Co. of Am. v. Westinghouse Elec. Corp., 15 N.C. App. 406, 190 S.E.2d 364 (1972).

As to nonapplicability of subdivision (5) to a simple breach of contract by defective performance, prior to the 1981 amendment, see North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 240 S.E.2d 345 (1978).

Continuing Duty to Inspect and Maintain Premises. — Subsection (d) plainly excludes from subsection (a) any person who is in possession or control of property at the time that person's negligent conduct proximately causes injury or damage to the claimant; the purpose of the exclusion is to place a continuing duty "to inspect and maintain premises" on persons who, after having constructed the property, remain in possession and control. Cage v. Colonial Bldg. Co., 337 N.C. 682, 448 S.E.2d 115 (1994).

Legislature intended, in subdivision (5), to benefit only those persons who were not in possession and control of the real property at the time the defective or unsafe condition of such improvement constituted the proximate cause of the injury or damage for which the action was brought. Hence, an action by owners in possession of real property against manufacturer and contractor for negligent manufacture and installation of heating and cooling equipment on the real property is governed by G.S. 1-52(5), the three-year statute of limitations, rather than by subdivision (5) of this section. Sellers v. Friedrich Refrigerators, Inc., 283 N.C. 79, 194 S.E.2d 817 (1973), decided prior to 1981 amendment.

The legislature intended in subdivision (5) of this section to prohibit all claims and crossclaims against designers and builders filed beyond the six-year period even if these claims or crossclaims are filed by persons in possession and control. The second sentence is meant to preserve claims brought against persons in possession and control of an improvement to real property who might also have designed or built the improvement. If, of course, persons in possession and control neither designed nor built the improvement, then the first sentence would by its own terms have no application. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

The purpose of the second sentence of subdivision (5) of this section is to preserve these kinds of claims by exempting them from the limiting period, since if those in possession and control also happen to have designed or built the improvement, a not uncommon occurrence, then claims against them brought beyond the limiting period would be barred were it not for the exclusionary sentence. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

The exception in paragraph (5)d, for owners and tenants is based on a continued duty to inspect and maintain the premises. Gillespie v. Coffey, 86 N.C. App. 97, 356 S.E.2d 376 (1987).

The exception found in subdivision (5)d is based on the continued duty of owners and tenants to inspect and maintain the premises. The exception indicates that the limited period of liability was not intended to apply to those in actual possession or control of the land if they knew or had reason to know of the defect. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Construction with Other Sections. — The terms of G.S. 1-52(16) apply "unless otherwise provided by statute"; therefore, since subsection (5) is the statute of repose governing actions against a materialman arising out of improvement to real property, it applies to the exclusion of G.S. 1-52(16). Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 336 N.C. 438, 444 S.E.2d 423 (1994).

Section Held Inapplicable to Tenant's Corporate Successor. — The six-year statute of limitations of this section did not apply to an action for fraud arising out of the collapse of the floor of a building, where the corporate tenant of the building merged into the successor corporate plaintiff after the building collapsed, since the plaintiff succeeded to the rights of the corporate tenant and thus was in actual possession and control of the building as tenant at the time of the injury. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981), decided prior to 1981 amendment.

Action Against Architect for Negligence Arising Out of Construction Project. — The effect of G.S. 1-52(5) and former G.S. 1-15(b) was that the date of the accrual of a cause of action against an architect for negligence arising out of a construction project was deemed to be the date of discovery of the defective or unsafe condition of a structure, and that the action had to be brought within three years thereafter, and subdivision (5) of this section set an outside limit on the right to sue, requiring that the action be brought within six years after construction was completed, except that it was not applicable "to any person in actual possession and control as owner, tenant or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury for which it is proposed to bring an action." Quail Hollow E. Condominium Ass'n v. Donald J. Scholz Co., 47 N.C. App. 518, 268 S.E.2d 12, cert. denied, 301 N.C. 527, 273 S.E.2d 454 (1980), decided prior to 1981 amendment.

Subsequent purchaser of house can maintain action against original builder for negligent construction of the house, and such an action is governed by the time limitations set forth in subdivision (5) of this section. Evans v. Mitchell, 77 N.C. App. 598, 335 S.E.2d 758 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986).

Claim Against Third Party for Indemnification or Contribution. — The accrual date of original plaintiff's claim determines which version of the statute of repose is applicable to the defendant's claim for indemnification or contribution against a third party. New Bern Assocs. v. Celotex Corp., 87 N.C. App. 65, 359

S.E.2d 481, cert. denied, 321 N.C. 297, 362 S.E.2d 782 (1987).

Chairlift as Improvement to Real Property. — As between owner and company which redesigned and repaired chairlift for recreational park, the chairlift would be treated as an "improvement to real property" and owner's third-party action against the company for negligence would be barred by this section. Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986).

Installation of gasoline storage tanks was not an improvement to real property within the meaning of subdivision (5), where the intention of the contracting parties at the time of installation was that the tanks would remain personal property. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Statute of Repose No Defense. — Under subsection (5), no statute of repose may be asserted as a defense to a claim of willful and wanton misconduct. Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 336 N.C. 438, 444 S.E.2d 423 (1994).

Suit Against Builder Barred. — Suit against builder for faulty construction of house built in 1972 under subdivision (5) of this section as it read from 1963 through 1981 was barred in 1978. Evans v. Mitchell, 74 N.C. App. 730, 329 S.E.2d 681, remanded for reconsideration in light of Oates v. Jag, Inc., 314 N.C. 276, 333 S.E.2d 222, at 314 N.C. 531, 335 S.E.2d 315 (1985).

Action Barred. — Action instituted on November 6, 1984, arising out of a fire which occurred on March 28, 1983, at the plaintiff's plant, allegedly caused by the explosion of a Sylvania 100-watt Metalarc lamp manufactured by one defendant, distributed by another, and installed as part of the plaintiff's plant by third defendant, electrical subcontractor for fourth defendant, the general contractor, was barred by this section where construction of the plant was completed on or before April 30, 1978. Cellu Prods. Co. v. G.T.E. Prods. Corp., 81 N.C. App. 474, 344 S.E.2d 566 (1986).

Plaintiff was barred by subdivision (5) from bringing action against city seeking damages for injuries suffered due to a fall at a restaurant, based on plaintiff's claim that remodeling of the restaurant entryway in May, 1979, did not meet the requirements of the North Carolina State Building Code, where the last act of defendant city occurred in May, 1979, when the building inspector approved the remodeling and concluded that the alterations to the restaurant complied with the Building Code. Gillespie v. Coffey, 86 N.C. App. 97, 356 S.E.2d 376 (1987).

Where plaintiffs, in their complaint, never alleged wanton negligence or made any assertions of intentional wrongdoing, and plaintiffs' claim was filed more than six years after defendants completed improvements to the real property in question, subdivision (5) of this section barred the action. Duncan v. Ammons Constr. Co., 87 N.C. App. 597, 361 S.E.2d 906 (1987).

Because defendant's conduct occurred more than six years before plaintiff brought her claim, the six-year statute of repose in subsection (a) barred the claim. Cage v. Colonial Bldg. Co., 337 N.C. 682, 448 S.E.2d 115 (1994).

Statute of repose for products liability claim was triggered upon the purchase by a drywaller of a synthetic stucco product for installation in a house, and the homebuyers' claims against the drywaller and the product's manufacturer, filed more than seven years later, were time barred; further, the statute of repose as to the homebuyers' claim against the drywaller was not tolled by the filing of a class action to which the homebuyers had previously been members; finally, the willful and wanton negligence exception to the real property statute of repose was not applicable because the contractor's and drywaller's actions did not constitute willful and wanton negligence. Cacha v. Montaco, Inc., 147 N.C. App. 21, 554 S.E.2d 388, 2001 N.C. App. LEXIS 1065 (2001), cert. denied, 355 N.C. 284, 560 S.E.2d 797 (2002).

Under the statute of repose, a court properly granted a motion to dismiss when a complaint was filed more than six years after substantial completion of a house and, according to the complaint, the only acts subsequent to completion were repairs. Whitehurst v. Hurst Built, 156 N.C. App. 650, 577 S.E.2d 168, 2003 N.C. App. LEXIS 209 (2003).

Action alleging faulty construction of a house was barred by the statute of repose where the case was not filed until more than six years after the house was substantial completed and occupied as a residence; the homeowners' allegations that the construction company's conduct and failure to follow the building code constituted more than ordinary negligence were insufficient to establish equitable estoppel to bar the construction company from asserting the statute of limitations defense. Moore v. F. Douglas Biddy Constr., Inc., 161 N.C. App. 87, 587 S.E.2d 479 (2003).

Court rejected customer's contention that the date of substantial completion, under G.S. 1-50(a)(5), of an allegedly defective bench was defined by a renovation contract between the store in which the bench was located and the construction company that installed the bench, and that the statute of repose was tolled because the architectural firm failed to issue a certificate of substantial completion as provided for in the contract; the customer did not invoke a real party in interest statute nor was she named as a third-party beneficiary of the contract between the company and the store. Mitchell v. Mitchell's Formal Wear, Inc., 168 N.C. App. 212, 606 S.E.2d 704, 2005 N.C. App. LEXIS 145 (2005).

Trial court properly granted a roofing company's motion under N.C. R. Civ. P. 12(b)(6) to dismiss a homeowner's action alleging breach of warranty because the homeowner's claim for monetary damages was barred by the six-year statute of repose pursuant to G.S. 1-50(a)(5)a; the complaint was filed approximately seven years after substantial completion of the improvement. Roemer v. Preferred Roofing, Inc., — N.C. App. —, 660 S.E.2d 920, 2008 N.C. App. LEXIS 1094 (June 3, 2008).

Summary judgment for a builder was proper in homeowners' claim for damages arising from alleged construction defects in their home because the suit was filed more than seven years after the certificate of occupancy was issued, and thus the homeowners were unable to prove that the G.S. 1-50(a)(5)(a) six-year statute of repose was not a bar; the homeowners alleged no act by the builder after the date of the certificate of occupancy, nor any fraud or willful or wanton negligence in the construction of the home pursuant to G.S. 1-50(a)(5)(e), and, as such, the date of "substantial completion" for purposes of G.S. 1-50(a)(5)(c) was the date of the certificate of occupancy. Peter T. v. Spectrum Homes, Inc., — N.C. App. —, — S.E.2d —, 2009 N.C. App. LEXIS 529 (May 5, 2009).

Claim Not Barred. — Claim which arose after the 1981 amendment to subdivision (5) of this section, which eliminated claims involving willful or wanton negligence from the operation of subdivision (5), held not barred, even though more than six years had elapsed since the building in question had been constructed. Olympic Prods. Co. v. Roof Systems, 79 N.C. App. 436, 339 S.E.2d 432, cert. denied and appeal dismissed, 316 N.C. 553, 344 S.E.2d 8 (1986).

Agreements between a motor speedway and a contractor tolled the statute of repose under G.S. 1-50(a)(5)(a) through the speedway's filing of an indemnity action against the contractor. Charlotte Motor Speedway, Inc. v. Tindall Corp., — N.C. App. —, 672 S.E.2d 691, 2009 N.C. App. LEXIS 120 (2009).

Estoppel from Raising Subdivision (5). — In case in which plaintiff and defendant had entered into extension agreements in which defendants agreed not to raise a defense based on any statute of limitations to a claim filed by any of the plaintiffs, defendants were estopped from raising subdivision (5) of this section in bar of plaintiffs' action on two grounds: (1) having made representations upon which plaintiffs relied, defendants could not in good faith repudiate such representations to plaintiffs' detriment, and (2) having reaped the benefits from the extension agreements, defendants could not challenge the terms thereof. One N. McDowell Ass'n v. McDowell Dev. Co., 98 N.C. App. 125, 389 S.E.2d 834 (1990), cert. denied, 327 N.C. 432, 395 S.E.2d 686, 395 S.E.2d 687 (1990).

V. DEFECTIVE PRODUCTS.

Constitutionality of Subdivision (6). — Although the North Carolina Supreme Court has yet to address the validity of subdivision (6), it has addressed the validity of paragraph (5)a, a companion provision dealing with defective or unsafe conditions resulting from an improvement to real property, and has found that statute valid (see Lamb v. Wedgewood S. Corp., 55 N.C. App. 686, 286 S.E.2d 876 (1982), modified and aff'd, 308 N.C. 419, 302 S.E.2d 868 (1983)). In addition, Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982), by way of dicta, strongly indicated a similar result for subdivision (6). Brown v. GE Co., 584 F. Supp. 1305 (E.D.N.C. 1983), aff'd, 733 F.2d 1085 (4th Cir. 1984).

Subdivision (6) of this section is constitutional. Brown v. GE Co., 733 F.2d 1085 (4th Cir. 1984), cert. denied, 469 U.S. 858, 105 S. Ct. 189, 83 L. Ed. 2d 122 (1984); Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 390, 320 S.E.2d 273 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 485 (1985); Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986); Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

Power of Legislature. — That the legislature has the authority to establish a condition precedent to what was originally a common-law cause of action is beyond question. The legislature created just such a condition precedent in subdivision (6) of this section. Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982).

Legislative Intent. — Lam v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983), contains the correct interpretation of the legislature's intent in enacting the 1963 version of subdivision (5) of this section. Starkey v. Cimarron Apts., Inc., 70 N.C. App. 772, 321 S.E.2d 229 (1984), cert. denied, 312 N.C. 798, 325 S.E.2d 633 (1985).

The built-in "accrual" date language in subdivision (6) "initial purchase for use or consumption" is not unconstitutionally vague; the obvious intent of the legislature was to limit manufacturers' liability after a certain period of years had elapsed from the date of initial purchase for use or consumption. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

Subdivision (6) of this section is intended to be a substantive definition of rights which sets a fixed limit after the time of the product's manufacture beyond which the seller will not be held liable. Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

Public Policy. — As subdivision (6) of this section and G.S. 1-52(16) make clear, the public policy of this State is to protect North Carolina manufacturers and designers as well as the North Carolina courts from stale claims based on injuries occurring long after the purchase of an allegedly defective product and long after a defendant participated in its manufacture or design. Boudreau v. Baughman, 86 N.C. App. 165, 356 S.E.2d 907 (1987), rev'd in part, modified and aff'd in part, 322 N.C. 331, 368 S.E.2d 849 (1988).

The North Carolina General Assembly intended to establish a fixed cut-off date to bar actions brought after six years involving an injury caused by a manufactured good. A defendant escapes liability if the action is not brought within the six-year window provided by subdivision (6) of this section. Lindsay v. Public Serv. Co., 725 F. Supp. 278 (W.D.N.C. 1989), appeal dismissed, 732 F. Supp. 623 (W.D.N.C. 1990).

With No Exception for Failure to Warn. — The statute of repose in subdivision (6) of this section, as incorporated into the North Carolina products liability statute, Chapter 99B, anticipates that the statute includes any action brought for or on account of personal injury. Specifically, the statute includes those injuries caused by or resulting from a warning (or lack thereof). Thus, the statute of repose contains no exception for failure to warn. Lindsay v. Public Serv. Co., 725 F. Supp. 278 (W.D.N.C. 1989), appeal dismissed, 732 F. Supp. 623 (W.D.N.C. 1990).

Construction with Other Sections. — The clear and explicit intent of the legislature, as evidenced by the statutory language of the Products Liability Act itself, is to allow the statute of repose to be tolled if G.S. 1-17 applies. Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995).

Purpose of Subdivision (6). — Subdivision (6) of this section was enacted with Chapter 99B to provide a period of limitations for actions to which that Chapter applies. Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982).

Subdivision (6) excludes all actions brought after six years, whether these actions are first-party actions, cross-claims or counter-claims. Tetterton v. Long Mfg. Co., 314 N.C. 44, 332 S.E.2d 67 (1985).

Subdivision (6) of this section is intended to be a substantive definition of rights, as distinguished from a procedural limitation on the remedy used to enforce rights. Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982).

Statutes such as subdivision (6) of this section, running from a time other than accrual of an action, are substantive rather than procedural limitations. Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982).

Which Establishes An Outside Time Limit for Bringing Suit. — Subdivision (6) of this section does not extend the negligence statute of limitations from three to six years, but instead establishes an outside time limit for bringing a personal injury claim based upon a defective product. Bobbitt v. Tannewitz, 538 F. Supp. 654 (M.D.N.C. 1982).

Subdivision (6) as Statute of Repose. — Although labeled a statute of limitations, subdivision (6) of this section is more properly referred to as a statute of repose, in that it places a cap or outer limit on the time period within which a products liability action may be brought, irrespective of when the claim accrues. Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982).

Statutes such as subdivision (6) of this section have been denominated "statutes of repose" by commentators and practitioners because they set a fixed limit after the time of the product's manufacture, sale or delivery beyond which the seller will not be held liable. Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982); Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Subdivision (6) of this section is not a statute of limitation but is instead merely a "statute of repose" that places an outer limit on the time period within which a products liability action may be brought. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

Statutes such as subdivision (6) of this statute have been denominated statutes of repose because they set a fixed limit after the time of the product's manufacture, sale, or delivery beyond which a plaintiff's claim will not be recognized. Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Statutes of Repose and Statutes of Limitation Compared. — The term "statute of repose" is used to distinguish ordinary statutes of limitation from those that begin to run at a time unrelated to the traditional accrual of the cause of action. This distinction corresponds to the distinction between procedural and substantive laws. Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover. The statute of repose, on the other hand, acts as a condition precedent to the action itself. Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Characterization of a statute of repose as a substantive definition of rights rather than a procedural limitation on the remedy used to enforce rights, holds true in the context of choice of law. When commencement of an action within a specified period is a condition precedent to relief, "the limitation period is considered to be so tied up with the underlying right that for choice of law purposes, the limitation clause is treated as a 'substantive' rule of law." Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Statute of Repose Cannot Be Impaired by Later Retroactive Statute. — Once the 1963 version of this section barred the plaintiffs' suit, a subsequent statute could not revive it. A statute of repose, unlike an ordinary statute of limitations, defines substantive rights to bring an action. Filing within the time limit prescribed is a condition precedent to bringing the action. Failure to file within that period gives the defendant a vested right not to be sued. Such a vested right cannot be impaired by the retroactive effect of a later statute. Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 390, 320 S.E.2d 273 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 485 (1985).

In enacting subdivision (5) of this section, the Legislature defined a liability of limited duration. Once the time limit on the plaintiffs' cause of action expired, the defendants were effectively "cleared" of any wrongdoing or obligation. If a court were to find that a later version of subdivision (5) of this section operates retrospectively, then it must revive a liability already extinguished, and not merely restore a lapsed remedy. Such a revival of the defendants' liability to suit, long after they have been statutorily entitled to believe it does not exist, and have discarded evidence and lost touch with witnesses, would be so prejudicial as to deprive them of due process. Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 390, 320 S.E.2d 273 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 485 (1985).

Initial Purchase for Use. — Manufacturer's purchase of component parts for the purpose of assembly into drying ranges, like a dealer-distributor's purchase of a product for the purpose of resale, was not the "initial purchase for use" within the meaning of subdivision (6) of this section; plaintiff's purchase of the drying ranges for the purpose of manufacturing textiles was the "initial purchase for use" because manufacturing textiles was the ultimate or intended use of this product. Chicopee, Inc. v. Sims Metal Works, Inc., 98 N.C. App. 423, 391 S.E.2d 211, cert. denied, 327 N.C. 632, 395 S.E.2d 675 (1990).

Filing within time limit prescribed by statute of repose is a condition precedent to bringing the action, and plaintiff's failure to file within the prescribed time gives defendant a vested right not to be sued. Boudreau v. Baughman, 86 N.C. App. 165, 356 S.E.2d 907 (1987), rev'd in part, modified and aff'd in part, 322 N.C. 331, 368 S.E.2d 849 (1988).

Choice of Law. — Statutes of repose are treated as substantive provisions for choice of law purposes. Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Where defendant, a North Carolina brake manufacturer, initially distributed his product from North Carolina into Kentucky, and plaintiff's injury as a result of a malfunction of brakes supplied by defendant took place in North Carolina, North Carolina law applied to plaintiff's breach of warranty claim. Mahoney v. Ronnie's Road Serv., 122 N.C. App. 150, 468 S.E.2d 279 (1996), aff'd per curiam, 345 N.C. 631, 481 S.E.2d 85 (1997).

Multiplicity of Claims Covered. — The generality of the language in subdivision (6) of this section indicates that the Legislature intended to cover the multiplicity of claims that can arise out of a defective product. Colony Hill Condominium I Ass'n v. Colony Co., 70 N.C. App. 390, 320 S.E.2d 273 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 485 (1985).

G.S. 1-50(a)(6) indicated that the legislature intended to cover a multiplicity of claims that could have arisen out of a defective product; a farmer's fraud action based on the alleged failure of a manufactured silo to perform as advertised or indicated by the silo's promotional literature, was thus controlled by G.S. 1-50(a)(6), not by G.S. 1-52(9), and was time-barred. Jack H. Winslow Farms, Inc. v. Dedmon, 171 N.C. App. 754, 615 S.E.2d 41, 2005 N.C. App. LEXIS 1359 (2005), cert. denied, 360 N.C. 64, 621 S.E.2d 625 (2005).

Fraud Claim Arising from Express Representation That Plaintiff's Interests Would Be Defended Held Not Barred. — The court erroneously dismissed plaintiffs' fraud claim arising from defendant's allegedly express representation that it would defend plaintiffs' interests; the bar evidenced by subdivision (6) was inapplicable to this particular fraud claim since plaintiffs alleged that they were injured by defendant's intentionally deceptive express representation that defendant would provide counsel for them and since this representation was allegedly made irrespective of barred products liability claims. Brown v. Lumbermens Mut. Cas. Co., 90 N.C. App. 464, 369 S.E.2d 367, cert. denied, 323 N.C. 363, 373 S.E.2d 541 (1988).

Claims Arising Out of Disease. — This section, insofar as it constitutes a statute of repose, has no application to claims arising out of a disease. Silver v. Johns-Manville Corp., 789 F.2d 1078 (4th Cir. 1986).

This section did not bar plaintiff's claim for damages for asbestosis, even though the product alleged to have given rise to the injury was purchased more than six years prior to the alleged onset of the disease. Hyer v. Pittsburgh

Corning Corp., 790 F.2d 30 (4th Cir. 1986).

Disease is not included within a statute of repose directed at personal injury claims unless the legislature expressly expands the statute's language to include it. Gardner v. Asbestos Corp., 634 F. Supp. 609 (W.D.N.C. 1986).

Where injury or death is alleged to have resulted from disease, the six-year statute of repose under this section is inapplicable. Guy v. E.I. DuPont De Nemours & Co., 792 F.2d 457 (4th Cir. 1986).

Asbestos-Related Claims. — Subdivision (6) does not bar action for wrongful death resulting from exposure to asbestos products brought pursuant to diversity jurisdiction. Burnette v. Nicolet, Inc., 818 F.2d 1098 (4th Cir. 1986).

Failure to Allege Viable Claim Under Chapter 99B. — Where plaintiffs sought recovery for damages to a mobile home, a product manufactured by defendant, plaintiffs' complaint did not allege a viable claim under Chapter 99B, and subdivision (6), the statute of limitations for product liability actions brought under Chapter 99B, was inapplicable. Reece v. Homette Corp., 110 N.C. App. 462, 429 S.E.2d 768 (1993).

Subdivision (6) Not Applicable to Claims Accruing Before October 1, 1979. — Since subdivision (6) of this section makes substantive changes in the law of products liability, it does not apply to claims arising before October 1, 1979. Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982).

Because subdivision (6) of this section is a substantive change in the conditions precedent to a cause of action, the legislature did not intend that subdivision (6) be retrospectively applied to causes of action that had accrued before its effective date of October 1, 1979. Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415 (1982).

Dismissal on Ground of Former G.S. 1-15(b) Held Error. — In an action for tort and breach of warranties, trial court erred in dismissing plaintiffs' claims of negligence and strict liability instituted in 1979, for personal injuries allegedly caused by the defective condition of a vehicle purchased from defendant dealer, on the ground that the claims were barred by the three-year limitation of former G.S. 1-15(b), where plaintiffs alleged that the link between their physical injuries and gas fumes in the vehicle was not discovered until 1978, since the claim did not accrue until the injury was discovered or ought reasonably to have been discovered, and whether plaintiffs should have discovered the invasion of their legal rights prior to 1978 was a question for the jury. Gillespie v. American Motors Corp., 51 N.C. App. 535, 277 S.E.2d 100 (1981).

Statute Held Applicable. — Raw material suppliers who sold resin to companies which manufactured the components of a plumbing system were remote manufacturers, and the six-year products liability statute of repose applied in a suit alleging that the plumbing system was defective. National Property Investors v. Shell Oil Co., 950 F. Supp. 710 (E.D.N.C. 1996).

Action Held Precluded. — Where date of initial purchase of Volkswagen bus whose lack of crashworthiness plaintiff alleged caused him serious personal injuries in an accident on March 24, 1983, was on or about September 4, 1974, by its clear language, the North Carolina statute of repose, subdivision (6) of this section, precluded plaintiff's action. Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

An employee's products liability claim against the manufacturer of allegedly defective "flip fingers" used on a press brake was barred by this section, despite the employee's claim that the suit was brought within the time allowed by G.S. 1-52, where the flip fingers were installed more than six years before the employee's hand was injured while using the press brake. Vogl v. LVD Corp., 132 N.C. App. 797, 514 S.E.2d 113 (1999).

§ 1-51. Five years.

Within five years —

(1) No suit, action or proceeding shall be brought or maintained against a railroad company owning or operating a railroad for damages or compensation for right-of-way or use and occupancy of any lands by the company for use of its railroad unless the action or proceeding is commenced within five years after the lands have been entered upon for the purpose of constructing the road, or within two years after it is in operation.

(2) No suit, action or proceeding shall be brought or maintained against a railroad company for damages caused by the construction of the road, or the repairs thereto, unless such suit, action or proceeding is commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party

aggrieved is entitled to recover by reason of the trespass on his property. (1893, c. 152; 1895, c. 224; 1897, c. 339; Rev., s. 394; C.S., s. 440.)

Local Modification. — Burke: Pub. Loc., 1925, c. 535; Caldwell: Pub. Loc., 1927, c. 119; Haywood: Pub. Loc., 1923, c. 433; McDowell: Pub. Loc., 1925, c. 535; Mitchell, Yancey: Pub. Loc., 1923, c. 433.

Cross References. — As to limitation period for unknown and certain other claims against a dissolved corporation, see G.S. 55-14-07.

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

CASE NOTES

Constitutionality. — This section is not violative of the equal protection clause of U.S. Const., Amend. XIV. Narron v. Wilmington & W.R.R., 122 N.C. 856, 29 S.E. 356 (1898).

Power of Legislature. — The legislature may reduce or extend the time within which an action may be brought, subject to the restriction that when the limitation is shortened a reasonable time must be given for the commencement of an action before the statute works a bar. Nichols v. Norfolk & C.R.R., 120 N.C. 495, 26 S.E. 643 (1897).

Actions Under This Section and G.S. 1-52 Distinguished. — In actions for damages against a railroad company arising from alleged negligence with respect to its roadbed, this section applies as to injuries arising from the original and permanent construction of the road, properly maintained; but as to injuries arising from the negligent failure of defendant to properly maintain the road, such as keeping open culverts and the like, actions may be brought from time to time for the three years preceding institution of the action, as in ordinary cases of recurrent injury. Perry v. Norfolk S.R.R., 171 N.C. 38, 87 S.E. 948 (1916).

This section does not apply to a suit begun before its passage. Nichols v. Norfolk & C.R.R., 120 N.C. 495, 26 S.E. 643 (1897); Harrell v. Norfolk & C.R.R., 122 N.C. 822, 29 S.E. 56 (1898).

This section has no application to an action in ejectment by the owner of the fee to recover that part of the right-of-way no longer used by the railroad company or its lessee for railroad purposes. Sparrow v. Dixie Leaf Tobacco Co., 232 N.C. 589, 61 S.E.2d 700 (1950).

This section makes uniform the periods of limitation against railroad companies for damages or compensation for lands taken for rights-of-way or use and occupancy. Carolina & N.W. Ry. v. Piedmont Wagon & Mfg. Co., 229 N.C. 695, 51 S.E.2d 301 (1949), discussed in 27 N.C.L. Rev. 579.

Section Applies Only to Railroads. — This section in express terms applies only to actions against railroad companies, and the courts have no authority to extend its provisions to actions of a different character. Cherry v. Canal Co., 140 N.C. 422, 53 S.E. 138 (1906).

And Is Inapplicable to Telegraph Companies. — The period of the acquisition by user for five years, allowed to railroad companies by this section, does not extend to telegraph companies. Teeter v. Postal Telegraph-Cable Co., 172 N.C. 783, 90 S.E. 941 (1916).

In case of railroads, the period within which actions for continuing trespasses may be brought has been reduced to five years, but there being no such statute in respect of telegraph companies, the common-law period of 20 years is required. Love v. Postal Telegraph-Cable Co., 221 N.C. 469, 20 S.E.2d 337 (1942). See also, Geer v. Durham Water Co., 127 N.C. 349, 37 S.E. 474 (1900).

When Statute Begins to Run — Generally. — The statute begins to run from the date of the first substantial injury. Ridley v. Seaboard & R.R.R., 118 N.C. 996, 24 S.E. 730 (1896); Beach v. Wilmington & W.R.R., 120 N.C. 498, 26 S.E. 703 (1897); Stack v. Railroad, 139 N.C. 366, 51 S.E. 1024 (1905); Staton v. Atlantic C.L.R.R., 147 N.C. 428, 61 S.E. 455 (1908); Pickett v. Atlantic C.L.R.R., 153 N.C. 148, 69 S.E. 8 (1910).

The statute of limitations begins to run, in cases where the injury is continual and gradual, not necessarily from the construction of the road, but from the time when the first injury was sustained. This means, of course, the first substantial injury, as it would be a hardship to require a plaintiff to bring an action when his recovery would necessarily be merely nominal but yet would be a bar to any future action. Beach v. Wilmington & W.R.R., 120 N.C. 498, 26 S.E. 703 (1897).

Under this section, actions for damages occasioned by the construction of railroads are to be commenced within five years after the cause of action occurs, and the jury shall assess the entire amount of damages suffered by the party aggrieved. The statute does not begin to run until the damage is done. Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

Same — Diversion of Water Caused by Insufficient Culvert. — This section did not apply to damages for the diversion of water from a lateral ditch along the roadbed of a railroad company, caused by an insufficient culvert to carry it under the roadbed, until the culvert became insufficient. Savage v. Norfolk S.R.R., 168 N.C. 241, 84 S.E. 292 (1915).

Same — Damages Arising After Construction. — This section does not necessarily begin to run from the time the road or structures were originally erected if thereafter changes have been made therein which caused appreciable and substantial damages to adjoining lands. Barclift v. Norfolk S.R.R., 175 N.C. 114, 95 S.E. 39 (1918).

Same — Against Remainderman. — The right of action of a remainderman against a railroad to recover lands accrues upon the death of the life tenant. Young v. Atlantic C.L.R.R., 189 N.C. 238, 126 S.E. 600 (1925).

Permanent Damages to Be Assessed. — The evident meaning of this section is that hereafter, in all actions against railroads for injuries from construction or repair of the road, the permanent damages must be assessed. Nichols v. Norfolk & C.R.R., 120 N.C. 495, 26 S.E. 643 (1897). See also, Strickland v. Draughan, 91 N.C. 103 (1884); Beach v. Wilmington & W.R.R., 120 N.C. 498, 26 S.E. 703 (1897).

In actions brought for damages to crops and personal injuries, since the passage of this section, only permanent damages, i.e., damages once for all, can be recovered; and such actions are barred by the lapse of five years. Ridley v. Seaboard & R.R.R., 124 N.C. 34, 32 S.E. 325 (1899).

If the damage is in itself irreparable, or if it will probably recur from a given state of things which the defendant refuses to change, and which the court from motives of public policy will not make him change, permanent damages are allowed as the only way of doing justice to the plaintiff, and at the same time preventing interminable litigation. Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

The assessment of "permanent damages" in a case against a railroad for injuries to land in the construction or repair of its roadbed is compulsory. Beasley v. Aberdeen & R.R.R., 147 N.C. 362, 61 S.E. 453 (1908); Pickett v. Atlantic C.L.R.R., 153 N.C. 148, 69 S.E. 8 (1910).

What Damages Contemplated by Section. — The damages to land caused by the building of a railroad and structures within contemplation of this section are the entire damages, past, present and prospective, including not only the depreciation of the land incident to the trespass, but also the injury to growth of crops during the period covered by the inquiry to the time of trial, which may be assessed by the jury on separate issues as to each. Barclift v. Norfolk S.R.R., 175 N.C. 114, 95 S.E. 39 (1918).

Amount of Damages Recoverable. — The amount recoverable is not the estimated sum of all future damages expected to result from a continuing trespass, but rather, the damage done to the estate of the plaintiff by the appropriation to the easement of so much of his land or such use thereof as may be necessary to the easement. Beach v. Wilmington & W.R.R., 120 N.C. 498, 26 S.E. 703 (1897).

This section does not profess to restrict the right of the plaintiff to compensation for the injury suffered. If the plaintiff is otherwise entitled to yearly damages, he can recover them in addition to the just compensation to which he is entitled for the value of the easement if it is conveyed to the defendant. While, if entitled thereto, he must recover them in the same action, they need not necessarily be submitted in the same issue. In fact, it is better to submit them in different issues, as they are distinct in principle. The one is compensation for a wrong, while the other is the conveyance of a right, as the allowance of permanent damages under this section is in effect the condemnation of land to the use of a statutory easement. Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

Allowance of Interest. — It is within the power of the lower court to allow interest on the amount found, since the actual taking by the railroad company of the owner's land for its right-of-way, as a part of the damages. Abernathy v. South & W. Ry., 159 N.C. 340, 74 S.E. 890 (1912).

Right of Railroad to Pay for Damages and Abate Cause of Injury. — Where railroad is damaging plaintiff, but not permanently, and does not wish to acquire the easement under this section, it may pay for the damage done and then abate the cause of the injury, without being forced to purchase the easement under this section. Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

Damages for Permanent Ditch. — While a ditch is not necessarily a permanent structure, ditches may be made permanent, as far as plaintiff is concerned, by the refusal of defendant to change them; and in that event, if the court refuses to compel the abatement, it must award permanent damages. Such permanent damages represent the damage done to the estate of the plaintiff by the appropriation of the easement of so much of his land, or such use thereof, as may be necessary to the easement. As this, being the value of a right, is essentially distinct from damages for the perpetration of a wrong, they are cumulative and may both be recovered in the same action, as is clearly intended by the statute. Lassiter v. Norfolk & C.R.R., 126 N.C. 509, 36 S.E. 48 (1900).

Recovery by Present Owner. — The

present owner of land may recover of a railroad company, under the provisions of this section, the entire damages to his land caused by permanent structures or proper permanent repairs of defendant, for a period of five years from the time when the structures or repairs caused substantial injury to the claimant's land, unless a former owner, entitled thereto, had instituted an action therefor before his sale and conveyance of the land. Louisville & N.R.R. v. Nichols, 187 N.C. 153, 120 S.E. 819 (1924).

Section Must Be Specially Pleaded by Railroad. — This section, with regard to bringing an action against a railroad for damages for a right-of-way taken by it without condemning the same or acquiring the easement by purchase, is a statute of limitation, and must be specially pleaded by the railroad company, if relied on; and it is not required of the owner to affirmatively show that he has commenced his action within the time specified, as it is not a condition annexed to his cause of action. Abernathy v. South & W. Ry., 159 N.C. 340, 74 S.E. 890 (1912).

Action Held Barred. — An action against a railroad company for damages caused to plaintiff's lands by an embankment built by defendant's grantor, a railroad company, which at the time of its erection produced the same physical conditions, necessarily causing the same or substantial injury and interference on plaintiff's lands that existed since, was barred by the statute of limitations after five years. Campbell v. Raleigh & C.R.R., 159 N.C. 586, 75 S.E. 1105 (1912).

Action Not Barred. — An amendment to the complaint in an action against a railroad company to recover for crop damage caused by diversion of the natural flow of water, so as to allege permanent damages to the land, did not add a new cause of action, but related only to the measure of damages arising from the injury; and this section would not bar the plaintiff by reason of the amendment alone. Pickett v. Atlantic C.L.R.R., 153 N.C. 148, 69 S.E. 8 (1910).

As to prior law, see Ridley v. Seaboard & R.R.R., 118 N.C. 996, 24 S.E. 730 (1896); Parker v. Norfolk & C.R.R., 119 N.C. 677, 25 S.E. 722 (1896); Nichols v. Norfolk & C.R.R., 120 N.C. 495, 26 S.E. 643 (1897); Harrell v. Norfolk & C.R.R., 122 N.C. 822, 29 S.E. 56 (1898); Ridley v. Seaboard & R.R.R., 124 N.C. 34, 32 S.E. 325 (1899).

Applied in Owenby v. Louisville & N.R.R., 165 N.C. 641, 81 S.E. 997 (1914); Poore v. Norfolk-Southern Ry., 30 N.C. App. 104, 226 S.E.2d 170 (1976).

Cited in Blevins v. Northwest Carolina Utils., Inc., 209 N.C. 683, 184 S.E. 517 (1936); Staley v. Lingerfelt, 134 N.C. App. 294, 517 S.E.2d 392, 1999 N.C. App. LEXIS 763 (1999); Curtis v. Norfolk Southern Ry. Co., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 26196 (M.D.N.C. Aug. 27, 2002).

§ 1-52. Three years.

Within three years an action —

(1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections or in G.S. 1-53(1).

(1a) Upon the official bond of a public officer.

(2) Upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it.

(3) For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.

(4) For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.

(5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.

(6) Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.

(7) Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.

(8) For fees due to a clerk, sheriff or other officer, by the judgment of a court; within three years from the entry of the judgment, or the issuing of the last execution thereon.

(9) For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

(10) Repealed by Session Laws 1977, c. 886, s. 1.

(11) For the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of 1938 and amendments thereto, said act being an act of Congress.

(12) Upon a claim for loss covered by an insurance policy that is subject to the three-year limitation contained in G.S. 58-44-16.

(13) Against a public officer, for a trespass, under color of his office.

(14) An action under Chapter 75B of the General Statutes, the action in regard to a continuing violation accrues at the time of the latest violation.

(15) For the recovery of taxes paid as provided in G.S. 105-381.

(16) Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

(17) Against a public utility, electric or telephone membership corporation, or a municipality for damages or for compensation for right-of-way or use of any lands for a utility service line or lines to serve one or more customers or members unless an inverse condemnation action or proceeding is commenced within three years after the utility service line has been constructed or by October 1, 1984, whichever is later.

(18) Against any registered land surveyor as defined in G.S. 89C-3(9) or any person acting under his supervision and control for physical damage or economic or monetary loss due to negligence or a deficiency in the performance of surveying or platting as defined in G.S. 1-47(6).

(19) For assault, battery, or false imprisonment. (C.C.P., s. 34; Code, s. 155; 1889, cc. 218, 269; 1895, c. 165; 1899, c. 15, s. 71; 1901, c. 558, s. 23; Rev., s. 395; 1913, c. 147, s. 4; C.S., s. 441; 1945, c. 785; 1971, c. 939, s. 1; 1975, c. 252, ss. 2, 4; 1977, c. 886, s. 1; c. 916, s. 2; c. 946, s. 4; 1979, c. 654, s. 3; 1981, c. 702; c. 777, s. 4; 1991, c. 268, s. 1; 1995 (Reg. Sess., 1996), c. 742, s. 1(b); 1997-297, s. 2; 2001-175, s. 2; 2004-203, s. 15(b); 2007-491, s. 3; 2009-171, s. 5.)

Cross References. — As to accrual of cause of action for professional malpractice, see G.S. 1-15(c). As to ten year limitation against registered land surveyor, see G.S. 1-47(6). As to actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property, see G.S. 1-50(5). As to statute of limitations in contracts for sale, see G.S. 25-2-725. As to reformed process for administration and judicial review of disputed tax matters, see G.S. 105-241.6 et seq.

Editor's Note. — Session Laws 2007-491, s. 47, provides: "G.S. 105-241.10, as enacted by Section 1 of this act, and Sections 6, 15, 16, 17, and 22 are effective for taxable years beginning on or after January 1, 2007. Section 14 is effective for taxable years beginning on or after January 1, 2008. Sections 45, 46, and 47 are effective when they become law. The remainder of this act becomes effective January 1, 2008. The procedures for review of disputed tax matters enacted by this act apply to assessments of tax that are not final as of the effective date of this act and to claims for refund pending on or filed on or after the effective date of this act. This act does not affect matters for which a petition for review was filed with the Tax Review Board under G.S. 105-241.2 [repealed] before the effective date of this act. The repeal of G.S. 105-122(c) and G.S. 105-130.4(t) and Sections 11 and 12 apply to requests for alternative apportionment formulas filed on or after the effective date of this act. A petition filed with the Tax Review Board for an apportionment formula before the effective date of this act is considered a request under G.S. 105-122(c1) or G.S. 105-130.4(t1), as appropriate."

Effect of Amendments. — Session Laws 2007-491, s. 3, effective January 1, 2008, deleted "G.S. 105-267 and" following "as provided in" in subdivision (15).

Session Laws 2009-171, s. 5, effective January 1, 2010, and applicable to fire insurance policies issued or renewed on and after that date, in subdivision (12), substituted "that" for "which" and "G.S. 58-44-16" for "lines 158 through 161 of the Standard Fire Insurance Policy for North Carolina, G.S. 58-44-15(c)."

Legal Periodicals. — For comment on limitations as to claims between spouses, see 44 N.C.L. Rev. 197 (1965).

For comment on running of limitations against equitable claims, see 44 N.C.L. Rev. 202 (1965).

For note on when a cause of action accrues for limitations purposes in medical malpractice — the discovery rule, see 6 Wake Forest Intra. L. Rev. 532 (1970).

For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For article discussing product liability as affected by statutes of repose, see 61 N.C.L. Rev. 33 (1982).

For comment on the effect of Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983), on future cases determining the constitutionality of G.S. 1-50(6), see 19 Wake Forest L. Rev. 1049 (1983).

For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For note, "Wilder v. Amatex Corp.: A First Step Toward Ameliorating the Effect of Statutes of Repose on Plaintiffs with Delayed Manifestation Diseases," see 64 N.C.L. Rev. 416 (1986).

For note, "Black v. Littlejohn: A New Discovery Formula for Non-apparent Injuries Under the Professional Malpractice Statute of Limitations," see 64 N.C.L. Rev. 1438 (1986).

For article, "The Statute of Limitations for Constructive Trusts in North Carolina," see 21 Wake Forest L. Rev. 613 (1986).

For survey of North Carolina construction law, with particular reference to statutes of limitation and repose, see 21 Wake Forest L. Rev. 633 (1986).

For note discussing the implications of implied warranty protection for used housing, in light of Gaito v. Auman, 70 N.C. App. 21, 318 S.E.2d 555 (1984), aff'd, 313 N.C. 243, 327 S.E.2d 870 (1985), see 21 Wake Forest L. Rev. 515 (1986).

For note examining the limitations period for constructive trusts and the effect of an employment relationship on the property interests of an inventor, see 21 Wake Forest L. Rev. 571 (1986).

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

For note, "Do You Need 'Will Insurance?' Let the Testator Beware — Hargett v. Holland," see 21 N.C. Cent. L.J. 353 (1995).

For comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina," see 18 Campbell L. Rev. 121 (1996).

CASE NOTES

I. In General.
II. Contracts.
  A. In General.
  B. Actions to Which Section Applies.
  C. Actions to Which Section Not Applicable.
  D. Actions Held Barred.
  E. Actions Not Barred.
III. Bonds of Public Officers.
IV. Liability Created by Statutes.
V. Trespass upon Realty.
VI. Goods or Chattels.
VII. Injury to Person or Rights of Another.
VIII. Sureties of Executors, etc.
IX. Bail.
X. Fees Adjudged Due to Clerk, Sheriff or Other Officer.
XI. Fraud or Mistake.
  A. In General.

B. Applicability.
C. When Cause Accrues.
D. Discovery of Fraud or Mistake.
E. Actions Held Barred.
F. Actions Not Barred.
XII. Fair Labor Standards Act.
XIII. Accrual of Cause of Action for Personal Injury or Property Damage.
XIV. Fire Insurance Policy Claim.
XV. Assault, Battery, and False Imprisonment.

I. IN GENERAL.

Statutes of limitation may be characterized as a right not to be sued beyond the time limited. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

The Legislature has been careful to provide a statute that is as broad as possible in order to insure that plaintiffs with both latent and patent personal injury claims would receive an adequate opportunity to pursue them. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Statutes of limitations are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Statutes of Repose Constitutional. — Although a certain number of plaintiffs will always have a problem with a statute of limitation or repose, this does not mean that they have been denied a constitutional right. Statutes limiting the time within which an action may be brought are the result of a legitimate legislative determination which balances the rights and duties of competing groups. Such statutes serve a necessary function in the fair administration of justice. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

The North Carolina statute of repose as applied to an occupational disease claim, does not violate the equal protection clause of U.S. Const., Amend. XIV and the open-courts and equal protection guarantees of N.C. Const., Art. I, §§ 18 and 32. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Plaintiff's argument that he had been denied equal protection because there is no legitimate public purpose to subdivision (16) of this section and because the statute promotes the interest of special groups over injured parties and the public in general was found to be without merit. Repose in the law is a legitimate public concern, and the repose granted after 10 years by subdivision (16) of this section is balanced against the plaintiff's expanded rights under the statute. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

The purpose behind G.S. 1A-1, Rule 4 and G.S. 1-52(5) is to give notice to the party against whom an action is commenced within a reasonable time after the accrual of the cause of action. Adams v. Brooks, 73 N.C. App. 624, 327 S.E.2d 19 (1985), overruled on other grounds, 317 N.C. 613, 346 S.E.2d 424 (1986).

The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970); Wheeless v. St. Paul Fire & Marine Ins. Co., 11 N.C. App. 348, 181 S.E.2d 144 (1971); Plott v. Wachovia Bank & Trust Co., 12 N.C. App. 694, 184 S.E.2d 384 (1971); Blue Cross & Blue Shield v. Odell Assocs., 61 N.C. App. 350, 301 S.E.2d 459, cert. denied, 309 N.C. 319, 306 S.E.2d 791 (1983).

And the court has no discretion when considering whether a claim is barred by the statute of limitations. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Right of Defendant to Rely on Statute as a Defense. — The statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

Operation of Statute Not Interrupted by Unavailability of Information. — The unavailability of information concerning a fact which must be proved in order for a plaintiff to recover does not interrupt or delay the operation of the statute of limitations. Wheeless v. St. Paul Fire & Marine Ins. Co., 11 N.C. App. 348, 181 S.E.2d 144 (1971).

Discovery of the Wrong. — Neither subdivision (2) nor subdivision (4) expressly provides for the three years to begin upon discovery of the wrong. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

The fact that a person, in good faith, pursued another remedy, which turned out to be unavailable, does not extend the time allowed by the statute for the institution of an action. Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 171 S.E.2d 873 (1970).

Classification of Limitations Is Based upon Nature of Right, Rather Than Rem-

edy. — There is no suggestion of classification in the limitations statutes on the basis of remedies which might be available for enforcement of the substantive right. The right asserted is determinative, not the relief sought. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

The bar is applied under this section, not to the mode in which relief is sought, but to the relief itself. Spruill v. Sanderson, 79 N.C. 466 (1878).

Cases to Which Section Applies. — Where bodily injury to the person or a defect in property is an essential element of the cause of action the three-year statute of limitations found in this section should be utilized. Hanover Ins. Co. v. Amana Refrigeration, Inc., 106 N.C. App. 79, 415 S.E.2d 99, cert. denied, 332 N.C. 344, 421 S.E.2d 147 (1992).

Cases to Which Statute Applies. — The one-year statute of limitations contained in G.S. 1-54(2), did not apply to action by the North Carolina School Boards Association and several boards of education for a declaratory judgment that various monetary payments collected by state agencies were subject to N.C. Const. art. IX, § 7; although G.S. 1-54(2) had been applied to actions commenced by the State to collect civil penalties or forfeitures, G.S. 1-54(2) was not applicable because the school boards sought to recover payments provided to the public schools by N.C. Const. art. IX, § 7, and those payments had already been collected by the State. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

Section Applies Even Though Enforcing Remedy Is Equitable Lien. — Ten-year statute which applies when title to property is at issue does not apply where the action is merely for breach of contract, even though the enforcing remedy, the equitable lien, is analogous to remedies for resort to which the statute of limitations is 10 years. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

When Equitable Estoppel Applies. — The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations or conduct the repudiation of which would amount to a breach of good faith. Nowell v. Great Atl. & Pac. Tea Co., 250 N.C. 575, 108 S.E.2d 889 (1959).

The doctrine of equitable estoppel will toll a limitation only when it is the defendant himself who has misled the plaintiff, in such a manner as to make strict application of the limitation inequitable. Camack v. Hardee's Food Sys., 410 F. Supp. 469 (M.D.N.C. 1976).

The doctrine of equitable estoppel may be invoked to prevent a defendant from relying on a statute of limitations if the defendant, by deception or a violation of duty toward the plaintiff, caused the plaintiff to allow his claim to be barred by the statute of limitations. Blizzard Bldg. Supply, Inc. v. Smith, 77 N.C. App. 594, 335 S.E.2d 762 (1985), cert. denied, 315 N.C. 389, 339 S.E.2d 410 (1986).

When Relief Will Be Barred by Laches. — Where the action is barred by the applicable statute of limitations, the question of laches does not arise; when an action is not barred by the statute of limitations, equity will not bar relief on the ground of laches except upon special facts demanding exceptional relief. Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Section Not Retroactive. — A bond for the payment of money executed prior to enactment of this section, by the principal and his sureties, is exempted from the operation of the statute of limitations as contained in this section. Knight v. Braswell, 70 N.C. 709 (1874).

The defense of the statute is not barred by the existence of a fiduciary relation between the parties. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

As to the effect of G.S. 1A-1, Rule 41(a)(2) upon the statute of limitations where actions are twice dismissed and recommenced in accordance with that rule, see Parrish v. Uzzell, 41 N.C. App. 479, 255 S.E.2d 219 (1979).

To determine if a lawsuit is barred by the three year statute of limitations in G.S. 1-52, a court first determines when the breach occurred that caused the cause of action to accrue; where a counterclaim on a breach of contract action was filed more than three years after the breach allegedly occurred, the counterclaim was barred by the statute of limtations and was properly dismissed on summary judgment. PharmaResearch Corp. v. Mash, 163 N.C. App. 419, 594 S.E.2d 148, 2004 N.C. App. LEXIS 410 (2004), cert. denied and dismissed, 358 N.C. 733, 601 S.E.2d 858 (2004).

Statute Begins to Run When Plaintiff's Right to Maintain Action Accrues. — The period of the statute of limitations begins to run when plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed. Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 171 S.E.2d 873 (1970).

A cause of action accrues to an injured party, so as to start the running of the statute of limitations, when he is at liberty to sue, being at the time under no disability. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966); Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 277 N.C. 216, 176 S.E.2d 751 (1970); Wheeless v. St. Paul Fire & Marine Ins. Co., 11 N.C. App. 348, 181 S.E.2d 144 (1971).

The statute of limitations cannot begin to run against an aggrieved party who under no circumstances could have maintained an action at the time the wrongful act was committed until that aggrieved party becomes entitled to maintain an action. Williams v. GMC, 393 F. Supp. 387 (M.D.N.C. 1975), aff'd, 538 F.2d 327 (4th Cir. 1976).

The limitations period does not begin to run, of course, until the injured party is at liberty to sue. Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983), aff'd, 92 N.C. App. 571, 375 S.E.2d 520, cert. denied, 324 N.C. 333, 378 S.E.2d 789 (1989); Glover v. First Union Nat'l Bank, 109 N.C. App. 451, 428 S.E.2d 206 (1993).

And When Defendant Becomes Liable to Suit. — A cause of action accrues and the statute of limitations begins to run whenever a party becomes liable to an action, if at such time the demanding party is under no disability. This rule is subject to certain exceptions, such as torts grounded on fraud or mistake. Lewis v. Godwin Oil Co., 1 N.C. App. 570, 162 S.E.2d 135 (1968).

The claim accrues at the time of invasion of the right, and nominal damages, at least, flow from such invasion. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

When the right of the party is once violated, even in ever so small a degree, the injury, in the technical acceptation of that term, at once springs into existence and the cause of action is complete. Lewis v. Godwin Oil Co., 1 N.C. App. 570, 162 S.E.2d 135 (1968).

Accrual of Claim in Action to Recover for Water Contamination. — Where plaintiffs were assured until May, 1984 by state and local officials that no contamination was present in their wells and where plaintiffs were informed in June, 1984, that their wells were contaminated, their cause of action accrued at this time, and because they instituted this civil action in July 1986, within three years from the time their cause of action accrued, their claims were not time-barred. Wilson v. McLeod Oil Co., 95 N.C. App. 479, 383 S.E.2d 392, rev'd on other grounds, Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), appeal of right allowed pursuant to N.C.R.A.P., Rule 16(b) and petition allowed as to additional issues, 325 N.C. 714, 388 S.E.2d 473 (1989), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Where plaintiffs sued to recover damages suffered as a result of gasoline contaminating their water and the earliest reports by the Department of Natural Resources and Community Development (now the Department of Environment and Natural Resources) which indicated that their water contained nonorganic substances was compiled in 1985, plaintiff's intervention in the case in Dec. 1987 was well before the three-year limitations period had expired. Wilson v. McLeod Oil Co., 95 N.C. App. 479, 383 S.E.2d 392, rev'd on other grounds, Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), appeal of right allowed pursuant to N.C.R.A.P., Rule 16(b) and petition allowed as to additional issues, 325 N.C. 714, 388 S.E.2d 473 (1989), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Common law claims of trespass and nuisance, based on allegations of seepage of gasoline from defendant's underground tanks into plaintiff's water supply, were not barred by the statute of limitations for a continuing trespass found in this section, where the ongoing seepage created a renewing rather than a continuing trespass. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Once the statute of limitations begins to run against an action, it continues to run. Sheppard v. Barrus Constr. Co., 11 N.C. App. 358, 181 S.E.2d 130 (1971).

And Nothing Stops It. — Once the period of limitation begins to run nothing stops it. Davis v. E.I. DuPont DeNemours & Co., 400 F. Supp. 1347 (W.D.N.C. 1974).

Except Appropriate Judicial Process. — When the statute begins to run, it continues until stopped by appropriate judicial process. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966); Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 277 N.C. 216, 176 S.E.2d 751 (1970); Wheeless v. St. Paul Fire & Marine Ins. Co., 11 N.C. App. 348, 181 S.E.2d 144 (1971); Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp., 36 N.C. App. 778, 245 S.E.2d 234 (1978).

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order, filed her complaint within the time allowed by the order, and properly served defendant with the complaint and a "Delayed Service of Complaint." The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Plaintiff's second complaint, therefore, constituted a new action which plaintiff failed to file within the three years required by the statute of limitations. Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

Statute Runs Between Spouses. — Statutes of limitation run as well between spouses as between strangers. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Effect of Disability. — This statute does not begin running against a person under disability, such as infancy, until the disability is removed, notwithstanding the fact that the cause may have otherwise accrued prior to that time. Settle v. Settle, 141 N.C. 553, 54 S.E. 445 (1906).

Disability Need Not Be Pleaded. — Plaintiff was not required to plead mental disability in avoidance of the affirmative defense of statute of limitations. Dunkley v. Shoemate, 121 N.C. App. 360, 465 S.E.2d 319 (1996).

The statute runs against an infant as to all rights of action which the guardian might bring and which it was incumbent on him to bring, insofar as may be consistent with the limitations of his office, except in suits for realty where the legal title is in the ward. Rowland v. Beauchamp, 253 N.C. 231, 116 S.E.2d 720 (1960).

Mere Assertion as Insufficient Plea of Statute. — The mere assertion, without any allegation of supporting facts, that plaintiff's cause of action is barred by the statute is insufficient to constitute plea in bar. Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 171 S.E.2d 873 (1970).

Relation Back of Amended Complaint. — Where the original pleadings clearly gave notice of the transactions, occurrences or series of transactions or occurrences to be proved pursuant to the amended pleadings, and the essential details were alleged in substantially the same fashion in both the original and the amended complaints, the original pleadings placed defendants on notice of the events involved and the amended complaint related back for purposes of the statute of limitations. Clary v. Nivens, 12 N.C. App. 690, 184 S.E.2d 374 (1971).

Where an action was commenced by the issuance of summons and filing of a complaint before the running of the three-year statute of limitations, an amended complaint related back to the issuance of the summons and the filing of the original complaint where the amendment did not in any way alter the substance of the complaint. Jones v. Whitaker, 59 N.C. App. 223, 296 S.E.2d 27 (1982).

When Judgment on Pleadings Proper. — A judgment on the pleadings based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the nonmovant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

A judgment on the pleadings in favor of a defendant on defendant's plea in bar of the statute of limitations is proper when all the facts necessary to establish said plea are alleged or admitted in plaintiff's pleadings. Land v. Neill Pontiac, Inc., 6 N.C. App. 197, 169 S.E.2d 537 (1969).

Where the statute of limitations is properly pleaded and all facts are admitted or established, the question of limitations becomes a matter of law, and summary judgment is appropriate. Blue Cross & Blue Shield v. Odell Assocs., 61 N.C. App. 350, 301 S.E.2d 459, cert. denied, 309 N.C. 319, 306 S.E.2d 791 (1983).

Once the statute is pleaded, the burden is on the plaintiff to show that the action was brought within the applicable period. Parker v. Harden, 121 N.C. 57, 28 S.E. 20 (1897); Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960); Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965); Lewis v. Godwin Oil Co., 1 N.C. App. 570, 162 S.E.2d 135 (1968); State v. Cessna Aircraft Corp., 9 N.C. App. 557, 176 S.E.2d 796 (1970); Little v. Rose, 285 N.C. 724, 208 S.E.2d 666 (1974); Burkhimer v. Gealy, 39 N.C. App. 450, 250 S.E.2d 678, cert. denied, 297 N.C. 298, 254 S.E.2d 918 (1979); Silver v. North Carolina Bd. of Transp., 47 N.C. App. 261, 267 S.E.2d 49 (1980).

And Not on Defendant. — While the plea of the statute of limitations is a positive defense and must be pleaded, even so, when it has been properly pleaded, the burden of proof is then upon the party against whom the statute is pleaded to show that his claim is not barred, and is not upon the party pleading the statute to show that it is barred. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Directed Verdict Where Plaintiff Fails to Sustain Burden. — If plaintiff fails to introduce evidence to carry the burden of proving that the action was instituted within the prescribed period, the trial judge can allow a defense motion for a directed verdict. Little v. Rose, 285 N.C. 724, 208 S.E.2d 666 (1974).

Propriety of Summary Judgment When Claim Is Barred. — If the plaintiff's claim is barred by the running of the statute of limitations, defendant is entitled to judgment as a matter of law, and summary judgment, under G.S. 1A-1, Rule 56, is appropriate. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

As to the grant of a nonsuit where party against whom statute was pleaded fails to sustain his burden, see Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957); Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Ordinarily, the bar of the statute of limitations is a mixed question of law and fact. Yancey v. Watkins, 17 N.C. App. 515, 195 S.E.2d 89, cert. denied, 283 N.C. 394, 196 S.E.2d 277 (1973); Little v. Rose, 285 N.C. 724, 208 S.E.2d 666 (1974).

Whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Where the statute of limitations is properly pleaded and the facts are not in conflict, the issue becomes one of law. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

When Bar of Limitations Is a Matter of Law. — Where the bar is properly pleaded and all the facts with reference thereto are admitted, the question of limitations becomes a matter of law. Yancey v. Watkins, 17 N.C. App. 515, 195 S.E.2d 89, cert. denied, 283 N.C. 394, 196 S.E.2d 277 (1973).

Where the facts are admitted or established, the trial court may sustain the plea to dismiss as a matter of law. Little v. Rose, 285 N.C. 724, 208 S.E.2d 666 (1974).

When the Issue Is a Jury Question. — Where the evidence is sufficient to support an inference that the cause of action is not barred, the issue is for the jury. Little v. Rose, 285 N.C. 724, 208 S.E.2d 666 (1974).

Where the facts are in doubt or in dispute and there is any evidence sufficient to justify the inference that the cause of action is not barred, the trial court may not withdraw the case from the jury. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Failure to plead subdivision (16) by precise number and subsection is not fatal under N.C.G.S. G.S. 1A-1, Rule 8(c). Bonestell v. North Topsail Shores Condominiums, Inc., 103 N.C. App. 219, 405 S.E.2d 222 (1991).

Actions Against Police Officers for False Arrest, False Imprisonment, and Assault and Battery. — This section, providing for three-year statute of limitations, not G.S. 1-54(3), providing for one-year statute, governed plaintiff's claims for false arrest and assault against police officer and city. Fowler v. Valencourt, 334 N.C. 345, 432 S.E.2d 306 (1993).

To the extent that Mobley v. Broome, 248 N.C. 54, 102 S.E.2d 407 (1958), Evans v. Chipps, 56 N.C. App. 232, 287 S.E.2d 426 (1982), and Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981), hold that the one-year statute of limitation for false imprisonment and assault and battery is the applicable statute when a plaintiff alleges claims for false arrest, false imprisonment, and assault and battery by a police officer in the exercise of official duties, those cases are expressly overruled. Fowler v. Valencourt, 334 N.C. 345, 432 S.E.2d 306 (1993).

Ruling that the three-year statute of limitation found in this section applies when a plaintiff alleges claims for false arrest, false imprisonment, and assault and battery by a police officer in the exercise of official duties was not to be given prospective application only. Fowler v. Valencourt, 334 N.C. 345, 432 S.E.2d 306 (1993).

Tolling of Statute. — A statute of limitations is tolled during the time the seller endeavors to make repairs to enable the product to comply with a warranty. Haywood Street Redevelopment Corp. v. Harry S. Peterson, Co., 120 N.C. App. 832, 463 S.E.2d 564 (1995).

Amendment Not Barred. — In depositor's action against bank to recover damages allegedly resulting from bank losing deposit in the original pleading, it was alleged that defendant breached the bailor-bailee relationship by failing to find and credit a deposit. Depositor's amendment to the complaint alleged that defendant's failure to find and credit the deposit was negligence. The amended pleading did not allude to any new occurrence or transaction; it merely characterized differently the same occurrences and transactions that the original pleading was based upon. The original pleading was notice to defendant of what was to be proved in the amended pleading pursuant to G.S. 1A-1, Rule 15(c); therefore, the amendment was deemed to have been interposed at the time the claim in the original pleading was interposed. Ford v. NCNB Corp., 104 N.C. App. 172, 408 S.E.2d 738 (1991).

An action to recover damages for patent infringement and for appropriating and using confidential information relating to the patent was governed by subdivisions (5) and (9) of this section and not by G.S. 1-56. Reynolds v. Whitin Mach. Works, 167 F.2d 78 (4th Cir. 1948), cert. denied, 334 U.S. 844, 68 S. Ct. 1513, 92 L. Ed. 1768 (1948).

This section was not applicable to an action specifically brought under former G.S. 105-414. Miller v. McConnell, 226 N.C. 28, 36 S.E.2d 722 (1946).

A resulting or constructive trust, as distinguished from an express trust, is governed by the 10-year statute of limitations, G.S. 1-56, and not by this section. Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Section Not Applicable to Action to Recover Share of Estate. — An action by an administrator to recover his intestate's share of an estate is governed by G.S. 1-56, which provides that actions not otherwise provided for shall be brought within 10 years, and not this section. Hunt v. Wheeler, 116 N.C. 422, 21 S.E. 915 (1895).

Action Not Barred. — An action for malicious prosecution or abuse of process was not barred by this section, where the action was begun two years, 11 months and 21 days after the plaintiff was discharged from the State hospital. Barnette v. Woody, 242 N.C. 424, 88 S.E.2d 223 (1955).

In an action to recover damages from defendant attorneys-at-law, for failing properly to file a cause of action on behalf of the plaintiff, the claim accrued at the time of the filing of the defective summons. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971). As to actions for professional malpractice, see now G.S. 1-15(c).

Action for Payment of Medical Treatment. — Absent a contract stipulating the date when payment is due, a cause of action for collection of payment for continuing medical treatment arises at the time the last treatment is provided. Johnson Neurological Clinic, Inc. v. Kirkman, 121 N.C. App. 326, 465 S.E.2d 32 (1996).

Plaintiff's claim against health care provider for unauthorized disclosure of communications was one for malpractice, and the applicable statute of limitations was G.S. 1-15(c), rather than this section. The cause of action accrued at the time of the last unauthorized discussion of the patient's case with another doctor. Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), rev'd on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986).

Statement Not Acknowledgment. — Defendant's statement that he "planned to refile this on my insurance and handle the balance myself" indicated his payment was conditioned upon whatever the insurance coverage did not pay. It demonstrated a willingness to pay only whatever amount would be left after refiling the claim with his insurance company; therefore, the statement failed as an acknowledgment sufficient to toll the statute of limitations. Johnson Neurological Clinic, Inc. v. Kirkman, 121 N.C. App. 326, 465 S.E.2d 32 (1996).

For cases as to recovery of real property sold for nonpayment of taxes under former subdivision (10) of this section, see Lyman v. Hunter, 123 N.C. 508, 31 S.E. 827 (1898); Kivett v. Gardner, 169 N.C. 78, 85 S.E. 145 (1915); Jordan v. Simmons, 169 N.C. 140, 85 S.E. 214 (1915); Ruark v. Harper, 178 N.C. 249, 100 S.E. 584 (1919); Smith v. Allen, 181 N.C. 56, 106 S.E. 143 (1921); Price v. Slagle, 189 N.C. 757, 128 S.E. 161 (1925); Bailey v. Howell, 209 N.C. 712, 184 S.E. 476 (1936).

Action for Permissive Waste Barred. — Three-year statute of limitations for permissive waste of property which was the subject of a life estate applied to nephew's claim against the decedent where the nephew was aware of the property deterioration seven years prior to the decedent's death but where the nephew did not bring the action until the date of the decedent's death. McCarver v. Blythe, 147 N.C. App. 496, 555 S.E.2d 680, 2001 N.C. App. LEXIS 1174 (2001).

Construction with Other Laws. — The court held that the 60-day limitations period in G.S. 150B-23 is the period associated with the state statute, former G.S. 115C-116 (repealed), most analogous to the IDEA and rejected the idea that North Carolina's catch-all three-year statute of limitations for statutory actions for which no limitations period is otherwise provided, pursuant to G.S. 1-52(2), constituted a better borrowing choice and one more consistent with federal policies. CM v. Board of Educ., 241 F.3d 374, 2001 U.S. App. LEXIS 2555 (4th Cir. 2001), cert. denied, 534 U.S. 818, 122 S. Ct. 48, 151 L. Ed. 2d 18 (2001).

Applied in Hall v. Hood, 208 N.C. 59, 179 S.E. 27 (1935); Copley v. Scarlett, 214 N.C. 31, 197 S.E. 623 (1938); Johnson v. Pilot Life Ins. Co., 215 N.C. 120, 1 S.E.2d 381 (1939); Howard v. White, 215 N.C. 130, 1 S.E.2d 356 (1939); Bynum v. Life Ins. Co., 222 N.C. 742, 24 S.E.2d 613 (1943); Sayer v. Henderson, 225 N.C. 642, 35 S.E.2d 875 (1945); Craver v. Spaugh, 227 N.C. 129, 41 S.E.2d 82 (1947); Henderson v. Henderson, 232 N.C. 1, 59 S.E.2d 227 (1950); Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952); Merchants & Planters Nat'l Bank v. Appleyard, 238 N.C. 145, 77 S.E.2d 783 (1953); Crowell v. Eastern Air Lines, 240 N.C. 20, 81 S.E.2d 178 (1954); Sandlin v. Weaver, 240 N.C. 703, 83 S.E.2d 806 (1954); Graham v. Taylor Biscuit Co., 161 F. Supp. 435 (M.D.N.C. 1957); Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959); Nowell v. Great Atl. & Pac. Tea Co., 250 N.C. 575, 108 S.E.2d 889 (1959); Horne v. Cloninger, 256 N.C. 102, 123 S.E.2d 112 (1961); Snyder v. Wylie, 239 F. Supp. 999 (W.D.N.C. 1965); Matthieu v. Piedmont Nat'l Gas Co., 269 N.C. 212, 152 S.E.2d 336 (1967); Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967); Cobb v. Clark, 4 N.C. App. 230, 166 S.E.2d 692 (1969); Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972); Wall v. Flack, 15 N.C. App. 747, 190 S.E.2d 671 (1972); Ford Motor Credit Co. v. Minges, 473 F.2d 918 (4th Cir. 1973); Little v. Rose, 21 N.C. App. 596, 205 S.E.2d 150 (1974); Brantley v. Meekins, 22 N.C. App. 683, 207 S.E.2d 377 (1974); Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974); Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975); Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702 (1975); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975); Howard v. Hamilton, 28 N.C. App. 670, 222 S.E.2d 913 (1976); Shuler v. Gaston County Dyeing Mach. Co., 30 N.C. App. 577, 227 S.E.2d 634 (1976); Pinkston v. Baldwin, Lima, Hamilton Co., 292 N.C. 260, 232 S.E.2d 431 (1977); Ward v. Hotpoint Div., 35 N.C. App. 495, 241 S.E.2d 710 (1978); Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978); Johnson v. Ryder Truck Lines, 575 F.2d 471 (4th Cir. 1978); FDIC v. Loft Apts., Ltd. Partnership, 39 N.C. App. 473, 250 S.E.2d 693 (1979); Johnson v. Podger, 43 N.C. App. 20, 257 S.E.2d 684 (1979); Flippin v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980); Brickell v. Collins, 44 N.C. App. 707, 262 S.E.2d 387 (1980); Hill v. Pinelawn Mem. Park, 50 N.C. App. 231, 275 S.E.2d 838 (1981); Hill v. Lassiter, 51 N.C. App. 34, 275 S.E.2d 237

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F. Supp. 1422 (W.D.N.C. 1987); In re Woodie, 85 N.C. App. 533, 355 S.E.2d 163 (1987); Lackey v. Bressler, 86 N.C. App. 486, 358 S.E.2d 560 (1987); Jetstream Aero Servs., Inc. v. New Hanover County, 672 F. Supp. 879 (E.D.N.C. 1987); McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988); South Shell Inv. v. Town of Wrightsville Beach, 703 F. Supp. 1192 (E.D.N.C. 1988); Spaulding v. R.J. Reynolds Tobacco Co., 93 N.C. App. 770, 379 S.E.2d 49 (1989); Wilson Heights Church of God v. Autry, 94 N.C. App. 111, 379 S.E.2d 691 (1989); Travis v. Knob Creek, Inc., 94 N.C. App. 111, 380 S.E.2d 380 (1989); American Multimedia, Inc. v. Freedom Distrib., Inc., 95 N.C. App. 750, 384 S.E.2d 32 (1989); Shook ex rel. Shook v. Gaston County Bd. of Educ., 882 F.2d 119 (4th Cir. 1989); Adams v. Moore, 96 N.C. App. 359, 385 S.E.2d 799 (1989); Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989); Cherokee Ins. Co. ex rel. Weed v. R/I, Inc., 97 N.C. App. 295, 388 S.E.2d 239 (1990); Cheek v. Poole, 98 N.C. App. 158, 390 S.E.2d 455 (1990); Cameron v. Martin Marietta Corp., 729 F. Supp. 1529 (E.D.N.C. 1990); Eaton Corp. v. Public Serv. Co., 99 N.C. App. 174, 392 S.E.2d 404 (1990); IR Constr. Prods. Co. v. D.R. Allen & Son, 737 F. Supp. 895 (W.D.N.C. 1990); Doe v. American Nat'l Red Cross, 798 F. Supp. 301 (E.D.N.C. 1992); Brittain v. Cinnoca, 111 N.C. App. 656, 433 S.E.2d 244 (1993); Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993); State ex rel. State Art Museum Bldg. Comm'n v. Travelers Indem. Co., 111 N.C. App. 330, 432 S.E.2d 419 (1993); Jordan v. Foust Oil Co., 116 N.C. App. 155, 447 S.E.2d 491 (1994); Cage v. Colonial Bldg. Co., 337 N.C. 682, 448 S.E.2d 115 (1994); Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994); Jones v. Summers, 117 N.C. App. 415, 450 S.E.2d 920 (1994); Coachman v. Gould, 122 N.C. App. 443, 470 S.E.2d 560 (1996); Tierney v. Garrard, 124 N.C. App. 415, 477 S.E.2d 73 (1996); Markham v. Nationwide Mut. Fire Ins. Co., 125 N.C. App. 443, 481 S.E.2d 349 (1997); Russell v. Adams, 125 N.C. App. 637, 482 S.E.2d 30 (1997); Soderlund v. North Carolina Sch. of Arts, 125 N.C. App. 386, 481 S.E.2d 336 (1997); Hudson v. Game World, Inc., 126 N.C. App. 139, 484 S.E.2d 435 (1997); Shiloh Methodist Church v. Keever Heating & Cooling Co., 127 N.C. App. 619, 492 S.E.2d 380 (1997); Rudd v. Electrolux Corp., 982 F. Supp. 355 (M.D.N.C. 1997); Liptrap v. City of High Point, 128 N.C. App. 353, 496 S.E.2d 817 (1998); Mrozek v. Mrozek, 129 N.C. App. 43, 496 S.E.2d 836 (1998); Robertson v. City of High Point, 129 N.C. App. 88, 497 S.E.2d 300 (1998); Bob Killian Tire, Inc. v. Day Enters., Inc., 131 N.C. App. 330, 506 S.E.2d 752 (1998); Timour v. Pitt County Mem. Hosp., 131 N.C. App. 548, 508 S.E.2d 329 (1998); Webb v. Nash Hosps., 133 N.C. App. 636, 516 S.E.2d 191, 1999 N.C. App. LEXIS 603 (1999); Vogl v. LVD Corp., 132 N.C. App. 797, 514 S.E.2d 113 (1999); Monson v. Paramount Homes, Inc., 133 N.C. App. 235, 515 S.E.2d 445 (1999); Kirkpatrick v. Lenoir County Bd. of Educ., 216 F.3d 380, 2000 U.S. App. LEXIS 14218 (4th Cir. 2000); White v. Crisp, 138 N.C. App. 516, 530 S.E.2d 87, 2000 N.C. App. LEXIS 638 (2000); Zenobile v. McKecuen, 144 N.C. App. 104, 548 S.E.2d 756, 2001 N.C. App. LEXIS 328 (2001); Renegar v. R.J. Reynolds Tobacco Co., 145 N.C. App. 78, 549 S.E.2d 227, 2001 N.C. App. LEXIS 550 (2001); Blair Concrete Servs., Inc. v. Van-Allen Steel Co., 152 N.C. App. 215, 566 S.E.2d 766, 2002 N.C. App. LEXIS 869 (2002); Pierce v. Johnson, 154 N.C. App. 34, 571 S.E.2d 661, 2002 N.C. App. LEXIS 1406 (2002); Strawbridge v. Sugar Mt. Resort, Inc., 243 F. Supp. 2d 472, 2003 U.S. Dist. LEXIS 1513 (W.D.N.C. 2003); Carter v. Rockingham County Bd. of Educ., 158 N.C. App. 687, 582 S.E.2d 69, 2003 N.C. App. LEXIS 1279 (2003); Kirkman v. N.C. R.R., 220 F.R.D. 49, 2003 U.S. Dist. LEXIS 24406 (M.D.N.C. 2003); Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 2005 U.S. Dist. LEXIS 19307 (M.D.N.C. Apr. 7, 2005); Pottle v. Link, 187 N.C. App. 746, 654 S.E.2d 64, 2007 N.C. App. LEXIS 2557 (2007); Sunset Beach Dev., LLC v. Amec, Inc., — N.C. App. —, 675 S.E.2d 46, 2009 N.C. App. LEXIS 454 (2009).

II. CONTRACTS.

A. In General.

Editor's Note. *— See also G.S. 25-2-725 as to statute of limitations in contracts for sale.*

Statute Begins to Run When Breach Occurs. — The three-year period of the statute of limitations governing actions based on express contracts does not begin to run until the alleged breach occurs and the cause of action accrues. Silver v. North Carolina Bd. of Transp., 47 N.C. App. 261, 267 S.E.2d 49 (1980); Flexolite Elec., Ltd. v. Gilliam, 55 N.C. App. 86, 284 S.E.2d 523 (1981).

The statute begins to run on the date the promise is broken. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960); Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp., 36 N.C. App. 778, 245 S.E.2d 234 (1978).

Where there is either a breach of an agreement or a tortious invasion of a right for which the party aggrieved is entitled to recover even nominal damages, the statute of limitations immediately begins to run against the party aggrieved, unless he is under one of the disabilities specified in G.S. 1-17. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

The statute of limitations does not begin to run until the contract is breached. Rawls v. Lampert, 58 N.C. App. 399, 293 S.E.2d 620 (1982); Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989).

The statute of limitations begins to run from the date that a contract is breached by failure to perform when required to do so under the contractual agreement, not from the first date when performance of the contract is possible. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Under subdivision (1) of this section, the period of limitations begins to run whenever the plaintiff's right to maintain an action accrues. United States Leasing Corp. v. Everett, Creech, Hancock, & Herzig, 88 N.C. App. 418, 363 S.E.2d 665, cert. denied, 322 N.C. 329, 369 S.E.2d 364 (1988).

The statute of limitations for contract actions is three years. The statute begins to run when the claim accrues; with a breach of contract action, the claim accrues upon breach. Abram v. Charter Medical Corp. of Raleigh, 100 N.C. App. 718, 398 S.E.2d 331 (1990), discretionary review denied, 328 N.C. 328, 402 S.E.2d 828 (1991).

Insured was not at liberty to assert a claim against defendant for uninsured motorist coverage as a consequence of insolvency of the tortfeasor's insurer until the date the insurance company was declared insolvent; therefore, the cause of action accrued on that date and the statute of limitations set out in subsection (1) began to run. North Carolina Ins. Guar. Ass'n v. State Farm Mut. Auto. Ins. Co., 115 N.C. App. 666, 446 S.E.2d 364 (1994).

Limitations of actions for breach of contract are governed by subdivision (1) of this section, and the statute begins to run when the claim accrues; for a breach of contract action, the claim accrues upon breach. Miller v. Randolph, 124 N.C. App. 779, 478 S.E.2d 668 (1996).

G.S. 1-52 provides a three-year statute of limitations for breach of contract actions; the three-year period begins at the time of the breach giving rise to the cause of action. Jones v. GE Life & Annuity Assur. Co., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 5297 (M.D.N.C. Mar. 17, 2004).

A cause of action for breach of contract accrues at the time of the breach which gives rise to the right of action. United States Leasing Corp. v. Everett, Creech, Hancock, & Herzig, 88 N.C. App. 418, 363 S.E.2d 665, cert. denied, 322 N.C. 329, 369 S.E.2d 364 (1988).

It is unimportant that the actual or the substantial damage does not occur until later if the whole injury results from the original tortious act. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

Or That Consequences Are Not Discovered or Discoverable When Cause of Action Accrues. — It is unimportant that the harmful consequences of the breach of duty or of contract were not discovered or discoverable at the time the cause of action accrued. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

To determine if a lawsuit is barred by the three year statute of limitations in G.S. 1-52, a court first determines when the breach occurred that caused the cause of action to accrue; where a counterclaim on a breach of contract action was filed more than three years after the breach allegedly occurred, the counterclaim was barred by the statute of limtations and was properly dismissed on summary judgment. PharmaResearch Corp. v. Mash, 163 N.C. App. 419, 594 S.E.2d 148, 2004 N.C. App. LEXIS 410 (2004), cert. denied and dismissed, 358 N.C. 733, 601 S.E.2d 858 (2004).

A new promise to pay fixes a new date from which the statute runs. Such promise, to be binding, must be in writing as required by G.S. 1-26. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

A new promise to pay fixes a new date from which the statute of limitations for a contract action runs. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

New Promise to Pay Existing Debt. — A letter to a creditor (plaintiff) written by a debtor (defendant), which did not state the amount owed but referred to the principal amount, constituted a new promise to pay the existing debt which tolled the statute of limitations for the plaintiff's claim pursuant to G.S. 1-26. Coe v. Highland Sch. Assocs. Ltd. Partnership, 125 N.C. App. 153, 479 S.E.2d 257 (1996).

Modification of Original Agreement. — Although plaintiffs and defendants entered into the original contract in 1982 and held a closing with respect thereto in May 1983, they had reached a new agreement, or a modification of their original agreement, in January 1985 concerning the construction of a boat slip. Plaintiff husband testified he thought they had reached an "acceptable solution" at that point, but when he discovered that the boat slip was difficult to access and not constructed according to the agreed-upon plans in January 1986 and filed a complaint in June 1988, his filing was well within the three year period which began in January 1986. Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993).

Negligent Advice of Insurance Agent. — A cause of action for negligent advice of an insurance agent, brought by the beneficiary of a life insurance policy issued in reliance on that advice, accrues at the death of the insured, rather than at the time of the negligent advice. Pierson v. Buyher, 330 N.C. 182, 409 S.E.2d 903 (1991).

A cause of action based on negligent advice rendered by an insurance agent does not involve professional malpractice, and the appropriate statute of limitations is the three-year period of subdivision (5) of this section, not G.S. 1-15(c). Pierson v. Buyher, 330 N.C. 182, 409 S.E.2d 903 (1991).

Effect of Partial Payment. — A part payment operates to toll the statute if made under such circumstances as will warrant the clear inference that the debtor in making the payment recognized his debt as then existing and acknowledged his willingness, or at least his obligation, to pay the balance. Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977).

Where plaintiff sues on a current account, a part payment which constitutes an acknowledgment begins the statute running anew as to the entire amount that is acknowledged and not merely those items which accrued within three years of the payment. Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977).

Payment After Statute Had Run. — Where a chattel mortgage on crops secured payment of the maker's note and the mortgagee endorsed the note, and mortgaged to another, the bar of the three-year statute of limitations which had otherwise run would not be repelled by payments on the note from the sale of the crop, as against the endorser, or without evidence of his intent to make the payment and thus impliedly at least acknowledge the debt; and his having attended the mortgage sale of the crop and become a purchaser was not sufficient. Nance v. Hulin, 192 N.C. 665, 135 S.E. 774 (1926).

Creditor's demand for payment made by his counsel was not sufficient to invoke the acceleration clause and did not operate to start the limitations period running. Vreede v. Koch, 94 N.C. App. 524, 380 S.E.2d 615 (1989).

Running of Statute on Continuing Contract. — Where debtor signed note to creditor, creditor received last payment from debtor on January 1, 1980, final date of performance on note was October, 1985, and both debtor and guarantor defaulted on the note, the statute of limitations did not begin to run until the date that final performance was due, Oct. 1, 1985, because the parties' agreement was a continuing contract; continuing performance was possible where there was no evidence that creditor treated debtor's failure to pay as a total repudiation of the contract and debtor's failure to make the balloon payment due on Dec. 31, 1979, was not treated by creditors as a repudiation, nor were debtor's repeated failures to make monthly installment payments from Jan. 1, 1980. Vreede v. Koch, 94 N.C. App. 524, 380 S.E.2d 615 (1989).

Obligation Payable by Installments. — The general rule in the case of an obligation payable by installments is that the statute of limitations runs against each installment individually from the time it becomes due, unless the creditor exercises a contractual option to accelerate the debt, in which case the statute begins to run from the date the acceleration clause is invoked. United States Leasing Corp. v. Everett, Creech, Hancock, & Herzig, 88 N.C. App. 418, 363 S.E.2d 665, cert. denied, 322 N.C. 329, 369 S.E.2d 364 (1988).

Effect of Exercise of Acceleration Clause in Note. — Where the holder of a note exercised the acceleration clause therein contained by instituting an action against two of the comakers on the note for the entire indebtedness after default in the payment of an installment, the exercise of the acceleration clause was effective as to a third comaker, even though he was not made a party to the action, and action on the note against the third comaker was barred after the elapse of more than three years from the exercise of the acceleration clause, the note not being under seal. Shoenterprise Corp. v. Willingham, 258 N.C. 36, 127 S.E.2d 767 (1962).

Running of Statute on Breach of Lease Provision. — Breach of lease occurred when defendants failed to pay taxes as they came due. Upon breach, plaintiff's cause of action accrued as to the unpaid taxes, and the statute of limitations began to run. Clause in lease requiring that plaintiff give defendants notice of default and allow defendants to cure default within a specified period of time did not affect accrual of cause of action. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Effect of Remedies in Lease on Running of Statute. — When defendants defaulted by failing to pay taxes as they became due under lease, plaintiff had three basic remedies which he could exercise: He could immediately bring an action to enforce defendants' obligation to pay, or he could pay taxes himself as provided by the lease and then be reimbursed by the defendants, or he could give written notice of default and repossess the premises if not cured within the time period specified by the lease. Regardless of the alternative, each was but a remedy available to the plaintiff, which arose upon default as defined by the lease, and which had to be exercised, if at all, within the three year statute of limitations which began to run upon default. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Lease Obligation Payable by Installments. — Where defendants' tax obligation under lease was on an annual basis, the statute of limitations ran independently on each annual default. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Necessity for Demand Where Fiduciary Relation Exists. — Where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until a demand and refusal. Efird v. Sikes, 206 N.C. 560, 174 S.E. 513 (1934).

Running of Statute as Between Partners. — As between partners themselves the statute would not begin to run on the cause of action for an accounting until one partner had notice of the other's termination of the partnership and his refusal to account. Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963); Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

When Statute Begins to Run as to Express Trust. — In the case of an express trust, the statute begins to run when the trustee disavows the trust with the knowledge of the cestui que trust. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

The general rule is that a trustee's repudiation of a trust and his assertion of an adverse claim of ownership is not sufficient to start the statute of limitations running, unless and until such repudiation and claim are made known to the beneficiary of the trust so as to require him to assert his rights. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Where loan between brothers was secured by deed of trust and son of borrower was made trustee, because of the close family relationships of the parties, the question of when lender knew or should have known of trustee's alleged breach of fiduciary duty, by executing cancellation of deed of trust, was question for trier of fact to resolve, and lender's action against trustee was not subject to dismissal on borrower's and trustee's motion under Rule 12(b)(6) to dismiss, alleging that the action was time barred. Dawn v. Dawn, 122 N.C. App. 493, 470 S.E.2d 341 (1996).

When compensation is to be provided in the will of the recipient, the cause of action accrues when he dies without having made the agreed testamentary provision. Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963); Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death, and the statutes of limitations do not begin to run until that time. Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Speights v. Carraway, 247 N.C. 220, 100 S.E.2d 339 (1957).

Quantum meruit claims for services rendered pursuant to a contract to devise are controlled by the three-year statute of limitations of this section. When the agreed upon compensation is to be provided in the will of the recipient of the services, the cause of action accrues when the recipient dies without having made the agreed testamentary provision. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986), cert. denied, 319 N.C. 403, 354 S.E.2d 711 (1987).

Or When Contract Is Abandoned. — Where it was agreed that services were to be rendered during the life of recipient and compensation was to be provided in the will of recipient, and the contract is abandoned, the cause of action accrues at the time of abandonment of the contract. Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

Accrual of Action for Compensation for Services Absent Arrangement as to Time for Compensation. — Where recovery of compensation for services rendered is sought upon implied contract or quantum meruit, and the arrangement is for indefinite and continuous service, without any definite arrangement as to time for compensation, and payment may be required toties quoties, the implied promise is to pay for services as they are rendered, and payment may be required whenever any are rendered; thus the statute is silently and steadily excluding so much as are beyond the prescribed limitation. Hicks v. Hicks, 13 N.C. App. 347, 185 S.E.2d 430 (1971).

Accrual of Action for Attorneys' Fees Under Contingent Fee Contract. — An attorneys' action for the reasonable value of his services upon termination of his employment under a contingent fee contract does not accrue until the occurrence of the contingency stated in the contract. Clerk of Superior Court v. Guilford Bldrs. Supply Co., 87 N.C. App. 386, 361 S.E.2d 115 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 918 (1988).

Accrual of Action Against Insurer for Legal Expenses. — Each legal expenditure incurred as a result of the insurer's refusal to defend creates a new right in the insured to recover such legal expenditures from the insurer; thus, given the three-year statute of limitations affecting contracts under subdivision (1) of this section, an insured has three years from the date each legal expense is incurred to bring suit against the insurer for its refusal to defend the insured. Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989).

As to the running of the statute on the amount unpaid on subscriptions to the capital stock of a corporation, see Windsor Redrying Co. v. Gurley, 197 N.C. 56, 147 S.E. 676 (1929).

Accrual of Action Against Guarantor. — A plaintiff's cause of action against a guarantor arises when the principal refuses to make further payments on the promissory note. If the guaranty of payment is absolute, the right to sue upon the guaranty accrues immediately upon the failure of the principal debtors to pay their debt at maturity. Better Adv., Inc. v. Peace, 43 N.C. App. 534, 259 S.E.2d 359 (1979), cert. denied, 299 N.C. 328, 265 S.E.2d 393 (1980).

An action on a guaranty not under seal must be commenced within three years of the breach triggering the obligation of the guarantors. Georgia-Pacific Corp. v. Bondurant, 81 N.C.

App. 362, 344 S.E.2d 302 (1986).

Accrual of Action on Obligation to Indemnify. — North Carolina follows the general rule that a cause of action on an obligation to indemnify normally accrues when the indemnitee suffers actual loss. Premier Corp. v. Economic Research Analysts, Inc., 578 F.2d 551 (4th Cir. 1978).

Where one person's liability for a tort or breach of warranty committed by another is secondary, the statute of limitations does not start running against his right to indemnity from the party who is primarily liable until he has paid damages to the injured party. Hager v. Brewer Equip. Co., 17 N.C. App. 489, 195 S.E.2d 54 (1973).

Suit by Surety on Surety Agreement. — G.S. 26-3.1 allows a surety to sue a principal on the original instrument or for reimbursement on the surety agreement. After three years, a suit on the latter theory would be barred by this section. Where a surety elects to sue on the underlying note under seal, he has the same rights the bank had on the original note. Thus, the 10-year statute of limitations, G.S. 1-47, would apply. Adams v. Bass, 88 N.C. App. 599, 364 S.E.2d 194 (1988), cert. denied, 326 N.C. 363, 389 S.E.2d 810 (1990).

Action on Bond Accrued When Amount Established. — Because a bond stated that the defendant, as principal and defendant, as surety "will pay the full amount of the Lien Claim as established in any appropriate court proceeding," the defendant was not under any obligation to pay until an amount was established. The statute of limitations did not begin to run upon defendant's filing of the bond discharging the lien. George v. Hartford Accident & Indem. Co., 102 N.C. App. 761, 404 S.E.2d 1 (1991), aff'd, 330 N.C. 755, 412 S.E.2d 43 (1992).

A plaintiff's cause of action against a surety under G.S. 20-288(e) begins to run when the fraud is discovered. Ferris v. Haymore, 967 F.2d 946 (4th Cir. 1992).

The cause of action against a surety under a motor vehicle dealer surety bond arises at the time that the cause of action arises against the surety's principal. Ferris v. Haymore, 967 F.2d 946 (4th Cir. 1992).

Causes of action of truck purchaser against dealer and dealer's surety under a motor vehicle dealer surety bond both arose when purchaser discovered dealer's breach of contract or fraud, and could accrue no later than the date on which purchaser filed a complaint against the dealer in the superior court. And as nothing prevented purchaser from joining both defendants in one action or from instituting a separate action against the surety while the case against the dealer was pending, the three-year statute of limitations of subdivision (1) of this section was not tolled. Bernard v. Ohio Cas. Ins. Co., 79 N.C. App. 306, 339 S.E.2d 20 (1986).

Repayment of Money Lent Under Verbal Agreement. — While, in general, the statute of limitations for a breach of contract is three years, money lent pursuant to a verbal agreement which fails to specify a time for repayment is payable within a reasonable time. The statute of limitations does not begin to run until a reasonable time for repayment has passed. Phillips & Jordan Inv. Corp. v. Ashblue Co., 86 N.C. App. 186, 357 S.E.2d 1, cert. denied, 320 N.C. 633, 360 S.E.2d 92 (1987).

Action on Uninsured Motorist Provisions of Insurance Policy. — The cause of action accrued, and the statute of limitations began running, with respect to plaintiff's claim under the uninsured motorist provisions of the insurance policy issued by defendant, at the time damages were sustained, and not, as plaintiff contended, when demand for payment under the policy was made and refused by defendant. Wheeless v. St. Paul Fire & Marine Ins. Co., 11 N.C. App. 348, 181 S.E.2d 144 (1971).

Breach of warranty claims which arose in other states are governed by subdivision (1) of this section since remedies are governed by the laws of the jurisdiction where the suit is brought. The lex fori determines the time within which a cause of action shall be enforced. Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984).

Warranty That Subject Matter of Sale Is Sound. — Where there is a warranty that the subject matter of a sale is sound at the date of sale, then the statute of limitations begins to run at the date of the warranty and not thereafter. Styron v. Loman-Garrett Supply Co., 6 N.C. App. 675, 171 S.E.2d 41 (1969). See also, Hall v. Gurley Milling Co., 347 F. Supp. 13 (E.D.N.C. 1972).

As to accrual of action based upon breach of warranty of fitness and safety of tobacco curer, see Lewis v. Godwin Oil Co., 1 N.C. App. 570, 162 S.E.2d 135 (1968).

As to when breach of contract by trademark licensor occurred, see Rothmans Tobacco Co. v. Liggett Group, Inc., 770 F.2d 1246 (4th Cir. 1985).

Sale of House with Defective Furnace. — Defendant's negligent breach of the legal duty arising out of his contractual relation with plaintiffs occurred when he delivered to them a house with a furnace that lacked a draft regulator and had been installed too close to combustible joists. Jewell v. Price, 264 N.C. 459, 142 S.E.2d 1 (1965).

An action ex contractu brought by a municipal corporation to recover the cost of rebuilding a bridge, upon a breach by defendant of his contract with plaintiff to replace it, was an action to enforce private, corporate or proprietary rights of the municipal corporation, and as such the three-year statute of limitations could be interposed as a defense by defendant. City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967).

Plea of Statute Held Available to Distributee Against Administrator. — In an action by plaintiff to recover his distributive share of an estate, where defendant administrator set up and pleaded debts due intestate by plaintiff as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable setoff had no application, and the plea of the statute of limitations was available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. Perry v. First-Citizens Bank & Trust Co., 223 N.C. 642, 27 S.E.2d 636 (1943).

Ancillary Remedy of Claim and Delivery Also Barred. — Where there had been no new promise or payment on purchase price for over three years prior to institution of action, three-year statute of limitations under this section barred the ancillary remedy of claim and delivery. Lester Piano Co. v. Loven, 207 N.C. 96, 176 S.E. 290 (1934).

Statute Not Suspended by War Measures. — An action to recover damages for a breach of contract for the sale of goods arising during federal war control of railroads was barred by the statute of limitations after three years from the time of its accrual. Vanderbilt v. Atlantic C.L.R.R., 188 N.C. 568, 125 S.E. 387 (1924), appeal dismissed, 270 U.S. 625, 46 S. Ct. 204, 70 L. Ed. 767 (1926).

As to admissibility of parol evidence to show in what capacity parties signed note under seal, see Furr v. Trull, 205 N.C. 417, 171 S.E. 641 (1933).

Federal ERISA Actions. — The North Carolina three-year statute of limitations for contract actions, codified at subdivision (1) of this section, is most analogous to a federal Employee Retirement Income Security Act (ERISA) action. Wise v. Dallas & Mavis Forwarding Co., 753 F. Supp. 601 (W.D.N.C. 1991).

Effect of Bankruptcy Proceeding on Limitations Period. — Although bankruptcy trustee made partial payment to plaintiff, defendant did not list plaintiff as a creditor and objected to plaintiff's claim; therefore, plaintiff's action seeking payment for landscape services, filed over 5 years after the work was performed, was not stayed by the bankruptcy proceedings, and defendant's motion to dismiss should have been granted. Person Earth Movers, Inc. v. Buckland, 136 N.C. App. 658, 525 S.E.2d 239, 2000 N.C. App. LEXIS 114 (2000).

B. Actions to Which Section Applies.

A lease agreement which a contract not under seal falls within a three-year statute of limitations. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Actions Against Sureties on Sealed Instruments. — The three-year statute of limitations is applicable to sureties on sealed instruments, as well as on instruments not under seal. Lee v. Chamblee, 223 N.C. 146, 25 S.E.2d 433 (1943).

This section applies to actions upon all sealed instruments not referred to in preceding sections. One of these not mentioned in the preceding sections is an action on a sealed note against the sureties thereto. Although such an action against the principal is not barred until 10 years by G.S. 1-47(2), that provision does not refer to sureties. Welfare v. Thompson, 83 N.C. 276 (1880); Redmond v. Pippen, 113 N.C. 90, 18 S.E. 50 (1893); Flippen v. Lindsey, 221 N.C. 30, 18 S.E.2d 824 (1942).

This section applies to sureties on a note under seal, and as to such sureties the right of action on the note is barred after the lapse of three years. Barnes v. Crawford, 201 N.C. 434, 160 S.E. 464 (1931).

An action on a note under seal against a surety thereon is barred after the lapse of three years from the maturity of the note, or after three years from the expiration of an extension of time for payment binding on the surety. Davis v. Alexander, 207 N.C. 417, 177 S.E. 417 (1934).

An action against the sureties on the bond of a clerk for defalcations in the office of the State Treasurer is barred after three years. Jackson v. Martin, 136 N.C. 196, 48 S.E. 672 (1904).

Subcontractor's Action to Recover on Contractor's Surety Bond. — Subsection (1) of this section, which provides for a three-year statute of limitations, applies to subcontractor's action to recover on contractor's surety bond. George v. Hartford Accident & Indem. Co., 102 N.C. App. 761, 404 S.E.2d 1 (1991), modified on other grounds, 330 N.C. 187, 409 S.E.2d 913 (1991).

A guaranty of the payment of a note is an obligation arising out of contract by which the guarantors assume liability for payment of the note in case the makers thereof do not pay same upon maturity, and the right to sue upon such guaranty arises immediately upon failure of the makers to pay the note according to its tenor; suit against the guarantors is barred by this section after three years from maturity of the note. Wachovia Bank & Trust Co. v. Clifton, 203 N.C. 483, 166 S.E. 334 (1932).

Guarantee of Prior Indorsement. — The statute of limitations within which to institute an action upon a guarantee of prior indorsement is three years after payment of the check. United States v. National City Bank, 28 F. Supp. 144 (S.D.N.Y. 1939).

Indemnity Arising from Primary-Sec-

ondary Liability. — Since indemnity arising from primary-secondary liability is a quasi-contractual right, it is subject to the three-year statute of limitations under subdivision (1) of this section. Ingram v. Smith, 16 N.C. App. 147, 191 S.E.2d 390, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

An action on a note under seal against an endorser on the note is ordinarily barred after three years from the maturity of the note, even though the endorsement is under seal. Hertford Banking Co. v. Stokes, 224 N.C. 83, 29 S.E.2d 24 (1944).

Action for Right to Contribution. — While the right to contribution among co-indemnitors or sureties has common law origin, since 1807 it has been a statutory right under the provisions of G.S. 26-5; accordingly, the applicable statute in this case provided that an action upon a liability created by statute must be brought within three years. Finch v. Barnes, 102 N.C. App. 733, 403 S.E.2d 552, rev'd on other grounds sub nom. State v. Case, 330 N.C. 192, 410 S.E.2d 57 (1991).

Agreement to Arbitrate. — An agreement to submit a controversy to arbitration is a contract between the parties, and an action thereon, when it is not under seal, is governed by the three-year statute of limitations. Sprinkle v. Sprinkle, 159 N.C. 81, 74 S.E. 739 (1912).

Action for Money Had and Received. — An action by a county board of school directors for fines and penalties collected by a city was in the nature of one for money had and received, with none of the incidents of a fiduciary or trust relation, and subdivision (1) of this section applied. School Dirs. v. City of Asheville, 128 N.C. 249, 38 S.E. 874 (1901).

Action on Check Given for Taxes. — A plea of the three-year statute of limitations will bar recovery in a civil action to collect a check given for the payment of taxes when the action is not instituted within three years of the date the check was issued. Miller v. Neal, 222 N.C. 540, 23 S.E.2d 852 (1943).

Breach of Express Trust. — Since occurrences which constitute a breach of an express trust amount in effect, and usually in fact, to a breach of contract, a cause of action for such breach is barred at the expiration of three years from such breach, under this section. Teachey v. Gurley, 214 N.C. 288, 199 S.E. 83 (1938).

Where a trust is based on an agreement or transaction operating as an express trust, the limitation applicable is the statute of three years set out in this section. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Actions against an executor or trustee for breach of fiduciary duty are actions arising out of contract. Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987), rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

Breach of Fiduciary Duty of Executor and Trustee Under Will. — The fiduciary duties of an executor and trustee under a will are essentially contractual in nature and any failure to perform in compliance with the duties as a fiduciary is tantamount to a breach of contract; hence, a beneficiary's action to enforce the terms of the arrangement and to recover damages sustained by reason of defendant's breach of fiduciary duty being essentially grounded in contract, is subject to the three-year limitation of subdivision (1) of this section. Tyson v. North Carolina Nat'l Bank, 305 N.C. 136, 286 S.E.2d 561 (1982).

Where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until there has been a demand and refusal. Glover v. First Union Nat'l Bank, 109 N.C. App. 451, 428 S.E.2d 206 (1993).

Accrual When Infant's Guardian Learns of Breach by Fiduciary. — Statute of limitations began to run on an infant's claims of breach of fiduciary duty against the trustee of the infant's trust when the infant's guardian discovered the alleged improper conduct on the part of the trustee, not when the infant attained majority. Toomer v. Branch Banking & Trust Co., 171 N.C. App. 58, 614 S.E.2d 328, 2005 N.C. App. LEXIS 1188 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

Action Based on Implied Contract. — An action based on an implied contract is analogous to one based on the breach of an express trust, which is necessarily based on a breach of contract, and the limitation applicable to both such actions is three years. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Claims for Services. — In absence of a special contract to compensate plaintiff for his services to defendant's intestate by will effective at defendant's death, the statute of limitations bars all claims for services except those rendered within three years. Grady v. Faison, 224 N.C. 567, 31 S.E.2d 760 (1944); Johnson v. Sanders, 260 N.C. 291, 132 S.E.2d 582 (1963).

Recovery cannot be had upon assumpsit or quantum meruit for personal services rendered in reliance upon oral contract to devise when action is instituted more than three years after the death of the promisor and the statute of limitations is pleaded in bar. Dunn v. Brewer, 228 N.C. 43, 44 S.E.2d 353 (1947).

This section bars a claim for personal services rendered a decedent only as to those services rendered more than three years prior to the date of decedent's death, and in view of G.S. 1-22, the contention that this section bars the claim for all services rendered more than three years prior to the institution of the action is untenable. Hodge v. Perry, 255 N.C. 695, 122 S.E.2d 677 (1961).

Insurance agents who procured an insurance policy for a contractor were not providers of professional services for purposes of the extended statute of limitations under G.S. 1-15(c). Therefore, the statute of limitations under G.S. 1-52 was applicable to the contractor's claims against the insurance agents for general negligence and breach of contract in failing to procure needed insurance coverage for the contractor's operations. Scott & Jones, Inc. v. Carlton Ins. Agency, Inc., — N.C. App. —, 677 S.E.2d 848, 2009 N.C. App. LEXIS 368 (2009).

A claim to stock was governed by the three-year limitations period of this section where the substantive right asserted was one of contract. American Hotel Mgt. Assocs. v. Jones, 768 F.2d 562 (4th Cir. 1985).

Action by Former Husband Against Former Wife to Declare Ownership Interest in Business. — The three-year contract limitations period provided in subdivision (1) is the applicable statute of limitations in a former husband's suit against his former wife and her incorporated fast-food restaurant franchise seeking a declaration of his ownership interest. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Claims Involving Bodily Injury as Essential Element. — The North Carolina Supreme Court has declined to apply G.S. 25-2-725 to such claims where bodily injury to the person is an essential element of the cause of action and has instead adopted as the appropriate statute of limitation the three-year period contained in G.S. 1-52(1). Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

Damage to Property Caused by Defective Product. — Where the loss sought to be recovered was the damage to real property caused by a defective air conditioning unit, and not just an action to recover the value or a replacement of the unit based on the breach of warranty, the trial judge properly concluded the applicable limitation period was three years under this section. Hanover Ins. Co. v. Amana Refrigeration, Inc., 106 N.C. App. 79, 415 S.E.2d 99, cert. denied, 332 N.C. 344, 421 S.E.2d 147 (1992).

Damages for Trespass to Land. — A claim for damages for trespass to land is governed by a three-year statute of limitations, and laches is not a tenable defense to such an action. Rudisail v. Allison, 108 N.C. App. 684, 424 S.E.2d 696 (1993).

Rent abatement sought by plaintiffs under the Residential Rental Agreements Act, G.S. 42-38 et seq., a remedy which is not spelled out but which is implied from the statute, and which is not punitive but rather in the nature of a restitutionary remedy, was governed by three-year statute of limitations pursuant to subdivisions (1) and (2) of this section. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Actions Under ERISA Provisions. — This section applied to union employees' Employee Retirement Income Security Act (ERISA) action; employee's claims were most analogous to claims for breach of contract and, in addition, subdivision (2) contains applicable alternative limitations provisions. United Food & Com. Workers Local 204 v. Harris-Teeter Super Mkts., Inc., 716 F. Supp. 1551 (W.D.N.C. 1989).

Where union employees brought Employee Retirement Income Security Act (ERISA) action against employer, employee's claims did not accrue until employers refused to comply with employee's request, as an individual, to be a participant in the employee benefits plan; the suit was filed in a timely fashion after employee's request was denied. United Food & Com. Workers Local 204 v. Harris-Teeter Super Mkts., Inc., 716 F. Supp. 1551 (W.D.N.C. 1989).

Employment Contract. — Where plaintiff alleged that he had entered into an employment contract with defendants, to include a weekly salary and commissions, and further alleged that his employment was terminated and that defendants did not pay him the commission and bonus to which he was entitled, plaintiff's action was governed by subdivision (1) of this section rather than G.S. 1-55(1). Miller v. Randolph, 124 N.C. App. 779, 478 S.E.2d 668 (1996).

Wrongful Discharge Claim. — Employee may state a claim for wrongful discharge in violation of public policy where he or she alleges the dismissal resulted from an assertion of rights under the North Carolina Workers' Compensation Act, G.S. 97-1 et seq.; the statute of limitations for such a claim is three years under G.S. 1-52(5). Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

C. Actions to Which Section Not Applicable.

Constitutional Impairment of Contract. — The three year statute of limitations pursuant to this section did not apply to claim for a constitutional impairment of contract. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curium, 335 N.C. 158, 436 S.E.2d 821 (1993).

Employee's Constructive Discharge Retaliation Claim. — Court of appeals reversed a district court's dismissal of a former employee's constructive discharge retaliation claim against her former employer brought in conjunction with a qui tam false claims action as time-barred, holding that the six-year limitation period of 31 U.S.C.S. § 3731(b)(1) applied to the retaliation claim. United States ex rel.

Wilson v. Graham County Soil & Water Conservation Dist., 367 F.3d 245, 2004 U.S. App. LEXIS 8477 (4th Cir. 2004).

Action Against Principal on Sealed Instrument. — Where contract for the management and division of profits of a business was held to be an instrument as that term is used in G.S. 1-47(2), and where it was held that there was no ambiguity in the wording of the contract as to the intent of the parties that it be under their respective seals, plaintiff's right to bring his action was governed by G.S. 1-47, and not by this section. Hutchinson v. Hutchinson, 49 N.C. App. 687, 272 S.E.2d 146 (1980).

When the promisor in an indemnity bond has a personal, immediate, and pecuniary interest in the transaction in which third party is the original obligor, the courts will always give effect to his promise as an original and direct promise to pay, and this section will not be applicable. New Amsterdam Cas. Co. v. Waller, 233 N.C. 536, 64 S.E.2d 826 (1951).

Where liability of insurer is expressly limited in an indemnity or fidelity bond to losses occasioned and discovered during a specified time, this section will not extend the period of indemnity, for this is a statute of limitations and can have no effect upon valid contractual relations existing between the indemnitor and indemnitee. Hood v. Rhodes, 204 N.C. 158, 167 S.E. 558 (1933).

Action Under Uninsured Motor Vehicle Policy. — Action against an insurer, brought under the uninsured motorist insurance endorsement to an automobile liability insurance policy, to recover damages for death caused by the wrongful act of an uninsured motorist, is subject to the two-year statute of limitations for wrongful death by G.S. 1-53(4), and not the three-year limitation prescribed for actions on contract by subdivision (1) of this section. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

Where the estate administrator filed a wrongful death action against the uninsured driver and later served the uninsured motorist insurer in the same action, the applicable statute of limitations was the two-year wrongful death statute of limitations under G.S. 1-53(4) and not the three-year contract statute of limitations under G.S. 1-52(1), and this finding was consistent with the requirement under G.S. 20-279.21(b)(3)(a) that the uninsured motorist insurer be made a party to the underlying tort action. Sturdivant v. Andrews, 161 N.C. App. 177, 587 S.E.2d 510, 2003 N.C. App. LEXIS 2003 (2003), cert. denied, cert. dismissed, 358 N.C. 242, 594 S.E.2d 34 (2004).

Contracts for the sale of "timber to be cut" are governed by Article 2 of the UCC, pursuant to G.S. 25-2-107(2); accordingly, the controlling statute is G.S. 25-2-725(1), which provides for a four-year period of limitation, not the three year statute of limitations in this section. Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759 (1985).

As Was Action Involving Sale of Mobile Home. — Where plaintiffs sought recovery solely for damage to their mobile home, which was manufactured by defendant, and because the sale of a mobile home is a "transaction in goods," the Uniform Commercial Code determined the rights of the parties; therefore, subsection (16) of this section was inapplicable. Reece v. Homette Corp., 110 N.C. App. 462, 429 S.E.2d 768 (1993).

Government's right to bring trespass action. — Defendants' claim that the government's right to bring a trespass action was barred by the three year statute of limitations under G.S. 1-52 was without merit. The United States may bring an action in trespass within a six year period and such a provision, of course, preempted the North Carolina statute of limitations; in pursuing a viable claim, a federal agency is bound by the terms of the federal statute of limitations, which may not be lengthened or shortened by a state enactment. United States v. Kubalak, 365 F. Supp. 2d 677, 2005 U.S. Dist. LEXIS 10732 (W.D.N.C. Apr. 15, 2005).

D. Actions Held Barred.

Claims Were Time-Barred. — In an action by a principal against, inter alia, a developer and the developer's attorney, claiming entitlement to indemnification and alleging breach of contract and negligent misrepresentation, summary judgment under Fed. R. Civ. P. 56(c) was granted for the developer's attorney where the developer's legal malpractice cross-claim, and the principal's claims were time-barred under G.S. 1-15(c) and G.S. 1-52(1) and (5), as their claims were filed after the three year limitations period. Cincinnati Ins. Co. v. Centech Bldg. Corp., 286 F. Supp. 2d 669, 2003 U.S. Dist. LEXIS 18585 (M.D.N.C. 2003).

Where the construction project was stopped in 1996, and plaintiff general contractor did not file his complaint until 2001, any breach of contract and warranty claims against defendant subcontractors were time-barred by G.S. 1-52(1). Kaleel Builders, Inc. v. Ashby, 161 N.C. App. 34, 587 S.E.2d 470, 2003 N.C. App. LEXIS 1993 (2003), cert. denied, 358 N.C. 235, 595 S.E.2d 152 (2004).

Insurer's motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) was granted where the insured's claim, which alleged that the insurer breached its contract with the insured, by increasing the applicable cost of insurance rates to compensate for the insurer's increased tax liability, was barred by three-year statute of limitations for breach of contract actions under G.S. 1-52; this was because (1) life insurance contracts were contracts for life, or for the term specified in the policy, in consideration of periodic payments, and each payment was not consideration for the period in which it was paid, but was part consideration for the entire contract, (2) the insured provided no applicable support for the insured's view that universal life policies should have been treated as divisible contracts instead of being governed by the general rule, (3) the face of the insured's complaint made it clear that only one breach was alleged, the increase in the cost of insurance rate, because, while the complaint did state that the insurer continued to use the new rate in calculating the cost of insurance charge each month, the provision of the policy alleged to have been breached addressed only the calculation of the cost of insurance rate, and not the cost of insurance charge, and (4) accordingly, the policy was properly treated as an entire contract, and more than three years elapsed between the alleged breach of contract and the insured's filing of suit. Jones v. GE Life & Annuity Assur. Co., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 5297 (M.D.N.C. Mar. 17, 2004).

Beneficiaries' claims for breach of fiduciary duty, which claims did not rise to the level of constructive fraud, against the bank that served as executor of a will and trustee of the beneficiaries' trusts were dismissed because their claims were barred by the three-year statute of limitations under G.S. 1-52(1). Toomer v. Branch Banking & Trust Co., 171 N.C. App. 58, 614 S.E.2d 328, 2005 N.C. App. LEXIS 1188 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

Where all the allegations supporting a breach of contract claim occurred before November 2002, because the borrower did not assert her breach of contract claim until over three years after the cause of action accrued, the claims were barred by the statute of limitations. Booker v. Wash. Mut. Bank, F.A., — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 9632 (M.D.N.C. Feb. 9, 2007).

Lessee's claim for water damage to his business property was barred by the statute of limitations in G.S. 1-52(16) because damage to his property ought to reasonably have become apparent well before the three-year period; evidence showed that building that he leased began to leak in the mid-1990's and leaked for several years. In re Brokers, Inc., — Bankr. —, 2008 Bankr. LEXIS 742 (Bankr. M.D.N.C. Mar. 4, 2008).

Time Limitation Barred Relief. — In a quiet title action instituted in 2006, the trial court did not err by ruling that the one-year statute of limitations set out in G.S. 43-26 had expired when defendants filed their motion to set aside a 1979 judgment and, therefore, barred their motion. Adams Creek Assocs. v. Davis, 186 N.C. App. 512, 652 S.E.2d 677, 2007 N.C. App. LEXIS 2302 (2007), review denied as to additional issues, 662 S.E.2d 900 (2008).

Action on New Promise. — Where plaintiff, payee and holder of a note, alleged that the debtor advised him not to enter his claim in bankruptcy, and made a promise after the filing of the petition but before the order of discharge was entered to pay the note, plaintiff's cause of action was on the new promise and not the original note, and as the new promise was made more than three years prior to the institution of the action, plaintiff's cause was barred by the statute of limitations. Westall v. Jackson, 218 N.C. 209, 10 S.E.2d 674 (1940).

Client was entitled to summary judgment based on the statute of limitations under G.S. 1-52(1) because a business consultant failed to show that the client in its e-mails to the consultant manifested a definite and unqualified intention to pay a contractual debt under G.S. 1-26 so that the time for the consultant to collect the contractual debt was extended by the e-mails. Andrus v. IQMax, Inc., 190 N.C. App. 426, 660 S.E.2d 107, 2008 N.C. App. LEXIS 900 (2008).

Where land was conveyed to an individual with condition that he pay certain sums to his brothers, and he accepted the land and took possession under the devise, he immediately became liable, and the right of action was barred in three years under this section. Rice v. Rice, 115 N.C. 43, 20 S.E. 185 (1894).

Leaking Roof. — An action filed on June 11, 1981 against various defendants alleging breach of contract involving the construction of a defective roof was barred by the three year statute of limitations where plaintiff was aware in early 1975 that the roof had begun to leak, and made repeated complaints about leaks in many places over the next three years and thereafter. Asheville School v. D.V. Ward Constr., Inc., 78 N.C. App. 594, 337 S.E.2d 659 (1985), cert. denied, 316 N.C. 385, 342 S.E.2d 890 (1986).

Parking Lot and Water Damage. — Where plaintiff acknowledged that as of 1987, parking area was peeling up, and water was already leaking into the building but negligence and breach of contract claims were not filed until 1992, more than three years later, the trial court correctly dismissed these claims as barred by the statute of limitations. Haywood Street Redevelopment Corp. v. Harry S. Peterson, Co., 120 N.C. App. 832, 463 S.E.2d 564 (1995).

Action to Enjoin Conveyance. — Plaintiff's causes of action against a nonprofit and a for profit corporation were barred by this section. Hamlet HMA, Inc. v. Richmond County, 138 N.C. App. 415, 531 S.E.2d 494, 2000 N.C. App. LEXIS 636 (2000).

Settlement Agreement. — Settlement could not be set aside on breach of contract grounds as the three-year statute of limitations had expired from both the time a contract was breached and any continuing obligations were repudiated. Piedmont Inst. of Pain Mgmt. v. Staton Found. , 157 N.C. App. 577, 581 S.E.2d 68, 2003 N.C. App. LEXIS 934 (2003).

Choice of Law. — In an advertising client's diversity action brought against the advertising company and its owners in federal court, the forum state's three-year statutes of limitations applied and barred the client's breach of contract, negligence, fraud, fraudulent inducement, and civil conspiracy claims. Eagle Nation, Inc. v. Market Force, Inc., 180 F. Supp. 2d 752, 2001 U.S. Dist. LEXIS 23699 (E.D.N.C. 2001).

Dismissal Upheld. — The trial court properly dismissed action brought by doctors against accountants who had been engaged to advise them on business opportunities under G.S. 1A-1, Rule 12(b)(6), as doctors' complaint against accountants disclosed that its claims were either time-barred or lacked facts sufficient to state a claim for relief. Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002).

Asset Transfers. — Claims by decedent's heirs of undue influence on the part of the university, to which the decedent by will and inter vivos agreements transferred her assets, and on the part of the university's attorney and president, were barred by the three-year statute of limitations. Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 563 (2002).

Insurance Contract. — Because an individual filed her action alleging breach of contract and breach of the implied covenant of good faith against an insurance company and its parent company outside the three-year statute of limitations for filing such claims in North Carolina, G.S. 1-52(1), her complaint was dismissed for failure to state a claim upon which relief could be granted; if the individual sought contractual relief for the insurance company's alleged promise to reinstate her life insurance policy, the date of breach was June 17, 1999, the date the insurance company's agent refused to honor an agreement to accept the individual's payment to reinstate the policy. If the individual sought contractual relief because the insurance company denied her claim, the date of breach was January 10, 2000, the date the insurance company denied the claim; because the individual filed her state-court action on January 29, 2003, the action was beyond the three-year statute of limitations regardless of the date of the breach. Mebane v. Phoenix Cos., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 16830 (M.D.N.C. Sept. 16, 2003).

In an action in which an insured alleged that an insurer failed to pay the full amount due under a commercial insurance policy for damage to the insured's property, the insured's breach of contract action was time-barred under G.S. 1-52(1) because the insured's complaint was filed more than three years after the insurer advised the insured that the insured's claim for further payment was rejected due to the insured's failure to document its claim properly. Amatulli & Sons, LLC v. Great N. Ins. Co., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 1589 (W.D.N.C. Jan. 8, 2008).

Insureds' counterclaims for reformation of contract, negligent failure to procure insurance, and misrepresentation in a declaratory judgment action brought by an insurer to determine the parties' rights under an insurance policy were barred because the insureds failed to file their counterclaims within the applicable three-year statute of limitations under G.S. 1-52(5) and 1-52(9). State Farm Mut. Auto. Ins. Co. v. Gaylor, 190 N.C. App. 448, 660 S.E.2d 104, 2008 N.C. App. LEXIS 821 (2008).

Alienation of Affections. — Defendant was entitled to summary judgment on plaintiff's alienation of affections claim; as plaintiff conceded the acts complained of occurred pre-separation more than three years before she filed suit, and such a claim had to be based on pre-separation conduct, it was time-barred under G.S. 1-52(5). McCutchen v. McCutchen, 170 N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005).

E. Actions Not Barred.

Promissory Notes Under Seal. — A civil action to recover on six promissory notes under seal executed on December 3, 1929, and maturing one each year for five successive years, which was begun on August 30, 1940, was not barred by the limitation in this section or by the 10-year statute of limitation in G.S. 1-47. Bell v. Chadwick, 226 N.C. 598, 39 S.E.2d 743 (1946).

Action for Dividends Accrued on Cumulative Preferred Stock. — The right of a stockholder to have dividends accrued on her cumulative preferred stock at the time of reorganization of corporation declared and paid in accordance with the stipulation of the certificate before dividends were set aside or paid on any other stock were based on contract, and her request for injunctive relief was merely ancillary thereto; plaintiff's cause of action arose when dividends were paid on the new stock before accrued dividends on her stock were paid, and her action instituted within three years thereafter was not barred. Clark v. Henrietta Mills, 219 N.C. 1, 12 S.E.2d 682 (1941).

Action on Retirement Benefits Contract. — Where plaintiff did not become eligible for retirement benefits until his retirement, the alleged breach of a retirement benefit contract could not have occurred until that time; because plaintiff brought this action within three years of defendants' refusal of his demand for benefits, his action was not barred by the statute of limitations. Glover v. First Union Nat'l Bank, 109 N.C. App. 451, 428 S.E.2d 206 (1993).

Suit on Indemnity Contract. — Where an issuer of securities brought suit against a broker on an indemnity contract several months after the issuer reimbursed investors to whom the broker had illegally sold the securities, the issuer's claim for indemnity based upon its contract with the broker was not barred by North Carolina's statute of limitations. Premier Corp. v. Economic Research Analysts, Inc., 578 F.2d 551 (4th Cir. 1978).

Where guarantors were liable under a continuing guaranty which could only be revoked in writing, the time for bringing the action was not limited by the three-year statute of limitations. Cities Serv. Oil Co. v. Howell Oil Co., 34 N.C. App. 295, 237 S.E.2d 921 (1977).

As warranty was a guarantee that waterproofing would be free of defects through March 15, 1993, each day the waterproofing was not free of defects there was a new breach of the agreement. With the occurrence of each breach a new cause of action accrued, thus as the plaintiff's action was filed within three years of a breach of the warranty, the trial court erred in dismissing it. Haywood Street Redevelopment Corp. v. Harry S. Peterson, Co., 120 N.C. App. 832, 463 S.E.2d 564 (1995).

Where an agreement contained a contract insuring a carrier from loss and also a contract of suretyship in regard to claims of third persons under G.S. 62-111, provisions of the insurance contract that action be commenced within a specified time were not applicable to claims under the surety contract, and the surety's right of action for reimbursement of claims of third persons paid by it did not arise until such payment; hence, an action brought within three years of such payment was not barred either under the contract or by the three-year statute of limitations. American Nat'l Fire Ins. Co. v. Gibbs, 260 N.C. 681, 133 S.E.2d 669 (1963).

Action to Compel Arbitration of An Insurance Claim. — Trial court erred in denying an insured's motion to compel arbitration pursuant to G.S. 1-567.3 of an underinsured motorist claim pursuant to G.S. 20-279.21; the contractual period to request arbitration did not begin to run until the insured settled a liability claim with another company, and therefore the arbitration request was timely pursuant to the terms of the contract and G.S. 1-52(16). Register v. White, 160 N.C. App. 657, 587 S.E.2d 95, 2003 N.C. App. LEXIS 1933 (2003), cert. granted, 358 N.C. 155, 590 S.E.2d 862 (2003), aff'd, 358 N.C. 691, 599 S.E.2d 549 (2004).

In a passenger's action against an insurer for coverage under an underinsured motorist policy that incorporated the three-year limitation period in G.S. 1-52(16) as the period within which to demand arbitration, the Supreme Court of North Carolina held that the policy was ambiguous as to whether the time limit began to run from the date the passenger's bodily injuries became apparent, which was the date of the accident, or whether the time limit began to run from the date the passenger's right to demand arbitration arose, which was the date that the driver's insurer tendered an inadequate amount as the liability limits of its policy; since a contractual ambiguity in an insurance policy was resolved in favor of the insured, the court held that the three-year period ran from the date the passenger's right to demand arbitration arose, the passenger's demand was, therefore, timely, and a decision granting the passenger's motion to compel arbitration of UIM coverage was affirmed. Register v. White, 358 N.C. 691, 599 S.E.2d 549, 2004 N.C. LEXIS 916 (2004).

Collection of Rent by Trustee from Cestui Que Trust. — Where the relation of landlord and tenant has been established between trustee and cestui que trust, evidenced by voluntary payment of rent by the cestui que trust to the trustee, such relation ordinarily suffices to set the statute of limitations running against the cestui que trust. But where the object of the trust was to hold and preserve title for the benefit of an unincorporated association whose personnel was constantly in flux and subject to future change, the mere establishment of the relation of landlord and tenant and the collection of rent by the trustee, without more, was not enough to start the statute running. To set the statute in motion it would have been necessary to show that all the members of the unincorporated association had knowledge, or in law were charged with knowledge, that the trustee was exacting and the association officers were paying rent. Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Action for Damages Against Carrier. — Where written demand against a carrier for damages was made within 30 days, and an action was brought within three years, such action was not barred by this section. United States Watch Case Co. v. Southern Express Co., 120 N.C. 351, 27 S.E. 74 (1897).

Defense of Laches Held Unavailable. — Where lessees' right to sue subtenant for nonpayment of taxes under lease was not conditional upon lessor first suing lessees for nonpayment of the taxes, the lessor's delay in suing lessees for nonpayment of taxes under the lease was immaterial and did not prejudice defendants' claim under the sublease. Thus, defense of laches was unavailable. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Where lessees entered into a number of subleases during term of lease and subleases to pay taxes, and sublessees and lessees failed to pay taxes under lease or sublease, lessor's suit against lessee was not barred by laches even though statute of limitations had run on some of the unpaid taxes. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Tort and Contract Claims. — When plaintiff contracted with defendant to provide structural steel design for a high school plaintiff was designing, and questions arose about the adequacy of defendant's steel design in the spring of 2001, plaintiff's negligence, professional malpractice, breach of contract, and breach of warranty claims accrued then, not in October 2001 when the school board notified plaintiff that it would be held responsible for the cost of the resulting cost overruns and delays. Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C., 180 N.C. App. 257, 636 S.E.2d 835, 2006 N.C. App. LEXIS 2329 (2006).

Defendant Equitably Estopped from Pleading the Statute of Limitations. — The defendant, who had a contractual obligation to pay the plaintiff for services rendered to his son, was equitably estopped from pleading the statute of limitations as a bar to the plaintiff's cause of action, where the trial judge, as trier of fact, found that the defendant's attorney made statements to the plaintiff which caused the plaintiff to reasonably believe it would receive payment once the court action between the defendant and the insurer was decided. Duke Univ. v. Stainback, 84 N.C. App. 75, 351 S.E.2d 806, aff'd, 320 N.C. 337, 357 S.E.2d 690 (1987).

Action Against Personal Representative. — Action filed on October 20, 2000, two days after qualification of deceased driver's personal representative, for personal injuries arising out of an automobile accident that occurred on June 27, 1997, was not barred by G.S. 1-52, where deceased died on November 7, 1997, at which time the three year limitations period had not yet expired, as under G.S. 28A-18-1 plaintiff's cause of action survived his death, and thus, pursuant to G.S. 1-22, plaintiff was permitted to commence a cause of action against deceased's personal representative, provided that either the action was brought within the time specified for the presentation of claims in G.S. 28A-19-3, or that notice of the claim upon which the action was based was presented to the personal representative within the time specified for the presentation of claims in G.S. 28A-19-3. The personal representative's failure to establish in the record that she complied with G.S. 28A-19-3(a) regarding general notice to creditors precluded her from relying upon the statute of limitations as a bar; moreover, under G.S. 28A-14-1(a), the absolute earliest "deadline" date which could have been specified by the personal representative in the general notice to creditors was January 18, 2001, three months from the day of the first publication or posting of such notice. Alford v. Catalytica Pharms., Inc., 150 N.C. App. 489, 564 S.E.2d 267, 2002 N.C. App. LEXIS 587 (2002).

Dismissal under Rule 12(b)(6) was error as to the insured's and trustees' claims for fraud, negligent misrepresentation, and unfair and deceptive practices, given allegations supporting these claims; furthermore, the claims were timely under N.C. Gen. Stat. § 1-52 and N.C. Gen. Stat. § 75-16.2. Hunter v. Guardian Life Ins. Co. of Am., 162 N.C. App. 477, 593 S.E.2d 595, 2004 N.C. App. LEXIS 174 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 48, 599 S.E.2d 49 (2004).

Motion to Dismiss Denied. — Because the face of the complaint did not clearly reveal that plaintiff borrower's claims against defendant attorney and law firm accrued before January 30, 2004 (the cut-off date under the three-year statute of limitations), the attorney and law firm's request to dismiss the remaining claims based on the statute of limitations was denied. Higgins v. Spence & Spence, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 13096 (E.D.N.C. Feb. 21, 2008).

Three year statute of limitations in G.S. 1-52 did not bar the city's breach of contract claims against an insurance company because the doctrine of "nullum tempus occurrit regi," or "time does not run against the king" applied to the city; since health and safety concerns were implicated by the enlargement of a wastewater treatment plant, the city was performing a government function when it brought suit to recover money related to the construction of a publicly funded municipal wastewater treatment plant. MCI Constructors, Inc. v. Hazen & Sawyer, P.C., 310 F. Supp. 2d 754, 2004 U.S. Dist. LEXIS 4886 (M.D.N.C. 2004).

Tolling Agreement. — Because a motor speedway filed suit against a contractor less than two years after the tolling agreement between the parties expired, the three-year statute of limitations under G.S. 1-52(1) did not bar the speedway's indemnity action against the contractor. Charlotte Motor Speedway, Inc. v. Tindall Corp., — N.C. App. —, 672 S.E.2d 691, 2009 N.C. App. LEXIS 120 (2009).

III. BONDS OF PUBLIC OFFICERS.

Editor's Note. — *The cases below were decided under former G.S. 1-50(a)(1), which provided for a six year limitation on the official bond of a public officer.*

This statute protects both principal and surety upon the bond. Vaughan v. Hines, 87 N.C. 445 (1882).

Section Applicable to Bond of Defaulted Court Clerk. — This section is applicable to an action against the surety on the bond of a defaulted clerk of the superior court. State ex rel. Lee v. Martin, 186 N.C. 127, 118 S.E. 914 (1923), modified on other grounds on rehearing, 188 N.C. 119, 123 S.E. 631 (1924).

But Not to Action for Tort Against Clerk. — In an action of tort against a clerk of the superior court for failing to index a docketed judgment as required, this section does not apply. Shackelford v. Staton, 117 N.C. 73, 23 S.E. 101 (1895).

Application to Register of Deeds. — The statutory limit for bringing actions on the official bond of the register of deeds seems to be six years (now three years), under this section. The statute commences to run from the time of the failure to register. State ex rel. Daniel v. Grizzard, 117 N.C. 105, 23 S.E. 93 (1895). See also, State ex rel. Bank of Spruce Pine v. McKinney, 209 N.C. 668, 184 S.E. 506 (1936).

When Statute Begins to Run — In General. — An action upon an official bond may be brought within six years (now three years) after a breach thereof; the statute begins to run only from the breach of the bond. Commissioners of Moore County v. MacRae, 89 N.C. 95 (1883).

Same — Failure of Sinking Fund Commissioner to Account for Funds. — Ordinarily the statute begins to run from the time of the breach of the bond. Where, upon termination of a sinking fund commissioner's term, the law required him to account for funds in his hands, his failure to do so constituted a breach of his official bond, giving rise to a cause of action thereon immediately. City of Washington v. Bonner, 203 N.C. 250, 165 S.E. 683 (1932).

Same — Losses Sustained Through Clerk's Investment. — Ordinarily, the statute of limitations on the bond of a clerk of the superior court begins to run upon default and not upon discovery, and when funds are paid into the clerk's office to the use of a person who is sui juris and knows that the funds are subject to his demand, and the clerk invests such funds in good faith, the provisions of G.S. 1-52(9) have no application in an action against successive sureties on the clerk's bonds to recover the loss sustained through such investment. State ex rel. Thacker v. Fidelity & Deposit Co., 216 N.C. 135, 4 S.E.2d 324 (1939).

Where official bond of a public officer by valid contractual limitation covered only the first year of the official's six-year term of office, the statute of limitations began to run in favor of the surety on the bond from the expiration of the first year of the official's term of office, and not from the expiration of the official's statutory six-year term of office. City of Washington v. Trust Co., 205 N.C. 382, 171 S.E. 438 (1933).

IV. LIABILITY CREATED BY STATUTES.

After the time prescribed, the statute is an absolute bar to the next of kin. Spruill v. Sanderson, 79 N.C. 466 (1878); Vaughan v. Hines, 87 N.C. 445 (1882).

Application of Section to Claims Under U.S. Const., Amend. XIV. — Liability alleged in a claim under U.S. Const., Amend. XIV, while it is created not by federal statute but by the Constitution itself, is more akin to "liability created by statute" than to common-law assault and battery, so that subdivision (2) of this section is applicable. Feilder v. Moore, 423 F. Supp. 62 (W.D.N.C. 1976).

This section is applicable to 42 U.S.C. § 1981 actions arising in North Carolina. Wilson v. Continental Group, Inc., 451 F. Supp. 1 (M.D.N.C. 1978).

Regardless of whether an action brought under 42 U.S.C. § 1981 is considered an action in contract or an action in tort, the appropriate North Carolina statute of limitations is three years under this section. Lattimore v. Loews Theatres, Inc., 410 F. Supp. 1397 (M.D.N.C. 1975).

The federal courts entertaining 42 U.S.C. § 1981 claims have adopted the most closely analogous State statute of limitations, and since 42 U.S.C. § 1981 guarantees equal contract rights to black citizens, the most closely analogous State statute of limitations is this section. Pittman v. Anaconda Wire & Cable Co., 408 F. Supp. 286 (E.D.N.C. 1974).

The statute of limitations for 42 U.S.C. § 1981 is the most analogous statute of limitations of the state where the deprivation occurred; in this State, the most analogous statute of limitations is either subdivision (1) or subdivision (2) of this section. Lilly v. Harris-Teeter Supermarket, 545 F. Supp. 686 (W.D.N.C. 1982), aff'd in part and rev'd in part, 720 F.2d 326 (4th Cir. 1983).

This section applies to an action alleging racial discrimination in violation of 42 U.S.C. § 1981 and serves as a three year cap on back pay. Kornegay v. Burlington Indus., Inc., 803 F.2d 787 (4th Cir. 1986).

And Filing Charge with E.E.O.C. on Same Facts Does Not Toll Running of Limitations. — The mere filing of a charge with the Equal Employment Opportunity Commission under 42 U.S.C. § 2000e-5(e) does not toll the running of the statute of limitations on a 42 U.S.C. § 1981 claim based upon the same set of facts. Camack v. Hardee's Food Sys., 410 F. Supp. 469 (M.D.N.C. 1976); Wilson v. Continental Group, Inc., 451 F. Supp. 1 (M.D.N.C. 1978).

Non-Compliance with Administrative Procedures Prescribed by E.R.I.S.A. — Because the employee failed to exhaust the administrative remedies provided by the employee benefit plan, the court granted defendants' motion for summary judgment and denied the employee's motion for summary judgment; although the attorney's actions might have been the cause of the employee's failure to timely file an appeal, such an excuse had not been recognized as a justification for non-compliance with the administrative procedures prescribed by the Employee Retirement Income Security Act, 29 U.S.C.S. § 1001 et seq., and did not extend the three year statute of limitations provided in subsection (l) of this section. Moses v. Provident Life & Accident Ins. Co., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 4529 (M.D.N.C. Mar. 21, 2003).

Subdivision (2) Governs Actions Under 42 U.S.C. §§ 1981 and 1983. — Since there is no federal statute of limitation governing 42 U.S.C. §§ 1981 and 1983, the appropriate limitation period is the most relevant period provided by State law. The most relevant period provided by North Carolina law is subdivision (2) of this section. Lugo v. City of Charlotte, 577 F. Supp. 988 (W.D.N.C. 1984).

Subdivision (2) of this section is applicable to claims asserted under 42 U.S.C. § 1983. Feilder v. Moore, 423 F. Supp. 62 (W.D.N.C. 1976); Gardner v. King, 464 F. Supp. 666 (W.D.N.C. 1979); Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980).

The three-year limitation period established by this section applied to G.S. 1983 claim where plaintiff sought to determine whether the imposition of an earnings cap in a disability pension plan after the beneficiary vested in the plan violated the U.S. Constitution, and began to run only when he was actually being paid above the earnings cap, and not when the plaintiff was required for the first time to report his previous year's earnings to the Local Retirement System pursuant to G.S. 128-27(e)(4). Kestler v. North Carolina Local Governmental Employees' Retirement Sys., 808 F. Supp. 1220 (W.D.N.C. 1992), rev'd on other grounds, 48 F.3d 800 (4th Cir. 1995).

As Well as Claims Under 42 U.S.C. § 1985(3). — For actions brought under 42 U.S.C. §§ 1983 and 1985 (3), the applicable limitations period is determined by reference to state law, and is three years, which is the time limitation prescribed by subdivision (2) of this section for actions founded on a liability created by statute, either state or federal. Evans v. Chipps, 56 N.C. App. 232, 287 S.E.2d 426 (1982), overruled on other grounds, Fowler v. Valencourt, 334 N.C. 345, 432 S.E.2d 306 (1993).

Subdivision (5) Applicable to 42 U.S.C. § 1983 and § 1981 Actions. — Subdivision (5) of this section was the applicable statute of limitation governing a 42 U.S.C. § 1983 action based upon charges against police officials of illegal seizure and use of excessive force. The court's decision as to this issue will also govern § 1981 actions. Reagan v. Hampton, 700 F. Supp. 850 (M.D.N.C. 1988).

Federal Rule Governs Accrual of Action Under 42 U.S.C. § 1983. — While the time limitation is borrowed from State law in an action under 42 U.S.C. § 1983, the federal rules fix the time of accrual of the right of action. Bireline v. Seagondollar, 567 F.2d 260 (4th Cir. 1977), overruled on other grounds, National Adv. Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991), cert. denied, 444 U.S. 842, 100 S. Ct. 83, 62 L. Ed. 2d 54 (1979).

Effect of Denial of in Forma Pauperis Status upon Tolling Statute in 42 U.S.C. § 1983 Action. — Receipt from a pro se state prisoner of a complaint under 42 U.S.C. § 1983 and affidavit in support of in forma pauperis status is sufficient to "commence" the action, and to toll the statute of limitations, notwithstanding the denial of in forma pauperis status, where the initial filing is in good faith, not interposed for dilatory purposes, based on the reasonable expectation that in forma pauperis status would be granted, and followed by reasonably prompt action to continue the prosecution of the action after in forma pauperis status is denied. Gardner v. King, 464 F. Supp. 666 (W.D.N.C. 1979).

G.S. 25-3-419 Liability. — Subdivision (2) of this section might arguably apply to case which arose "upon a liability created by statute," namely G.S. 25-3-419. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Claims under section 101(a)(2) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411-(a)(2), are governed by state general or residual personal injury statutes, which are to be identified in conformity with the United States Supreme Court decision in Owens v. Okure, 488 U.S. 886, 109 S. Ct. 214, 102 L. Ed. 2d 206 (1988); Reed v. United Transp. Union, 488 U.S. 319, 109 S. Ct. 621, 102 L. Ed. 2d 665 (1989).

Application of Section to Title VII Litigation. — The three-year limitations period found in this section is the appropriate limitations period for employment discrimination claims where there is no specific federal statute of limitations. Chisholm v. United States Postal Serv., 516 F. Supp. 810 (W.D.N.C. 1980), vacated in part and aff'd in part, 665 F.2d 482 (1981).

While a State statute of limitations may have some relation to the degree of relief afforded in Title VII litigation, the crucial time limitation for the original filing of the Title VII claim is determined by Title VII itself. Pittman v. Anaconda Wire & Cable Co., 408 F. Supp. 286 (E.D.N.C. 1974).

On the issue of whether Title VII actions are barred by State statutes of limitations, courts have ruled in favor of the tolling when Equal Employment Opportunities Commission charges are filed. Pittman v. Anaconda Wire & Cable Co., 408 F. Supp. 286 (E.D.N.C. 1974).

Civil Rights Action. — Where complaint alleged that defendant, while in the employment of the United States Department of Transportation violated plaintiffs' civil rights by entering plaintiff's home and assaulting her, the most relevant limitation period was the three years limitation period in subdivision (2) of this section. Warlick v. Wilson, 902 F. Supp. 90 (M.D.N.C. 1995).

Action Under North Carolina Retaliatory Employment Discrimination Act. — Under subsection (2) of this section, a civil action must be commenced within three years upon a liability created by statute, unless some other time is mentioned in the statute creating it; subsection (2) of this section is inapplicable to claims under the North Carolina Retaliatory Employment Discrimination Act, G.S. 95-240 et seq. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Action Under County Discrimination Ordinance and Enabling Statute. — Employer's cause of action for a declaratory judgment counterclaim accrued when the employer was sued under the employment provisions of a county discrimination ordinance and not when the enabling statute for the ordinance was passed; therefore, the employer's declaratory judgment counterclaim was not time-barred as the alleged wrong constituted a continuing violation and did not occur until the statute was enforced or applied. Williams v. Blue Cross Blue Shield, 357 N.C. 170, 581 S.E.2d 415, 2003 N.C. LEXIS 595 (2003).

Action Under Oil Pollution and Hazardous Substances Control Act Held Barred. — Subdivision (2) of this section barred an action brought under the state Oil Pollution and Hazardous Substances Control Act of 1978, G.S. 143-215.75, where plaintiff waited longer than three years after discovering the contamination to file the action. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Action for Treble Damages Under Unfair Trade Practices Statutes. — An action under G.S. 75-16 to recover treble damages for a violation of the unfair trade practices statute, G.S. 75-1.1, instituted prior to the enactment of the four-year statute of limitations of G.S. 75-16.2 on June 12, 1979, was governed by the three-year limitation of subdivision (2) of this section, and not the one-year limitation of G.S. 1-54(2) applicable to actions to recover a statutory penalty. Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

An action to enforce liability under G.S. 49-15 is barred after three years under subdivision (2) of this section; and since each time a mother makes an expenditure reasonably incurred for the support of a child such expenditure creates in her a new right to reimbursement, subdivision (2) begins to run against each expenditure on the date when the expenditure was made. Tidwell v. Booker, 290 N.C. 98, 225 S.E.2d 816 (1976).

Contribution Claims. — The legislature has failed to fix a time in G.S. 1B-3(d)(3) for refiling contribution claims in the situation where a party brings a claim for contribution that is voluntarily dismissed after settlement of the underlying claim. However, the legislature has provided that a three-year statute of limitations applies upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it. Safety Mut. Cas. Corp. v. Spears, 104 N.C. App. 467, 409 S.E.2d 736 (1991), cert. granted, 331 N.C. 118, 415 S.E.2d 200 (1992), petition withdrawn, 333 N.C. 346, 429 S.E.2d 552 (1993).

Creditor's Action for Relief Under G.S. 23-1. — The three-year statute of limitation applies to a creditor's action for relief under G.S. 23-1. Wilson v. Crab Orchard Dev. Co., 5 N.C. App. 600, 169 S.E.2d 50 (1969), aff'd, 276 N.C. 198, 171 S.E.2d 873 (1970).

Action by county against inmate of county home to secure reimbursement or indemnity for sums expended for upkeep in the home comes within this section. Guilford County v. Hampton, 224 N.C. 817, 32 S.E.2d 606 (1945).

Failure of Court Clerk to Index Judgment. — In a tort action against a clerk of the superior court for failing to index a docketed judgment as required by G.S. 1-233, this section is applicable. Shackelford v. Staton, 117 N.C. 73, 23 S.E. 101 (1895).

Action Against Bank for Failure to Collect Check. — An action against a bank for breach of its duty to collect a check and against another bank which took over the assets of the former was barred as against the latter bank by this section where it was not commenced until five years after the transaction and four years after the transfer of the assets. Standard Trust Co. v. Commercial Nat'l Bank, 240 F. 303 (4th Cir. 1917).

Action Against Corporate Director. — Summary judgment was granted in favor of a director of a corporation in an action alleging violations of G.S. 55-8-30 and N.Y. Gen. Bus. Law § 717 relating to the sale of certain illegal agreements because the causes of action were time barred. Rich Food Servs., Inc. v. Rich Plan Corp., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27799 (E.D.N.C. Nov. 11, 2002).

Liability of National Bank Stockholder

for Assessment. — Though the original liability of a national bank stockholder is contractual in nature, being based upon his original stock subscription, his liability under a stock assessment fixing his amount of liability is "statutory" and not contractual as respects the running of limitations. And partial payments by the stockholder on the stock assessment did not toll the running of this section against his liability. Briley v. Crouch, 115 F.2d 443 (4th Cir. 1940).

Section Held Inapplicable to Private Action for Treble Damages Under Antitrust Laws. — A private action brought by theater owners for treble damages under federal antitrust laws was an action to recover a penalty or forfeiture within the meaning of G.S. 1-54(2), to which a one-year period of limitations applied, and subdivision (2) of this section was inapplicable thereto. North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960), decided prior to the prescription of a period of limitations by federal law.

Petition to Have Damages Assessed Against Railroad. — Where the charter of a railroad company provides that when the company has appropriated land without authority no action shall be brought by the owner except a petition to have the damage assessed, and fixes no limitation on such action, such petition is neither an action of trespass nor one on a liability created by statute within the meaning of subdivisions (2) and (3) of this section, and the refusal of the trial judge to submit an issue upon the statute of limitations was not error. Land v. Wilmington & W.R.R., 107 N.C. 72, 12 S.E. 125 (1890); Utley v. Wilmington & W.R.R., 119 N.C. 720, 25 S.E. 1021 (1896).

Action to Recover Delinquent Taxes. — Neither the three nor the 10-year statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides. Wilmington v. Cronly, 122 N.C. 383, 30 S.E. 9 (1898).

Teacher Tenure Action. — A civil action in which plaintiff sought reinstatement as a classroom teacher in defendant board of education's school system and back pay and other benefits arising out of defendant's alleged violation of the Teacher Tenure Act was not governed by the two-year statute of limitations set out in G.S. 1-53(1), which applies to an action upon a contract against a local unit of government; the applicable statute of limitations was the three-year statute in subdivision (2) of this section "upon a liability created by statute." Rose v. Currituck County Bd. of Educ., 83 N.C. App. 408, 350 S.E.2d 376 (1986).

Teacher's claim for declaratory judgment under G.S. 115C-325(c)(2) was time-barred by the three year statute of limitations under G.S. 1-52(2) because the teacher did not timely file his claim and the continuing wrong doctrine did not apply. Hicks v. Wake County Bd. of Educ., 187 N.C. App. 485, 653 S.E.2d 236, 2007 N.C. App. LEXIS 2422 (2007).

Charter School Actions. — Three-year statute of limitations of G.S. 1-52(2) applied to the charter schools' suit against the public school system for the alleged improper funding of public education because the statute concerning charter school funding, G.S. 115C-238.29H, did not contain an express limitations period. In that regard, most of the charter schools' actions were not time barred because the causes of action did not accrue until the fiscal year ended and a determination could be made about whether the charter schools had received proper funding. Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ., 188 N.C. App. 454, 655 S.E.2d 850, 2008 N.C. App. LEXIS 225 (2008).

Rent abatement sought by plaintiffs under the Residential Rental Agreements Act, G.S. 42-38 et seq., a remedy which is not spelled out but which is implied from the statute, and which is not punitive but rather in the nature of a restitutionary remedy, was governed by three-year statute of limitations pursuant to subdivisions (1) and (2) of this section. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

The doctrine of laches is not applicable to an action for retroactive child support; the public policy concerns about stale claims are already adequately served by the three-year statute of limitations set forth in subdivision (2). Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

The sole limitation on a party's right to reimbursement for documented past support expenditures is imposed by subdivision (2) which limits recovery to those expenditures incurred within three years before the date the action for support is filed. Freeman v. Freeman, 103 N.C. App. 801, 407 S.E.2d 262 (1991).

Recovery for Past Child Support Expenditures. — Assuming adequate proof of the expenditures under G.S. 50-13.4(c), the plaintiff-mother could recover reimbursement for her past support expenditures: (1) to the extent she paid the father's share of such expenditures, and (2) to the extent the expenditures occurred three years or less before August 8, 1986, the date she filed her claim for child support. Napowsa v. Langston, 95 N.C. App. 14, 381 S.E.2d 882, cert. denied, 325 N.C. 709, 388 S.E.2d 460 (1989).

Discriminatory Hiring by State. — Claim by applicant for state employment who alleged discrimination by hiring agency had to be commenced within three years of the allegedly discriminatory action, where applicant was an intermittent state employee and not an "employee" for purposes of chapter governing state personnel system, which applies only to "career State employees" and which establishes the time limit for appeals. Clay v. Employment Sec. Comm'n, 340 N.C. 83, 457 S.E.2d 725 (1995).

Action Under COBRA. — Three year limitation in subdivision (1) was applicable to plaintiffs' civil rights claims brought under 29 U.S.C. § 1132(c) for violation of the Comprehensive Omnibus Budget Reconciliation Act ("COBRA"), 29 U.S.C. § 1161 et seq., requiring a health care benefits plan administrator to notify a qualified beneficiary within 30 days of the beneficiary's termination. Middleton v. Russell Group, Ltd., 924 F. Supp. 48 (M.D.N.C. 1996).

Action Under Motor Vehicle Liability Statutes. — Limitations period for claims involving liabilities created by statute, under G.S. 1-52(2), did not apply to an insured's obligation to give his or her insurer notice of a possible underinsured motorist coverage claim; the insurer's liability was derivative of the tortfeasor's liability and was, therefore, not created by statute, even though the insurer's liability to the insured arose, in part, from G.S. 20-279.21(b)(4). Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573 S.E.2d 118, 2002 N.C. LEXIS 1252 (2002).

Action Under Usury Statutes. — Plaintiffs' claims against a trust company and its trustee under G.S. 24-10 failed where the statute of limitations for the action began to accrue when plaintiffs closed on their property and as that was more than four years prior to the filing of the action, the statute of limitations in G.S. 1-52(2)-(3) had expired. Skinner v. Preferred Credit, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005).

Plaintiff's challenge to the constitutionality of Senate Bill 335 which absolved all defendants from their liability to plaintiff for participating in the conveyance process without requiring outside bids was time-barred. Hamlet HMA, Inc. v. Richmond County, 138 N.C. App. 415, 531 S.E.2d 494, 2000 N.C. App. LEXIS 636 (2000).

V. TRESPASS UPON REALTY.

Meaning of "Continuing Trespass". — The term, "continuing trespass" was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some quasi-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of wrong. Sample v. John L. Roper Lumber Co., 150 N.C. 161, 63 S.E. 731 (1909); Teeter v. Postal Telegraph-Cable Co., 172 N.C. 783, 90 S.E. 941 (1916); Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298, cert. denied, 310 N.C. 743, 315 S.E.2d 700 (1984).

Plaintiff property owner's claim for trespass against defendants, who were adjoining property owners and a water company, was barred by the three-year statute of limitations set forth in G.S. 1-52(3) because the trespass was continuing, rather than recurring, and an action for a continuing trespass was to have been brought within three years of the original trespass. Woodring v. Swieter, 180 N.C. App. 362, 637 S.E.2d 269, 2006 N.C. App. LEXIS 2387 (2006).

The statute of limitations on claims for continuing trespass and nuisance begins to run from the first act of trespass, however, where the trespass is recurrent, as opposed to continuing, the limitations period does not bar the claim. James v. Clark, 118 N.C. App. 178, 454 S.E.2d 826 (1995).

For interpretation of what constitutes a continuing trespass in water diversion cases, see Galloway v. Pace Oil Co., 62 N.C. App. 213, 302 S.E.2d 472 (1983).

Recurrent Trespass Not Barred. — Where evidence showed that plaintiffs' well was contaminated with gasoline when action for nuisance and trespass was filed and indicated continuing gasoline leakage at that time, the trespass was recurrent and thus plaintiffs' trespass and nuisance claims were not barred by subdivision (3). James v. Clark, 118 N.C. App. 178, 454 S.E.2d 826 (1995).

The law will not permit recovery for negligence which has become a fait accompli at a remote time not within the period specified by subdivision (3) of this section, even though injury may result from it within the period of limitation. Hooper v. Carr Lumber Co., 215 N.C. 308, 1 S.E.2d 818 (1939); Davenport v. Pitt County Drainage Dist. No. 2, 220 N.C. 237, 17 S.E.2d 1 (1941).

Presumption as to Date of Conversion. — Absent proof as to the date of conversion of property, the presumption is that it was as of the date of taking the property into possession. Parker v. Harden, 121 N.C. 57, 28 S.E. 20 (1897).

Application of Section to Construction and Maintenance of Telegraph Lines. — Where a telegraph company had constructed its line of poles and wires along a railroad right-of-way on the lands of the owner more than three years before commencement of the owner's action for trespass, but within three years constructed an additional line of its wires thereon and repaired its old line, replacing some of the old poles with new ones in the same holes, plaintiff's right to damages for the construction of the old line was barred by the statute, but the wrongful maintenance of the old and the building of the new line was a separate and independent trespass for which permanent damages could be awarded. Teeter v. Postal Telegraph-Cable Co., 172 N.C. 783, 90 S.E. 941 (1916).

Where landowner sought to recover for trespass and for permanent damages to his land resulting from the erection and maintenance by defendant telegraph company of transmission lines over his land, the action for trespass was barred by the three-year statute of limitations, the trespass being a continuing trespass, but the action for permanent damages as compensation for the easement was not barred until defendant had been in continuous use thereof for a period of 20 years so as to acquire the right by prescription. Love v. Postal Telegraph-Cable Co., 221 N.C. 469, 20 S.E.2d 337 (1942).

An action against a telegraph company for the erection of poles on the land of the plaintiff, if brought within three years of the trespass, is not barred by limitation. Hodges v. Western Union Tel. Co., 133 N.C. 225, 45 S.E. 572 (1903).

Landowner's claims based on allegedly unauthorized installation of telecommunications and other utility lines were barred as they were brought over 11 years after construction, outside the 3 year statute of limitations, thus, summary judgment was proper. Curtis v. Norfolk Southern Ry. Co., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 26196 (M.D.N.C. Aug. 27, 2002).

The unlawful diversion of river water is not a trespass on realty, but it is so nearly in the nature of an easement as to be governed by the same statute of limitations. Geer v. Durham Water Co., 127 N.C. 349, 37 S.E. 474 (1900).

Wrongful Diversion of Water onto Land of Another. — The injury caused by wrongfully ponding or diverting water on the land of another, causing damage, is regarded as a renewing rather than a continuing trespass, and unless sustained in a manner and for sufficient length of time to establish an easement, damages therefor, accruing within three years next before action brought, can be recovered, though the injury may have taken its rise at a more remote period. Whitfield v. Winslow, 48 N.C. App. 206, 268 S.E.2d 245, cert. denied, 301 N.C. 405, 273 S.E.2d 451 (1980).

Negligence in Widening Canal. — In an action brought in 1903 to recover permanent damages caused by the negligent widening of defendant's canal, where the entire wrong was done in 1898 and 1899, the action was barred under subdivision (3) of this section. Cherry v. Canal Co., 140 N.C. 422, 53 S.E. 138 (1906).

Flooding Caused by Canal. — Allegations that a drainage district failed to cause a canal to follow the channel of a creek as originally planned and stopped the canal on the lands of plaintiff, and failed to keep the mouth of the channel properly cleared out, resulting in plaintiff's land being flooded, commencing immediately after the canal was finished and continuing practically every year thereafter, stated a cause of action for continuing trespass, and the right of action for damages to crops for all the years was barred after the lapse of three years from the original trespass. Davenport v. Pitt County Drainage Dist. No. 2, 220 N.C. 237, 17 S.E.2d 1 (1941).

Improper Drainage Caused by Construction of Dam. — Where plaintiffs alleged that construction of a dam caused progressive injury to their land from improper drainage, and that the mere construction was the cause of the injury, the action, being limited to "injury and damage" caused by the "construction" of the dam, rested in tort, and as the trespass was a continuous rather than a renewing or intermittent one, and as the action was not for an appropriation of plaintiffs' property or an easement therein by reason of the operation of the dam, the action was barred by the three-year statute of limitations. Tate v. Western Carolina Power Co., 230 N.C. 256, 53 S.E.2d 88 (1949).

Negligence in Logging Operations. — Where plaintiff instituted an action to recover for damages to his lands resulting from the overflow of waters of a river, alleged to have been caused by the negligent acts and omissions of defendant in its logging operations, even if it was conceded that the alleged negligence constituted a continuing omission of duty toward plaintiff by defendant, plaintiff still had to show that defendant was in possession and control of the upper lands within the statutory period. Hooper v. Carr Lumber Co., 215 N.C. 308, 1 S.E.2d 818 (1939).

Action for Cutting Timber. — The three-year statute applies to actions to recover damages for trespass in cutting and removing trees from the land. Tillery v. Whiteville Lumber Co., 172 N.C. 296, 90 S.E. 196 (1916).

Damages from Gasoline Seepage. — Where plaintiff instituted action to recover damages to his land caused by the seeping of gasoline from defendant's underground storage tank, and after defendant pleaded the statute in his answer, plaintiff alleged in his reply that on three separate occasions defendant dug up and reinstalled the tank to stop the leakage, the last of which was within three years of institution of the action, the reply, liberally construed, was sufficient to allege recurring acts of negligence or wrongful conduct, each causing a renewed injury to plaintiff's property, and therefore demurrer to the reply should have been overruled. Oakley v. Texas Co., 236 N.C. 751, 73 S.E.2d 898 (1953).

Summary judgment based on statute of limitations was inappropriate on claims brought in 1988 under the Oil Pollution and Hazardous Substances Control Act (143-215.75 et seq.) and for negligence, premised on contamination of well water with gasoline, where plaintiffs did not associate the bad taste in their well water with gasoline until 1986, several years after they stopped drinking it, and in that same year were officially informed that their water was contaminated with gasoline. James v. Clark, 118 N.C. App. 178, 454 S.E.2d 826 (1995).

Damages Resulting from Sewage Disposal Plant. — Where plaintiff executed a deed of trust and deeded his equity of redemption to his sons and the deed of trust was foreclosed, all more than three years before institution of the action, and plaintiff did not again acquire title until less than a year before the action, it was held in an action to recover damages to the land resulting from defendant's sewage disposal plant that the measure of damages should have been predicated upon the difference in value at the time plaintiff again acquired title and the date of institution of the action, and an instruction that the jury should assess as damages the difference in the market value of the land on the date of institution of the action and the date three years prior thereto constituted reversible error. Ballard v. Town of Cherryville, 210 N.C. 728, 188 S.E. 334 (1936).

Wrongful maintenance of a portion of the defendants' dwelling house on the plaintiffs' lot is a separate and independent trespass each day it so remains and the three-year statute for removal begins to run each day the encroaching structure remains upon the plaintiffs' land. Any action to remove the encroachment, as in an action for compensation for the easement, or for the fee by adverse possession would not be barred until defendants had been in continuous use thereof for a period of 20 years so as to acquire the right by prescription. Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298, cert. denied, 310 N.C. 743, 315 S.E.2d 700 (1984).

Action for damages incident to construction in 1975 of an apartment building which encroached approximately one square foot on plaintiff's land involved a continuing trespass, and for damages incident to the original wrong, i.e., the construction of the building itself, no recovery could be had. However, action to permanently redress defendant's unauthorized taking of the land was subject to the 20-year statute of limitations for adverse possession. Williams v. South & S. Rentals, Inc., 82 N.C. App. 378, 346 S.E.2d 665 (1986).

An action for the "fair rental value" of occupied property was brought upon a statutory liability (i.e., G.S. 42-4; recovery for use and occupation) and was subject to the three-year statute of limitation provided for in subdivision (2) of this section. Such a cause of action accrued continually, for each day the property was occupied. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

A landowner's claim for "reasonable compensation" for occupation of her property (G.S. 42-4), brought against one of the former co-tenants as administratrix of her husband's estate, was presented to the administratrix within the statutory period (G.S. 28A-19-3) and was therefor not barred by the three-year statute of limitations of this section as of the decedent's death. The landowner was allowed to sue the administratrix for rents not paid in the period of three years prior to the decedent's death, although the action itself was not brought until some six months after this date. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Property owner was not entitled to 17 years of back rent from an occupier and an estate for the use of his property because there was a three-year statute of limitations under G.S. 42-4 and G.S. 1-52(2). Perkins v. Watson, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 11192 (M.D.N.C. June 3, 2005).

Burden of Proof. — Where defendant pleads this section to an action for trespass, the burden is on the plaintiff to prove that he commenced his action within the time prescribed. Tillery v. Whiteville Lumber Co., 172 N.C. 296, 90 S.E. 196 (1916).

Allegations Held Properly Stricken Where No Damages for Trespass Were Claimed. — In an action to remove a cloud on title, in which defendants claimed title by adverse possession, allegations in their answer pleading that plaintiffs' cause of action for trespass accrued more than three years prior to the commencement of the action were properly stricken as irrelevant, as there was no claim of damages for trespass. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

VI. GOODS OR CHATTELS.

In General. — If an action is one for conversion, it is clear that subsection (4) of this section is applicable. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

When a federal court is applying state substantive law, the North Carolina statute of limitations and attendant tolling provisions apply, regardless of whether the case was in federal court on diversity or federal question jurisdiction. Altman v. City of High Point, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 26412 (M.D.N.C. Jan. 17, 2002).

Possession of a chattel for a sufficient period to bar recovery under this section does not confer title. The prior law, c. 65, s. 20 Revised Code, so provided, but it has been repealed. Pate v. Hazell, 107 N.C. 189, 11 S.E. 1089 (1890).

Accrual of Conversion Action. — The general rule appears to be that conversion actions accrue upon the conversion itself rather than upon its discovery. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Plaintiff's cause of action for each alleged conversion accrued at the time of that particular conversion. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

The "discovery rule," codified at subdivision (16) of this section, does not apply to conversion actions. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Nonapplicability of Subdivision (16) in Conversion Actions. — The statute of limitations for conversion is clearly one "otherwise provided by statute" thereby excluded from the purview of subdivision (16) of this section. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Subdivision (4) of this section is a separate and distinct subsection, enacted independently from subdivision (16) and contains no provision that would indicate that it is subject to subdivision (16). Had the legislature intended such connection or intended for the statute of limitations for conversion to be subject to the discovery rule, it could have expressly indicated that intention such as was done in subdivision (9) of this section, the statute of limitations for fraud actions. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

In a conversion action, when the parties separated and plaintiff moved to a smaller apartment with limited storage space, and defendant retained lawful possession of the goods at the marital residence, but at the time of separation there was no evidence that plaintiff manifestly intended to abandon the property or that defendant exercised unauthorized dominion over it to her exclusion, the statute of limitations did not begin to run until defendant changed the locks on the residence after plaintiff asserted her continuing interest in the remaining property and her desire to remove it at some future time. White v. White, 76 N.C. App. 127, 331 S.E.2d 703 (1985).

The period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the alleged wrong accrues. White v. White, 76 N.C. App. 127, 331 S.E.2d 703 (1985).

Conversion Action Held Barred. — Where a case was filed more than three years after the last alleged act of conversion, the action was barred by the statute of limitations. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Running of Statute as to Funds Held by Trustee. — When a trustee notifies the party for whom he holds funds that he disavows the trust and will pay the funds over to another party, and does so, this is a conversion, and the statute of limitations begins to run, so that the cause of action is barred in three years. County Bd. of Educ. v. State Bd. of Educ., 107 N.C. 366, 12 S.E. 452 (1890).

In an action against statutory receiver of an insolvent bank to recover bonds held by the bank as trustee for safekeeping, where there was evidence that plaintiffs received a letter from the attorney of the liquidating agent denying the claim for the bonds, and that the action was instituted within three years from the receipt of this letter, the action was not barred by this section, since under the facts the cause of action did not accrue until the disavowal or repudiation of the trust. Bright v. Hood, 214 N.C. 410, 199 S.E. 630 (1938).

Proceeding to Recover Furniture from Home of Mother. — In a claim and delivery proceeding instituted in 1971 to recover furniture from the home of plaintiff's mother, who died in 1960, where the trial judge made no finding of fact as to when plaintiff's cause of action accrued, there was no basis on which to conclude as a matter of law that plaintiff's cause of action had been barred by the three-year statute of limitation. Hodges v. Johnson, 18 N.C. App. 40, 195 S.E.2d 579 (1973).

Burden of Proof. — Where the three-year statute of limitations is pleaded in defense to an action for wrongful conversion of personal property, the burden of proof is on the plaintiff to show that the action was brought within the time allowed from the accrual of the cause, or that otherwise it was not barred. Rankin v. Oates, 183 N.C. 517, 112 S.E. 32 (1922).

Charging in Conjunction with G.S. 1-56 Not Error. — Where if an action had not been barred by the provisions of subdivisions (4) and (9) of this section, it would have been barred under G.S. 1-56, it was not error to tell the jury that the action was barred in three years or in 10 years. Osborne v. Wilkes, 108 N.C. 651, 13 S.E. 285 (1891).

VII. INJURY TO PERSON OR RIGHTS OF ANOTHER.

Editor's Note. *— As to accrual of cause of action for personal injury or property damage, see analysis line XIII below and the cases cited thereunder.*

G.S. 1-50(5) must be interpreted in conjunction with subdivision (5) of this section so that both statutes may be given effect. So interpreted, G.S. 1-50(5) provides an outside limit of six years for bringing an action coming within the terms of that statute. Within that outside limit, subdivision (5) of this section continues to operate, and G.S. 1-50(5) does not serve to extend the time for bringing an action otherwise barred by the three-year statute. Smith v. American Radiator & Std. San. Corp., 38 N.C. App. 457, 248 S.E.2d 462 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 33 (1979), overruled on other grounds, Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

The purpose behind G.S. 1A-1, Rule 4 and G.S. 1-52(5) is to give notice to the party against whom an action is commenced within a reasonable time after the accrual of the cause of action. Adams v. Brooks, 73 N.C. App. 624, 327 S.E.2d 19, cert. denied, 313 N.C. 596, 332 S.E.2d 177 (1985), overruled on other grounds, Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986).

Subdivision (5) Applicable Absent Other Specific Limitation. — On its face, subdivision (5) of this section appears to apply to all actions for personal injuries that are not specifically enumerated elsewhere in a distinct statute of limitation. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

Subdivision (5) Applicable to 42 U.S.C. § 1983 and § 1981 Actions. — Subdivision (5) of this section was the applicable statute of limitation governing a 42 U.S.C. § 1983 action based upon charges against police officials of illegal seizure and use of excessive force. The court's decision as to this issue will also govern § 1981 actions. Reagan v. Hampton, 700 F. Supp. 850 (M.D.N.C. 1988).

Accrual of Claims in 42 U.S.C.S. § 1983 Action. — In a 42 U.S.C.S. § 1983 action, claims stemming from a city's demolition of apartments and the city's determination that a general contractor was ineligible to participate in the city's housing programs were time barred under G.S. 1-52(2) because the claims were filed more than three years after the apartments were demolished and more than three years after the contractor received notice that he was ineligible to participate in the city's housing programs. The date on which the North Carolina Department of Insurance ruled that a permit issued by the city for renovation of the subsequently demolished apartments was valid was irrelevant to determining the date that the claims accrued because (1) prior to the Department's ruling, the contractor alleged that the demolition of the apartments violated his rights, and (2) the ruling did not pertain to the contractor's eligibility for the city's housing programs. Dillahunt v. City of New Bern, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 14957 (E.D.N.C. Feb. 26, 2009).

Subdivision (5) Applicable to Bivens Actions. — The appropriate limitations period for an actionable constitutional tort under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), is North Carolina's three-year personal injury statute of limitations. Mallas v. Kolak, 721 F. Supp. 748 (M.D.N.C. 1989), modified, 993 F.2d 1111 (4th Cir. 1993).

Applicability of Three-Year Statute to Actions for Personal Injuries. — The three-year statute of limitations applied in an action for personal injuries allegedly received by the plaintiff as the result of negligence on the part of the defendant. Sheppard v. Barrus Constr. Co., 11 N.C. App. 358, 181 S.E.2d 130 (1971).

Subdivision (5) of this section applies to a cause of action to recover for personal injuries negligently inflicted. Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958).

An action to recover for personal injuries negligently inflicted must be commenced within three years from the date on which the action accrues. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983).

Considering the fact that no notice of claims was published by the personal representative of decedent's estate previous to plaintiff's filing of personal injury action by injured passenger, it was clear that plaintiff's claim was not barred by the three-year statute of limitations set out in this section. Lassiter v. Faison, 111 N.C. App. 206, 432 S.E.2d 373, cert. denied, 335 N.C. 174, 436 S.E.2d 381 (1993).

Employee's claims against a co-employee for reckless negligence and against his employers for intentional misconduct substantially certain to cause serious injury were incorrectly dismissed on statute of limitations grounds because the applicable statute of limitations was the three-year statute in G.S. 1-52(5), rather than a one-year limitations period. Cameron v. Merisel, Inc., 163 N.C. App. 224, 593 S.E.2d 416, 2004 N.C. App. LEXIS 380 (2004), cert. denied, 358 N.C. 731, 602 S.E.2d 676 (2004).

Insurance agents who procured an insurance policy for a contractor were not providers of professional services for purposes of the extended statute of limitations under G.S. 1-15(c). Therefore, the statute of limitations under G.S. 1-52 was applicable to the contractor's claims against the insurance agents for general negligence and breach of contract in failing to procure needed insurance coverage for the contractor's operations. Scott & Jones, Inc. v. Carlton Ins. Agency, Inc., — N.C. App. —, 677 S.E.2d 848, 2009 N.C. App. LEXIS 368 (2009).

Intentional Tort Not Barred by This Section. — Summary judgment was improper where the defendant's act of shooting the plaintiff, although she intended only to hit his tire, was not only an intentional tort but also gave rise to a claim of negligence, which was not barred by the one year statute of limitation but could appropriately be brought within the three year limit of this section. Lynn v. Burnette, 138 N.C. App. 435, 531 S.E.2d 275, 2000 N.C. App. LEXIS 618 (2000).

Criminal Conversation. — In an action for criminal conversation, the applicable three-year statute of limitations in G.S. 1-52(5) was tolled until the husband's discovery of the extramarital affair; failure to apply the discovery rule to actions for criminal conversation would have the unacceptable consequence of rewarding a defendant for deceptive and clandestine behavior that successfully prevented discovery of an extramarital affair until after the three-year statute of limitations expired. Misenheimer v. Burris, 360 N.C. 620, 637 S.E.2d 173, 2006 N.C. LEXIS 1196 (2006).

Invasion of Privacy Claim. — Invasion of privacy claim was barred by the three-year statute of limitations under G.S. 1-52(5) as an employee first filed a complaint against an employer in 2003 or 2004, but the complaint was voluntarily dismissed and the invasion of privacy claim was not made until the complaint was re-filed in 2005, and the objectionable statements were made in December 2001 and early to mid-January 2002; the G.S. 1A-1-41(a) tolling of the applicable statute of limitations applied only to the claims in the original complaint and not to other causes of action that might arise out of the same set of operative facts. Losing v. Food Lion, L.L.C., 185 N.C. App. 278, 648 S.E.2d 261, 2007 N.C. App. LEXIS 1704 (2007), cert. denied, 362 N.C. 236, 659 S.E.2d 735 (2008).

Emotional Distress Claims. — By its terms, G.S. 1-52(16) applies to "personal injury," a phrase that would seem to include emotional distress. Doe v. Doe, 973 F.2d 237 (4th Cir. 1992).

Because there is no evidence that the legislature deliberately omitted reference to emotional distress claims, that reason for excepting them from the period of repose does not exist. Doe v. Doe, 973 F.2d 237 (4th Cir. 1992).

The patient's cause of action for emotional distress was barred by the three-year statute of limitations, where the claim arose as part of a medical malpractice action but the last act giving rise to the patient's cause of action occurred more than three years prior to the date the action was filed. Jones v. Asheville Radiological Group, 129 N.C. App. 449, 500 S.E.2d 740 (1998).

Since plaintiff failed to file her claim for emotional distress within the three-year limitations period, the trial court did not err in granting defendants summary judgment. Jones v. Asheville Radiological Group, P.A., 134 N.C. App. 520, 518 S.E.2d 528 (1999).

The court rejected the plaintiff's contention that his causes of action for intentional and negligent infliction of emotional distress did not accrue and, thus, that the statute of limitations did not begin to run until his injury became apparent or ought reasonably to have become apparent to him — which was only after his conversation with his mother in 1992 or his diagnosis by his psychologist in 1993 — where, by his own admissions, he manifested signs of severe emotional distress several years earlier. Soderlund v. Kuch, 143 N.C. App. 361, 546 S.E.2d 632, 2001 N.C. App. LEXIS 313 (2001), review denied, 353 N.C. 729, 551 S.E.2d 438 (2001).

Store manager's claim of negligent infliction of emotional distress arising from an incident when a coworker exposed himself to her and grabbed her breast accrued within the three-year period allotted under G.S. 1-52(5), the claim was timely. McDougal-Wilson v. Goodyear Tire & Rubber Co., 427 F. Supp. 2d 595, 2006 U.S. Dist. LEXIS 19865 (E.D.N.C. 2006).

Intentional Infliction of Mental Distress. — Subdivision (5) of this section would apply to a complaint seeking recovery for the intentional infliction of mental distress, not the one-year statute of limitations for assault and battery, G.S. 1-54(3). Dickens v. Puryear, 45 N.C. App. 696, 263 S.E.2d 856 (1980), rev'd in part on other grounds, 302 N.C. 437, 276 S.E.2d 325 (1981).

No statute of limitations addresses the tort of intentional infliction of mental distress by name. It must, therefore, be governed by the more general three-year statute of limitations, subdivision (5) of this section, and not by the one-year statute, G.S. 1-54(3). Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

Because it is not specifically denominated under any limitation statute, a cause of action for emotional distress falls under the general three-year provision of subdivision (5) of this section. King v. Cape Fear Mem. Hosp., 96 N.C. App. 338, 385 S.E.2d 812 (1989), cert. denied, 326 N.C. 265, 389 S.E.2d 114 (1990).

Sexual Harassment Involving Continuing Conduct. — In a sexual harassment case, the trial court properly admitted evidence of defendant's actions occurring more than three years before the action was filed, where the actions were part of defendant's continuing conduct, contributed to plaintiff's emotional distress, and caused her to visit medical professionals. Bryant v. Thalhimer Bros., 113 N.C. App. 1, 437 S.E.2d 519 (1993), cert. denied and appeal dismissed, 336 N.C. 71, 445 S.E.2d 29 (1994).

Absence of Discovery Provision in Subdivision (5). — The North Carolina General Assembly has not included a "discovery provision" in subdivision (5) of this section; that omission is significant because the General Assembly has included a discovery provision in other statutes such as subdivision (16) of this section. Doe v. Doe, 973 F.2d 237 (4th Cir. 1992).

A cause of action for malicious prosecution is subject to a three-year limitation period under subdivision (5) of this section. Evans v. Chipps, 56 N.C. App. 232, 287 S.E.2d 426 (1982), overruled on other grounds, Fowler v. Valencourt, 334 N.C. 345, 432 S.E.2d 306 (1993).

Where plaintiff's cause of action, based upon the alleged wrongful and unlawful act of defendant in swearing out a warrant against plaintiff charging plaintiff with larceny, accrued within three years prior to the issuance of summons in this suit, it was not barred by this section. Jackson v. Parks, 216 N.C. 329, 4 S.E.2d 873 (1939).

Action for Negligent Manufacture and Installation of Heating and Cooling Equipment. — An action by owners in possession of real property against manufacturer and contractor for negligent manufacture and installation of heating and cooling equipment on the real property was governed by subdivision (5) of this section, the three-year statute of limitations, rather than G.S. 1-50(5), the six-year statute. Sellers v. Friedrich Refrigerators, 283 N.C. 79, 194 S.E.2d 817 (1973), decided prior to the 1981 amendment to § 1-50(5).

A residential structure may be considered "new" for warranty purposes within the maximum statute of limitations period. Gaito v. Auman, 70 N.C. App. 21, 318 S.E.2d 555 (1984), aff'd, 313 N.C. 243, 327 S.E.2d 870 (1985).

A residential structure which is approximately four and a half years old at the time of the sale from the builder-vendor to the initial purchaser may be considered to be a "new dwelling" for implied warranty purposes. Gaito v. Auman, 70 N.C. App. 21, 318 S.E.2d 555 (1984), aff'd, 313 N.C. 243, 327 S.E.2d 870 (1985).

Negligence Claim Was Time-Barred. — Where the construction project was stopped in 1996, and plaintiff general contractor did not file his complaint until 2001, any negligence claims were time-barred by G.S. 1-52(5). Kaleel Builders, Inc. v. Ashby, 161 N.C. App. 34, 587 S.E.2d 470, 2003 N.C. App. LEXIS 1993 (2003), cert. denied, 358 N.C. 235, 595 S.E.2d 152 (2004).

Plaintiff's lack of reasonable diligence in filing suit for fraud against an insurance company with regard to one of its agent's fraud of misappropriating annuity funds for his own gambling habit meant the claim was time barred, subject only to plaintiff's claim of equitable estoppel, because no discovery rule is provided for in G.S. 1-52(16); however, two transactions which occurred within the three-year statute of limitations were not time barred. White v. Consol. Planning, Inc., 166 N.C. App. 283, 603 S.E.2d 147, 2004 N.C. App. LEXIS 1780 (2004), cert. denied, — N.C. —, 610 S.E.2d 717 (2005).

Failure to make a proper disclosure is in the nature of malpractice (negligence) and the three-year statute of limitations applies. Nelson v. Patrick, 58 N.C. App. 546, 293 S.E.2d 829 (1982). As to action accrual of cause of action for professional malpractice, see G.S. 1-15(c).

Medical Malpractice Suit. — Prescription medication, absent any other contact with a doctor, did not constitute a continuing course of treatment and, therefore, did not extend the statute of limitations period. Trexler v. Pollock, 135 N.C. App. 601, 522 S.E.2d 84, 1999 N.C. App. LEXIS 1184 (1999).

In a suit seeking injunctive relief to halt the construction of a landfill, the district court erred in dismissing as untimely plaintiffs' claims under 42 U.S.C.S. §§ 1982, 2000d, and 3604(b) and the Equal Protection Clause of the Fourteenth Amendment, because the limitations period was not triggered until the issuance of the landfill permit. Franks v. Ross, 313 F.3d 184, 2002 U.S. App. LEXIS 24523 (4th Cir. 2002).

Motor Vehicle Liability Suit. — Injured insureds, who learned that the insurance coverage for the tortfeasor who injured them was insufficient to cover their damages, were not required to give their underinsured motorist insurer notice of a possible underinsured motorist claim within the statute of limitations applicable to the underlying tort, in G.S. 1-52(16), because the plain language of G.S. 20-279.21(b)(4), requiring notice of such a claim to the insurer, did not impose this requirement. Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573 S.E.2d 118, 2002 N.C. LEXIS 1252 (2002).

Amended Complaint. — Where the pending action in which an amended complaint was filed had been instituted prior to the expiration of three years from the date of the alleged events, and the amended complaint related back to the date of the original pleading, the plaintiff's action for malicious prosecution was not barred by the statute of limitations. Clary v. Nivens, 12 N.C. App. 690, 184 S.E.2d 374 (1971).

Exclusion of Testimony. — The trial court in a negligence action ruled correctly in excluding testimony where the time period inquired about was outside the three years prior to the institution of the action. Wells v. French Broad Elec. Membership Corp., 68 N.C. App. 410, 315 S.E.2d 316, cert. denied, 312 N.C. 498, 322 S.E.2d 565 (1984).

Accrual of Action Based on Disease. — The first identifiable injury occurs when a disease is diagnosed as such, and at that time it is no longer latent. Gardner v. Asbestos Corp., 634 F. Supp. 609 (W.D.N.C. 1986).

An action based on disease-related claims is not barred by the statute of limitations for personal injury actions under this section, so long as the action is filed within three years after plaintiff's illness is first diagnosed. Guy v. E.I. DuPont De Nemours & Co., 792 F.2d 457 (4th Cir. 1986).

Where plaintiff took a voluntary dismissal and re-filed his personal injury claim within the time permitted by G.S. 1A-1, Rule 41(a), his spouse had the right to join with it her derivative cause of action for loss of consortium. Sloan v. Miller Bldg. Corp., 128 N.C. App. 37, 493 S.E.2d 460 (1997).

Running of Statute for Minors. — Motion for dismissal of an action under 42 U.S.C § 1983 would be denied where (1) juvenile was 14 years old when the alleged incident took place, (2) juvenile was now only 17 years of age, and (3) pursuant to G.S. 1-17 (a)(1), the statute of limitations had not begun to run against the juvenile. Simmons v. Justice, 87 F. Supp. 2d 524, 2000 U.S. Dist. LEXIS 2945 (W.D.N.C. 2000).

Continuing Violation Not Found. — Where plaintiff conceded that an allegedly unconstitutional seizure occurred more than three years prior to plaintiff's assertion of the claim, but asserted that the seizure and the town's condonation of the arresting officers' conduct constituted a continuing violation, no basis was shown for tolling or extending the limitations period; there was no continuing unlawful conduct of the officers, and the town's alleged condonation of the officers' conduct was merely an effect of the original violation rather than an independent injury. Spencer v. Town of Chapel Hill, 290 F. Supp. 2d 655, 2003 U.S. Dist. LEXIS 20700 (M.D.N.C. 2003).

Tolling of Limitation Period Not Allowed. — Where plaintiff conceded that an allegedly unconstitutional seizure occurred more than three years prior to plaintiff's assertion of the claim, but asserted that the arresting officers unconstitutionally conspired to cover up the violation after the incident, no basis was shown for tolling or extending the limitations period beyond three years from the date of the incident; the federal basis for the conspiracy claim was the denial of access to the courts, and the alleged conspiracy did not prevent plaintiff from timely filing a complaint. Spencer v. Town of Chapel Hill, 290 F. Supp. 2d 655, 2003 U.S. Dist. LEXIS 20700 (M.D.N.C. 2003).

Because the driver of an automobile was never properly served with the accident victim's first complaint under G.S. 1A-1, N.C. R. Civ. P. 4, the victim's voluntary dismissal without prejudice did not toll the statute of limitations under G.S. 1-52(5). Lawrence v. Sullivan, — N.C. App. —, 666 S.E.2d 175, 2008 N.C. App. LEXIS 1668 (2008).

VIII. SURETIES OF EXECUTORS, ETC.

Purpose of Section. — This section and the other related sections are intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and, after reasonable time, to give quiet and repose to the estates of dead men. Andres v. Powell, 97 N.C. 155, 2 S.E. 235 (1887).

Subdivision (6) Only Applies to Sureties. — While G.S. 1-50(2) expressly applies to actions on the "official bond," subdivision (6) of this section applies to sureties only. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Sureties Also Protected by G.S. 1-50(2). — In addition to the protection of G.S. 1-50(2), the sureties on the bond are exonerated unless action is brought within three years after breach of the bond. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

While the sureties have the protection of six years under G.S. 1-50 in common with their principal, they have a further exoneration, unless sued within three years after breach of the bond. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Presence of Seal Immaterial. — This section creates the statute of limitations for sureties, notwithstanding the fact that a seal may appear after their names. Pickett v. Rigsbee, 252 N.C. 200, 113 S.E.2d 323 (1960).

The statute of limitations barring actions against defendants as sureties is this section, and not G.S. 1-47(2), notwithstanding the seal appearing after their names. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

G.S. 1-56 Not Affected. — G.S. 1-56, limiting the time for the bringing of an action to 10 years, and applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of this section as to actions on their official bonds. Pierce v. Faison, 183 N.C. 177, 110 S.E. 857 (1922).

Effect of Surety Being Foreign Corporation. — The statute of limitations is not suspended against the surety on a guardian bond by reason of the fact that such surety is a foreign corporation, when it is shown that it continuously had a general agent within the jurisdiction of North Carolina courts for executing judicial bonds and collecting premiums thereon for the company and had complied with the section authorizing service of process on the Commissioner of Insurance. State ex rel. Anderson v. United States Fid. Co., 174 N.C. 417, 93 S.E. 948 (1917).

Effect of Payment by Principal. — Payment made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the statute of limitations. Moore v. Goodwin, 109 N.C. 218, 13 S.E. 772 (1891).

The running of the statute under this section as against plaintiffs and in favor of sureties was not suspended by payment of interest by guardian on the amount due by him to each of the plaintiffs. The liability of the sureties on the bond is a conditional liability, dependent upon the failure of the guardian to pay the damages caused by his breach of the bond. The guardian and the sureties are not in the same class. For that reason, the payment by the guardian of interest on the amount due by him to his former wards did not suspend the statute of limitations, which began to run against each of his wards when she became of age. State ex rel. Finn v. Fountain, 205 N.C. 217, 171 S.E. 85 (1933).

Effect of Estate Being Unrepresented. — When there was no one in esse, from the death of the first administrator until the qualification of the administrator de bonis non, who could sue upon the bond, that time should not be counted in applying the statute of limitations in an action against the sureties. Brawley v. Brawley, 109 N.C. 524, 14 S.E. 73 (1891).

As to the effect of intervening disabilities, see Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891). See also G.S. 1-17.

Authorization or Ratification by Surety. — If the original borrower makes a new promise to pay the debt in writing or actually makes a partial payment after his or her original promise to pay is broken but before the statute of limitations has run, then the statute begins to run anew from the date of this payment or acknowledgment as against a surety who authorizes or ratifies it. Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Running of Statute from Demand and Refusal. — Whether the final account is or is not filed, if there is a demand and refusal, the action is barred as to both the principal and sureties on said bond in three years. Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891).

From the demand of the plaintiff for an account and settlement made on the administrator, and his failure and refusal to comply, this section began to run in favor of the defendant sureties on the administration bond. Gill v. Cooper, 111 N.C. 311, 16 S.E. 316 (1892); Stonestreet v. Frost, 123 N.C. 290, 31 S.E. 718 (1898).

This section is applicable only when there has been a settlement, either by the acts of the parties or a decree of court. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Action by Cestui Against Trustee After Settlement or Court Decree. — Where there has been a settlement between the trustee and cestui que trust, or a final determination of the amount due by a decree of court, the trust is closed, and an action will be barred within three years from a demand and refusal. Whedbee v. Whedbee, 58 N.C. 392 (1860); Barham v. Lomax, 73 N.C. 76 (1875); Spruill v. Sanderson, 79 N.C. 466 (1878); Wyrick v. Wyrick, 106 N.C. 84, 10 S.E. 916 (1890).

Action to Reopen Account and Readjust Settlement. — An action or proceeding to reopen an account stated by an executor and to readjust a settlement made under the supervision of a court and sanctioned by a decree must be brought within three years from the rendition of such decree if the plaintiff is under no disability and the case involves no equitable element improper for the consideration of a court of law. Spruill v. Sanderson, 79 N.C. 466 (1878).

Action against guardian and bondsman, where no final account has been filed, is barred after three years from the time of default and, at farthest, within three years from the ward's coming of age. State ex rel. Anderson v. United States Fid. Co., 174 N.C. 417, 93 S.E. 948 (1917).

Action to recover for alleged breach of bond as administratrix accrues at the time the alleged breach is committed, subdivision (6) of this section having no provision relating to discovery of the breach of the official bond as is provided for in cases under subdivision (9). Hicks v. Purvis, 208 N.C. 657, 182 S.E. 151 (1935).

Cause of action by the administrator d.b.n. under this section does not accrue until his appointment, and the action by such administrator therefore is not barred as against the bondsman until three years subsequent to his appointment. Dunn v. Dunn, 206 N.C. 373, 173 S.E. 900 (1934).

Ward's Suit Against Sureties. — A suit by a ward against the sureties on the bond of his deceased guardian comes within the terms of this section and must be brought within the three-year limit. Norman v. Walker, 101 N.C. 24, 7 S.E. 468 (1888).

Burden of Proof. — Where this section was pleaded, it was incumbent upon the plaintiff to show that the breach of the bond was within less than three years before the institution of this action against the appellee. Hussey v. Kirkman, 95 N.C. 63 (1886); Moore v. Garner, 101 N.C. 374, 7 S.E. 732 (1888); Hobbs v. Barefoot, 104 N.C. 224, 10 S.E. 170 (1889); Nunnery v. Averitt, 111 N.C. 394, 16 S.E. 683 (1892). See also, Norman v. Walker, 101 N.C. 24, 7 S.E. 468 (1888); Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889); Kennedy v. Cromwell, 108 N.C. 1, 13 S.E. 135 (1891); Brawley v. Brawley, 109 N.C. 524, 14 S.E. 73 (1891); Koonce v. Pelletier, 115 N.C. 233, 20 S.E. 391 (1894).

Instrument Held Contract of Surety-

ship. — Instrument executed and delivered by defendant to plaintiff's predecessor, which provided that defendant's obligation would be a primary and not a secondary obligation, payable immediately upon demand without recourse first having been had against the borrower or any other person or property, was a contract of suretyship, notwithstanding the instrument's title of "Guaranty Agreement." Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Constructive Fraud Claim Against a Trustee. — Claim of constructive fraud against a trustee based upon a breach of fiduciary duty was not time-barred by the three-year statute of limitations under G.S. 1-52 because the claim fell under the ten-year statute of limitations contained in G.S. 1-56. Babb v. Graham, 190 N.C. App. 463, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

IX. BAIL.

Application of Section Where Principal Is Out of State. — The language and meaning of this section is clear. Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meanwhile. Albemarle Steam Nav. Co. v. Williams, 111 N.C. 35, 15 S.E. 877 (1892).

Action Not Barred If Extraordinary Cause. — Trial court erred in ruling that G.S. 1-52 and 1-46 establish a statute of limitations of three years for an action involving bail and in failing to apply the "extraordinary cause" standard of former G.S. 15A-544(h) (see now G.S. 15A-544.1 et seq.) when petitioner sought remission of bonds. State v. Harkness, 133 N.C. App. 641, 516 S.E.2d 166 (1999).

X. FEES ADJUDGED DUE TO CLERK, SHERIFF OR OTHER OFFICER.

Plaintiff in a judgment on which only costs are due is not barred by this section from the proper proceedings to enforce his claim, the same being in his favor and not in favor of the officers of the court. Cowles v. Hall, 113 N.C. 359, 18 S.E. 329 (1893).

The claim of a referee for payment for services rendered in a cause which was still pending in the courts upon exceptions to his report was not barred by this section. Farmers Bank v. Merchants & Farmers Bank, 204 N.C. 378, 168 S.E. 221 (1933).

XI. FRAUD OR MISTAKE.

A. In General.

Fraud has no all-embracing definition. Because of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth, and in order that each case may be determined on its own facts, it has been wisely stated that fraud is better left undefined, lest the craft of men should find a way of committing fraud which might escape a rule or definition. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

Fraud may be said to embrace all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another or the taking of undue or unconscientious advantage of another. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

Meaning of "Relief on the Ground of Fraud". — The words "relief on the ground of fraud" are used in the broad sense to apply to all actions, both legal and equitable, where fraud is an element, and to all forms of fraud, including deception, imposition, duress and undue influence. Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960).

It will be noted from the language, "relief on the ground of fraud" that subdivision (9) of this section has and was intended to have broader meaning than the ordinary common-law actions for fraud and deceit, and clearly applies to any and all actions, legal or equitable, where fraud is the basis of an essential element of the action. Cooper v. Floyd, 9 N.C. App. 645, 177 S.E.2d 442 (1970). See also, Little v. Bank of Wadesboro, 187 N.C. 1, 121 S.E. 185 (1924).

It is difficult to establish with certainty when the statute of limitations on a claim of fraud begins to run. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

Where there is concealment of fraud or continuing fraud, the statute does not bar a suit for relief on account of it, and thereby permit the statute which was designed to prevent fraud to become an instrument to perpetrate and perpetuate it. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Three-year statute of limitation for an action grounded in fraud did not start to run until the first partner became aware that the second partner's statements, which were allegedly made to induce the first partner to settle a state court lawsuit, were false; whether the first partner's fraud claim was barred was a factual determination. George v. McClure, 266 F. Supp. 2d 413, 2001 U.S. Dist. LEXIS 25274 (M.D.N.C. 2001).

Nature of Substantive Right Determinative of Period of Limitations. — The period of limitations for actions in which the relief asked is the declaration of a constructive trust is determined by reference to the nature of the substantive right asserted. A declaration that one is a constructive trustee may be an appropriate remedial step, but it is not descriptive of the substantive right, and the fact that plaintiff seeks it is irrelevant to the question of limitations. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

Effect of Nonresidence of Plaintiff. — The nonresidence of a plaintiff claiming lands here under an allegation of fraud, etc., did not affect the running of the statute of limitations adverse to his demand in his action. Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922).

A nonresident creditor who sought to set aside a deed of his debtor for fraud was not excused by his absence for not complying with the provisions of this section requiring that he must bring his action within three years from the discovery of the fraud. Ewbank v. Lyman, 170 N.C. 505, 87 S.E. 348 (1915).

The date the final account closing decedent's estate was signed was the date that the alleged wrong of executrix was complete for purposes of bringing claims against her for fraud, breach of fiduciary duty, and conversion stemming from her administration of the estate. Davis v. Wrenn, 121 N.C. App. 156, 464 S.E.2d 708 (1995), overruled in part, on other grounds, by Forbis v. Neal, 361 N.C. 519, 649 S.E.2d 382 (2007).

Construction with Statute Limiting Claims Against Decedent's Estates. — For the purpose of the discovery rule delaying the running of a limitation period, a subtle yet distinct difference in meaning between the words "arise" and "accrue" becomes evident: a cause of action for fraud accrues when the fraud is discovered. Because a participant in fraud died more than four years before action was filed, any alleged fraud committed by him must have arisen more than four years ago since then, during his lifetime, and the North Carolina non-claim statute barred any claims filed more than six months after final creditor's notice, though sounding in fraud. Liner v. DiCresce, 905 F. Supp. 280 (M.D.N.C. 1994).

Where plaintiff's claims were based on fraud, and one participant in the fraud was dead, two statutes were applicable to their action, subsection (9) requiring a claim be filed within three years of the discovery of the fraud, and G.S. 28A-14-1 requiring that a claim be filed within six months after the personal representative of the decedent first published the notice to creditors. Since G.S. 28A-14-1 more specifically deals with when a claim may be filed against an estate, this statute controlled, and would bar a cause of action even if the action had been filed within three-years of discovery. Liner v. DiCresce, 905 F. Supp. 280 (M.D.N.C. 1994).

B. Applicability.

Actions for fraud are not subject to the 10-year limitation of former subsection (b) of G.S. 1-15 (see now subdivision (16) of this section) since subdivision (9) of this section is a statute that otherwise provides as to the time of accrual of such actions. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Subdivision (9) Applicable to All Actions Grounded on Fraud or Mistake. — While subdivision (9) of this section originally applied only to actions for relief on the ground of fraud in cases solely cognizable by courts of equity, by statutory amendment and the decisions of North Carolina courts it now applies to all actions for relief on the ground of fraud or mistake. Stancill v. Norville, 203 N.C. 457, 166 S.E. 319 (1932).

Fraud or Mistake Prerequisite to Application. — Subdivision (9) of this section has no application to an action to recover money, where there is no evidence or allegation of fraud and mistake. Barden v. Stickney, 132 N.C. 416, 43 S.E. 912 (1903); Bonner v. Stotesbury, 139 N.C. 3, 51 S.E. 781 (1905).

Subsection (9) applies to a claim for negligent misrepresentation against an insurance company since that claim is essentially one for mistake. Jefferson-Pilot Life Ins. Co. v. Spencer, 336 N.C. 49, 442 S.E.2d 316 (1994).

Forgery as Fraud. — An action to set aside a deed on the grounds of forgery is an action for relief on the grounds of fraud, and such an action is barred after three years from the date of knowledge of the forgery. Cooper v. Floyd, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

Section Held Applicable — Action to Set Aside Guardian's Settlement. — The time within which settlement of a guardian may be set aside for fraud is by several adjudications and this section restricted to the period of three years. Wheeler v. Piper, 56 N.C. 249 (1857); Whedbee v. Whedbee, 58 N.C. 392 (1860); Spruill v. Sanderson, 79 N.C. 466 (1878); State v. Smith, 83 N.C. 306 (1880).

Same — Action to Set Aside Conveyance of Equity of Redemption. — An action by the heirs of mortgagors to set aside a conveyance of the equity of redemption by mortgagors to the mortgagee was an action based on fraud and had to be instituted within three years from the discovery of the acts constituting the fraud, and the 10 year statute had no application. Massengill v. Oliver, 221 N.C. 132, 19 S.E.2d 253 (1942).

Same — Action for Damages for Obtaining Deed by Fraud. — In an action for damages for obtaining by fraud or deceit a deed from plaintiff conveying a larger amount of timber than was intended to be conveyed, the statute of limitations applicable is this section. Modlin v. Roanoke R.R. & Nav. Co., 145 N.C. 218, 58 S.E. 1075 (1907).

Same — Inadequate Consideration Due

to Fraudulent Influence. — This section applied to suit to recover the difference between grossly inadequate consideration paid for a conveyance of land, attacked upon the ground of fraudulent influence used upon the mind of the grantor, and the reasonable value thereof, and it was reversible error for the trial judge to hold, as a matter of law, that the 10-year statute relating to actions to impress a trust upon property only was applicable. Little v. Bank of Wadesboro, 187 N.C. 1, 121 S.E. 185 (1924).

Same — False Material Statements in Insurance Application. — Whether considered fraud in the broad sense or mistake, subdivision (9) of this section is applicable to an action to rescind an insurance policy on the ground of false material statements in the application therefor. Swartzberg v. Reserve Life Ins. Co., 252 N.C. 150, 113 S.E.2d 270 (1960).

Same — Embezzlement by Court Clerk. — Where a clerk of the superior court embezzled funds and such fraud was not discovered until about 90 days prior to institution of proceedings against the clerk and the surety on his bonds, and such fraud could not have been discovered earlier by reasonable diligence, this section and not G.S. 1-50 applied. State v. Gant, 201 N.C. 211, 159 S.E. 427 (1931); State ex rel. Pasquotank County v. American Sur. Co., 201 N.C. 325, 160 S.E. 176 (1931).

Section Not Applicable to Alleged Failure to Perform As Advertised. — G.S. 1-50(a)(6) indicated that the legislature intended to cover a multiplicity of claims that could have arisen out of a defective product; a farmer's fraud action based on the alleged failure of a manufactured silo to perform as advertised or indicated by the silo's promotional literature, was thus controlled by G.S. 1-50(a)(6), not by G.S. 1-52(9), and was time-barred. Jack H. Winslow Farms, Inc. v. Dedmon, 171 N.C. App. 754, 615 S.E.2d 41, 2005 N.C. App. LEXIS 1359 (2005), cert. denied, 360 N.C. 64, 621 S.E.2d 625 (2005).

Section Not Applicable to Action to Remove Cloud from Title. — The right to maintain an action to remove a cloud from a title is a continuing one to which the statute of limitations is not applicable. Cauble v. Trexler, 227 N.C. 307, 42 S.E.2d 77 (1947).

Nor to Resulting or Constructive Trusts. — A resulting or constructive trust, as distinguished from an express trust, is governed by the 10-year and not the three-year statute of limitations. Bowen v. Darden, 241 N.C. 11, 84 S.E.2d 289 (1954).

Action by Corporation to Impose Resulting Trust. — An action by a corporation alleging that certain of its officers and directors purchased a tract of real property with corporate funds, but title was placed in the individuals' names, was one to impose a resulting trust, which was governed by the 10-year statute of limitations (G.S. 1-56), and not one to reform a deed based on mistake, which is governed by the three-year statute of limitations (G.S. 1-52(9)). BM & W of Fayetteville, Inc. v. Barnes, 75 N.C. App. 600, 331 S.E.2d 308 (1985).

Section Held Applicable in Action to Impose Constructive Trust. — Where plaintiff specifically alleged fraud, or, alternatively, mistake as the basis for imposing a constructive trust on proceeds from certain stocks, the three-year limitation set forth in this section would apply. J. Lee Peeler & Co. v. Makepeace, 96 N.C. App. 118, 384 S.E.2d 283 (1989).

C. When Cause Accrues.

Actions involving fraud or mistake shall not be deemed to have accrued until discovery. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966); Hice v. Hi-Mil, Inc., 47 N.C. App. 427, 267 S.E.2d 507 (1980), aff'd, 301 N.C. 647, 273 S.E.2d 268 (1981).

The three-year statute of limitations for fraud or mistake does not commence to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

Or from When Fraud or Mistake Should Have Been Discovered. — The statute runs from the discovery of the fraud or mistake, or from when it should have been discovered in the exercise of ordinary care. Sinclair v. Teal, 156 N.C. 458, 72 S.E. 487 (1911). See also, Stubbs v. Motz, 113 N.C. 458, 18 S.E. 387 (1893); Peacock v. Barnes, 142 N.C. 215, 55 S.E. 99 (1906).

In an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. Wimberly v. Washington Furn. Stores, Inc., 216 N.C. 732, 6 S.E.2d 512 (1940); Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951); Brooks v. Ervin Constr. Co., 253 N.C. 214, 116 S.E.2d 454 (1960); B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966); Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 171 S.E.2d 873 (1970); Calhoun v. Calhoun, 18 N.C. App. 429, 197 S.E.2d 83 (1973); Driggers v. Commercial Credit Corp., 31 N.C. App. 561, 230 S.E.2d 201 (1976); Cowart v. Whitley, 39 N.C. App. 662, 251 S.E.2d 627 (1979); Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979), rev'd on other grounds, 300 N.C. 247, 266 S.E.2d 610 (1980); Shepherd v. Shepherd, 57 N.C. App. 680, 292 S.E.2d 169 (1982); Lynch v. Universal Life Church, 775 F.2d 576 (4th Cir. 1985).

In actions for relief from real estate transactions infected by mistake or fraud, the cause of action accrues when discovery was or should have been made by the exercise of ordinary diligence. Fulcher v. United States, 696 F.2d 1073 (4th Cir. 1982).

Where a person is aware of facts and circumstances which, in the exercise of due care, would enable him or her to learn of or discover the fraud, the fraud is discovered for purposes of the statute of limitations. The law regards the means of knowledge as the knowledge itself. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984); Lynch v. Universal Life Church, 775 F.2d 576 (4th Cir. 1985).

The statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

The limitation period begins to run from the time the mistake is discovered or should have been discovered. Howell v. Waters, 82 N.C. App. 481, 347 S.E.2d 65 (1986), cert. denied, 318 N.C. 694, 351 S.E.2d 747 (1987), aff'd, 89 N.C. App. 721, 367 S.E.2d 3 (1988).

Since the two clients did not discover for two years the attorney's breach of fiduciary duty and conversion, the statute of limitations for the state bar filing an action for reimbursement for compensation it paid to the two clients because of the attorney's misconduct did not start running, pursuant to G.S. 1-52(9), until the fraud was discovered. Since the state filed its action within two years of that time, its fraudulent conduct action was timely filed. N.C. State Bar v. Gilbert, 189 N.C. App. 320, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

Regardless of Length of Time Between the Act and the Discovery. — Under subdivision (9) of this section, the three-year limitation for an action for fraud accrues at the time of discovery, regardless of the length of time between the fraudulent act or mistake and discovery of it. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Knowledge of Law Not Required for Action to Accrue. — Knowledge of the law governing alleged fraud is not included in the requirement under subdivision (9) of this section as to knowledge of the facts constituting the alleged fraud. Hiatt v. Burlington Indus., Inc., 55 N.C. App. 523, 286 S.E.2d 566, cert. denied, 305 N.C. 395, 290 S.E.2d 365 (1982); Lynch v. Universal Life Church, 775 F.2d 576 (4th Cir. 1985).

Upon the question of fraudulent concealment of funds, this section runs from the discovery of the facts constituting the fraud or mistake, and not from the discovery by a party of rights hitherto unknown to him. Bonner v. Stotesbury, 139 N.C. 3, 51 S.E. 781 (1905).

This statute begins to run from time of discovery of breach of trust relationship and not from the time the relation was brought to an end. Egerton v. Logan, 81 N.C. 172 (1879).

Running of Statute Against Action to Reform Instrument for Mutual Mistake. — The three-year statute begins to run against a cause of action to reform an instrument for mutual mistake from the time the mistake is discovered or should have been discovered in the exercise of due diligence; conflicting evidence in respect thereto presents a question for the jury and its verdict thereon is determinative. Lee v. Rhodes, 231 N.C. 602, 58 S.E.2d 363 (1950).

In an action to reform a timber deed for an alleged mutual mistake of the parties, the statute will run three years after the plaintiff had knowledge of the mistake alleged. Jefferson v. Roanoke R.R. & Lumber Co., 165 N.C. 46, 80 S.E. 882 (1914). See also, Lanning v. Commissioners of Transylvania County, 106 N.C. 505, 11 S.E. 622 (1890).

Running of Statute Against Action for Negligent Misrepresentation. — While an action for negligent misrepresentation of an insurance contract does not accrue before the misrepresentation is discovered, neither does it accrue until the misrepresentation has caused claimant harm. Jefferson-Pilot Life Ins. Co. v. Spencer, 336 N.C. 49, 442 S.E.2d 316 (1994).

Conversion Claim. — Plaintiff's lack of reasonable diligence in filing suit for conversion against an insurance company with regard to one of its agent's fraud of misappropriating annuity funds for his own gambling habit meant that the claim was time barred, subject only to plaintiff's claim of equitable estoppel, because no discovery rule is provided for in G.S. 1-52(4); because the agent's unlawful dominion over plaintiff's funds occurred when he withdrew the funds from the annuity without plaintiff's permission and the wrongful taking and possession were simultaneous. White v. Consol. Planning, Inc., 166 N.C. App. 283, 603 S.E.2d 147, 2004 N.C. App. LEXIS 1780 (2004), cert. denied, — N.C. —, 610 S.E.2d 717 (2005).

D. Discovery of Fraud or Mistake.

"Discovery" means actual discovery or the time when the fraud should have been discovered in the exercise of due diligence. United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985).

Reasonable Diligence. — Where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the mistake or discrepancy but failed to do so, the absence of reasonable diligence is established as a matter of law. Grubb Properties, Inc. v. Simms Inv. Co., 101 N.C. App. 498, 400 S.E.2d 85 (1991).

Under G.S. 1-52(9), "discovery" means either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence; it was a policyholder's burden to show she should not be charged with discovery, or imputed discovery by reasonable diligence, of an insurance policy exclusion within the three year period preceding when she filled a counterclaim to reform her policy on allegations of fraud. State Farm Fire & Cas. Co. v. Darsie, 161 N.C. App. 542, 589 S.E.2d 391, 2003 N.C. App. LEXIS 2257 (2003), cert. denied, 358 N.C. 241, 594 S.E.2d 194 (2004), cert. dismissed, 358 N.C. 241, 594 S.E.2d 193 (2004).

Burden on Plaintiff to Show Both Ignorance of Facts and Diligence. — It is incumbent upon plaintiff to show not only that he was ignorant of the facts upon which he relies in his action, but also, that he could not have discovered them in the exercise of proper diligence or reasonable business prudence. Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922). See also, Johnson v. Pilot Life Ins. Co., 219 N.C. 202, 13 S.E.2d 241 (1941); Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

The burden is on the plaintiffs to show that neither they nor their predecessor in title knew of the fraud, or would have discovered it in the exercise of reasonable business prudence. Sanderlin v. Cross, 172 N.C. 234, 90 S.E. 213 (1916).

As to plaintiff's burden of proof, see also Hooker v. Worthington, 134 N.C. 283, 46 S.E. 726 (1904); Taylor v. Edmunds, 176 N.C. 325, 97 S.E. 42 (1918); Willetts v. Willetts, 254 N.C. 136, 118 S.E.2d 548 (1961).

Effect of Confidential Relationship on Duty to Use Diligence. — Failure to discover the facts constituting fraud may be excused where a confidential relationship exists between the parties, yet failure of the defrauded party to use diligence in discovering the fraud is not wholly excused merely because a relation of trust and confidence exists between the parties. Shepherd v. Shepherd, 57 N.C. App. 680, 292 S.E.2d 169 (1982).

A failure to use such diligence as is ordinarily required of two persons transacting business with each other may be excused when there exists such a relation of trust and confidence between the parties that it is the duty, on the part of the one who committed the fraud and thereby induced the other to refrain from inquiry, to disclose to the other the truth. Bennett v. Anson Bank & Trust Co., 265 N.C. 148, 143 S.E.2d 312 (1965).

Where the person perpetrating the fraud is a fiduciary, the party defrauded is under no duty to make inquiry until something happens which reasonably excites his suspicion that the fiduciary has breached his duty to disclose all the essential facts and to take no unfair advantage. Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951).

The existence and nature of a confidential relationship between the parties to a transaction may excuse a failure to use due diligence. However, a failure to use due diligence is not always excused by the existence of such a relationship. Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984).

Plaintiff's lack of reasonable diligence in filing suit for fraud against an insurance company with regard to one of its agent's fraud of misappropriating annuity funds for his own gambling habit was excused because the fraud was committed by a fiduciary, who had purposely fabricated financial statements to plaintiff and otherwise prevented plaintiff from realizing that a fraud was being committed. White v. Consol. Planning, Inc., 166 N.C. App. 283, 603 S.E.2d 147, 2004 N.C. App. LEXIS 1780 (2004), cert. denied, — N.C. —, 610 S.E.2d 717 (2005).

Whether Plaintiff Should Have Discovered Facts Is Ordinarily for Jury. — In an action to reform a deed on grounds of mistake, whether the plaintiff in the exercise of due diligence should have discovered the facts more than three years prior to the institution of the action is ordinarily for the jury when the evidence is not conclusive or is conflicting. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976); Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979), rev'd on other grounds, 300 N.C. 247, 266 S.E.2d 610 (1980).

Whether plaintiff should, in the exercise of reasonable care and due diligence, have discovered the fraud is a question of fact to be resolved by the jury. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981); Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242, cert. denied as to additional issues, 314 N.C. 548, 335 S.E.2d 27 (1985).

Whether plaintiff failed to exercise due diligence in discovering his mistake or whether he assumed the risk of a mistake are questions of fact to be determined by a jury. Howell v. Waters, 82 N.C. App. 481, 347 S.E.2d 65 (1986), cert. denied, 318 N.C. 694, 351 S.E.2d 747 (1987), aff'd, 89 N.C. App. 721, 367 S.E.2d 3 (1988).

Because the statute of limitations began to run when a decedent or her estate discovered or should have discovered the alleged fraud, and the forecast of evidence was too inconclusive for the trial court to resolve the issue as a matter of law, the statute of limitations was not a proper basis for summary judgment. Forbis v. Neal, 361 N.C. 519, 649 S.E.2d 382, 2007 N.C. LEXIS 813 (2007).

Discoverability of Mistake Is a Factual Question. — Whether a discrepancy or mistake in a deed or other document should be discovered in the exercise of reasonable diligence depends upon the circumstances of each case and is ordinarily a question of fact for the jury, particularly when the evidence is inconclusive or conflicting. Grubb Properties, Inc. v. Simms Inv. Co., 101 N.C. App. 498, 400 S.E.2d 85 (1991).

When Due Diligence Determined as Matter of Law. — In an action to reform a deed on grounds of mistake, failure to exercise due diligence in discovering a mistake has been determined as a matter of law where it was clear that there was both capacity and opportunity to discover the mistake. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

Mere registration of a deed, standing alone, will not be imputed for constructive notice. Elliott v. Goss, 250 N.C. 185, 108 S.E.2d 475 (1959).

When Registration of Deed Is Notice of Fraud. — The mere registration of a deed containing an accurate description of the locus in quo and indicating on the face of the record facts disclosing the alleged fraud will not, standing alone, be imputed for constructive notice of the facts constituting the alleged fraud, so as to set in motion the statute of limitations. In addition to the record, there must be facts and circumstances sufficient to put the defrauded person on inquiry which, if pursued, would lead to discovery of the facts constituting the fraud. Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951). See also, Stubbs v. Motz, 113 N.C. 458, 18 S.E. 387 (1893); Modlin v. Roanoke R.R. & Nav. Co., 145 N.C. 218, 58 S.E. 1075 (1907); Tuttle v. Tuttle, 146 N.C. 484, 59 S.E. 1008 (1907); Ewbank v. Lyman, 170 N.C. 505, 87 S.E. 348 (1915).

Action for Reformation of Deed. — In a reformation of deed case, mistake or discrepancy in deed that plaintiff complains of should have been discovered through the exercise of due diligence when plaintiff filed its declaration converting the apartment complex to condominiums, as plaintiff had a positive duty to exercise reasonable care in describing the converted land. Plaintiff had both the capacity and the opportunity to discover that tract was not included in the deed by simply comparing the deed legal description with the survey of the property that it had recently received. Cause of action accrued then, not when it was later actually discovered. Grubb Properties, Inc. v. Simms Inv. Co., 101 N.C. App. 498, 400 S.E.2d 85 (1991).

Cause of action for reformation of deed accrued not when plaintiff discovered that the adjacent parcel of land was not included in the deed, but when that fact should have been discovered in the exercise of reasonable diligence. Grubb Properties, Inc. v. Simms Inv. Co., 101 N.C. App. 498, 400 S.E.2d 85 (1991).

Claims Arising Out of Alleged Forgery During Procurement of Insurance. — It was error to dismiss the insured's negligence, fraud, constructive fraud, breach of contract, breach of covenant of good faith and fair dealing with punitive damages, unfair and deceptive trade practices, and breach of fiduciary duty claims as untimely under G.S. 1-56, 1-52(1), (5), and (9), and § 75-16.2, as the claims accrued when the insured was denied underinsured motorist (UIM) coverage since: (1) the insured reasonably should have discovered the alleged fraud or negligence committed by the insurer and the agent in allegedly forging the insured's name on a rejection of UIM coverage form when the insured was denied UIM coverage, (2) the insured signed the policy in 1998, and was injured in a car accident in October 2000, (3) the insured filed suit in November 2005, (4) the insured was first informed that the policy did not include UIM coverage in February 2003, and (5) the insured would not have acquired any contractual right to such coverage if it existed until November 2004, when the insured exhausted the other driver's policy. Piles v. Allstate Ins. Co., 187 N.C. App. 399, 653 S.E.2d 181, 2007 N.C. App. LEXIS 2449 (2007).

Dismissal of Cross Action Filed More Than Three Years from Discovery of Fraud. — Where defendant in his answer alleged that he refused to comply with his contract on the contractual date because of his discovery of fraudulent misrepresentations inducing his execution of the contract, and filed a cross action against plaintiff and his codefendants for such fraud more than three years after the contractual date, judgment dismissing the cross action on motion upon the plea of the three-year statute of limitations was upheld. Speas v. Ford, 253 N.C. 770, 117 S.E.2d 784 (1961).

Newly Discovered Evidence Held Necessary in Action to Reconsider. — Plaintiff could derive no aid from this section in an action to reconsider a case which had been sanctioned by the court and settled by a decree from it in the absence of newly discovered evidence showing fraud. Where the plaintiff knew all the facts at the time of the first action, the first action would stand notwithstanding this section. Spruill v. Sanderson, 79 N.C. 466 (1878).

E. Actions Held Barred.

Where, as early as 1971, plaintiff had warning that supposed husband was still married to another woman, her action for fraud filed in January, 1980, was barred by this section. Shepherd v. Shepherd, 57 N.C. App. 680, 292 S.E.2d 169 (1982).

Proceedings before clerk to sell trust

lands to make assets to pay the debts of the deceased, and the open, notorious and adverse possession of the purchasers of the land, under their registered deeds, were sufficient to put plaintiffs, claiming under the children of the said son, the cestuis que trustent, upon notice of the fraud alleged, if any, committed by the executor, and would bar their right of action within three years therefrom. Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922).

Foreclosure Sale Where Timber Sold Separately. — Where a foreclosure sale of lands was attacked for fraud upon the ground that the trustee sold the timber on the land separately from the land and made deeds to each to separate parties, which were duly recorded, the record itself gave notice of the transaction, which with knowledge of the sale itself should have put the plaintiffs and their mother, as whose heirs at law they claimed, and in whose lifetime foreclosure was had, upon reasonable notice of the fact, and barred their recovery after three years. Sanderlin v. Cross, 172 N.C. 234, 90 S.E. 213 (1916).

Where plaintiff acquired title to real estate, subject to a contract to cut timber within three years, thinking the time for cutting was 18 months, and failed to examine the record or to bring suit for wrongful cutting until more than three years after being told that the time was three years, the action was barred by this section. Blankenship v. English, 222 N.C. 91, 21 S.E.2d 891 (1942).

Cause of action for reformation of bonds accrued when the mistake should have been discovered by plaintiff in the exercise of due diligence, and plaintiff being an educated man, and there being no evidence of any effort to conceal the plain language of the bonds or to prevent plaintiff from reading them, plaintiff's cause of action was barred under this section. Moore v. Fidelity & Cas. Co., 207 N.C. 433, 177 S.E. 406 (1934). See also, in this connection, Hargett v. Lee, 206 N.C. 536, 174 S.E. 498 (1934); Hood v. Paddison, 206 N.C. 631, 175 S.E. 105 (1934).

Where insurance company rejected third application of insured for additional insurance on grounds that insured was no longer a satisfactory risk, it was held that insured should have been put on notice thereby that company's agent's promise to redeliver a second policy within seven months after it was tendered to insured and refused because of illness was false, and that insured's claim, if he had any, had atrophied as a result of his procrastination and was barred by this section. Jones v. Bankers Life Co., 131 F.2d 989 (4th Cir. 1942).

Where plaintiffs contended that usurious interest was paid by their agent without their knowledge, and that therefore their action to recover the penalty for usury was not barred although it was instituted more than two years after the last usurious payment, it was held that plaintiffs were not entitled to invoke the statute, as they did not institute action until more than three years after they had executed a note bearing six percent interest in renewal of the original note upon which usury was paid, and that they were negligent in asserting their rights, if any. Ghormley v. Hyatt, 208 N.C. 478, 181 S.E. 242 (1935).

Cause of Action to Set Aside Deed for Fraud and Undue Influence. — Where it was established that the person under whom plaintiffs claimed was mentally competent and had knowledge for more than three years prior to her death of the facts constituting the basis of the cause of action to set aside a deed to property for fraud and undue influence, plaintiffs' claim was barred. Muse v. Muse, 236 N.C. 182, 72 S.E.2d 431 (1952).

Amendment of Complaint. — Where it appeared from plaintiff's own pleadings and admissions that plaintiff discovered and had knowledge of alleged fraud more than three years prior to the filing of an amendment to her complaint, which for the first time alleged cause of action for fraud, the action was barred by subdivision (9) of this section. Nowell v. Hamilton, 249 N.C. 523, 107 S.E.2d 112 (1959).

Alleged Misrepresentations of Doctor. — The trial court did not err in entering summary judgment as to plaintiff's claim based on fraud where the evidence showed that plaintiff learned in April 1983 of the alleged misrepresentations of his doctor regarding his experience in gastroplasty procedures and did not file an action until August 1986. Foard v. Jarman, 93 N.C. App. 515, 378 S.E.2d 571 (1989), rev'd on other grounds, 326 N.C. 24, 387 S.E.2d 162 (1990).

Alleged Misrepresentations of Employer. — An employee's fraud claim against her employer for his failure to pay her job-related medical bills, despite his promise to do so, accrued when the employee knew or should have known that the employer was lying. Seigel v. Patel, 132 N.C. App. 783, 513 S.E.2d 602 (1999).

Alleged Fraudulent Actions of Attorney. — Partner's fraud claim was properly dismissed as time-barred as the partner received actual notice of another partner's ownership interest in a buyer of the partnership's property more than three years before an attorney was sued for failing to reveal or for misrepresenting the other partner's interest; the partner's claim that he was not required to adhere to the discovery provisions of the statute of limitations because he sued an attorney with whom he had an attorney-client relationship was rejected. Carlisle v. Keith, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

Alleged Constructive Fraud of Attorney. — Partner's constructive fraud claim against an attorney was properly dismissed as time-barred as the partner's claim accrued when he became aware of another partner's ownership interest in the buyer of the partnership's property, which was more than five years before an attorney was added to the suit. Carlisle v. Keith, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

Action to Set Aside Transfer of Title to Real Property for Fraud and Misrepresentation. — Although a deed which a grantor delivered to a grantee as a trustee was void ab initio because it was executed before the trust came into effect, the trial court erred by denying the trustee's motion for summary judgment on the grantor's claim for title to the property because the grantor's claim was based on allegations of fraud and misrepresentation, and was barred by subsection (9) of this section. Gifford v. Linnell, 157 N.C. App. 530, 579 S.E.2d 440, 2003 N.C. App. LEXIS 744 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 754 (2003).

Settlement Could Not Be Set Aside for Fraud. — Settlement between a pain clinic and the foundation and trustee that funded the clinic could not be set aside on fraud grounds as the three-year statute of limitations had expired because the clinic failed to exercise due diligence in uncovering the alleged fraud as a matter of law. Piedmont Inst. of Pain Mgmt. v. Staton Found. , 157 N.C. App. 577, 581 S.E.2d 68, 2003 N.C. App. LEXIS 934 (2003).

Transfer of Decedent's Assets. — Claims by decedent's heirs of undue influence on the part of the university, to which the decedent by will and inter vivos agreements transferred her assets, and on the part of the university's attorney and president, were barred by the three-year statute of limitations. Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002), cert. denied, 355 N.C. 490, 563 S.E.2d 563 (2002).

Re-Filed Suit Barred by Statute of Limitations After Initial Defective Service. — Defective service in the alleged accident victims' original negligence action under G.S. 1A-1 and N.C. R. Civ. P. 4 resulted in the victims' subsequent refiled action, despite the voluntary dismissal by the victims of the original action under G.S. 1A-1 and N.C. R. Civ. P. 41(a) being brought after the statute of limitations under G.S. 1-52(16) ran. Camara v. Gbarbera, 191 N.C. App. 394, 662 S.E.2d 920, 2008 N.C. App. LEXIS 1325 (2008).

F. Actions Not Barred.

Where a reversionary clause was omitted from a deed by mistake of the draftsman, the registration of the deed was insufficient to constitute notice to plaintiffs, and the action was not barred until three years after plaintiffs discovered, or should have discovered, the mistake in the exercise of due diligence. Ollis v. Board of Educ., 210 N.C. 489, 187 S.E. 772 (1936).

Where defendant was directed by his mother to prepare a conveyance to himself of a certain tract of land, and he surreptitiously substituted a description of a larger and more valuable tract, which deed reserved therein, as directed, a life estate in the grantor, and the grantor died some three years and seven months thereafter, there being nothing to rebut the inference that she retained possession of the property until her death, it was held that as there was nothing to excite the grantor's suspicion or to put her upon inquiry during her lifetime, the statute of limitations did not begin to run against her, and the action of the devisees of the property to set aside the conveyance for fraud, instituted within three years of the grantor's death, was not barred. Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202 (1951).

In an action to recover damages for fraudulent representations as to amount of land included in a lot purchased by plaintiffs, plaintiffs' testimony was sufficient to show that the action was begun within three years from the time the facts constituting the alleged fraud were discovered or should have been discovered by them in the exercise of reasonable diligence. Swinton v. Savoy Realty Co., 236 N.C. 723, 73 S.E.2d 785 (1953), overruled on other grounds, Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976).

Sale of Illegal Agreements. — Summary judgment was denied in a case against a director alleging negligent misrepresentation in connection with the sale of illegal agreements in North Carolina because there was a genuine issue of material fact as to whether the elements were met under New York law and whether the statute of limitations had expired under North Carolina law. Rich Food Servs., Inc. v. Rich Plan Corp., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 27799 (E.D.N.C. Nov. 11, 2002).

In interpleader action by insurance carrier to determine the right to the proceeds of a life insurance policy, where husband and wife did not know of carrier's misrepresentation prior to husband's death, the action did not accrue before his death on July 10, 1988; the counterclaim filed on February 20, 1991, was therefore brought within three years of the accrual of the cause of action and, thus, wife's claim was not barred by the statute of limitations. Jefferson-Pilot Life Ins. Co. v. Spencer, 336 N.C. 49, 442 S.E.2d 316 (1994).

Action That Accrued While Plaintiff Was a Minor. — Summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c) was improperly granted in the youngest child's claim against the father alleging fraud, among other things, as the action was not barred by res judicata and collateral estoppel, and the youngest child filed the action within three years of when the child reached the age of majority, as was required under G.S. 1-52 and G.S. 1-17(a). Beall v. Beall, 156 N.C. App. 542, 577 S.E.2d 356, 2003 N.C. App. LEXIS 188 (2003).

Summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c) was properly granted in the older child's claim against the father alleging fraud, among other things; because the claim accrued when the child was a minor, the child was required under G.S. 1-17(a) and G.S. 1-52 to file the claim within three years of reaching majority, which the child failed to do, as the summons and complaint, which began the lawsuit pursuant to G.S. 1A-1, N.C. R. Civ. P. 3, were not issued until after the deadline passed. Beall v. Beall, 156 N.C. App. 542, 577 S.E.2d 356, 2003 N.C. App. LEXIS 188 (2003).

Indemnity. — When plaintiff contracted with defendant to provide structural steel design for a high school plaintiff was designing, and problems with defendant's steel design led to cost overruns and delays, plaintiff's indemnification claim against defendant was not time-barred; a cause of action on an obligation to indemnify normally accrued when the indemnitee suffered actual loss, and here plaintiff had filed its claim for indemnity before a school board brought suit against plaintiff for costs and damages incurred as a result of the steel design errors. Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C., 180 N.C. App. 257, 636 S.E.2d 835, 2006 N.C. App. LEXIS 2329 (2006).

XII. FAIR LABOR STANDARDS ACT.

Federal Statute of Limitation Preempts Conflicting State Provision. — Subdivision (11) of this section is invalid under the force of the Supremacy Clause, and the federal two-year statute of limitation is the applicable statute. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Because the Fair Labor Standards Act (F.L.S.A.) has been duly adopted by Congress and because it was enacted pursuant to the Commerce Clause of the federal Constitution, any state law promulgated in conflict with it must yield under the force of the Supremacy Clause. In that the state three-year statute of limitation directly conflicts with the federal two-year statute of limitation, the federal statute must prevail. The federal statute of limitation reflects a purpose and objective of Congress to establish a uniform, two-year limitations period governing all claims filed pursuant to the F.L.S.A. North Carolina's three-year statute of limitation, therefore, "stands as an obstacle to the accomplishment and execution" of this purpose and objective. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Purpose of Subdivision (11). — Subdivision (11) of this section was passed in order to enlarge the period of limitations for the recovery of penalties under the Fair Labor Standards Act, which would otherwise have been limited to the period of one year under subdivision (2) of G.S. 1-54. North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960).

XIII. ACCRUAL OF CAUSE OF ACTION FOR PERSONAL INJURY OR PROPERTY DAMAGE.

Editor's Note. — *Many of the cases cited below were decided prior to the 1979 enactment of subdivision (16) of this section. As to limitations of actions for injury to the person or rights of another under subdivision (5) of this section, see analysis line VII, above, and the cases cited thereunder.*

Storm Drains. — Property owner's negligence claim for damage to property caused by municipality's alleged failure to adequately maintain its storm drainage pipe running under property owner's property was not time barred, pursuant to G.S. 1-52(16), as property owner filed the claim within three years of the date the damage to the home was discovered. Howell v. City of Lumberton, 144 N.C. App. 695, 548 S.E.2d 835, 2001 N.C. App. LEXIS 570 (2001).

Public Policy. — As G.S. 1-50(6) and subdivision (16) of this section make clear, the public policy of this State is to protect North Carolina manufacturers and designers as well as the North Carolina courts from stale claims based on injuries occurring long after the purchase of the allegedly defective product and long after a defendant participated in its manufacture or design. Boudreau v. Baughman, 86 N.C. App. 165, 356 S.E.2d 907 (1987), rev'd in part, modified and aff'd in part, 322 N.C. 331, 368 S.E.2d 849 (1988).

Primary purpose of subdivision (16) appears to have been the adoption of the "discovery" rule. That is, it was intended to apply to plaintiffs with latent injuries. Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Integrated Statutory Schemes. — Subdivision (16) of this section was not meant to be applicable to specialized causes of action provided for in integrated statutory schemes such as found in Article 3 of Chapter 25. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

"Physical damage," within the context of subdivision (16) of this section, was meant to be literally interpreted. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

The North Carolina courts have clearly not expanded the meaning of "physical damage to property" beyond the traditional meaning of the phrase. Its application has been limited to cases wherein latent damages have been discovered in the form of personal injuries or physical damage to property. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Filing within time limit prescribed by statute of repose is a condition precedent to bringing the action, and plaintiff's failure to file within the prescribed time gives defendant a vested right not to be sued. Boudreau v. Baughman, 86 N.C. App. 165, 356 S.E.2d 907 (1987), rev'd in part, modified and aff'd in part, 322 N.C. 331, 368 S.E.2d 849 (1988).

Statute of Repose and Child Abuse. — Plaintiff reasoned that a period of repose bar to a claim such as hers is especially unfair because child abuse is widespread, usually without witnesses, rarely reported because the victim feels ashamed or intimidated or suppresses memories of the abuse, and not sufficiently deterred by criminal sanctions; while these points are compelling, they are appropriately addressed to a legislative, not a judicial, body. Doe v. Doe, 973 F.2d 237 (4th Cir. 1992).

Subdivision (16) Modifies Common Law. — The well established common law rule has long been that "when the right of the party is once violated, even in ever so small a degree, the injury, in the technical acception of that term, at once springs into existence and the cause of action is complete." Subdivision (16) of this section modifies the common law rule in that it requires discovery of bodily harm to the claimant or physical damage to his property before a cause of action can accrue. First Investors Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D.N.C. 1991), aff'd, 956 F.2d 263 (4th Cir. 1992).

Subdivision (16) modifies the common-law rule that once the right of a party is violated, the cause of action is complete in the case of latent damage only to the extent that it requires discovery of physical damage before a cause of action can accrue; it does not change the fact that once some physical damage has been discovered the injury springs into existence and completes the cause of action. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 69 N.C. App. 505, 317 S.E.2d 41 (1984), aff'd, 313 N.C. 488, 329 S.E.2d 350 (1985).

The 10-year statute of repose does not create a special class of defendants. Instead, the statute applies to any defendant where a plaintiff can allege a cause of action having as an essential element bodily injury to the person which originated under circumstances making the injury not readily apparent to the claimant at the time of its origin. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Subdivision (16) of this section does not adversely affect claimants with latent diseases, but actually expands their rights and opportunities to recover. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

There is no difference between a cause of action for negligent damage to property and one for negligent injury to person insofar as the time of accrual of the cause of action for commencement of the running of the statute of limitations is concerned. Land v. Neill Pontiac, Inc., 6 N.C. App. 197, 169 S.E.2d 537 (1969).

Plaintiffs' negligence claims against the manufacturer and distributor accrued on the date their recreational vehicle and its contents were destroyed by fire. Moore v. Coachmen Indus., Inc., 129 N.C. App. 376, 499 S.E.2d 772 (1998).

Defendant's negligence conferred no right of action upon plaintiff's intestate until he suffered an injury proximately caused thereby. Until then, his cause of action was not complete and, nothing else appearing, the three-year statute would not begin to run against his right to sue. Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976).

The statute of limitations by its terms begins to run after the action has "accrued." A suit does not involve an "injury to the person or rights of another" until the plaintiff is hurt. Where plaintiff was injured in an accident allegedly caused by failure of a tire, there was no "injury" and no basis for action until the wreck occurred. Stell v. Firestone Tire & Rubber Co., 306 F. Supp. 17 (W.D.N.C. 1969).

For purposes of personal injury, the claim is deemed to have accrued when the injury became or should have become apparent to the claimant. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983), overruled on other grounds, Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

Subdivision (16) of this section modifies the sometimes harsh common law rule so as to protect a potential plaintiff in the case of a latent injury by providing that a cause of action does not accrue until the injured party becomes aware or should reasonably have become aware of the existence of the injury. However, that is the extent to which the common law rule is changed; as soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run; it does not matter that further damage could occur, such further damage being only aggravation of the original injury. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 329 S.E.2d 350 (1985).

Accrual When Wrong Is Complete. — An action to recover for personal injuries negligently inflicted must be commenced within three years from the date on which the action accrues; the cause of action accrues when the wrong is complete. Stokes v. Southeast Hotel Properties, Ltd., 877 F. Supp. 986 (W.D.N.C. 1994).

Date of Discovery Rule. — Plaintiffs with injuries not readily apparent at the time of injury are not charged with notice of the injury until discovery — a great benefit to plaintiffs. Defendants in such cases have lost the old protection of accrual being determined by the date of injury (even though the injury may not have been known to the plaintiff). Defendants have, however, received the balancing consideration (10-year statute of repose) giving them some protection from stale claims. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

The Legislature in adopting the date of discovery rule improved the lot of certain plaintiffs, but also considered the rights, duties and obligations of potential defendants. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

Prior to the enactment of former subsection (b) of G.S. 1-15 (see now subdivision (16) of this section), North Carolina plaintiffs were subject to a strict common-law rule that the cause of action accrued at the time of the occurrence of any injury, however slight, regardless of whether the plaintiff was aware of the injury. By adopting the "discovery rule" the accrual of a cause of action was postponed until the plaintiff knew or should have known of his injury. Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984).

This statute serves to delay the accrual of a cause of action in the case of latent damages until the plaintiff is aware he has suffered damage, not until he is aware of the full extent of the damages suffered. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 69 N.C. App. 505, 317 S.E.2d 41 (1984), aff'd, 313 N.C. 488, 329 S.E.2d 350 (1985).

Subdivision (16) of this section modifies the common law rule on accrual of actions only insofar as it requires discovery of physical damage before a cause of action can accrue; it does not change the fact that once some physical damage has been discovered, the injury springs into existence and completes the cause of action. Marshburn v. Associated Indem. Corp., 84 N.C. App. 365, 353 S.E.2d 123, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

The statute of limitations for plaintiff's cause of action did not accrue until physical damage to her townhouse became apparent in October, 1990 when the carpeting was removed to reveal rotting floorboards. It was then that the three-year statute of limitations enumerated in subdivision (5) began to run. Plaintiff then had three years from the time she discovered the latent defects (October 1990) to file suit. Plaintiff's filing, within the three-year limitations period, was also well within the 10-year statute of repose which began to run on December 7, 1984 when defendant sold the townhouse to plaintiff. Cage v. Colonial Bldg. Co, 111 N.C. App. 828, 433 S.E.2d 827 (1993), cert. granted, 335 N.C. 553, 441 S.E.2d 111 (1994).

As the home buyers' evidence raised at least an inference that their discovery of their home's defects occurred less than three years before they sued the sellers, the trial court erred in granting the sellers summary judgment on statute of limitations grounds. Everts v. Parkinson, 147 N.C. App. 315, 555 S.E.2d 667, 2001 N.C. App. LEXIS 1177 (2001).

Nephew's cause of action for permissive waste of property against decedent who had occupied the property accrued on the date when the nephew discovered the damage, which was seven years prior to the decedent's death; thus the action was barred by the applicable three-year statute of limitations. McCarver v. Blythe, 147 N.C. App. 496, 555 S.E.2d 680, 2001 N.C. App. LEXIS 1174 (2001).

Partner's claim was properly dismissed as the partner knew of another partner's ownership interest in the buyer of the partnership's property more than three years before he sued an attorney for negligent misrepresentation; when the partner became aware of the other partner's ownership interest in the buyer, he experienced damage that was apparent or reasonably ought to have become apparent to him. Carlisle v. Keith, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

Trial court erred in granting summary judgment to the city on the property owners' claims against the city based on a large amount of sewage being discharged on to their property during a heavy rain storm, which caused substantial property damage; the separate and distinct heavy amount of damage started the limitations period running, not the lesser problems that had occurred with sewer discharge on to their property years earlier, and the city also did not have governmental immunity. Harrison v. City of Sanford, 177 N.C. App. 116, 627 S.E.2d 672, 2006 N.C. App. LEXIS 698 (2006).

Summary judgment for a neighbor's tenant and a petroleum servicing company was proper as that the property owners did not discover that their land was contaminated by underground storage tanks on a neighbors' property until after the statute of repose had expired did not extend the time for filing suit. Hodge v. Harkey, 178 N.C. App. 222, 631 S.E.2d 143, 2006 N.C. App. LEXIS 1310 (2006).

Contractor had no valid argument regarding extension of the statute of limitations under G.S. 1-52(16) due to late discovery of the lack of completed products coverage in the insurance policy issued to the contractor as the absence of the coverage should have been apparent to the contractor on the date it received the policy, or at the latest, it should have been apparent to the contractor immediately upon an accident victim's injury. Thus, the contractor's causes of action against the insurance agents who procured the policy for the contractor were barred by the statute of limitations because the contractor's complaint was filed approximately three years and nine months after the latest date that its claims could possibly have accrued. Scott & Jones, Inc. v. Carlton Ins. Agency, Inc., — N.C. App. —, 677 S.E.2d 848, 2009 N.C. App. LEXIS 368 (2009).

Auto dealership was entitled to the protection of the discovery rule in G.S. 1-52(16) because (1) a debtor began to move the dealership's vehicles when the dealership's operators were not present; (2) the operators became aware of the damage on May 3, 2002, when one of them came to the property and noticed that vehicles were missing; (3) a court could not have found that the dealership reasonably should have discovered the damages or negligence prior to May 3, 2002, because the debtor moved and damaged the majority of the vehicles at a time when the operators were essentially taking a leave of absence from the business to care for their ailing father and visiting mother; and (4) even if one of the operators did stop by the office on the property sometime in late March or April, the court could not have found that the damage should have reasonably been discovered because the operators had hundreds of vehicles, and the damaged vehicles were moved to a location that was not utilized by the dealership and that was not visible from the dealership's sales lot or the dealership's office. By filing the complaint within three years of discovering the property damage, the dealership was not barred by the statute of limitations from seeking damages for injuries sustained when the debtor moved the vehicles in March and April 2002. In re Brokers, Inc., 407 B.R. 693, 2009 Bankr. LEXIS 1594 (Bankr. M.D.N.C. 2009).

Continuing Course of Treatment Doctrine. — Where a plaintiff shows a continuous relationship with a physician and subsequent treatment by the physician related to the original act or omission that gave rise to the claim, the continuing course of treatment doctrine tolls the running of the statute of limitations for the period between the original negligent act and the time the damage is discovered and corrected. Goins v. Puleo, 130 N.C. App. 28, 502 S.E.2d 621 (1998), rev'd on other grounds, 350 N.C. 277, 512 S.E.2d 748 (1999).

Even assuming that a continuing doctor/patient relationship for treatment related to the patient's negligence action, there was no competent evidence to suggest that the patient's severed nerve could have been restored or repaired, and therefore the continuing course of treatment doctrine was inapplicable; thus, applying G.S. 1-52(16) and G.S. 1-15(c), the three-year statute of limitations began to run with the doctor's last act giving rise to the cause of action, i.e. the surgery in which he severed the nerve, and barred the patient's cause of action. Webb v. Hardy, 182 N.C. App. 324, 641 S.E.2d 754, 2007 N.C. App. LEXIS 575 (2007).

Discovery of Further Damage. — Where plaintiff clearly knew more than three years prior to bringing suit that it had a defective roof, yet took no legal action until the statute of limitations had run, the fact that further damage which plaintiff did not expect was discovered did not bring about a new cause of action so as to preclude summary judgment in defendant's favor. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 329 S.E.2d 350 (1985).

Subsequent Aggravation. — The three-year statute of limitations on plaintiff's claim for arm injuries began to run when she was diagnosed with the injuries; subsequent aggravation did not alter the date of accrual. Keith v. U.S. Airways, Inc., 994 F. Supp. 692 (M.D.N.C. 1998).

Three-Year Statute of Limitations and Wrongful Death Claim. — The three-year statute of limitations period of this section for a bodily injury claim does not trigger the running of, nor cut short, the period for filing a wrongful death action when the underlying bodily injury claim of the decedent was not time-barred at his death. The proviso in subdivision (4) of this section merely provides a limitations defense to a wrongful death action when the claim for injuries caused by the underlying wrong had become time-barred during the decedent's life. Dunn v. Pacific Employers Ins. Co., 332 N.C. 129, 418 S.E.2d 645 (1992).

Statute of limitations for claims for injury or damage from a defective product begins to run from the date of the sale and delivery of the product, not the date of the ultimate failure of the product or the injury. Employers Com. Union Co. of Am. v. Westinghouse Elec. Corp., 15 N.C. App. 406, 190 S.E.2d 364 (1972); Davis v. E.I. DuPont DeNemours & Co., 400 F. Supp. 1347 (W.D.N.C. 1974).

The statute of limitations for tort claims had no impact on the notification provisions of G.S. 20-279.21(b)(4), and the defendants, therefore, were not required to notify the plaintiff insurer within that SOL. Liberty Mut. Ins. Co. v. Pennington, 141 N.C. App. 495, 541 S.E.2d 503, 2000 N.C. App. LEXIS 1441 (2000), aff'd, 356 N.C. 571, 573 S.E.2d 118 (2002).

For case holding the continuing course of treatment exception applicable in a medical malpractice action, see Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978). As to accrual of cause of action for malpractice, see now G.S. 1-15(c).

Failure to make proper disclosure of risks involved in a medical procedure is in the nature of malpractice (negligence) and the three-year statute of limitations applies. Nelson v. Patrick, 58 N.C. App. 546, 293 S.E.2d 829 (1982).

Personal injury claim of individual suffering asbestosis accrued on the date he was diagnosed as having the disease asbestosis, and under subdivision (16) he had three years from that date to bring suit. Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985).

In occupational disease cases, a cause of action grounded in negligence accrues when the disease is diagnosed. Dunn v. Pacific Employers Ins. Co., 332 N.C. 129, 418 S.E.2d 645 (1992).

Post-Traumatic Stress Disorder. — Subsection (16) did not apply to the plaintiff's cause of action for post-traumatic stress disorder arising from negligent or intentional infliction of emotional distress as the plaintiff's severe emotional distress was apparent several years before he was diagnosed with post-traumatic stress disorder. Soderlund v. Kuch, 143 N.C. App. 361, 546 S.E.2d 632, 2001 N.C. App. LEXIS 313 (2001), review denied, 353 N.C. 729, 551 S.E.2d 438 (2001).

Where plaintiff conceded that his claim for emotional distress caused by police officers' high risk vehicle stop was not asserted within three years of the incident, but argued that plaintiff was not diagnosed with post-traumatic stress disorder until a substantial period after the incident, the limitations period began from the date of the incident and barred plaintiff's claim; the complaint clearly alleged that plaintiff suffered extreme emotional distress immediately after the incident, regardless of when plaintiff was diagnosed with post-traumatic stress disorder. Spencer v. Town of Chapel Hill, 290 F. Supp. 2d 655, 2003 U.S. Dist. LEXIS 20700 (M.D.N.C. 2003).

A residential structure may be considered "new" for warranty purposes within the maximum statute of limitations period. Gaito v. Auman, 70 N.C. App. 21, 318 S.E.2d 555 (1984), aff'd, 313 N.C. 243, 327 S.E.2d 870 (1985).

A residential structure which is approximately four and a half years old at the time of the sale from the builder-vendor to the initial purchaser may be considered to be a "new dwelling" for implied warranty purposes. Gaito v. Auman, 70 N.C. App. 21, 318 S.E.2d 555 (1984), aff'd, 313 N.C. 243, 327 S.E.2d 870 (1985).

As to accrual of cause of action against an architect for negligence arising out of a construction project under former subsection (b) of G.S. 1-15(b) (see now subdivision (16) of this section) and subdivision (5) of this section, see Quail Hollow E. Condominium Ass'n v. Donald J. Scholz Co., 47 N.C. App. 518, 268 S.E.2d 12, cert. denied, 301 N.C. 527, 273 S.E.2d 454 (1980).

A claim for negligent misrepresentation does not accrue until two events occur: (1) the claimant suffers harm because of the misrepresentation; and (2) the claimant discovers the misrepresentation. Barger v. McCoy Hillard & Parks, 346 N.C. 650, 488 S.E.2d 215 (1997).

Gasoline supplier was not liable for underground seepage of gasoline, where the evidence did not show that it had "control" over the gasoline less than ten years prior to the time the action was filed. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Contaminated Water. — A mere suspicion of contaminated water will not begin the statute of limitations period. Crawford v. Boyette, 121 N.C. App. 67, 464 S.E.2d 301 (1995).

Although plaintiff noticed his water tasted bad and smelled funny, and did not use the water for drinking or cooking 5 years before action was filed, as plaintiff took reasonable steps to determine whether his well was contaminated the limitations period did not accrue until 2 years later when plaintiff first received official notification that his well water was contaminated with benzene. Crawford v. Boyette, 121 N.C. App. 67, 464 S.E.2d 301 (1995).

Summary judgment for a tenant and a petroleum servicing company was proper as the company removed underground storage tanks on the leased property in 1988, the tenant's lease ended in 1988, and the last act or omission that could give rise to a cause of action against either defendant occurred in 1988; as defendants' last acts or omissions occurred more than 10 years before the suit was filed, the claims were barred by the statute of repose. Hodge v. Harkey, 178 N.C. App. 222, 631 S.E.2d 143, 2006 N.C. App. LEXIS 1310 (2006).

Where a laundry owner sued a town and a fire department regarding dirty water, the negligence claims were barred by the statute of limitations in G.S. 1-52(16) because the injury was a continuing injury which was apparent to the laundry owner for more than three years, since the dirty water had been periodically furnished to the owner over a period of more than 10 years, and the injuries complained of did not have a separate and distinct nature. Jones v. Town of Angier, 181 N.C. App. 121, 638 S.E.2d 607, 2007 N.C. App. LEXIS 67 (2007).

Applicability to Right of Subrogation. — Where insured property was damaged by the tortious act of another and the insurance paid the owner of the property covered the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation of the owner's indivisible cause of action against the tortfeasor, but where the statute of limitations would have run on the property owner's right to file the cause of action, plaintiff insurance company also lost its right to file the suit after that date. Aetna Cas. & Sur. Co. v. Anders, 116 N.C. App. 348, 447 S.E.2d 504 (1994).

Claims Between Insurance Companies. — Claim for contribution by insurance company against another insurance company was sufficiently analogous to claim for subrogation to warrant application of three-year statute of limitations of subsection (1). Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 122 N.C. App. 449, 470 S.E.2d 556 (1996).

Third-party complaint against previous landowners for alleged contamination of an adjacent property resulting from gasoline seepage was properly dismissed, where the landowners had sold the property more than ten years before plaintiff filed the original action. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), rehearing denied, 328 N.C. 336, 402 S.E.2d 844 (1991).

Accrual of Cause of Action Against Architect. — Contractor's negligence action against the architect accrued when the contractor realized that the architect's performance caused economic loss, that the architect would not issue payment certificates to compensate the loss, and that legal action would be necessary to gain relief. RPR & Assocs. v. O'Brien/Atkins Assocs., 24 F. Supp. 2d 515 (M.D.N.C. 1998).

Whether Discovery Was Timely Held a Jury Question. — In an action for tort and breach of warranties, the trial court erred in dismissing plaintiffs' negligence and strict liability claims instituted in 1979 for personal injuries allegedly caused by the defective condition of a vehicle purchased from defendant dealer on the ground that the claims were barred by the three-year limitation of former G.S. 1-15(b) (replaced by subdivision (16) of this section), where plaintiffs alleged that the link between their physical injuries and gas fumes in the vehicle was not discovered until 1978, since the claim did not accrue until the injury was discovered or ought reasonably to have been discovered, and whether plaintiffs should have discovered the invasion of their legal rights prior to 1978 was a question for the jury. Gillespie v. American Motors Corp., 51 N.C. App. 535, 277 S.E.2d 100 (1981).

Summary judgment for a contractor and a tile company in owner's breach of contract and negligence suit alleging defects in the owners' deck was improper because the owners' claim that they could not have known about the damage to the deck until they received a report documenting the defects, or at the earliest when a painter suggested the cause of damage, created genuine fact issues as to when the owners knew or reasonably should have known about the damage to their deck; if either of the owners' two contentions was accepted as the truth, the complaint was timely even though it was filed more than three years after the deck was completed. Baum v. John R. Poore Builder, Inc., 183 N.C. App. 75, 643 S.E.2d 607, 2007 N.C. App. LEXIS 839 (2007).

Not Applicable to Claim Arising from Improvement to Real Property. — Subsection (16) has no application to a claim arising out of improvement to real property; the real property improvement statute of repose at G.S. 1-50(5) applies exclusively to all claims based upon or arising out of the defective or unsafe condition of an improvement to real property. Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 336 N.C. 438, 444 S.E.2d 423 (1994).

Accrual of Alienation of Affections Claim. — Summary judgment was improperly granted dismissing former wife's claim for alienation of affections filed in April 2003 on the ground that it was barred by the statute of limitations in G.S. 1-52(5) because, while the husband and the wife separated in 1998, the wife's allegations in her sworn affidavit and verified complaint, to the effect that the husband expressed his desire to return to the marriage multiple times in October 1999 and September 2000, that the couple purchased a car together in May 1999, that the couple maintained joint finances after their separation, that they participated in marriage counseling until February 2001, and that the husband told the wife during their last counseling session that he was not planning on divorcing her. presented a genuine issue of material fact as to whether there was love and affection following the wife's separation from the husband. Since a jury could determine that alienation did not occur until as late as February 2001 when the husband made the final decision to end the marriage and because the wife filed her complaint within three years of his decision, her claim for alienation of affections was not barred. McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006).

Federal Claim. — State limitations period governing a claim for damages for personal injuries applies to a U.S.C. § 1983 action, regardless of the allegations in the complaint; the three-year statute of limitations set forth in subdivision (5) controls. Brooks v. City of Winston-Salem, 85 F.3d 178 (4th Cir. 1996).

Effect of Bankruptcy Action. — Even if an auto dealership should have discovered the damage that a debtor caused to its vehicles in early April 2002, the three-year statute of limitations, under G.S. 1-52, had not expired before the petition date because (1) 11 U.S.C.S. § 108(c) provided additional time for a stayed creditor to commence a civil action against a debtor; (2) the debtor filed its bankruptcy petition on November 22, 2004; (3) the stay was lifted as to the dealership on April 27, 2005, and the complaint was filed well within 30 days of that date, on April 29, 2005; and (4) the dealership's claim against the debtor did not arise until 2002. In re Brokers, Inc., 407 B.R. 693, 2009 Bankr. LEXIS 1594 (Bankr. M.D.N.C. 2009).

Question of Fact for the Jury. — Plaintiffs were not entitled to a directed verdict and judgment notwithstanding the verdict as to plaintiffs' negligence claims, as the economic loss rule did not apply in the instant case, and the issue of whether the action was barred by the statute of limitations, G.S. 1-52, was a question of fact for the jury. Lord v. Customized Consulting Specialty, Inc., — N.C. App. —, 643 S.E.2d 28, 2007 N.C. App. LEXIS 782 (2007).

Action Held Barred. — Because an estate administrator was not served until after the statute of limitations in G.S. 1-52(16) had expired, and because there was no indication of any subterfuge or delay by the administrator that prevented the driver from timely amending a driver's personal injury complaint, pursuant to G.S. 1A-1, N.C. R. Civ. P. 15(c), the driver's amended complaint did not relate back to the date of the original filing of the complaint. Reece v. Smith, 188 N.C. App. 605, 655 S.E.2d 911, 2008 N.C. App. LEXIS 191 (2008).

XIV. FIRE INSURANCE POLICY CLAIM.

Application of Subdivision (12). — The language of this section does not require that subdivision (12) be applied in conjunction with or subject to the provisions of subdivision (16) of this section. Marshburn v. Associated Indem. Corp., 84 N.C. App. 365, 353 S.E.2d 123, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

Inclusion of Standard Fire Insurance Policy Limitation Period. — By enacting subdivision (12) of this section, the General Assembly intended only to include the standard fire insurance policy limitation period in the comprehensive list of actions which are generally subject to three-year periods of limitation and to provide a cross-reference between general statutory periods of limitation contained in this section, and the more specific limitation provisions of the Standard Fire Insurance Policy for North Carolina set out in G.S. 58-44-15(c). Marshburn v. Associated Indem. Corp., 84 N.C. App. 365, 353 S.E.2d 123, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

Application of Subdivision (16) Precluded by the Standard Fire Insurance Policy Limitation Provision. — The standard fire insurance policy limitation provision, contained in subdivision (12) of this section and G.S. 58-44-15(c) and reproduced in plaintiffs' policy of homeowner's insurance, constituted a limitation period "otherwise provided by statute," which precluded the applicability of subdivision (16) of this section to the action. Marshburn v. Associated Indem. Corp., 84 N.C. App. 365, 353 S.E.2d 123, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987).

XV. ASSAULT, BATTERY, AND FALSE IMPRISONMENT.

Editor's Note. *— The cases annotated below were decided under G.S. 1-54, prior to Session Laws 2001-175, which changed the statute of limitations for assault, battery, and false imprisonment from one year to three years.*

A jury question existed as to whether the defendant nephew who shoved his uncle was equitably estopped from asserting the statute of limitations as a defense to his intentional tort or, in the alternative, intent as a defense to plaintiff's negligence claim where he gained a dismissal in criminal court due to his assertion that he "never had criminal intent" and then, in the civil suit, claimed that he "intentionally pushed" plaintiff in an attempt to preclude plaintiff from seeking any remedy at all and where plaintiff relinquished his right to any remedy in criminal court, based solely on defendant's assertion that he had no criminal intent. Keech v. Hendricks, 141 N.C. App. 649, 540 S.E.2d 71, 2000 N.C. App. LEXIS 1399 (2000).

Actions Against Police Officers for False Arrest, False Imprisonment, and Assault and Battery. — To the extent that Mobley v. Broome, 248 N.C. 54, 102 S.E.2d 407 (1958), Evans v. Chipps, 56 N.C. App. 232, 287 S.E.2d 426 (1982), and Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981), hold that the one-year (now three-year) statute of limitation for false imprisonment and assault and battery is the applicable statute when a plaintiff alleges claims for false arrest, false imprisonment, and assault and battery by a police officer in the exercise of official duties, those cases are expressly overruled. Fowler v. Valencourt, 334 N.C. 345, 432 S.E.2d 306 (1993).

Where the gist of a claim is assault and battery, courts have applied the statute of limitations applicable to assault and battery, despite allegations in the complaint that it was some other tort. This is particularly true where it appears the purpose in the use of a label different from assault and battery is to provide a different and longer statute of limitations. In such cases, courts have been particularly careful to use the statute of limitations applicable to the facts and not the label. Dickens v. Puryear, 45 N.C. App. 696, 263 S.E.2d 856 (1980), rev'd in part on other grounds, 302 N.C. 437, 276 S.E.2d 325 (1981).

Action for False Imprisonment Not Barred. — Where it appeared that plaintiff's cause of action based upon alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum was instituted less than one year (now three years) from the date plaintiff was discharged as sane, plaintiff's cause of action was not barred. Jackson v. Parks, 216 N.C. 329, 4 S.E.2d 873 (1939).

Disability Preventing Bar Against Action for Assault and Battery. — An action for assault and battery is barred upon the plea of this section, if not commenced within one year (now three years); but if the plaintiff alleges and shows that he could not sooner have brought the action because of his mental condition or insanity, the time of such disability will be deducted from the running of the statute. Hayes v. Lancaster, 200 N.C. 293, 156 S.E. 530 (1931).

Negligence Distinguished from Assault. — Where defendant fired a gun and bullet had ricocheted and struck plaintiff in the leg, trial court erred in holding that plaintiff's claim was barred by the one-year (now three-year) statute of limitations; while an assault claim was barred by the one-year (now three-year) statute of limitations, plaintiff had filed his claim well within the time prescribed for negligence actions. Vernon v. Barrow, 95 N.C. App. 642, 383 S.E.2d 441 (1989).

Summary judgment was not warranted on the basis that plaintiff's suit was barred by the G.S. 1-54 statute of limitations for assault and battery where a genuine issue of material fact existed as to whether defendant intended to injure the plaintiff when he backed his vehicle into plaintiff's truck on the highway. Britt v. Hayes, 142 N.C. App. 190, 541 S.E.2d 761, 2001 N.C. App. LEXIS 31 (2001), cert. granted, 353 N.C. 450, 548 S.E.2d 523 (2001).

Intentional Misconduct by Employer. — Plaintiff employees' claim pursuant to Woodson v. Rowland, 329 N.C. 330, 407 S.E. 2d 222 (1991), alleging that their employer intentionally engaged in misconduct, incident to their injurious exposure to bromine, knowing that such conduct was substantially certain to cause serious injury or death to the employees, was barred by the one year statute of limitations in G.S. 1-54(3) as it read prior to amendment by Session Laws 2001-175, because the conduct alleged was equivalent to an intentional tort. Alford v. Catalytica Pharms., Inc., 150 N.C. App. 489, 564 S.E.2d 267, 2002 N.C. App. LEXIS 587 (2002).

Action Held Time-Barred. — Partner's civil conspiracy claim based on breach of fiduciary duty, fraud, and negligent misrepresentation was properly dismissed as time-barred as the claim was brought more than six years after the date of a partnership transaction and eight years after a subdivision claim. Carlisle v. Keith, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

42 U.S.C.S. § 1983. — Inmate's claims under 42 USCS § 1983 that a state violated his Fifth and Sixth Amendment rights by not acting lawfully in settling a charge against the inmate in 1992 were dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because, inter alia, the claims were time-barred by the three-year statute of limitations borrowed from G.S. 1-52(2), and the complaint did not plainly state, as required by Fed. R. Civ. P. 8(a). Williams v. North Carolina, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 28552 (E.D.N.C. Oct. 8, 2004).

§ 1-53. Two years.

Within two years —

(1) An action against a local unit of government upon a contract, obligation or liability arising out of a contract, express or implied. Unless otherwise provided by law, if the preceding sentence of this subsection would bar commencement of a cause of action arising out of a contract to improve real property: (i) such an action may be brought no later than 90 days after substantial completion, provided proper notice of the claim has been given if required by contract, or (ii) if prior to substantial completion the contract was terminated by either party, such an action may be brought no later than 90 days after the date of termination of the contract. As used in this subdivision, "substantial completion" has the same meaning as in G.S. 1-50(a)(5)c. This subdivision shall not apply to actions based upon bonds, notes and interest coupons or when a different period of limitation is prescribed by this Article.

(2) An action to recover the penalty for usury, including an action regarding the financing of usurious points, usurious fees, or other

usurious charges; the two-year period shall accrue with each payment made and accepted on the loan.

(3) The forfeiture of all interest for usury.

(4) Actions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under G.S. 28A-18-2; the cause of action shall not accrue until the date of death. Provided that, whenever the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) or 1-52(16), no action for his death may be brought. (1874-5, c. 243; 1876-7, c. 91, s. 3; Code, ss. 756, 3836; 1895, c. 69; Rev., s. 396; C.S., s. 442; 1931, c. 231; 1937, c. 359; 1945, c. 774; 1951, c. 246, s. 2; 1979, c. 654, s. 3; 1981, c. 777, s. 3; 2007-351, s. 1; 2008-139, s. 1.)

Local Modification. — Carteret: 1933, c. 386; Cherokee, Clay: 1933, c. 318; Haywood: 1933, c. 386.

Cross References. — As to pleading affirmative defense of usury, see G.S. 1A-1, Rule 8. As to penalty and forfeiture for usury, see G.S. 24-2. As to power of county to be sued, see G.S. 153A-11. As to power of municipality to be sued, see G.S. 160A-11.

Editor's Note. — Session Laws 2008-139, s. 2, provides that the amendments to this section by s. 1 of the act are applicable to actions filed on or after July 28, 2008, and do not revive claims previously barred under G.S. 1-53(1).

Effect of Amendments. — Session Laws 2008-139, s. 1, effective July 28, 2008, in subdivision (1) added the second and third sentence. See Editor's note for applicability.

Legal Periodicals. — As to necessity for presenting tort claims, see 27 N.C.L. Rev. 145 (1949).

For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For article, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1053 (1981).

For note, "Judicially Imposed Usury Penalties in the Absence of Statutory Penalties: Can Freedom of Contract Co-Exist with Public Policy After Merritt v. Knox?," see 68 N.C.L. Rev. 1021 (1990).

CASE NOTES

I. In General.
II. Contractual Obligations of Local Governmental Units.
III. Penalty for Usury.
IV. Forfeiture of All Interest for Usury.
V. Death by Wrongful Act.

I. IN GENERAL.

Applied in Rogers v. Bank of Oxford, 108 N.C. 574, 13 S.E. 245 (1891); Hall v. Carroll, 253 N.C. 220, 116 S.E.2d 459 (1960); Preyer v. Parker, 257 N.C. 440, 125 S.E.2d 916 (1962); Hardbarger v. Deal, 258 N.C. 31, 127 S.E.2d 771 (1962); High v. Broadnax, 271 N.C. 313, 156 S.E.2d 282 (1967); Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969); Groce v. Rapidair, Inc., 305 F. Supp. 1238 (W.D.N.C. 1969); Baer v. Davis, 47 N.C. App. 581, 267 S.E.2d 581 (1980); Cooke v. Town of Rich Square, 65 N.C. App. 606, 310 S.E.2d 76 (1983); Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984); Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984); Smith v. Starnes, 74 N.C. App. 306, 328 S.E.2d 20 (1985); Merritt v. Knox, 94 N.C. App. 340, 380 S.E.2d 160 (1989); Boomer v. Caraway, 116 N.C. App. 723, 449 S.E.2d 215 (1994); Liptrap v. City of High Point, 128 N.C. App. 353, 496 S.E.2d 817 (1998); Draughon v. Harnett County Bd. of Educ., 166 N.C. App. 449, 602 S.E.2d 717, 2004 N.C. App. LEXIS 1784 (2004); Wilkerson v. Christian, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 12744 (M.D.N.C. Feb. 19, 2008).

Cited in Medford v. Haywood County Hosp. Found., 115 N.C. App. 474, 444 S.E.2d 699; Roberts v. Life Ins. Co., 118 N.C. 429, 24 S.E. 780 (1896); McNeill v. Suggs, 199 N.C. 477, 154 S.E. 729 (1930); Smith v. Finance Co. of Am., 207 N.C. 367, 177 S.E. 183 (1934); Ghormley v. Hyatt, 208 N.C. 478, 181 S.E. 242 (1935); Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958); Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973); Travis v. McLaughlin, 29 N.C. App. 389, 224 S.E.2d 243 (1976); Smith v. Starnes, 317 N.C. 613, 346

S.E.2d 424 (1986); Adams v. Beard Dev. Corp., 116 N.C. App. 105, 446 S.E.2d 862 (1994); Howard v. Vaughn, 155 N.C. App. 200, 573 S.E.2d 253, 2002 N.C. App. LEXIS 1609 (2002).

II. CONTRACTUAL OBLIGATIONS OF LOCAL GOVERNMENTAL UNITS.

Teacher Tenure Action. — A civil action in which plaintiff sought reinstatement as a classroom teacher in defendant board of education's school system and back pay and other benefits arising out of defendant's alleged violation of the Teacher Tenure Act was not governed by the two-year statute of limitations set out in subdivision (1) of this section, which applies to an action upon a contract against a local unit of government; the applicable statute of limitations was the three-year statute in G.S. 1-52(2) "upon a liability created by statute." Rose v. Currituck County Bd. of Educ., 83 N.C. App. 408, 350 S.E.2d 376 (1986).

Statute of limitations under G.S. 1-53(1) was not applicable to a teacher's claim for declaratory judgment against a board of education because the claim was not based upon any contract with the board of education, but rather was based on a statutory liability created by G.S. 115C-325(c)(2). Hicks v. Wake County Bd. of Educ., 187 N.C. App. 485, 653 S.E.2d 236, 2007 N.C. App. LEXIS 2422 (2007).

Plaintiff's causes of action against the county and the county commissioners to enjoin a conveyance and for a declaratory judgment upon the validity of a conveyance were barred by this section as they were filed on 21 August 1998 and the deed conveying the hospital tract was executed on 28 March 1994; this result extended also to a quitclaim deed for personal property located in the hospital, which was recorded on 20 February 1995. Hamlet HMA, Inc. v. Richmond County, 138 N.C. App. 415, 531 S.E.2d 494, 2000 N.C. App. LEXIS 636 (2000).

Claims Barred. — Trial court did not err in granting partial summary judgment for the board of education on the corporation's breach of contract claim or in granting summary judgment for the board of education on the corporation's breach of warranty claim because both claims were barred by the two-year statute of limitations found in G.S. 1-53(1) where the corporation was aware of its injury at least by April 24, 2001, but it did not sue until August 26, 2003. ABL Plumbing & Heating Corp. v. Bladen County Bd. of Educ., 175 N.C. App. 164, 623 S.E.2d 57, 2005 N.C. App. LEXIS 2728 (2005).

Employee contract claims were time barred because she filed her complaint asserting claims arising out of a city's termination of her employment more than two years after her right to benefits under the retirement plan vested. Tripp v. City of Winston-Salem, 188 N.C. App. 577, 655 S.E.2d 890, 2008 N.C. App. LEXIS 193 (2008).

Summary Judgment Inappropriate in Water Quality Case. — Where a laundry owner sued a town regarding dirty water, summary judgment was inappropriate as to the owner's claim for breach of the implied warranty of merchantability because: (1) without being able to inspect the water prior to purchase, the owner could not determine whether the water was fit for use; and (2) under G.S. 1-53, the owner could sue for any damages that occurred within two years prior to filing the lawsuit. Jones v. Town of Angier, 181 N.C. App. 121, 638 S.E.2d 607, 2007 N.C. App. LEXIS 67 (2007).

Prior Law. — Prior to its amendment in 1981, subdivision (1) of this section provided for the presentation of claims against counties, cities, and towns within two years to certain officers thereof. For cases decided under subdivision (1) as it read prior to the 1981 amendment, see Wharton v. Commissioners of Currituck, 82 N.C. 11 (1880); Moore v. Commissioners of Greene, 87 N.C. 209 (1882); Royster v. Board of Comm'rs, 98 N.C. 148, 3 S.E. 739 (1887); Lanning v. Commissioners of Transylvania County, 106 N.C. 505, 11 S.E. 622 (1890); Board of Educ. v. Town of Greenville, 132 N.C. 4, 43 S.E. 472 (1903); Dockery v. Town of Hamlet, 162 N.C. 118, 78 S.E. 13 (1913); Moore v. City of Charlotte, 204 N.C. 37, 167 S.E. 380 (1933); Lightner v. City of Raleigh, 206 N.C. 496, 174 S.E. 272 (1934); Fletcher v. Parlier, 206 N.C. 904, 206 N.C. 907, 173 S.E. 343, 173 S.E. 343 (1934); Mebane Graded Sch. Dist. v. County of Alamance, 211 N.C. 213, 189 S.E. 873 (1937); Reed v. Madison County, 213 N.C. 145, 195 S.E. 620 (1938); Ivester v. City of Winston-Salem, 215 N.C. 1, 1 S.E.2d 88 (1939); Grimes v. County of Beaufort, 218 N.C. 164, 10 S.E.2d 640 (1940); Valleytown Tp. v. Women's Catholic Order of Foresters, 115 F.2d 459 (4th Cir. 1940); Rivers v. Town of Wilson, 233 N.C. 272, 63 S.E.2d 544 (1951); Dennis v. City of Albemarle, 242 N.C. 263, 87 S.E.2d 561 (1955); Styers v. Gastonia, 252 N.C. 572, 114 S.E.2d 348 (1960); Bowling v. City of Oxford, 267 N.C. 552, 148 S.E.2d 624 (1966); Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966); Broadfoot v. Everett, 270 N.C. 429, 154 S.E.2d 522 (1967); Hodge v. First Atl. Corp., 10 N.C. App. 632, 179 S.E.2d 855 (1971); Williams v. GMC, 393 F. Supp. 387 (M.D.N.C. 1975), aff'd, 538 F.2d 327 (4th Cir. 1976); Wheeler v. Roberts, 45 N.C. App. 311, 262 S.E.2d 829 (1980); Messer v. American Gems, Inc., 612 F.2d 1367 (4th Cir.), cert. denied, 446 U.S. 956, 100 S. Ct. 2927, 64 L. Ed. 2d 815 (1980).

III. PENALTY FOR USURY.

Right of action to recover for usurious interest paid is purely statutory, and the plaintiff must comply with the terms of the statute as to the time of bringing his action. Roberts v. Life Ins. Co., 118 N.C. 429, 24 S.E. 780 (1896).

The right to recover interest is governed by G.S. 24-2, which permits a recovery of twice the amount of interest paid if brought within the time prescribed by this section. Roberts v. Life Ins. Co., 118 N.C. 429, 24 S.E. 780 (1896).

Section Not Retroactive. — The right added by the Act of 1876-77 to recover interest paid could not apply to contracts made prior to its passage. Moore v. Beaman, 112 N.C. 558, 17 S.E. 676 (1893).

The Act of 1895, c. 69, which provided for the recovery of usurious interest if the action was brought within two years after the payment in full of the indebtedness, by its express terms did not apply to contracts antedating its ratification. Roberts v. Life Ins. Co., 118 N.C. 429, 24 S.E. 780 (1896).

When Statute Begins to Run. — The right of action to recover the penalty for usury paid accrues upon each payment of usurious interest when that payment is made. Each payment of usurious interest gives rise to a separate cause of action to recover the penalty therefor, which action is barred by the statute of limitations at the expiration of two years from such payment. Henderson v. Security Mtg. & Fin. Co., 273 N.C. 253, 160 S.E.2d 39 (1968); Haanebrink v. Meyer, 47 N.C. App. 646, 267 S.E.2d 598 (1980). See also, Sloan v. Piedmont Fire Ins. Co., 189 N.C. 690, 128 S.E. 2 (1925).

Where all details of borrowers' loan, including the interest rate, fees, and expenses, were disclosed before the closing in loan documents to the borrowers, who had the capacity and the opportunity to discover their claim but failed to do so, the statute of limitations for the borrowers' usury claim began to run on the date of the closing of their loan. Shepard v. Ocwen Fed. Bank, FSB, 172 N.C. App. 475, 617 S.E.2d 61, 2005 N.C. App. LEXIS 1810 (2005).

Because borrowers failed to file suit on their claim based on a usurious loan origination fee within two years of the date the loan in question was closed, their claim was time barred; the loan origination fee was not added to loan amount, but was deducted from the proceeds received by the borrowers at closing, so the loan closing date was the relevant date for statute of limitations purposes. Shepard v. Ocwen Fed. Bank, FSB, 361 N.C. 137, 638 S.E.2d 197, 2006 N.C. LEXIS 1327 (2006).

As to the running of the statute where the transaction constitutes a mutual running account, see English Lumber Co. v. Wachovia Bank & Trust Co., 179 N.C. 211, 102 S.E. 205 (1920).

This two-year prescription is subject to the provisions of G.S. 1-21 that when a cause of action accrues against a person who is out of the State or thereafter departs therefrom and resides out of the State, the time of his absence shall not be deemed or taken as a part of the time limited for the commencement of such action. Armfield v. Moore, 97 N.C. 34, 2 S.E. 347 (1887); Williams v. Iron Belt Bldg. & Loan Ass'n, 131 N.C. 267, 42 S.E. 607 (1902).

As to actions against foreign corporations, see Williams v. Iron Belt Bldg. & Loan Ass'n, 131 N.C. 267, 42 S.E. 607 (1902).

For case holding an attorneys' fee not usurious, see Woody v. Prudential Life Ins. Co. of Am., 209 N.C. 364, 183 S.E. 296 (1936).

Counterclaim Held Barred. — Where more than two years had elapsed from the payment of alleged usury until the institution of an action on the debt alleged to have been tainted with usury, the defendant's counterclaim for twice the amount of usury charged was barred. Farmers Bank & Trust Co. v. Redwine, 204 N.C. 125, 167 S.E. 687 (1933).

Usury Found. — The court made adequate findings to support its conclusions that defendant willfully charged usurious rates of interest and that defendant's pre-trial rejection of plaintiff's offer to settle constituted an unwarranted refusal to settle. Britt v. Jones, 123 N.C. App. 108, 472 S.E.2d 199 (1996).

Damages for Usury and Unfair Trade Practices. — Where damages allowed under the usury statute alone would not have fully compensated plaintiff, the court properly awarded damages for both usury and unfair trade practices. Britt v. Jones, 123 N.C. App. 108, 472 S.E.2d 199 (1996).

Double Damages. — Plaintiff was properly awarded $1,700 in damages for usury, and was entitled to have the damages doubled pursuant to G.S. 24-2. Britt v. Jones, 123 N.C. App. 108, 472 S.E.2d 199 (1996).

Action Held Barred. — Homeowner's claim for allegedly illegal interest rates on her second mortgage was dismissed as the two year statute of limitations pursuant to G.S. 1-53 had expired; the homeowner should have discovered any violation on the day of the closing. Faircloth v. Nat'l Home Loan Corp., 313 F. Supp. 2d 544, 2003 U.S. Dist. LEXIS 4206 (M.D.N.C. 2003).

IV. FORFEITURE OF ALL INTEREST FOR USURY.

This section is prospective only, and is applicable only to a forfeiture under G.S. 24-2, which has occurred, or shall occur, since its ratification on April 1, 1931. Farmers Bank & Trust Co. v. Redwine, 204 N.C. 125, 167 S.E. 687 (1933).

When Statute Begins to Run. — The two-year statute of limitations on the forfeiture of all interest for usury begins to run at the time an agreement or charge for usurious interest is first made. Haanebrink v. Meyer, 47 N.C. App. 646, 267 S.E.2d 598 (1980).

A junior lienor seeking to enjoin foreclosure under a prior mortgage on the same land until a bona fide controversy as to the amount due under the prior debt was settled was not entitled to invoke the forfeiture of all interest, but was required to tender the principal of the debt plus legal interest. Hence, a decree continuing injunction to the final hearing was not error, notwithstanding defendants' plea of the two-year statute of limitations for the forfeiture of interest, even if it was conceded that an action for forfeiture of the interest was barred by the statute. Pinnix v. Maryland Cas. Co., 214 N.C. 760, 200 S.E. 874 (1939).

V. DEATH BY WRONGFUL ACT.

Construction of "Would Have Been Barred". — The phrase, "would have been barred" in subdivision (4) of this section is in the past subjunctive tense; it must, therefore, refer to a past event — an event, in other words, that occurred before decedent's death. Dunn v. Pacific Employers Ins. Co., 332 N.C. 129, 418 S.E.2d 645 (1992).

Two-Year Period Is Now a Statute of Limitations and Not a Condition Precedent. — The two-year period now prescribed for the commencement of a wrongful death action is not a condition precedent annexed to the cause of action as was the one-year limitation specified in former G.S. 28-173 prior to its amendment in 1951. It is a statute of limitations. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974); Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976). See also, McCrater v. Stone & Webster Eng'r Corp., 248 N.C. 707, 104 S.E.2d 858 (1958); Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963); Kinlaw v. Norfolk S. Ry., 269 N.C. 110, 152 S.E.2d 329 (1967).

Section Bars Remedy, Not Right. — The two-year limitation period for wrongful death actions is an ordinary statute of limitation; it bars the remedy and not the right. Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980), cert. dismissed, 448 U.S. 911, 101 S. Ct. 25, 65 L. Ed. 2d 1141 (1980).

Two-Year Period Not Applicable to Sentencing Proceedings. — In the context of sentencing proceedings under G.S. 15A-1343(d), the two-year statute of limitations in subdivision (4) of this section pertaining to actions instituted under the wrongful death act is not applicable. State v. Smith, 99 N.C. App. 184, 392 S.E.2d 625 (1990).

Entry of Order and Service of Process After Two-Year Period. — Where order allowing the plaintiff's motion to amend related back to the date the motion was filed, thus making the motion and the included amended complaint valid within the two year statute of limitations for a wrongful death action, the fact that the order was entered and actual service of process on the new defendants occurred after the two year period was of no legal significance, since the action was sufficiently commenced by filing the motion and amended complaint together, which was later allowed by order. Flood v. Hardy, 868 F. Supp. 809 (E.D.N.C. 1994).

Qualification as Ancillary Administrator Held to Relate Back. — Where defendants had full notice of the transactions and occurrences upon which a wrongful death claim was based when the claim was originally filed within the period of limitations by plaintiff in her capacity as foreign administrator, plaintiff's motion to file a supplemental pleading to show a change in her capacity to that of locally qualified ancillary administrator, which change occurred after the period of limitations had run, should have been granted and allowed to relate back to the commencement of her action. Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

For cases holding that commencement of a wrongful death action by a foreign administrator would not bar the running of this statute or relate back, see Reid v. Smith, 5 N.C. App. 646, 169 S.E.2d 14 (1969); Merchants Distrib., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972); Johnson v. Wachovia Bank & Trust Co., 22 N.C. App. 8, 205 S.E.2d 353 (1974); Sims v. Rea Constr. Co., 25 N.C. App. 472, 213 S.E.2d 398 (1975), decided prior to Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

Applied in Wrongful Death Action Based on Foreign Statute. — Action barred where the court applied North Carolina's two year statute of limitations to a wrongful death action based on a South Carolina statute. Johnson v. Holiday Inn of Am., Inc., 895 F. Supp. 97 (M.D.N.C. 1995).

Applicability to Action Under Uninsured Motor Vehicle Policy. — An action against an insurer brought under the uninsured motorist insurance endorsement to an automobile liability insurance policy to recover damages for a death caused by the wrongful act of an uninsured motorist is subject to the two-year statute of limitations prescribed for the commencement of a tort action for wrongful death, and not the three-year limitation prescribed for actions on contract. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

Although an insurer's liability under an uninsured motorist liability policy is derivative of the uninsured motorist's liability, the insurer is not precluded from asserting the statute of limitations as a defense, where the plaintiff has not timely commenced an action against the insurer, even though the defense might not be available to the tortfeasor. Reese v. Barbee, 129 N.C. App. 823, 501 S.E.2d 698 (1998), aff'd, 350 N.C. 60, 510 S.E.2d 374 (1999).

Where the estate administrator filed a wrongful death action against the uninsured driver and later served the uninsured motorist insurer in the same action, the applicable statute of limitations was the two-year wrongful death statute of limitations under G.S. 1-53(4) and not the three-year contract statute of limitations under G.S. 1-52(1), and this finding was consistent with the requirement under G.S. 20-279.21(b)(3)(a) that the uninsured motorist insurer be made a party to the underlying tort action. Sturdivant v. Andrews, 161 N.C. App. 177, 587 S.E.2d 510, 2003 N.C. App. LEXIS 2003 (2003), cert. denied, cert. dismissed, 358 N.C. 242, 594 S.E.2d 34 (2004).

Wrongful Death Due to Defect in Machinery. — A cause of action for wrongful death due to a defect in machinery is governed by subdivision (4) of this section and accrues on the date of decedent's death. Pinkston v. Baldwin, Lima, Hamilton Co., 29 N.C. App. 604, 225 S.E.2d 147 (1976), aff'd, 292 N.C. 260, 232 S.E.2d 431 (1977).

Although a cause of action was available to plaintiff under former G.S. 109-34 (see now G.S. 58-76-5) with its attendant six-year statute of limitations, where plaintiff chose to bring an action for wrongful death allegedly caused by the negligence of defendant officers in not providing medical attention for plaintiff's jailed intestate, the two-year statute of limitations provided for in subdivision (4) of this section was applicable; therefore, plaintiff was entitled to his day in court on his wrongful death action where plaintiff's intestate was imprisoned on September 13, 1971, and died the next day and the action was commenced on September 12, 1973. State ex rel. Williams v. Adams, 288 N.C. 501, 219 S.E.2d 198 (1975).

Wrongful Death Action Not Extended by G.S. 1-15(c). — G.S. 1-15(c) would not apply to extend statute of limitations for plaintiff bringing action for wrongful death based on alleged acts of medical malpractice; plaintiff was required to bring her wrongful death claim within two years of deceased's death, pursuant to subdivision (4) of this section. King v. Cape Fear Mem. Hosp., 96 N.C. App. 338, 385 S.E.2d 812 (1989), cert. denied, 326 N.C. 265, 389 S.E.2d 114 (1990).

Four year statute of repose for medical malpractice actions, G.S. 1-15(c), applied to wrongful death cases; a wrongful death medical malpractice suit filed within two years of decedent's death, but more than four years after doctor's last act, was properly dismissed as untimely. Udzinski v. Lovin, 358 N.C. 534, 597 S.E.2d 703, 2004 N.C. LEXIS 658 (2004).

G.S. 1-52(16) and Claims for Wrongful Death. — The three-year statute of limitations period of G.S. 1-52(16) for a bodily injury claim does not trigger the running of, nor cut short, the period for filing a wrongful death action when the underlying bodily injury claim of the decedent was not time-barred at his death. The proviso in subdivision (4) of this section merely provides a limitations defense to a wrongful death action when the claim for injuries caused by the underlying wrong had become time-barred during the decedent's life. Dunn v. Pacific Employers Ins. Co., 332 N.C. 129, 418 S.E.2d 645 (1992).

One who actively, affirmatively and deliberately conceals his identity as a tortfeasor is equitably estopped from asserting the statute of limitations as a defense to an action for damages resulting from his tortious act. Friedland v. Gales, 131 N.C. App. 802, 509 S.E.2d 793 (1998).

Action Held Barred. — Although appeal at hand involved a different uninsured motorist insurer than prior appeal, plaintiff's claims were barred by the law of the instant case and doctrine of res judicata. Reese v. Barbee, 134 N.C. App. 728, 518 S.E.2d 571, 1999 N.C. App. LEXIS 895 (1999), cert. denied, 351 N.C. 188, 541 S.E.2d 716 (1999).

Claims for medical malpractice and wrongful death which an administrator filed against a doctor in July 2001, alleging that the administrator's mother died in April 1999 because the doctor misread a chest x-ray in February 1997, were barred by G.S. 1-15(c) and 1-53(4). Udzinski v. Lovin, 159 N.C. App. 272, 583 S.E.2d 648, 2003 N.C. App. LEXIS 1508 (2003), aff'd, 358 N.C. 534, 597 S.E.2d 703 (2004).

Where the accident occurred on April 12, 2000, and the uninsured motorist insurer was not served in the wrongful death action against the uninsured driver until July 3, 2002, the trial court properly dismissed the action under G.S. 1A-1, Rule 12, as the two-year wrongful death statute of limitations action under G.S.1-53(4) had expired. Sturdivant v. Andrews, 161 N.C. App. 177, 587 S.E.2d 510, 2003 N.C. App. LEXIS 2003 (2003), cert. denied, cert. dismissed, 358 N.C. 242, 594 S.E.2d 34 (2004).

Trial court properly granted summary judgment to defendant as to an insurance company's action under the survivorship statute, G.S. 28A-18-1, because the claim was based on a single negligent act of defendant, and thus the sole remedy available was under the wrongful death statute, G.S. 28A-18-2, and any wrongful death action was barred by the statute of limitations under G.S. 1-53(4). State Auto Ins. Co. v. Blind, 185 N.C. App. 707, 650 S.E.2d 25, 2007 N.C. App. LEXIS 1940 (2007).

Action Held Not Barred. — Decedent's liver cancer was diagnosed on August 29, 1985. Decedent's bodily injury claim, had he lived, would have accrued on August 29, 1985 and would have been time-barred three years later under G.S. 1-52(16). Decedent died on June 24, 1987. On that date, his bodily injury claim would not have been time-barred. Thus, this wrongful death claim, having been filed within two years of decedent's death, was not time-barred by any of the provisions of G.S. 1-53(4). Dunn v. Pacific Employers Ins. Co., 332 N.C. 129, 418 S.E.2d 645 (1992).

§ 1-54. One year.

Within one year an action or proceeding —

(1) Repealed by Session Laws 1975, c. 252, s. 5.

(2) Upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

(3) For libel and slander.

(4) Against a public officer, for the escape of a prisoner arrested or imprisoned on civil process.

(5) For the year's allowance of a surviving spouse or children.

(6) For a deficiency judgment on any debt, promissory note, bond or other evidence of indebtedness after the foreclosure of a mortgage or deed of trust on real estate securing such debt, promissory note, bond or other evidence of indebtedness, which period of limitation above prescribed commences with the date of the delivery of the deed pursuant to the foreclosure sale: Provided, however, that if an action on the debt, note, bond or other evidence of indebtedness secured would be earlier barred by the expiration of the remainder of any other period of limitation prescribed by this subchapter, that limitation shall govern.

(7) Repealed by Session Laws 1971, c. 939, s. 2.

(7a) For recovery of damages under Article 1A of Chapter 18B of the General Statutes.

(8) As provided in G.S. 105-377, to contest the validity of title to real property acquired in any tax foreclosure action or to reopen or set aside the judgment in any tax foreclosure action.

(9) As provided in Article 14 of Chapter 126 of the General Statutes, entitled "Protection for Reporting Improper Government Activities". (C.C.P., s. 35; Code, s. 156; 1885, c. 96; Rev., s. 397; C.S., s. 443; 1933, c. 529, s. 1; 1951, c. 837, s. 2; 1965, c. 9; 1969, c. 1001, s. 2; 1971, c. 12; c. 939, s. 2; 1975, c. 252, s. 5; 1977, c. 886, s. 3; 1983, c. 435, s. 38; 1989, c. 236, s. 4; 2001-175, s. 1.)

Cross References. — For present limitation as to claims for loss covered by insurance policies subject to three-year limitation in lines 158 through 161 of North Carolina Standard Fire Insurance Policy, see G.S. 1-52(12). For present limitation on action against a public officer for trespass under color of office, see G.S. 1-52(13). As to widow's year's allowance and application therefor, see G.S. 30-15.

Legal Periodicals. — For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1053 (1981).

CASE NOTES

I. In General.
II. Actions for Penalty or Forfeiture.
III. Deficiency Judgments.
IV. Libel and Slander.

I. IN GENERAL.

As to the application of former subdivision (1) of this section, relating to actions against public officers for trespass under color of office, see Brown v. Walker, 188 N.C. 52, 123 S.E. 633 (1924).

The unpled affirmative defense of the statute of limitations could be heard for the first time on motion for summary judgment where both parties were aware of the defense. Dickens v. Puryear, 45 N.C. App. 696, 263 S.E.2d 856 (1980), rev'd in part on other grounds, 302 N.C. 437, 276 S.E.2d 325 (1981).

Plaintiff was not required to plead mental disability in avoidance of the affirmative defense of statute of limitations. Dunkley v. Shoemate, 121 N.C. App. 360, 465 S.E.2d 319 (1996).

When plaintiff attempts to allege an entirely different transaction by amendment, as for example, the separate publication of a libelous statement, the new claim will be subject to the defense of statute of limitations. Price v. J.C. Penney Co., 26 N.C. App. 249, 216 S.E.2d 154, cert. denied, 288 N.C. 243, 217 S.E.2d 666 (1975).

A jury question existed as to whether the defendant nephew who shoved his uncle was equitably estopped from asserting the statute of limitations as a defense to his intentional tort or, in the alternative, intent as a defense to plaintiff's negligence claim where he gained a dismissal in criminal court due to his assertion that he "never had criminal intent" and then, in the civil suit, claimed that he "intentionally pushed" plaintiff in an attempt to preclude plaintiff from seeking any remedy at all and where plaintiff relinquished his right to any remedy in criminal court, based solely on defendant's assertion that he had no criminal intent. Keech v. Hendricks, 141 N.C. App. 649, 540 S.E.2d 71, 2000 N.C. App. LEXIS 1399 (2000).

Not Applicable. — The one-year statute of limitations contained in G.S. 1-54(2), did not apply to action by the North Carolina School Boards Association and several boards of education for a declaratory judgment that various monetary payments collected by state agencies were subject to N.C. Const. art. IX, § 7; although G.S. 1-54(2) had been applied to actions commenced by the State upon a statute to collect civil penalties or forfeitures, G.S. 1-54(2) was not applicable because the school boards sought to recover payments provided to the public schools by N.C. Const. art. IX, § 7, and those payments had already been collected by the State. N.C. Sch. Bds. Ass'n v. Moore, 160 N.C. App. 253, 585 S.E.2d 418 (2003).

Applied in Lewis v. Shaver, 236 N.C. 510, 73 S.E.2d 320 (1952); Moser v. Fulk, 237 N.C. 302, 74 S.E.2d 729 (1953); Barnette v. Woody, 242 N.C. 424, 88 S.E.2d 223 (1955); Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959); Clary v. Nivens, 12 N.C. App. 690, 184 S.E.2d 374 (1971); Priddy v. Cook's United Dep't Store, 17 N.C. App. 322, 194 S.E.2d 58 (1973); Feilder v. Moore, 423 F. Supp. 62 (W.D.N.C. 1976); Harris v. Atlantic-Richfield Co., 469 F. Supp. 759 (E.D.N.C. 1978); Stutts v. Duke Power Co., 47 N.C. App. 76, 266 S.E.2d 861 (1980); Reagan v. Hampton, 700 F. Supp. 850 (M.D.N.C. 1988); Dunn v. Town of Emerald Isle, 722 F. Supp. 1309 (E.D.N.C. 1989); Middleton v. Russell Group, Ltd., 924 F. Supp. 48 (M.D.N.C. 1996); Alford v. Catalytica Pharms., Inc., 150 N.C. App. 489, 564 S.E.2d 267, 2002 N.C. App. LEXIS 587 (2002); Jennings v. Univ. of N.C., 240 F. Supp. 2d 492, 2002 U.S. Dist. LEXIS 25254 (M.D.N.C. 2002); Byrd v. Hopson, 265 F. Supp. 2d 594, 2003 U.S. Dist. LEXIS 8934 (W.D.N.C. 2003); Arbia v. Owens-Illinois, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 9429 (M.D.N.C. June 4, 2003).

Cited in Leonard v. England, 115 N.C. App. 103, 445 S.E.2d 50; Wooley v. Bruton, 184 N.C. 438, 114 S.E. 628 (1922); Reid v. Holden, 242 N.C. 408, 88 S.E.2d 125 (1955); Miller Motors, Inc. v. Ford Motor Co., 149 F. Supp. 790 (M.D.N.C. 1957); Miller Motors, Inc. v. Ford Motor Co., 252 F.2d 441 (4th Cir. 1958); Johnson v. Graye, 251 N.C. 448, 111 S.E.2d 595 (1959); North Carolina Theatres, Inc. v. Thompson, 277 F.2d 673 (4th Cir. 1960); Waldron Buick Co. v. GMC, 254 N.C. 117, 118 S.E.2d 559 (1961); Jocie Motor Lines v. International Bhd. of Teamsters, 260 N.C. 315, 132 S.E.2d 697 (1963); Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966); B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979); Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980); Selby v. Taylor, 57 N.C. App. 119, 290 S.E.2d 767 (1982); Evans v. Chipps, 56 N.C. App. 232, 287 S.E.2d 426 (1982); Nelson v. Patrick, 58 N.C. App. 546, 293 S.E.2d 829 (1982); Peterson v. Air Line Pilots Ass'n, Int'l, 759 F.2d 1161 (4th Cir. 1985); Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986); Olschesky v. Houston, 84 N.C. App. 415, 352 S.E.2d 884 (1987); Jetstream Aero Servs., Inc. v. New Hanover County, 672 F. Supp. 879 (E.D.N.C. 1987); Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994); Gibson v. Mutual Life Ins. Co., 121 N.C. App. 284, 465 S.E.2d 56 (1996); Whitley v. Kennerly, 132 N.C. App. 390, 512 S.E.2d 426, 1999 N.C. App. LEXIS 103 (1999); Staley v. Lingerfelt, 134 N.C. App. 294, 517 S.E.2d 392, 1999 N.C. App. LEXIS 763 (1999); Alford v. Catalytica Pharms., Inc., 150 N.C. App. 489, 564 S.E.2d 267, 2002 N.C. App. LEXIS 587 (2002); Cameron v. Merisel, Inc., 163 N.C. App. 224, 593 S.E.2d 416, 2004 N.C. App. LEXIS 380 (2004).

II. ACTIONS FOR PENALTY OR FORFEITURE.

Applicability of Subdivision (2). — Subdivision (2) of this section applies only to actions based on statutes which expressly provide for a penalty or forfeiture, the purpose of which is punitive. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

State could add a claim against a shareholder, contingent on the State's subsequent ability to demonstrate that the shareholder and a corporation were alter egos. The State made the necessary showings at the pleading stage to establish that the corporation was operated as a mere instrumentality of the shareholder; therefore, G.S. 1-54(2)'s one-year statute of limitations was tolled as to the shareholder, and the addition of the shareholder as a party related back and did not violate N.C. R. Civ. P. 15(c). State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 362 N.C. 431, 666 S.E.2d 107, 2008 N.C. LEXIS 687 (2008).

G.S. 1-54(2) did not bar a City's recovery against a driver for unpaid taxes and fines as it applied only to actions based on statutes that expressly provided for a penalty or forfeiture, the purpose of which was punitive, and the penalty at issue was civil in nature; G.S. 160A-175 granted the City the power to impose fines and penalties for the violation of its ordinances, and the penalties assessed against the driver were assessed pursuant to Greensboro, N.C., Code of Ordinances § 16-71, which was a municipal ordinance rather than a statute, for parking violations. City of Greensboro v. Morse, — N.C. App. —, 677 S.E.2d 505, 2009 N.C. App. LEXIS 745 (2009).

Administrative Actions Pursuant to G.S. 113A-64(a). — The one-year statute of limitations contained in subdivision (2) of this section does not apply to the assessment of a civil penalty by the Secretary of the Department of Environment, Health and Natural Resources (now Secretary of Environment and Natural Resouces) pursuant to G.S. 113A-64(a) because the assessment of the penalty is not an "action or proceeding" as those terms are used in this section. Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources, 333 N.C. 318, 426 S.E.2d 274 (1993).

Rent abatement remedy under the Residential Rental Agreements Act, G.S. 42-38 et seq., does not constitute a "penalty or forfeiture" within the meaning of subdivision (2) of this section. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

An action against a court clerk for a penalty, if not brought within one year, is barred by the statute of limitations. State ex rel. Hewlett v. Nutt, 79 N.C. 263 (1878).

Section Held Inapplicable to Action for Treble Damages Under Unfair Trade Practices Statutes. — An action under G.S. 75-16 to recover treble damages for a violation of the unfair trade practices statute, G.S. 75-1.1, instituted prior to enactment of the four-year statute of limitations of G.S. 75-16.2 on June 12, 1979, was governed by the three-year limitation of G.S. 1-52(2), not the one-year limitation of subdivision (2) of this section applicable to actions to recover a statutory penalty. Holley v. Coggin Pontiac, Inc., 43 N.C. App. 229, 259 S.E.2d 1, cert. denied, 298 N.C. 806, 261 S.E.2d 919 (1979).

Protection of Worker's Compensation Claimants from Discharge or Demotion by Employers. — Former G.S. 97-6.1, which related to protection of worker's compensation claimants from discharge or demotion, provided the time period for commencement of an action pursuant to this section. Whitt v. Roxboro Dyeing Co., 91 N.C. App. 636, 372 S.E.2d 731 (1988).

Libel or Slander Action Accrues on Date of Publication. — To escape the bar of the statute of limitations, an action for libel or slander must be commenced within one year from the time the action accrues, and the action accrues at the date of publication of the defamatory words, regardless of the fact that plaintiff may discover the identity of the author only at a later date. Price v. J.C. Penney Co., 26 N.C. App. 249, 216 S.E.2d 154, cert. denied, 288 N.C. 243, 217 S.E.2d 666 (1975).

A libel action must be brought within one year of the date it accrues, which is the date of publication. Pressley v. Continental Can Co., 39 N.C. App. 467, 250 S.E.2d 676, cert. denied, 297 N.C. 177, 254 S.E.2d 37 (1979).

Relation Back of Supplementary Pleadings in Slander Actions. — There can be no relation back of supplementary pleadings where at the time suits were instituted no actionable damages existed, and where the claims alleged did not become actionable within the time provided by statute for the instituting of suits in slander actions. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

Defamation has a one year statute of limitations; however, filing an action in federal court which is based on state substantive law tolls the statute of limitations while that action is pending. Ward v. Lyall, 125 N.C. App. 732, 482 S.E.2d 740, 1997 N.C. App. LEXIS 233 (1997), cert. denied, appeal dismissed, 346 N.C. 290, 487 S.E.2d 573 (1997).

Action for Libel Not Barred. — Where, in an action for libel, defendant admitted that the article in question was published in defendant's magazine on a certain date, and plaintiff showed that the action was instituted one day less than a year thereafter, defendant was not entitled to nonsuit upon his plea of the one-year statute of limitations. Harrell v. Goerch, 209 N.C. 741, 184 S.E. 489 (1936).

Subdivision (3) Not Applicable to Action for Intentional Infliction of Mental Distress. — No statute of limitations addresses the tort of intentional infliction of mental distress by name. It must, therefore, be governed by the more general three-year statute of limitations, G.S. 1-52(5), and not by subdivision (3) of this section. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

G.S. 1-54(2) did not bar a City's recovery against a driver for unpaid taxes and fines as the common law doctrine of nullum tempus occurrit regi applied such that no statute of limitations barred actions pursuant to governmental functions; the collection of parking fines and late fees, imposed for parking violations, was a governmental function as the collection of the fines and fees was necessary to enforce the parking regulations. City of Greensboro v. Morse, — N.C. App. —, 677 S.E.2d 505, 2009 N.C. App. LEXIS 745 (2009).

III. DEFICIENCY JUDGMENTS.

Who May Assert Subdivision (6) as Bar. — The one-year statute of limitations under subdivision (6) of this section is not available as a defense to a party liable as a maker on an underlying note who is not a mortgagor of the property on which the creditor has foreclosed. Only a party with an interest in mortgaged property may assert subdivision (6) of this section as a bar to an action for a deficiency judgment. First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979), cert. denied, 299 N.C. 741, 267 S.E.2d 661 (1980).

An action for a deficiency judgment after foreclosure was not barred when it was instituted less than one year after the expiration of the 10-day period for an increase in bid, even though it was instituted more than one year after the date the property was exposed for sale. Shelby Bldg. & Loan Ass'n v. Black, 215 N.C. 400, 2 S.E.2d 6 (1939), decided under the former statute which became G.S. 1-48 and was subsequently rewritten as subdivision (6) of this section.

Summary judgment was inappropriate where the evidence was sufficient to create an issue of fact with respect to the delivery date of the foreclosure deeds. The plaintiff submitted affidavits indicating that the action was timely, under this section, and the defendants submitted affidavits indicating that it was not, but neither submitted dated copies of the foreclosure deeds. Lexington State Bank v. Miller, 17 N.C. App. 748, 529 S.E.2d 454, 2000 N.C. App. LEXIS 501 (2000).

IV. LIBEL AND SLANDER.

Doctor's counterclaim against a patient for slander per se was dismissed because none of the allegations of oral slander occurred within the limitations period; while an allegation was made that unsigned letters were mailed by the patient to the doctor's partner, the appellate court did not consider this allegation as the doctor only counterclaimed for slander per se, which included oral statements, and not for libel, which encompassed the letter as a written statement. Iadanza v. Harper, 169 N.C. App. 776, 611 S.E.2d 217, 2005 N.C. App. LEXIS 808 (2005), cert. denied, 360 N.C. 63, 621 S.E.2d 624 (2005).

Claims Barred. — Club manager's claims for libel and slander were barred by the one year limitations period set forth in G.S. 1-54(3) when the statements at issue were made more than one year before the club manager initiated his action. Martin v. Boyce, 217 F.R.D. 368, 2003 U.S. Dist. LEXIS 14660 (M.D.N.C. 2003).

Attorneys' claim for slander per se was barred by the one-year statute of limitations of G.S. 1-54(3). It was irrelevant when the slanderous remarks were discovered; the cause of action accrued when the slanderous remarks were published. Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings, — N.C. App. —, 676 S.E.2d 79, 2009 N.C. App. LEXIS 534 (2009).

§ 1-54.1. Two months.

Within two months an action contesting the validity of any zoning ordinance or amendment thereto adopted by a county under Part 3 of Article 18 of Chapter 153A of the General Statutes or other applicable law or adopted by a city under Chapter 160A of the General Statutes or other applicable law. (1981, c. 705, s. 1; c. 891, s. 4; 1991 (Reg. Sess., 1992), c. 1030, s. 1; 1995 (Reg. Sess., 1996), c. 746, s. 5.)

Local Modification. — Union: 1987, c. 604, s. 2(2).

CASE NOTES

Editor's Note. — Most of the notes below were decided prior to the 1996 amendment, which changed the time limit from nine months to two months.

This section does not deny disaffected property owners adequate avenues of redress. Instead, the property owner is merely required to go through the statutorily mandated procedures for an amendment or variance. Whatever action was taken by the town's legislative body on the amendment would then be appealable. Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357, cert. denied and appeal dismissed, 318 N.C. 417, 349 S.E.2d 600 (1986).

Challenge to Zoning Amendment Barred. — Challenge by plaintiffs to 1975 amendment prohibiting duplexes in R-1 districts as being violative of the purposes of zoning was barred by the statute of limitations of this section, even though the ordinance was already in effect when plaintiffs acquired their interest in the property. Sherrill v. Town of Wrightsville Beach, 81 N.C. App. 369, 344 S.E.2d 357, cert. denied and appeal dismissed, 318 N.C. 417, 349 S.E.2d 600 (1986).

Amendment Ineffective to Cure Failure to Join the County in Rezoning Dispute. — The trial court erred in denying the Board of Commissioners' motion to dismiss under G.S. 1A-1, Rule 12(b)(1), (2), (4), (6) and (7) where the plaintiffs brought their action challenging a rezoning solely against the Board and not against the County and where the plaintiffs' attempts to amend the complaint to substitute the county as the named defendant were ineffective as they occurred after the statute of limitations had run under G.S. 1-54.1 because G.S. 1A-1, Rule 15(c) is not authority for the relation back of claims against a new party. Piland v. Board of Comm'rs, 141 N.C. App. 293, 539 S.E.2d 669, 2000 N.C. App. LEXIS 1411 (2000).

Applicability to Amendment Adopted Without Required Notice. — This section does not apply only in those situations where an amendment is adopted pursuant to Chapter 160A, even where an amendment is adopted inconsistent with the notice requirements of Chapter 160A; an action which attacks the validity of the amendment commenced more than nine months (now two months) from the adoption of the amendment is barred. Thompson v. Town of Warsaw, 120 N.C. App. 471, 462 S.E.2d 691 (1995).

Applied in Issuance of Cama Minor Dev. Permit No. 82-0010 v. Town of Bath, 82 N.C. App. 32, 345 S.E.2d 699 (1986); Mahaffey v. Forsyth County, 99 N.C. App. 676, 394 S.E.2d 203 (1990); Reunion Land Co. v. Village of Marvin, 129 N.C. App. 249, 497 S.E.2d 446 (1998).

Cited in Baucom's Nursery Co. v. Mecklenburg County, 89 N.C. App. 542, 366 S.E.2d 558 (1988); White v. Union County, 93 N.C. App. 148, 377 S.E.2d 93 (1989); Frizzelle v. Harnett County, 106 N.C. App. 234, 416 S.E.2d 421 (1992); Capital Outdoor Adv., Inc. v. City of Raleigh, 337 N.C. 150, 446 S.E.2d 289; Nazziola v. Landcraft Properties, Inc., 143 N.C. App. 564, 545 S.E.2d 801, 2001 N.C. App. LEXIS 290 (2001); Hyatt v. Town of Lake Lure, 225 F. Supp. 2d 647, 2002 U.S. Dist. LEXIS 16862 (W.D.N.C. 2002); Laurel Valley Watch, Inc. v. Mt. Enters. of Wolf Ridge, LLC, — N.C. App. —, 665 S.E.2d 561, 2008 N.C. App. LEXIS 1629 (2008).

§ 1-55. Six months.

Within six months an action —

(1) Upon a contract, transfer, assignment, power of attorney or other instrument transferring or affecting unearned salaries or wages, or future earnings, or any interest therein, whether said instrument be under seal or not under seal. The above period of limitations shall commence from the date of the execution of such instrument.

(2) For the wrongful conversion or sale of leaf tobacco in an auction tobacco warehouse during the regular season for auction sales of tobacco in such warehouse. This paragraph shall not apply to actions for the wrongful conversion or sale of leaf tobacco which was stolen from the lawful owner or possessor thereof.

(3) For wrongful discharge or demotion because of proceedings under the North Carolina Workers' Compensation Act as prohibited by G.S. 97-6.1. (C.C.P., s. 36; Code, s. 157; Rev., s. 398; C.S., s. 444; 1931, c. 168; 1943, c. 642, s. 2; 1969, c. 1001, s. 1; 1979, c. 738, s. 2; 1991, c. 636, s. 3.)

Local Modification. — Cleveland, Rutherford: 1933, c. 167.

Legal Periodicals. — For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

CASE NOTES

Application of subdivision (1) of this section requires three elements: (1) an instrument transferring or assigning some right to or interest in (2) unearned or future employment compensation (3) to a third party. Miller v. Randolph, 124 N.C. App. 779, 478 S.E.2d 668 (1996).

Section Not Applicable. — Where plaintiff alleged that he had entered into an employment contract with defendants, to include a weekly salary and commissions, and further alleged that his employment was terminated and that defendants did not pay him the commission and bonus to which he was entitled, plaintiff's action was governed by G.S. 1-52(1) rather than subdivision (1) of this section. Miller v. Randolph, 124 N.C. App. 779, 478 S.E.2d 668 (1996).

For cases decided under a former subdivision (1) of this section, relating to actions for slander, see Hanna v. Ingram, 53 N.C. 55 (1860); Pegram v. Stoltz, 67 N.C. 144 (1872); Hester v. Mullen, 107 N.C. 724, 12 S.E. 447 (1890); Gordon v. Fredle, 206 N.C. 734, 175 S.E. 126 (1934).

Cited in Johnson v. Graye, 251 N.C. 448, 111 S.E.2d 595 (1959); Badgett v. Fed. Express Corp., 378 F. Supp. 2d 613, 2005 U.S. Dist. LEXIS 19307 (M.D.N.C. Apr. 7, 2005).

ARTICLE 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. All other actions, 10 years.

An action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued. (C.C.P., s. 37; Code, s. 158; Rev., s. 399; C.S., s. 445; 1951, c. 837, s. 3.)

Legal Periodicals. — For article, "The Statute of Limitations for Constructive Trusts in North Carolina," see 21 Wake Forest L. Rev. 613 (1986).

For note examining the limitations period for constructive trusts and the effect of an employment relationship on the property interests of an inventor, see 21 Wake Forest L. Rev. 571 (1986).

CASE NOTES

I. In General.
II. Actions to Which Section Applies.
III. Actions to Which Section Does Not Apply.
IV. Actions Held Barred.
V. Actions Held Not Barred.

I. IN GENERAL.

Purpose of Section. — This is a catch-all section, designed to place an outer time limit on all actions not specifically covered by other sections of this Subchapter of the General Statutes. Lattimore v. Loews Theatres, Inc., 410 F. Supp. 1397 (M.D.N.C. 1975).

As to the purpose of this section, see also, Wyrick v. Wyrick, 106 N.C. 84, 10 S.E. 916 (1890); Ex parte Smith, 134 N.C. 495, 47 S.E. 16 (1904).

This statute does not begin to run until there is a person in esse competent to begin suit. Godley v. Taylor, 14 N.C. 178 (1831); Lynn v. Lowe, 88 N.C. 478 (1883).

When Statute Begins Running — Breach of Covenant. — Where a covenant of warranty and seizin was breached at the time of delivery of the deed, this section began running against an action for such breach from the time of the delivery. Shankle v. Ingram, 133 N.C. 254, 45 S.E. 578 (1903).

Same — Action by Vendor to Recover Possession. — This section begins to run against an action by vendor to recover possession from vendee when the possession of vendee becomes hostile by a refusal to surrender after demand and notice. Overman v. Jackson, 104 N.C. 4, 10 S.E. 87 (1889).

Same — Action to Impeach Final Account. — An action to impeach the final account of a personal representative must be brought within 10 years from the filing and auditing thereof as provided in this section. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Same — Where Mortgagee Sells and Repurchases. — Where the mortgagee sells and conveys to one who reconveys to him, the mortgagor or his representatives can call upon the mortgagee for an account at any time within 10 years after the cause of action accrues. Bruner v. Threadgill, 88 N.C. 361 (1883).

Same — Action to Impose Constructive Trust. — In the absence of a demand and refusal, the statute of limitations in an action to impose a constructive trust upon an administrator does not begin to run until the administrator completes and closes the administration. Moore v. Bryson, 11 N.C. App. 149, 180 S.E.2d 437 (1971).

Same — Action Against Former Administrator and by Guardian. — Where individual defendant was removed as guardian for an incompetent, and plaintiff was appointed as guardian and duly qualified, plaintiff's cause of action against former administrator for money due the incompetent and against former administrator's surety accrued to plaintiff upon his qualification as guardian; and there was no merit to the surety's contention that recovery was limited to the amounts removed by the guardian during the three years prior to the date suit was brought, less any sums returned during that period. State ex rel. Duckett v. Pettee, 50 N.C. App. 119, 273 S.E.2d 317 (1980).

In an action by one who claimed as enterer of "Cherokee Lands," the cause of action was barred in 10 years from registration of the grant. Frazier v. Gibson, 140 N.C. 272, 52 S.E. 1035 (1905); Phillips v. Buchanan Lumber Co., 151 N.C. 519, 66 S.E. 603 (1909).

Where one tenant in common in possession has obtained for himself the outstanding title to the locus in quo, equity will declare him to have purchased for the benefit of the others, to be held in trust for them, and the 10-year statute applying to his possession, this section in such instances, will not begin to run in his favor against his cotenants until some act of ouster on his part sufficient to put them to their action. Gentry v. Gentry, 187 N.C. 29, 121 S.E. 188 (1924).

In action to remove cloud on title, in which defendants claim title by adverse possession, allegations in the answer pleading this section upon the assertion that plaintiffs' action accrued more than 10 years prior to the commencement of the action were properly stricken as irrelevant. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

Section Not Affected by G.S. 1-52. — This section, applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of G.S. 1-52, as to actions on their official bonds. Pierce v. Faison, 183 N.C. 177, 110 S.E. 857 (1922).

Charge of Section Along with G.S. 1-52. — Where, if an action had not been barred by the provisions of subdivisions (4) and (9) of G.S. 1-52, it would have been barred under this section, it was not error to tell the jury that the action was barred in three years or in 10 years. Osborne v. Wilkes, 108 N.C. 651, 13 S.E. 285 (1891).

Statutes Runs Between Spouses. — Statutes of limitation run as well between spouses as between strangers. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

When Action Barred by Laches. — Where an action is barred by the applicable statute of limitations, the question of laches does not arise; when an action is not barred by the statute of limitations, equity will not bar relief on the ground of laches except upon special facts demanding exceptional relief. Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969).

Action to Test Validity of Stockholder's Election. — There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. Jones v. Commissioners of Person County, 107 N.C. 248, 12 S.E. 69 (1890).

Applied in Murdock v. Chatham County, — N.C. App. —, 679 S.E.2d 850, 2009 N.C. App. LEXIS 1164 (July 21, 2009);

Teachey v. Gurley, 214 N.C. 288, 199 S.E. 83 (1938); Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953); Sandlin v. Weaver, 240 N.C. 703, 83 S.E.2d 806 (1954); Solon Lodge v. Ionic Lodge, 247 N.C. 310, 101 S.E.2d 8 (1957).

Cited in Smith v. Smith, 72 N.C. 139 (1875); Ross v. Henderson, 77 N.C. 170 (1877); McDonald v. Dickson, 85 N.C. 248 (1881); Mauney v. Coit, 86 N.C. 464 (1882); Burgwyn v. Daniel, 115 N.C. 115, 20 S.E. 462 (1894); Bradsher v. Hightower, 118 N.C. 399, 24 S.E. 120 (1896); Williams v. Scott, 122 N.C. 545, 29 S.E. 877 (1898); Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904); Frazier v. Eastern Band of Cherokee Indians, 146 N.C. 477, 59 S.E. 1005 (1907); Dayton v. City of Asheville, 185 N.C. 12, 115 S.E. 827 (1923); Spence v. Foster Pottery Co., 185 N.C. 218, 117 S.E. 32 (1923); Marshall v. Hammock, 195 N.C. 498, 142 S.E. 776 (1928); Tieffenbrun v. Flannery, 198 N.C. 397, 151 S.E. 857 (1930); United States v. Pastell, 91 F.2d 575

(4th Cir. 1937); Creech v. Creech, 222 N.C. 656, 24 S.E.2d 642 (1943); Jennings v. Morehead City, 226 N.C. 606, 39 S.E.2d 610 (1946); Stewart v. Wyrick, 228 N.C. 429, 45 S.E.2d 764 (1947); Lee v. Rhodes, 231 N.C. 602, 58 S.E.2d 363 (1950); Quevedo v. Deans, 234 N.C. 618, 68 S.E.2d 275 (1951); Scott Poultry Co. v. Graves, 272 N.C. 22, 157 S.E.2d 608 (1967); Scott Poultry Co. v. Bryan Oil Co., 272 N.C. 16, 157 S.E.2d 693 (1967); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970); In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970); Moore v. Bryson, 11 N.C. App. 149, 180 S.E.2d 437 (1971); Bireline v. Seagondollar, 567 F.2d 260 (4th Cir. 1977); Wing v. Wachovia Bank & Trust Co., 35 N.C. App. 346, 241 S.E.2d 397 (1978); Hill v. Lassiter, 51 N.C. App. 34, 275 S.E.2d 237 (1981); Lea Co. v. North Carolina Bd. of Transp., 57 N.C. App. 392, 291 S.E.2d 844 (1982); American Hotel Mgt. Assocs. v. Jones, 768 F.2d 562 (4th Cir. 1985); J. Lee Peeler & Co. v. Makepeace, 96 N.C. App. 118, 384 S.E.2d 283 (1989); Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002).

II. ACTIONS TO WHICH SECTION APPLIES.

The 10-year statute applies when the title to property is at issue, not where the action is merely for breach of contract, though the enforcing remedy, the equitable lien, is analogous to remedies for resort to which the statute of limitations is 10 years. Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Resulting or Constructive Trust. — A resulting or constructive trust, as distinguished from an express trust, is governed by the 10-year and not the three-year statute of limitations. Bowen v. Darden, 241 N.C. 11, 84 S.E.2d 289 (1954); Howell v. Alexander, 3 N.C. App. 371, 165 S.E.2d 256 (1969). See also, Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965).

Constructive trusts are governed by the ten-year statute of limitations in this section. Guy v. Guy, 104 N.C. App. 753, 411 S.E.2d 403 (1991).

The institution of an action to enforce a resulting trust is governed by the 10-year statute. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

Actions seeking to impose a constructive trust or to obtain an accounting involve conduct which approaches the level of fraud, and for that reason the 10-year statute, this section, applies. Tyson v. North Carolina Nat'l Bank, 305 N.C. 136, 286 S.E.2d 561 (1982).

An action by a corporation alleging that certain of its officers and directors purchased a tract of real property with corporate funds, but title was placed in the individuals' names, was one to impose a resulting trust, which was governed by the 10-year statute of limitations (G.S. 1-56), and not one to reform a deed based on mistake, which is governed by the three-year statute of limitations (G.S. 1-52(9)). BM & W of Fayetteville, Inc. v. Barnes, 75 N.C. App. 600, 331 S.E.2d 308 (1985).

Constructive trusts, as distinguished from express trusts, are governed by the 10-year statute of limitations in this section. Brisson v. Williams, 82 N.C. App. 53, 345 S.E.2d 432, cert. denied, 318 N.C. 691, 350 S.E.2d 857 (1986).

Action by Children Against Trustee. — Where testator created his executor as trustee of a part of the estate "to collect and apply the rents and hires, and interests thereof, to the support of his certain named son and his family during the son's life and then to convey to his child or children," this constituted an active trust during the life of the son, which would become passive at his death, at which time the relationship of the parties would be adverse to each other, and start the running of the statute of limitations, against the children, then of age, and not under legal disability, and bar their action for an accounting and settlement after 10 years, especially when the relationship of trustee had been openly repudiated. Latham v. Latham, 184 N.C. 55, 113 S.E. 623 (1922).

Impeachment of Final Account of Representative. — When a final account of a representative is filed and audited, an action to impeach it must be brought within 10 years from the filing and auditing of the same. The period of limitation is not specifically declared, but such a case falls within this section. Woody v. Brooks, 102 N.C. 334, 9 S.E. 294 (1889).

Release of Right to Surcharge and Restate Final Account. — There was no express statute as to the length of time necessary to presume a release of the right to surcharge and restate a final account, duly filed and audited, but by analogy it seems to have been 10 years, the same length of time which is now required by this section to bar such action. Nunnery v. Averitt, 111 N.C. 394, 16 S.E. 683 (1892).

Action by Vendor to Recover Possession. — In an action to recover possession by vendor against a vendee who enters under the contract, the only statute of limitation applicable is that of this section. Overman v. Jackson, 104 N.C. 4, 10 S.E. 87 (1889).

Contract Action for Breach of Covenant. — An action in contract for the breach of covenants of seizin and warranty in a deed, and not in tort for fraud, is not governed by G.S. 1-52, subdivision (9), but by this section. Shankle v. Ingram, 133 N.C. 254, 45 S.E. 578 (1903).

Suit to Declare Defendant in Execution Equitable Owner. — A suit to declare one of the defendants in execution to be the equitable owner of lands for the purchase of which he furnished the price, and his codefendants trustees, is barred by the 10-year statute of limitations. Sexton v. Farrington, 185 N.C. 339, 117 S.E. 172 (1923).

An action to enforce the execution of a decree of court confirming a report that an alley was to be laid off in certain lands is barred by this statute. Hunter v. West, 172 N.C. 160, 90 S.E. 130 (1916).

Action to Declare Trust in Land. — This section was applicable to plaintiff's right of action to declare a trust in land. Marshall v. Hammock, 195 N.C. 498, 142 S.E. 776 (1928).

Action to Declare Trust in Stock. — An action by the beneficiaries of a trust to establish a constructive or resulting trust in certain stock sold by the executor-trustee, to recover the property, and for an accounting, is not barred by laches or the statute of limitations if brought within 10 years from the date of the accrual of the cause of action. Jarrett v. Green, 230 N.C. 104, 52 S.E.2d 223 (1949).

Foreclosure of Tax Lien. — An action to foreclose a tax lien is a civil action and this section bars civil actions commenced more than 10 years after the action accrues. Bradbury v. Cummings, 68 N.C. App. 302, 314 S.E.2d 568 (1984).

Constructive Fraud Based on Breach of Fiduciary Duty. — The 10-year statute of limitations under this section applies to constructive fraud claims based upon a breach of fiduciary duty. Adams v. Moore, 96 N.C. App. 359, 385 S.E.2d 799 (1989), cert. denied, 326 N.C. 46, 389 S.E.2d 83 (1990).

Claim of constructive fraud based upon a breach of fiduciary duty falls under the 10-year statute of limitations. Toomer v. Branch Banking & Trust Co., 171 N.C. App. 58, 614 S.E.2d 328, 2005 N.C. App. LEXIS 1188 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

Claim of constructive fraud against a trustee based upon a breach of fiduciary duty was not time-barred by the three-year statute of limitations under G.S. 1-52 because the claim fell under the ten-year statute of limitations contained in G.S. 1-56. Babb v. Graham, 190 N.C. App. 463, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

This section, not G.S. 1-15, applied to plaintiff financial institution's claim alleging constructive fraud against defendant attorney; however, the claim failed because there was no evidence that the amount paid defendant for notarizing and witnessing loan documents would have been any different if the documents had not been forged. NationsBank v. Parker, 140 N.C. App. 106, 535 S.E.2d 597, 2000 N.C. App. LEXIS 1092 (2000).

III. ACTIONS TO WHICH SECTION DOES NOT APPLY.

Where an action is for breach of contract and not one to establish a constructive or resulting trust, the action is barred after three years from defendant's categorical denial of plaintiff's rights. Parsons v. Gunter, 266 N.C. 731, 147 S.E.2d 162 (1966).

Damages for Breach of Fiduciary Duty. — The three-year statute of limitations, and not the 10-year statute provided in this section, applied to a claim for damages for breach of fiduciary duty in the administration of a deceased's estate. Tyson v. North Carolina Nat'l Bank, 305 N.C. 136, 286 S.E.2d 561 (1982).

Recovery of Real Estate. — This section does not apply to actions for the recovery of real estate, because G.S. 1-39 and 1-40 apply to its exclusion. Williams v. Scott, 122 N.C. 545, 29 S.E. 877 (1898).

Conveyance Between a County and a Nonprofit Organization. — This section did not apply to plaintiff's claim for (1) a declaratory judgment as to the constitutionality of legislation governing conveyances, (2) a declaratory judgment upon the validity of a conveyance between a county and a nonprofit organization, and (3) enjoining a conveyance between the two parties. Hamlet HMA, Inc. v. Richmond County, 138 N.C. App. 415, 531 S.E.2d 494, 2000 N.C. App. LEXIS 636 (2000).

An action to recover damages for patent infringement and for appropriating and using confidential information relating to the patent was governed by subdivisions (5) and (9) of G.S. 1-52, and not by this section. Reynolds v. Whitin Mach. Works, 167 F.2d 78 (4th Cir. 1948), cert. denied, 334 U.S. 844, 68 S. Ct. 1513, 92 L. Ed. 1768 (1948).

Action for Delinquent Taxes. — Neither the three-year nor the 10-year statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes, unless such act expressly so provides. City of Wilmington v. Cronly, 122 N.C. 383, 30 S.E. 9 (1898).

Absolute Divorce. — Balancing the reasons for having statutes of limitations against the State's public policies of endeavoring to maintain the marital state on the one hand and not denying divorce to parties who have demonstrated a ground for divorce on the other hand, this section, the general, residuary statute of limitations, should not be applied to actions for absolute divorce under G.S. 50-6. Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855, cert. denied, 317 N.C. 701, 347 S.E.2d 36 (1986).

IV. ACTIONS HELD BARRED.

Action to Have Claimants Under Senior Grantee Declared Trustees. — An action brought by plaintiff, claiming under the junior grantee of public land, to have defendants, claiming under the senior grantee, declared to be trustees for plaintiff, and to require them to convey to plaintiff such title as they claimed, was barred by this section, where not brought within 10 years from the registration of the senior grant. Ritchie v. Fowler, 132 N.C. 788, 44 S.E. 616 (1903).

Action for Balance Due Heirs. — Where the distributees, who until they became of age had a guardian, did not bring suit for an alleged balance due under the testator's will for 15 years after the executor filed his final account, the action was barred by either G.S. 1-50, subdivision (2) or this section. Culp v. Lee, 109 N.C. 675, 14 S.E. 74 (1891).

Action by Widow to Enforce Claim. — Where a petition in partition was filed, and the petitioners entered into possession of their respective shares in accordance with the judgment of partition therein entered, and it was therein provided that the widow of the intestate should receive a certain sum monthly in lieu of dower, which sum was made a lien upon the lands, an action by the widow to enforce her claim against the land was barred after the lapse of more than 10 years from the partition and decree of owelty in view of this section, and the fact that a second decree of confirmation was entered in the case several years thereafter for the purpose of recording the papers, the original papers having been destroyed by fire, did not alter this result. Aldridge v. Dixon, 205 N.C. 480, 171 S.E. 777 (1933).

Malpractice Actions. — As five years had passed before client brought a legal malpractice action it was barred by the statute of limitations; the allegations of fraud and constructive fraud were basically the same claims as the legal malpractice and failed. Fender v. Deaton, 153 N.C. App. 187, 571 S.E.2d 1, 2002 N.C. App. LEXIS 1244, cert. denied, 356 N.C. 612, 574 S.E.2d 680 (2002).

V. ACTIONS HELD NOT BARRED.

Action for Injunction Prohibiting Practice of Podiatry. — The 10-year statute of limitations of this section did not bar an action by the Board of Podiatry Examiners seeking an injunction prohibiting the practice of podiatry by a defendant who opened a foot clinic some 30 years earlier, since defendant's violation of the podiatry statutes was an ongoing violation, and defendant was unlawfully practicing podiatry at the time the action was filed. Costin v. Shell, 53 N.C. App. 117, 280 S.E.2d 42, cert. denied, 304 N.C. 193, 285 S.E.2d 97 (1981).

Foreclosure of Mortgage Against Remainderman. — Where a remainderman, not being in possession, executed a mortgage, the foreclosure of the mortgage was not barred after 10 years from the forfeiture thereof or from the last payment, where such action was brought within 10 years from the time of acquisition of the possession by the remainderman. Woodlief v. Wester, 136 N.C. 162, 48 S.E. 578 (1904).

Recovery of Amount Due on Final Account. — Where administrator of decedent died eight years after filing an ex parte account, and plaintiff qualified as his executor within one month and within 17 months began a proceeding to make real estate assets, to which the administrator de bonis non of the initial decedent became a party and filed a complaint to recover the amount due on said final account, it was held, that although this section applied, it did not bar the action. Wyrick v. Wyrick, 106 N.C. 84, 10 S.E. 916 (1890).

Claims Arising Out of Alleged Forgery During Procurement of Insurance. — It was error to dismiss the insured's negligence, fraud, constructive fraud, breach of contract, breach of covenant of good faith and fair dealing with punitive damages, unfair and deceptive trade practices, and breach of fiduciary duty claims as untimely under G.S. 1-56, 1-52(1), (5), and (9), and § 75-16.2, as the claims accrued when the insured was denied underinsured motorist (UIM) coverage since: (1) the insured reasonably should have discovered the alleged fraud or negligence committed by the insurer and the agent in allegedly forging the insured's name on a rejection of UIM coverage form when the insured was denied UIM coverage, (2) the insured signed the policy in 1998, and was injured in a car accident in October 2000, (3) the insured filed suit in November 2005, (4) the insured was first informed that the policy did not include UIM coverage in February 2003, and (5) the insured would not have acquired any contractual right to such coverage if it existed until November 2004, when the insured exhausted the other driver's policy. Piles v. Allstate Ins. Co., 187 N.C. App. 399, 653 S.E.2d 181, 2007 N.C. App. LEXIS 2449 (2007).

SUBCHAPTER III. PARTIES.

ARTICLE 6.

Parties.

§ 1-57. Real party in interest; grantees and assignees.

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section does not authorize the assignment of a thing in action not arising out of contract. An action may be maintained by a grantee of real estate in his own name, when he or any grantor or other person through whom he derives title might maintain such action, notwithstanding the conveyance of the grantor is void, by reason of the actual possession of a person claiming under a title adverse to that of the grantor, or other person, at the time of the delivery of the conveyance. In case of an assignment of a thing in action the action by the assignee is without prejudice to any setoff or other defense, existing at the time of, or before notice of, the assignment; but this does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, upon good consideration, and before maturity. (C.C.P., s. 55; 1874-5, c. 256; Code, s. 177; Rev., s. 400; C.S., s. 446.)

Cross References. — As to real parties in interest, see also G.S. 1A-1, Rule 17.

Legal Periodicals. — For case law surveys on pleading and parties, see 43 N.C.L. Rev. 873 (1965) and 44 N.C.L. Rev. 897 (1966).

For comment on contribution among joint tort-feasors and rights of insurers, see 44 N.C.L. Rev. 142 (1965).

For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

I. In General.
II. Parties Held Real Parties in Interest.
III. Parties Held Not Real Parties in Interest.
IV. Actions by Grantees of Real Estate.
V. Assignments.
  A. In General.
  B. Setoffs and Defenses.

I. IN GENERAL.

Purpose of Section. — The provision requiring every action to be prosecuted in the name of the real party in interest is significant, and was necessary to let in all defenses, equitable as well as legal, against the real party in interest, and save a resort to another action, so as to harmonize with the North Carolina Constitution. Abrams v. Cureton, 74 N.C. 523 (1876).

Section as Enabling Act. — The section does not confer a right of action; it only enables the enforcement of a right of action already accrued. Usry v. Suit, 91 N.C. 406 (1884).

Strict Compliance Required. — Under this section there is no middle ground; for whenever an action can be brought in the name of the real party in interest, it must be so done. Rogers v. Gooch, 87 N.C. 442 (1882). See also, McGuinn v. City of High Point, 219 N.C. 56, 13 S.E.2d 48 (1941).

A motion in the cause is the prosecution of an action within the meaning of this section. Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966).

A real party in interest is a party who will be benefited or injured by the judgment in the case. Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

Interest Must Be in Subject of Litigation. — The requirement that an action must be maintained by the real party in interest means some interest in the subject matter of the litigation and not merely an interest in the action. Choate Rental Co. v. Justice, 211 N.C. 54, 188 S.E. 609 (1936).

An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation. Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

Plaintiff Must Be Real Party in Interest. — Before one can call on a court to redress or protect against a wrongful act done or threatened, he must allege that he is or will in some manner be adversely affected thereby. He must be the real party in interest. State ex rel. East Lenoir San. Dist. v. City of Lenoir, 249 N.C. 96, 105 S.E.2d 411 (1958). See also, Hyatt v. McCoy, 194 N.C. 25, 138 S.E. 405 (1927); Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966).

Under this section and G.S. 1A-1, Rule 17(a), only the real party in interest can prosecute a claim. Crowell v. Chapman, 306 N.C. 540, 293 S.E.2d 767 (1982).

And Cannot Redress Wrong Done to Another. — A right of action accrues because of the wrong done plaintiff; he cannot maintain an action to redress a wrong done the other party to a contract. Walker v. Nicholson, 257 N.C. 744, 127 S.E.2d 564 (1962).

Presumption from Possession of Chose in Action. — The possession of a chose in action raises a presumption that the person producing it on trial is the real party in interest. Jackson v. Love, 82 N.C. 405 (1880); Pate v. Brown, 85 N.C. 166 (1881).

Right to Jury Trial on Question of Plaintiff's Status. — On the issue of whether the plaintiff was the real party in interest he was entitled to a trial by jury. Hershey Corp. v. Atlantic C.L.R.R., 207 N.C. 122, 176 S.E. 265 (1934).

Dismissal Where Plaintiff Is Not Real Party in Interest. — When it appears that the real party in interest is not before the court, the proceeding should be dismissed. Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966). See also, Chapman v. McLawhorn, 150 N.C. 166, 63 S.E. 721 (1909).

Where plaintiff sued a class of defendants pursuant to G.S. 1A-1, Rule 23, but thereafter lost her status as a real party in interest by conveying the property that was the subject of the suit and filed a notice of voluntary dismissal under G.S. 1A-1, Rule 41(a), upon which the new owners were joined as plaintiffs, the trial judge should have dismissed the original plaintiff as no longer a real party in interest on that ground alone. Crowell v. Chapman, 306 N.C. 540, 293 S.E.2d 767 (1982).

Continuance for Bringing in Necessary Parties. — Absence of necessary parties does not merit nonsuit. Instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and plead. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

Summary Judgment Held Improper. — Where original suit was brought against general contractor by homeowners who sought damages for alleged defects in stucco applied to their house, and in the settlement the general contractor's insurance carrier paid the homeowners, who in exchange dismissed the general contractor and assigned all rights they had to the insurance carrier, the insurance company, not the general contractor, was the real party in interest on the third-party complaint filed by the general contractor. However, the trial court should not have granted summary judgment in third-party defendants' favor on the third-party complaint until a reasonable time had passed for the insurance carrier to substitute itself for the general contractor, and should have refused to deal with the merits until the absent parties were brought into the action or should have corrected the defect itself. Land v. Tall House Bldg. Co., 150 N.C. App. 132, 563 S.E.2d 8, 2002 N.C. App. LEXIS 405 (2002).

As to the right to bring an action for quo warranto, see Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892); Hines v. Vann, 118 N.C. 3, 23 S.E. 932 (1896).

As to contracts for the benefit of third parties, see Shoaf v. Palatine Ins. Co., 127 N.C. 308, 37 S.E. 451 (1900); Voorhees v. Porter, 134 N.C. 591, 47 S.E. 31 (1904).

Actions by Executor or Administrator in Representative Capacity. — An executor or administrator must sue, upon causes of action to which the estate is the real party in interest, in his representative capacity. Rogers v. Gooch, 87 N.C. 442 (1882). See also, Setzer v. Lewis, 69 N.C. 133 (1873); Davis v. Fox, 69 N.C. 435 (1873).

Administrator of deceased guardian cannot maintain an action to collect a note payable to intestate as guardian unless it is shown that the money due thereon had become the property of the intestate's estate. Alexander v. Wriston, 81 N.C. 191 (1879).

Making Landowner a Party in Tenant's Action for Trespass. — Under this section, the court has the power to order the owner of the title to be made a party in his tenant's action for trespass involving an injury both to the possession and to the inheritance. Tripp v. Little, 186 N.C. 215, 119 S.E. 225 (1923).

Applied in Hood v. Mitchell, 206 N.C. 156, 173 S.E. 61 (1934); Brewer v. Union Cent. Life Ins. Co., 214 N.C. 554, 200 S.E. 1 (1938); First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965); Community Bank v. McKenzie, 32 N.C. App. 68, 230 S.E.2d 788 (1977); In re Estate of Etheridge, 33 N.C. App. 585, 235 S.E.2d 924 (1977).

Cited in Holly v. Holly, 94 N.C. 670 (1886); Thompson v. Wiggins, 109 N.C. 508, 14 S.E. 301 (1891); Hood v. Sudderth, 111 N.C. 215, 16 S.E. 397 (1892); Scarlett v. Norwood, 115 N.C. 284, 20 S.E. 459 (1894); Woodcock v. Bostic, 118 N.C. 822, 24 S.E. 362 (1896); Willeford v. Bailey, 132

N.C. 402, 43 S.E. 928 (1903); Snider v. Newell, 132 N.C. 614, 44 S.E. 354 (1903); Vaughan & Barnes & Moseley Bros v. Davenport, 157 N.C. 156, 72 S.E. 842 (1911); Tillotson v. Currin, 176 N.C. 479, 97 S.E. 395 (1918); Cunningham v. Long, 188 N.C. 613, 125 S.E. 265 (1923); Lawshe v. Norfolk & S.R.R., 191 N.C. 473, 132 S.E. 160 (1926); Hunt v. State, 201 N.C. 37, 158 S.E. 703 (1931); First Nat'l Bank v. Thomas, 204 N.C. 599, 169 S.E. 189 (1933); McCarley v. Council, 205 N.C. 370, 171 S.E. 323 (1933); Betts v. Southern Ry., 71 F.2d 787 (4th Cir. 1934); Buckner v. United States Fire Ins. Co., 209 N.C. 640, 184 S.E. 520 (1936); Lawson v. Langley, 211 N.C. 526, 191 S.E. 229 (1937); In re Wallace, 212 N.C. 490, 193 S.E. 819 (1937); John P. Nutt Corp. v. Southern Ry., 214 N.C. 19, 197 S.E. 534 (1938); Atlantic Joint Stock Land Bank v. Foster, 217 N.C. 415, 8 S.E.2d 235 (1940); Riddick v. Davis, 220 N.C. 120, 16 S.E.2d 662 (1941); Kemp v. Funderburk, 224 N.C. 353, 30 S.E.2d 155 (1944); Ionic Lodge #72 F. & A.A.M. v. Ionic Lodge F. & A.A.M. #72 Co., 232 N.C. 648, 62 S.E.2d 73 (1950); Locklear v. Oxendine, 233 N.C. 710, 65 S.E.2d 673 (1951); Bizzell v. Bizzell, 237 N.C. 535, 75 S.E.2d 536 (1953); Queen City Coach Co. v. Burrell, 241 N.C. 432, 85 S.E.2d 688 (1955); Hendrix v. B. & L. Motors, Inc., 241 N.C. 644, 86 S.E.2d 448 (1955); McGill v. Bison Fast Freight, Inc., 245 N.C. 469, 96 S.E.2d 438 (1957); Adams v. Flora Macdonald College, 251 N.C. 617, 111 S.E.2d 859 (1960); Branch Banking & Trust Co. v. Bank of Wash., 255 N.C. 205, 120 S.E.2d 830 (1961); Gulf Life Ins. Co. v. Waters, 255 N.C. 553, 122 S.E.2d 387 (1961); Crawford v. General Ins. & Realty Co., 266 N.C. 615, 146 S.E.2d 651 (1966); State ex rel. Lanier v. Vines, 274 N.C. 486, 164 S.E.2d 161 (1968); State ex rel. Lanier v. Vines, 1 N.C. App. 208, 161 S.E.2d 35 (1968); Newsome v. Prudential Ins. Co. of Am., 4 N.C. App. 161, 166 S.E.2d 487 (1969); State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975); Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984); Howard v. Smoky Mt. Enters., Inc., 76 N.C. App. 123, 332 S.E.2d 200 (1985); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404 (1986).

II. PARTIES HELD REAL PARTIES IN INTEREST.

Subrogated Insurer. — When an insurer against fire has completely indemnified the insured, he is subrogated to the rights of the insured, and he alone, under this section, as the real party in interest, may maintain an action against the wrongdoer. Cunningham v. Railroad, 139 N.C. 427, 51 S.E. 1029 (1905).

Where the insurance paid to an insured covers the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation against the tort-feasor. This is true because the insurance company in such case is entitled to the entire fruits of the action, and must be regarded as the real party in interest under this section. Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952), commented on in 31 N.C.L. Rev. 224 (1953); Milwaukee Ins. Co. v. McLean Trucking Co., 256 N.C. 721, 125 S.E.2d 25 (1962); Shambley v. Jobe-Blackley Plumbing & Heating Co., 264 N.C. 456, 142 S.E.2d 18 (1965). See also, Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955); Security Fire & Indem. Co. v. Barnhardt, 267 N.C. 302, 148 S.E.2d 117 (1966).

Where insured property is destroyed or damaged by the tortious act of a third party and the insurance company pays its insured, the owner, the full amount of his loss, the insurance company is subrogated to the owner's (indivisible) cause of action against such third person. In such case, the insurance company as the real party in interest under this section, may maintain such action in its name and for its benefit. Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961); Jewell v. Price, 259 N.C. 345, 130 S.E.2d 668 (1963).

An insurance company, as plaintiff, could bring suit in its own name against parents of minor who set fire to school property upon a claim to which it had become subrogated by payment in full of its loss to the school board under the provisions of its policy of insurance. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Where an insurance company pays the insured in part only for the loss sustained, it is subrogated pro tanto in equity to the rights of the insured against the tort-feasor, and by virtue of that fact it holds an equitable interest in the subject matter of the action and becomes a proper although not a necessary party to the litigation. Taylor v. Green, 242 N.C. 156, 87 S.E.2d 11 (1955).

Where there has been an accident involving an automobile insured against loss by collision or upset, the insured is a necessary party plaintiff where the insurance company has paid only a portion of the loss. Security Fire & Indem. Co. v. Barnhardt, 267 N.C. 302, 148 S.E.2d 117 (1966).

Endorser Subrogated to Rights of Payee. — Where a person presenting a note to a bank was required to endorse it, and later to endorse the drawer's check payable to the bank and taken by it in payment of the note, and the check was not paid and was charged by the bank to the endorser's account therein, the endorser so paying the check was subrogated to the rights of the payee bank and became the real party in interest, and could prosecute an action against the drawer, payee, and collecting banks under the provisions of this section to determine the liability of the parties. Morris v. Cleve, 197 N.C. 253, 148 S.E. 253 (1929).

Sole Stockholder. — In a suit instituted by a corporation wherein all the stock was owned by one person, the sole stockholder was a real party in interest, and was a necessary party plaintiff. Park Terrace, Inc. v. Phoenix Indem. Co., 243 N.C. 595, 91 S.E.2d 584 (1956).

Ward as Equitable Owner of Bond Payable to Guardian. — A bond made payable to a guardian was in equity the property of the ward, and suit could be brought upon it by the ward when the same was turned over in the guardian's settlement, notwithstanding the fact that the legal title had been transferred by the guardian's endorsement to another. Usry v. Suit, 91 N.C. 406 (1884). See also, Mebane v. Mebane, 66 N.C. 334 (1872).

Undisclosed Principal on Contract. — An undisclosed principal holding the business rights and interests under a contract may sustain an action thereon. Virginia-Carolina Peanut Co. v. Atlantic C.L.R.R., 155 N.C. 148, 71 S.E. 71 (1911); Williams v. Honeycutt, 176 N.C. 102, 96 S.E. 730 (1918).

Where directors of a bank had paid the liability of others under an agreement, each one of them could maintain his action against each of the defaulting members under this section, and such was not a misjoinder of parties prohibited by statute. Taylor v. Everett, 188 N.C. 247, 124 S.E. 316 (1924).

Action on Note by Liquidating Agent. — In an action on a note executed to a bank, the liquidating agent of the payee bank and the Reconstruction Finance Corporation, to which the note had been pledged as collateral security were both interested parties and could jointly sue the makers of the note. Hood ex rel. United Bank & Trust Co. v. Progressive Stores, Inc., 209 N.C. 36, 182 S.E. 694 (1935).

Action on Fidelity Bond of Defaulting Cashier. — Where stockholders and directors gave their note to the bank for the amount of a shortage due to embezzlement by a cashier to prevent liquidation, and the bank neither surrendered nor assigned the fidelity bond of the defaulting cashier, the bank was the real party in interest and was entitled to maintain an action upon the bond. People's Bank v. Fidelity & Deposit Co., 4 F. Supp. 379 (M.D.N.C. 1933), aff'd, 72 F.2d 932 (4th Cir.)

Suit by State Officer. — Where a State officer goes out of office pending a suit by him in his official capacity, his incoming successor is entitled to be made a party in his stead, as the State is the real party in interest, appearing in the name of its successive agents. Lacy v. Webb, 130 N.C. 545, 41 S.E. 549 (1902). See also, Peebles v. Boone, 116 N.C. 57, 21 S.E. 187, 44 Am. St. R. 429 (1895).

Where a bond for payment of money is executed to an administrator as such, and he dies, an action on said bond can be maintained only by an administrator de bonis non of the testator. Ballinger v. Curriton, 104 N.C. 474, 10 S.E. 664 (1889).

Widow who paid an account for burial expenses of her husband was the proper party plaintiff in an action against the administrator, being the real party in interest. Ray v. Honeycutt, 119 N.C. 510, 26 S.E. 127 (1896).

Negligent Mutilation of Dead Body. — In order of their priority of inheritance of the personal property of the deceased, the next of kin may maintain an action to recover damages for the negligent mutilation of his dead body. Floyd v. Atlantic C.L. Ry., 167 N.C. 55, 83 S.E. 12 (1914).

Where a party has commenced an action concerning an interest in lands, the cause may be continued by his successors in interest as the real parties in interest. Barbee v. Cannady, 191 N.C. 529, 132 S.E. 572 (1926).

Suit to Remove Cloud on Title Where Land Conveyed Pendente Lite. — Where landowner sought to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite he conveyed the land to another with full warranty deed, he could continue to prosecute his suit against the mortgagee as to the title, being a real party in interest. Plotkin v. Merchants Bank & Trust Co., 188 N.C. 711, 125 S.E. 541 (1924).

Action to Vacate Grant When State Not Interested. — Where the State has no interest in the land, as where title would not revest in the State, an action to vacate a grant must be brought by the party in interest in his own name, the State not being such a party. State ex rel. Att'y Gen. v. Bland, 123 N.C. 739, 31 S.E. 475 (1898). See also, State v. Bevers, 86 N.C. 588 (1882); Carter v. White, 101 N.C. 30, 7 S.E. 473 (1888); Henry v. McCoy, 131 N.C. 586, 42 S.E. 955 (1902).

Action by Tenant Cultivating Land. — Against any third person, the tenant is entitled to the possession of the land and the crop, and for any injury thereunto while it is being cultivated he may maintain an action in his own name for the injury. He is the real party in interest. Bridgers v. Dill, 97 N.C. 222, 1 S.E. 767 (1887); State v. Higgins, 126 N.C. 1112, 36 S.E. 113 (1900).

Where the grantor of land reserved hunting rights and later leased them, and defendant successor to grantee refused to permit lessee to enter upon the property for the purpose of hunting, the lessee and not the lessor was the proper party to maintain an action against defendant for damages. Jones v. Neisler, 228 N.C. 444, 45 S.E.2d 369 (1947).

A suit by mortgagor to correct a mortgage which, through fraud or mistake or the negligence of the register of deeds in cross-indexing, failed to give a priority of lien to one of several mortgages entitled thereto, would be entertained in equity, as he was a real party in interest. Gray v. Mewborn, 194 N.C. 348, 139 S.E. 695 (1927).

Where the agent of a manufacturer was obligated to pay freight charges on shipments made to him, pursuant to an agreement with his principal, and upon demand of the carrier he paid its unlawful charges on a shipment, he was the party aggrieved, within the meaning of this section, and could maintain his actions to recover the excess, and also the penalty when entitled thereunto. Tilley v. Southern Ry., 172 N.C. 363, 90 S.E. 309 (1916).

Generally an employee may maintain an action to enforce provisions inserted for his benefit in a collective labor contract made between a labor union and the employer, particularly in regard to wage provisions. Lammonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956).

III. PARTIES HELD NOT REAL PARTIES IN INTEREST.

Attorney Not Real Party For Costs Incurred By Clients. — Attorney's action against a medical records copier, which alleged that the copier charged excessive fees for records obtained on behalf of personal injury clients, was properly dismissed where it was held that the attorney was not the real party in interest pursuant to G.S. 1A-1, Rule 17(a) and this section because he was not ultimately liable for the costs thereof pursuant to the dictates of N.C. Rev. R. Prof. Conduct 1.8, and accordingly, he lacked standing to bring the action in his own name; in addition the attorney was not entitled to substitute his clients as the proper parties because no request to do so was made in a timely fashion. Street v. Smart Corp., 157 N.C. App. 303, 578 S.E.2d 695 (2003).

An agent is not the real party in interest and cannot maintain an action. Morton v. Thornton, 259 N.C. 697, 131 S.E.2d 378 (1963); Parnell v. Nationwide Mut. Ins. Co., 263 N.C. 445, 139 S.E.2d 723 (1965).

An agent for another cannot maintain an action in his name for the benefit of his principal. Howard v. Boyce, 266 N.C. 572, 146 S.E.2d 828 (1966).

An agent for the collection of rents is not the real party in interest. Martin v. Mask, 158 N.C. 436, 74 S.E. 343 (1912).

A rental agent may not maintain a suit in ejection or for the collection of rents, the owner being the real party in interest under this section. Home Real Estate Loan & Ins. Co. v. Locker, 214 N.C. 1, 197 S.E. 555 (1938).

Lessor Must Bring Action of Summary Ejectment. — Although an agent of the lessor could make the oath in writing required by statute in summary ejectment, the action had to be prosecuted in the name of the lessor as the real party in interest, and it could not be maintained in the name of the lessor's rental agent. Choate Rental Co. v. Justice, 211 N.C. 54, 188 S.E. 609 (1936).

Where land has broom sage growing thereon, the tenant is not the owner thereof in the sense that he may maintain an action against one who has negligently destroyed it by fire, except for its value for farming purposes on the leased premises. Chauncy v. Atlantic C.L.R.R., 195 N.C. 415, 142 S.E. 327 (1928).

Plaintiff taxpayers could not maintain an action to determine title to a public office, neither claimant to the office being a party, since plaintiffs were not the real parties in interest. Freeman v. Board of County Comm'rs, 217 N.C. 209, 7 S.E.2d 354 (1940).

Purchaser of Bond Transferred Without Authority by Special Agent. — When a special agent goes beyond the scope of his authority and sells a negotiable bond, without endorsement, the purchaser thereof is not a real party in interest. McMinn v. Freeman, 68 N.C. 342 (1873).

Parties to Interpretation, etc., of Will. — Persons who are interested neither as heirs at law of the deceased nor as beneficiaries under writing propounded as a will are neither necessary nor proper parties to a case agreed to interpret its provisions, nor to set it aside, nor to assert that an order made by the court be vacated on the ground that they had not been duly made parties or given consent that judgment be rendered out of term, etc. It is otherwise as to one who has been named as a beneficiary who has neither been duly made a party nor given consent to the agreed case or the further action of the court thereon. Citizens Bank & Trust Co. v. Dustowe, 188 N.C. 777, 125 S.E. 546 (1924).

Where notes were bequeathed to testator's widow for life and she, as executrix, distributed them to herself, and there was no evidence that they were not endorsed or that such distribution did not pass title to the notes from her as representative, plaintiff, as testator's administrator c.t.a., did not show that he was the real party in interest under this section to recover the notes from the widow's administrators. Upon distribution the property had inured to the benefit of the life tenant and remaindermen and was not subject to further administration. Darden v. Boyette, 247 N.C. 26, 100 S.E.2d 359 (1957).

Action by Remaindermen. — An action brought by remaindermen, during the lifetime of the first taker, to recover the land will not lie, because they are not the real parties in interest. Blount v. Johnson, 165 N.C. 25, 80 S.E. 882 (1914).

Slander of Wife. — Where an action was brought by a husband, without making the wife a party thereunto, for slander of the wife, and the husband alleged no special damages, his action would not lie because he was not the real party in interest. Harper v. Pinkston, 112 N.C. 293, 17 S.E. 161 (1893).

In an action on a contract instituted by an individual, allegations that, although the contract was made in the name of plaintiff, the negotiations leading to the contract were carried on by a named corporation, that the contract was for the benefit of the corporation, and that plaintiff had assigned his interest in the contract to the corporation, without allegation that plaintiff was bringing the action as trustee for the corporation nor facts from which a trusteeship could be inferred, disclosed that plaintiff was not the real party in interest and that he was without any right to maintain the action. Skinner v. Empresa Transformador De Productos Agropecuarios, S.A., 252 N.C. 320, 113 S.E.2d 717 (1960).

Where carriers by truck sought injunctive relief against railroad carriers for discrimination in rates against certain cities and against certain commodities, it was held that the basis for injunctive relief must be an interference or threatened interference with a legal right of the petitioner, not of a third party, and that the shippers would be the real parties in interest, not the contract truck carriers. Carolina Motor Serv., Inc. v. Atlantic C.L.R.R., 210 N.C. 36, 185 S.E. 479, 104 A.L.R. 1165 (1936).

IV. ACTIONS BY GRANTEES OF REAL ESTATE.

Constitutionality. — This section, permitting a grantee of real estate to maintain an action in his own name, is not unconstitutional. It is concerned only with the mode of procedure and does not affect the merits of the case. Buie v. Carver, 75 N.C. 559 (1876); Justice v. Eddings, 75 N.C. 581 (1876).

An action of ejectment may be maintained by a grantee in his own name whenever the grantor has a right to sue, notwithstanding the fact that the person in actual possession claims under a title adverse to that of such grantor. Buie v. Carver, 75 N.C. 559 (1876); Osborne v. Anderson, 89 N.C. 263 (1883); Johnson v. Prairie, 94 N.C. 775 (1886); Bland v. Beasley, 145 N.C. 168, 58 S.E. 993 (1907).

V. ASSIGNMENTS.

A. In General.

"Assignment" Defined. — An "assignment" is substantially a transfer, actual or constructive, with the clear intent at the time to part with all interest in the thing transferred and with a full knowledge of the rights so transferred. Morton v. Thornton, 259 N.C. 697, 131 S.E.2d 378 (1963).

Effect of Section. — This section abrogates the principle of the common law that a chose in action cannot be assigned. It confers an unlimited right to assign "anything in action" arising out of contract, and subjects the assignee to any setoff or other defense existing at the time of or before notice of the assignment; the only saving being in regard to "negotiable promissory notes and bills of exchange transferred in good faith and upon good consideration before due." This language is as broad as it can be, so that a note assigned after it is due, a half dozen times, will be subject to any setoff or other defense that the maker had against any one or all of the assignees at the date of the assignment or before notice thereof. Harris v. Burnwell, 65 N.C. 584 (1871); Standard Amusement Co. v. Tarkington, 247 N.C. 444, 101 S.E.2d 398 (1958), appeal dismissed, 251 N.C. 461, 111 S.E.2d 538 (1959).

The provision in the first sentence as to assignment means merely that the statute does not authorize for the first time the assignment of a "thing in action not arising out of contract" which was not assignable under the existing law. The provision does not in itself forbid the assignment of all choses in action not arising out of contract. American Sur. Co. v. Baker, 172 F.2d 689 (4th Cir. 1949).

Judgments Not Embraced by Section. — While judgments are not treated as contracts for all purposes, they are so treated for the purpose of distinguishing them from causes of action arising ex delicto, and they are not embraced by this section, forbidding the assignment of things in an action not arising out of contract. Winbury v. Koonce, 83 N.C. 351 (1880); Moore v. Norvell, 94 N.C. 265 (1886).

When Executory Contracts Assignable. — As a general rule, executory contracts of an ordinary kind are now assignable, except that contracts involving a personal relation, imposing liabilities which by express terms or by the nature of the contracts themselves import reliance on the personal credit, trust or confidence of or in the other party, cannot be assigned. Atlantic & N.C.R.R. v. Atlantic & N.C. Co., 147 N.C. 368, 61 S.E. 185 (1908).

A claim for unpaid wages is a chose in action which may be assigned and, when assigned the assignee may maintain an action thereon in his own name. Morton v. Thornton, 257 N.C. 259, 125 S.E.2d 464 (1962).

Claims for bad faith refusal to settle, breach of fiduciary duty, and tortious breach of contract are not assignable. Horton v. New South Ins. Co., 122 N.C. App. 265, 468 S.E.2d 856, 1996 N.C. App. LEXIS 240 (1996), cert. denied, 472 S.E.2d 8 (1996).

Installments of a pension payable in the future are not assignable. Gill v. Dixon, 131 N.C. 87, 42 S.E. 538 (1902).

The one to whom there has been an absolute assignment is the "real party in interest" rather than the assignor who has parted with all interest therein. Commerce Mfg. Co. v. Blue Jeans Corp., 146 F. Supp. 15 (E.D.N.C. 1956).

An assignee of a contractual right is a real party in interest and may maintain the action. Morton v. Thornton, 259 N.C. 697, 131 S.E.2d 378 (1963).

Assignee Sues in Own Name. — An assignee may sue in his own name, under this section, as an equitable assignee or cestui que trust could formerly have done in equity. Miller v. Tharel, 75 N.C. 148 (1876). See also, Sutton v. Owen, 65 N.C. 124 (1871); Safeco Ins. Co. of Am. v. Nationwide Mut. Ins. Co., 264 N.C. 749, 142 S.E.2d 694 (1965).

The assignee of a chose in action may bring an action thereon in his own name, under this section, and a bond given to indemnify a bank from any loss it might sustain by reason of its taking over the assets and discharging the liabilities of another bank is assignable. North Carolina Bank & Trust Co. v. Williams, 201 N.C. 464, 160 S.E. 484 (1931).

Action on Assigned Nonnegotiable Note. — The assignee of a nonnegotiable note may maintain an action thereon, as may the owner where there is no written assignment. Wilcoxon v. Logan, 91 N.C. 449 (1884).

In the case of an assignment of a bill or note, which transfers only the equitable ownership, as distinguished from an endorsement according to the law merchant, which transfers the legal title, the equitable owner being the real party in interest may sue in his own name. Andrews v. McDaniel, 68 N.C. 385 (1873); Milley v. Gatling, 70 N.C. 410 (1874); Egerton v. Carr, 94 N.C. 653 (1886); Tyson v. Joyner, 139 N.C. 69, 51 S.E. 803 (1905); Ball-Thrash & Co. v. McCormick, 162 N.C. 471, 78 S.E. 303 (1913).

The assignee of a negotiable note endorsed by the clerk of the payee without authority is simply the holder of unendorsed negotiable paper and, as such, has, prima facie, the equitable title, and can maintain a suit thereon. Bresee v. Crumpton, 121 N.C. 122, 28 S.E. 351 (1897).

Assignment of Note by One of Several Joint Payees. — A note payable to three persons as executors of their testator, assigned by one of them without the concurrence of the others, does not enable the assignee to sue the makers thereon, under this section. Johnson v. Mangum, 65 N.C. 146 (1871).

Assignor of Bank Deposit May Not Maintain Action. — As a consequence of the requirement that every action be prosecuted in the name of the real party in interest, a depositor cannot maintain an action against a bank to recover a deposit when it appears from his own evidence that he has assigned the deposit to a third person and has no further interest in it. Lipe v. Guilford Nat'l Bank, 236 N.C. 328, 72 S.E.2d 759 (1952).

The assignee of a contract to convey real estate may maintain an action thereon against the seller for specific performance. Harry's Cadillac-Pontiac Co. v. Norburn, 230 N.C. 23, 51 S.E.2d 916 (1949).

Where language of assignment of a lease clearly established that lessor assigned only the right to rent payments, plaintiff retained all other rights under the lease, including the right to enforce lessee's tax obligation under the lease, and thus, lessor was a real party in interest in action against lessees who defaulted under lease. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Assignment of a Judgment Pending Appeal. — Where an assignment of a judgment for one of the defendants against the plaintiff was made during the pendency of the appeal, and it appeared that the judgment was brought by another person, such person, and not the nominal assignee, should have been substituted as plaintiff. Field v. Wheeler, 120 N.C. 270, 26 S.E. 810 (1897).

An assignee for purposes of collection is not a "real party in interest." Abrams v. Cureton, 74 N.C. 523 (1876); Morefield v. Harris, 126 N.C. 626, 36 S.E. 125 (1900); Third Nat'l Bank v. Exum, 163 N.C. 199, 79 S.E. 498 (1913); First Nat'l Bank v. Rochamora, 193 N.C. 1, 136 S.E. 259 (1927); Federal Reserve Bank v. Whitford, 207 N.C. 267, 176 S.E. 584 (1934); Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

Where plaintiff transferred claim upon which action was subsequently brought to an attorney at law for collection, with directions to apply the proceeds to demands which he held for collection against the plaintiff, an action would not lie in the name of the plaintiff on the claim, as he was not the real party in interest. Wynne v. Heck, 92 N.C. 414 (1885).

Determination of Status of Insured on Assignment to Insurer — When Insurer's Payments Exceed Insured's Loss. — Where there is no genuine dispute that insurer's payments exceeded the insured's full loss, the trial court may summarily determine an objection to the insured's real party in interest status. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Same — Where Extent of Loss Has Not Been Determined. — Trial court could not enter summary judgment against plaintiff based on G.S. 1A-1, Rule 17(a) where plaintiff's status as a partial assignor and real party in interest could not be determined until the factual issue of the extent of plaintiff's entire loss was determined. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Same — Where Insured Retains a Separable Interest. — If plaintiff insured assignor retained any separable legal interest in the subject matter of its claims, then both plaintiff and insurer assignee would be real parties in interest under G.S. 1A-1, Rule 17(a) in the subject matter of the litigation. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

B. Setoffs and Defenses.

Assignment of Negotiable and Nonnegotiable Notes Distinguished. — The assignee of a promissory note or bill of exchange endorsed before maturity takes it free from all equities and defenses it may be subject to in the hands of the payee, but the assignee of a nonnegotiable instrument, even before maturity, takes it subject to all equities or counterclaims existing between the original parties at the time of the assignment; bonds or sealed notes are on the same footing with nonnegotiable instruments. Hanens v. Potts, 86 N.C. 31 (1882); Spence v. Tabscott, 93 N.C. 248 (1885); Clinton Loan Ass'n v. Merritt, 112 N.C. 243, 17 S.E. 296 (1893). See also, Andrews v. McDaniel, 68 N.C. 385 (1873); First Nat'l Bank v. Bynum, 84 N.C. 24 (1881).

Assignee Takes Subject to Setoffs and Other Defenses. — An assignee of a chose in action is by this section given the right to maintain the action in his name, but that right is circumscribed by the express provision that it shall be without prejudice to any offset or other defense existing at the time of the assignment. Overton v. Tarkington, 249 N.C. 340, 106 S.E.2d 717 (1959).

The assignee of a nonnegotiable instrument for value and in good faith before maturity takes the same subject to all defenses which the debtor may have had against the assignor which are based upon facts existing at the time of the assignment or facts arising thereafter but prior to the debtor's knowledge of the assignment. William Iselin & Co. v. Saunders, 231 N.C. 642, 58 S.E.2d 614 (1950).

Lease Taken Subject to Lessees' Defenses. — Where plaintiff, according to the allegations of its complaint, became the assignee of a lease, a nonnegotiable chose in action, it took it subject to any setoff or other defense which the lessees may have had against its assignors based on facts existing at the time of, or before notice of, the assignment, even though it bought it for value, and in good faith. Standard Amusement Co. v. Tarkington, 247 N.C. 444, 101 S.E.2d 398 (1958), appeal dismissed, 251 N.C. 461, 111 S.E.2d 538 (1959).

Past Due Notes Subject to Defenses. — A note taken after it is due is subject to any setoff or any other defense existing at the time of or before notice of assignment. Vaughan v. Jeffreys, 119 N.C. 135, 26 S.E. 94 (1896); Guthrie v. Moore, 182 N.C. 24, 108 S.E. 334 (1921). See also, Mosby v. Hodge, 76 N.C. 387 (1877); Capell v. Long, 84 N.C. 17 (1881).

§ 1-58. Suits for penalties.

Where a penalty is imposed by any law, and it is not provided to what person the penalty is given, it may be recovered, for his own use, by anyone who sues for it. When a penalty is allowed by statute, and it is not prescribed in whose name suit therefor may be commenced, suit must be brought in the name of the State. (R.C., c. 35, ss. 47, 48; Code, ss. 1212, 1213; Rev., ss. 401, 402; C.S., s. 447.)

CASE NOTES

Constitutionality. — This section does not conflict with the Constitution. Katzenstein v. Raleigh & G.R.R., 84 N.C. 688 (1881); State ex rel. Hodge v. Marietta & N.G.R.R., 108 N.C. 24, 12 S.E. 1041 (1891); Sutton v. Phillips, 116 N.C. 502, 21 S.E. 968, aff'd on rehearing, 117 N.C. 228, 23 S.E. 264 (1895); State ex rel. Goodwin v. Caraleigh Phosphate & Fertilizer Works, 119 N.C. 120, 25 S.E. 795 (1896).

For case holding that suit should be in the name of the person claiming the penalty, and to whom, upon a recovery, it belongs, see Norman v. Dunbar, 53 N.C. 317 (1861).

For case holding that suit should be prosecuted in the name of the State for the use of the person claiming the penalty, see Duncan v. Philpot, 64 N.C. 479 (1870). But see the following cases, in which suit was brought in the name of the person suing and not in the name of the State: Branch v. Wilmington & W.R.R., 77 N.C. 347 (1877); Katzenstein v. Raleigh & G.R.R., 84 N.C. 688 (1881); Keeter v. Wilmington & W.R.R., 86 N.C. 346 (1882); Whitehead v. Wilmington & W.R.R., 87 N.C. 255 (1882); Branch v. Wilmington & W.R.R., 88 N.C. 570 (1883); Middleton v. Wilmington & W.R.R., 95 N.C. 167 (1886); Maggett v. Roberts, 108 N.C. 174, 12 S.E. 890 (1891); State ex rel.

Carter v. Wilmington & W.R.R., 126 N.C. 437, 36 S.E. 14 (1900).

Penalty Against Railroads. — The penalty prescribed by statute against railroads for failure to make returns can only be recovered in an action brought by the State. State ex rel. Hodge v. Marietta & N.G.R.R., 108 N.C. 24, 12 S.E. 1041 (1891).

Applied in State v. Briggs, 203 N.C. 158, 165 S.E. 339 (1932).

§ 1-59. Suit for penalty, plaintiff may reply fraud to plea of release.

If an action be brought in good faith by any person to recover a penalty under a law of this State, or of the United States, and the defendant shall set up in bar thereto a former judgment recovered by or against him in a former action brought by any other person for the same cause, then the plaintiff in such action, brought in good faith, may reply that the said former judgment was obtained by covin; and if the collusion or covin so averred be found, the plaintiff in the action sued with good faith shall have recovery; and no release made by such party suing in covin, whether before action brought or after, shall be in anywise available or effectual. (4 Hen. VII, c. 20; R.C., c. 31, s. 100; Code, s. 932; Rev., s. 1521; C.S., s. 447(a); 1925, c. 21.)

Editor's Note. — The provision permitting plaintiff to reply fraud to a plea of release in a suit for penalty was § 932 of the Code of 1883 and § 1521 of the Revisal of 1905. It was left out of the Consolidated Statutes, but was again inserted by Public Laws 1925, c. 21.

§ 1-60. Suit on bonds; defendant may plead satisfaction.

When an action shall be brought on any single bill or on any judgment, if the defendant had paid the money due upon such bill or judgment before action brought, or where the defendant hath made satisfaction to the plaintiff of the money due on such bill or judgment in other manner than by payment thereof, such payment or satisfaction may be pleaded in bar of such action; and where only part of the money due on such single bill or judgment hath been paid by the defendant, or satisfied in other manner than by payment of money, such part payment or part satisfaction may be pleaded in bar of so much of the money due on such single bill or judgment, as the same may amount to; and where an action is brought on any bond which hath a condition or defeasance to make void the same upon the payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before the action brought, paid to the obligee, his executor or administrator, the principal and interest due by the condition or defeasance of such bond, though such payments were not made strictly according to the condition or defeasance; or if such obligor, his heirs, executors or administrators have before action brought made satisfaction to the plaintiff of the principal and interest due by the condition or defeasance of such bond, in other manner than by payment thereof, yet the said payment or satisfaction may be pleaded in bar of such action, and shall be effectual as a bar thereof, in like manner as if the money had been paid at the day and place, according to the condition or defeasance, and so pleaded. (4 Hen. VII, c. 20; R.C., c. 31, s. 101; Code, s. 933; Rev., s. 1522; C.S., s. 147(b); 1925, c. 21.)

Editor's Note. — The provision permitting the defendant to plead satisfaction in a suit on bonds was § 933 of the Code of 1883 and § 1522 of the Revisal of 1905. It was left out of the Consolidated Statutes, but was again inserted by Public Laws 1925, c. 21.

CASE NOTES

Applied in Walden v. Vaughn, 157 N.C. App. 507, 579 S.E.2d 475, 2003 N.C. App. LEXIS 727 (2003).

§ 1-61: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-62. Action by purchaser under judicial sale.

Anyone given possession under a judicial sale confirmed, where the title is retained as a security for the price, is the legal owner of the property for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession, in the same manner as if the title had been conveyed to him on day of sale, unless restrained by some order of the court directing the sale; and the suit brought is under the control of the court ordering the sale. (1858-9, c. 50; Code, s. 942; Rev., s. 403; C.S., s. 448.)

CASE NOTES

The bidder at a judicial sale acquires no right before confirmation of the report of the commissioner who made the sale under the order of the court. State ex rel. Att'y Gen. v. Roanoke Nav. Co., 86 N.C. 408 (1882); Vanderbilt v. Brown, 128 N.C. 498, 39 S.E. 36 (1901).

Where a sale has not been confirmed, the commissioner's deed has not yet divested the title out of the petitioner. While a formal direction to make a title is not always necessary, a confirmation of the sale cannot be dispensed with. In re Dickerson, 111 N.C. 108, 15 S.E. 1025 (1892); Vanderbilt v. Brown, 128 N.C. 498, 39 S.E. 36 (1901).

When confirmation is made, the bargain is complete, and it relates back to the day of sale. Vass v. Arrington, 89 N.C. 10 (1883).

All that a purchaser at a judicial sale is required to know is that the court has jurisdiction of the subject matter and the person. Cord v. Finch, 142 N.C. 140, 54 S.E. 1009 (1906); Hackley v. Roberts, 147 N.C. 201, 60 S.E. 975 (1908); Harris v. Bennett, 160 N.C. 339, 76 S.E. 217 (1912).

Collection of Purchase Price. — The remedy to enforce a decree under a judicial sale of land for the collection of the purchase price of the land is by motion in the cause. Davis v. Pierce, 167 N.C. 135, 83 S.E. 182 (1914).

§§ 1-63, 1-64: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions relating to action by executor or trustee and relating to infants, incompetents, etc., suing by guardian, see G.S. 1A-1, Rule 17.

§§ 1-65 to 1-65.4: Repealed by Session Laws 1967, c. 954, s. 4.

Editor's Note. — Session Laws 1955, c. 1366, amended former G.S. 1-65 by changing its number to 1-65.1 and by adding G.S. 1-65.2 to 1-65.4. Former G.S. 1-65.1 was amended by Session Laws 1957, c. 249. For present provisions relating to infants, incompetents, etc., being defended by a guardian ad litem and relating to appointment of guardian ad litem, see G.S. 1A-1, Rule 17(b).

§ 1-65.5: Repealed by Session Laws 1969, c. 895, s. 19.

§ 1-66: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions relating to appointment of guardian ad litem, see G.S. 1A-1, Rule 17.

§§ 1-67 through 1-69: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to necessary joinder of parties, see G.S. 1A-1, Rule 19. As to permissive joinder of parties, see G.S. 1A-1, Rule 20.

§ 1-69.1. Unincorporated associations and partnerships; suit by or against.

(a) Except as provided in subsection (b) of this section:

(1) All unincorporated associations, organizations or societies, or general or limited partnerships, foreign or domestic, whether organized for profit or not, may hereafter sue or be sued under the name by which they are commonly known and called, or under which they are doing business, to the same extent as any other legal entity established by law and without naming any of the individual members composing it.

(2) Any judgments and executions against any such association, organization or society shall bind its real and personal property in like manner as if it were incorporated.

(3) Any unincorporated association, organization, society, or general partnership bringing a suit in the name by which it is commonly known and called must allege the specific location of the recordation required by G.S. 66-68.

(b) Unincorporated nonprofit associations are subject to Chapter 59B of the General Statutes and not this section. (1955, c. 545, s. 3; 1975, c. 393, ss. 1, 2; 2006-226, s. 3.)

Editor's Note. — Session Laws 2006-226, s. 5, is a severability clause.

Session Laws 2006-226, s. 6, provides: "This act does not affect an action or proceeding commenced or right accrued before this act takes effect."

Session Laws 2006-226, s. 7 provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Unincorporated Nonprofit Association Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

CASE NOTES

The requirements of this section are mandatory and failure to satisfy them is not exonerated by § 66-71. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

Strict construction of this section requires that before an unincorporated association may gain the privilege of instituting a lawsuit in its common name, first there must be recordation of the necessary information required by G.S. 66-68 and then allegation of its specific location. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

This section does not apply to actions filed prior to its effective date. Youngblood v. Bright, 243 N.C. 635, 91 S.E.2d 599 (1956).

The words "sue" and "be sued" include the natural and appropriate incidents of legal proceedings, and embrace all civil process incident to the commencement or continuance of legal proceedings. J.A. Jones Constr. Co. v. Local Union 755, 246 N.C. 481, 98 S.E.2d 852 (1957).

Effect of Section. — This section allows an unincorporated association to sue and be sued under its common name, but does not affect the character of the association as merely the aggregate of its members. Any attempt by the aggregate to sue a member, a part of itself, in tort necessarily must fail, since a person cannot be both plaintiff and defendant in the same action. Employers Mut. Cas. Co. v. Griffin, 46 N.C. App. 826, 266 S.E.2d 18 (1980).

When church officials sued, in the name of the church diocese, seceders from the church to recover church property, the officials' failure to allege the filing of an assumed name certificate was not fatal because the officials amended their complaint before the seceders filed an answer, as allowed by G.S. 1A-1, Rule 15(a), to substitute the names of the diocesan trustees for the diocese. Daniel v. Wray, 158 N.C. App. 161, 580 S.E.2d 711, 2003 N.C. App. LEXIS 1038 (2003).

Trial court properly found that a neighborhood association did not have standing to bring suit in a rezoning matter. While G.S.1-69.1(b) eliminated the pleading requirements set forth in G.S. 1-69.1(a)(3), G.S. 1A-1, N.C. R. Civ. P. 9(a) required the association to affirmatively aver that it was an unincorporated nonprofit association; the association failed to make an affirmative averment showing its legal existence and capacity to sue. N. Iredell Neighbors for Rural Life v. Iredell County, — N.C. App. —, 674 S.E.2d 436, 2009 N.C. App. LEXIS 370 (2009).

This Section Controls over former § 39-24. — Former G.S. 39-24 (repealed) was enacted in 1939. The amendment to this section, which added the requirement of an allegation of G.S. 66-68 recordation before suit may be brought by an unincorporated association in its common name, was enacted effective October 1, 1975. In the face of any irreconcilable conflict between the provisions of these two statutes, this section, being the later enactment, will control or be regarded as a qualification of the earlier statute. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Requirements of this section are mandatory and failure to satisfy them was not exonerated by former G.S. 39-24 (repealed). Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

This Section Controls in Conflict with § 66-71. — In the face of any irreconcilable conflict between the provisions of this section and G.S. 66-71, this section, being the later enactment, will control or be regarded as a qualification of the earlier statute. The same conclusion is reached when the subject matter of the two statutes is examined, since the more particular directives of this section would prevail over the general recordation provisions of G.S. 66-71. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

Right to Hold Property Not Affected by This Section. — While it is true that this section requires an unincorporated association to allege its registration for purposes of bringing suit in its collective name, there is no concomitant requirement attached to its right to hold property under G.S. 39-25. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

But Right to Bring Suit Concerning Property Depends on Registration Under This Section. — Under the wording of G.S. 39-25, an unincorporated, unregistered association may hold real property in its common name; however, if the association wishes to bring suit concerning this property, it must be registered in accordance with G.S. 66-68. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

Method of Service Not Covered by Section. — No provision of this section purports to prescribe the manner in which service of process is to be made on an unincorporated association. Melton v. Hill, 251 N.C. 134, 110 S.E.2d 875 (1959).

Under this section, a union member may seek judicial relief from efforts by the union to deprive him of his legal rights. Poole v. Local 305 Nat'l Post Office Mail Handlers, 69 N.C. App. 675, 318 S.E.2d 105 (1984).

Suits by and Against Unincorporated Labor Union. — An unincorporated labor union doing business in North Carolina by performing acts for which it was formed can sue and be sued as a separate legal entity in the courts of this State, and may be served with process in the manner prescribed by statute. Martin v. Local 71, Int'l Bhd. of Teamsters, 248 N.C. 409, 103 S.E.2d 462 (1958); Gainey v. Local 71, Int'l Bhd. of Teamsters, 252 N.C. 256, 113 S.E.2d 594 (1960).

An unincorporated labor union, which is doing business in North Carolina by performing acts for which it was formed, is suable in this State as a separate legal entity. J.A. Jones Constr. Co. v. Local Union 755, 246 N.C. 481, 98 S.E.2d 852 (1957).

An unincorporated labor union may be sued in the courts of this State as a legal entity separate and apart from its members. R.H. Bouligny, Inc. v. United Steelworkers of Am., 270 N.C. 160, 154 S.E.2d 344 (1967).

Liability of Unincorporated Labor Union for Torts of Employees and Agents. — An unincorporated labor union, as a legal entity separate and apart from its members, may be held liable in damages for torts committed by its employees or agents acting in the course of their employment. R.H. Bouligny, Inc. v. United Steelworkers of Am., 270 N.C. 160, 154 S.E.2d 344 (1967).

Failure of unincorporated association to comply with the directives of this section was fatal to its complaint. Cherokee Home Demonstration Club v. Oxendine, 100 N.C. App. 622, 397 S.E.2d 643 (1990).

For case holding evidence sufficient to support a finding that a labor union was doing business in North Carolina by performing some of the acts for which it was formed, see Reverie Lingerie, Inc. v. McCain, 258 N.C. 353, 128 S.E.2d 835 (1963).

Applied in Sizemore v. Maroney, 263 N.C. 14, 138 S.E.2d 803 (1964).

Cited in Solon Lodge v. Ionic Lodge, 245 N.C. 281, 95 S.E.2d 921 (1957); Glover v. Brotherhood of Ry. & S.S. Clerks, 250 N.C. 35, 108 S.E.2d 78 (1959); Walker v. Nicholson, 257 N.C. 744, 127 S.E.2d 564 (1962); Benvenue Parent-Teacher Ass'n v. Nash County Bd. of Educ., 4 N.C. App. 617, 167 S.E.2d 538 (1969); Goard v. Branscom, 15 N.C. App. 34, 189 S.E.2d 667

(1972); Clark v. Inn West, 89 N.C. App. 275, 365 S.E.2d 682 (1988).

§ 1-70: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to joinder of parties, see G.S. 1A-1, Rules 19 and 20. As to class actions, see G.S. 1A-1, Rule 23.

§ 1-71: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to permissive joinder of parties, see G.S. 1A-1, Rule 20.

§ 1-72. Persons jointly liable.

In all cases of joint contracts of partners in trade or others, suit may be brought and prosecuted against all or any number of the persons making such contracts. (R.C., c. 31, s. 84; 1871-2, c. 24, s. 1; Code, s. 187; Rev., s. 413; C.S., s. 459.)

Cross References. — As to assertion of claims against all of the persons making joint contracts, see also G.S. 1A-1, Rule 19.

CASE NOTES

History. — Contracts made by copartners or other joint obligors were made separate by statute, and the plaintiff could sue one or more at his election without impairing his right to proceed against others afterwards, by the Revised Code, c. 31, s. 84. This provision was not introduced into the Code of Civil Procedure and hence the principle governing contracts as construed at common law was restored. The necessity for remedy arose. The omitted section, which in Merwin v. Ballard, 65 N.C. 168 (1871), was decided to have been repealed, was enacted at the session of the General Assembly of 1871-72, c. 24, s. 1, which was § 187 of the Code, and now constitutes this section. See Rufty v. Claywell, 93 N.C. 306 (1885).

Effect of Section. — The result of this section is to render contracts that are joint in form several in legal effect, and to neutralize, if not displace, those provisions which operate only upon contracts that are joint. The fact that the contract possesses the twofold quality of being joint as well as several in law cannot render available provisions which, in terms, are applicable to such as are joint only. It is solely to remove the resulting inconveniences of an action prosecuted to judgment against part of those whose obligation is joint only, that the remedy is provided, and it becomes needless when the obligation is several also. Such is the construction adopted in the courts of New York. Rufty v. Claywell, 93 N.C. 306 (1885).

Partnership Liability, Generally. — Members of a partnership are jointly and severally bound for all its debts; because of the joint liability, the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the partners. Hanstein v. Johnson, 112 N.C. 253, 17 S.E. 155 (1893). See also, Bain v. Clinton Loan Ass'n, 112 N.C. 248, 17 S.E. 154 (1893); Daniel v. Bethell, 167 N.C. 218, 83 S.E. 307 (1914).

Suit Against One of Several Parties Permitted. — Where a firm in Maryland gave its promissory note to plaintiff, signed in the name of the firm, plaintiff was permitted to sue one of the partners alone. Palyart v. Goulding, 1 N.C. 691 (1796).

Effect of Judgment Against One Partner Only. — Where a judgment was obtained in an action against a partnership and summons therein was issued and served on only one of the partners, and the other did not make himself a party or take proper steps by independent action to prevent it, execution could issue on the partnership property and on the property of the individual member who had been served with process. Daniel v. Bethell, 167 N.C. 218, 83 S.E. 307 (1914).

New Action to Enforce Liability of Partner Not Previously Made a Party. — Where a judgment is taken against two of three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action, and not a motion in the action in which such judgment was rendered; it is only when the liability is joint and not several that the motion in the cause is proper. Davis v. Sanderlin, 119 N.C. 84, 25 S.E. 815 (1896).

Nonsuit Against Codefendant Not Party to Contract Not a Fatal Variance. — When an action was brought against more than one defendant on what was alleged to be a joint contract, and the evidence showed that the agreement was made with only one defendant, nonsuit against the other defendants did not constitute a variance which justified a nonsuit against the defendant with whom the agreement was made. The existence of other defendants was not an essential element of the contract. Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959).

Collateral Estoppel Constituted Meritorious Defense. — Where action stemmed from breach of auction contract between sellers, defendant and her husband, and plaintiff auctioneer, plaintiff auctioneer was not permitted to recover in a second action interest from the date of breach which was denied to it in a previous action; collateral estoppel constituted a meritorious defense. Thomas M. McInnis & Assocs. v. Hall, 318 N.C. 421, 349 S.E.2d 552 (1986).

Cited in Jones v. Rhea, 198 N.C. 190, 151 S.E. 255 (1930).

§ 1-72.1. Procedure to assert right of access.

(a) Any person asserting a right of access to a civil judicial proceeding or to a judicial record in that proceeding may file a motion in the proceeding for the limited purpose of determining the person's right of access. The motion shall not constitute a request to intervene under the provisions of Rule 24 of the Rules of Civil Procedure and shall instead be governed by the procedure set forth in this statute. The movant shall not be considered a party to the action solely by virtue of filing a motion under this section or participating in proceedings on the motion. An order of the court granting a motion for access made pursuant to this section shall not make the movant a party to the action for any purpose.

(b) The movant shall serve a copy of its motion on all parties to the proceeding in any manner provided in Rule 5 of the Rules of Civil Procedure. Upon receipt of a motion filed pursuant to this section, the court shall establish the date and location of the hearing on the motion that shall be set at a time before conducting any further proceedings relative to the matter for which access is sought under the motion. The court shall cause notice of the hearing date and location to be posted at the courthouse where the hearing is scheduled. The movant shall serve a copy of the notice of the date, time, and location of the hearing on all parties to the proceeding in any manner provided in Rule 5 of the Rules of Civil Procedure.

(c) The court shall rule on the motion after consideration of such facts, legal authority, and argument as the movant and any other party to the action desire to present. The court shall issue a written ruling on the motion that shall contain a statement of reasons for the ruling sufficiently specific to permit appellate review. The order may also specify any conditions or limitations on the movant's right of access that the court determines to be warranted under the facts and applicable law.

(d) A party seeking to seal a document or testimony to be used in a court proceeding may submit the document or testimony to the court to be reviewed in camera. This subsection also applies to (i) any document or testimony that is the subject of a motion made under this section and that is submitted for review for the purposes of the court's consideration of the motion to seal, and (ii) to any document or testimony that is the subject of a motion made under this section and that was submitted under seal or offered in closed session prior to the filing of a motion under this section. Submission of the document or proffer of testimony to the court pursuant to this section shall not in itself result in the document or testimony thereby becoming a judicial record subject to constitutional, common law, or statutory rights of access unless the document or testimony is thereafter introduced into evidence after a motion to seal or to restrict access is denied.

(e) A ruling on a motion made pursuant to this section may be the subject of an immediate interlocutory appeal by the movant or any party to the proceeding. Notice of appeal must be given in writing, filed with the court, and served on all parties no later than 10 days after entry of the court's ruling. If notice of appeal is timely given and given before further proceedings are held in the court that might be affected by appellate review of the matter, the court, on its own motion or on the motion of the movant or any party, shall consider whether to stay any proceedings that could be affected by appellate review of the court's ruling on the motion. If notice of appeal is timely given but is given only after further proceedings in the trial court that could be affected by appellate review of the ruling on a motion made pursuant to this section, or if a request for stay of proceedings is made and is denied, then the sole relief that shall be available on any appeal in the event the appellate court determines that the ruling of the trial court was erroneous shall be reversal of the trial court's ruling on the motion and remand for rehearing or retrial. On appeal the court may determine that a ruling of the trial court sealing a document or restricting access to proceedings or refusing to unseal documents or open proceedings was erroneously entered, but it may not retroactively order the unsealing of documents or the opening of testimony that was sealed or closed by the trial court's order.

(f) This section is intended to establish a civil procedure for hearing and determining claims of access to documents and to testimony in civil judicial proceedings and shall not be deemed or construed to limit, expand, change, or otherwise preempt any provisions of substantive law that define or declare the rights and restrictions with respect to claims of access. Without in any way limiting the generality of the foregoing provision, this section shall not apply to juvenile proceedings or court records of juvenile proceedings conducted pursuant to Chapters 7A, 7B, 90, or any other Chapter of the General Statutes dealing with juvenile proceedings.

(g) Nothing in this section diminishes the rights of a movant or any party to seek appropriate relief at any time from the Supreme Court or Court of Appeals through the use of the prerogative writs of mandamus or supersedeas. (2001-516, s. 1.)

§ **1-73:** Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions relating to necessary joinder of parties, see G.S. 1A-1, Rule 19. As to interpleader, see G.S. 1A-1, Rule 22.

§ **1-74:** Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions relating to abatement of actions, see G.S. 1A-1, Rule 25.

§ **1-75:** Repealed by Session Laws 1967, c. 954, s. 4.

SUBCHAPTER IIIA. JURISDICTION.

ARTICLE 6A.

Jurisdiction.

§ 1-75.1. Legislative intent.

This Article shall be liberally construed to the end that actions be speedily and finally determined on their merits. The rule that statutes in derogation of the common law must be strictly construed does not apply to this Article. (1967, c. 954, s. 2.)

Cross References. — As to service of process, see G.S. 1A-1, Rule 4.

Legal Periodicals. — For article on jurisdiction and process, see 5 Wake Forest Intra. L. Rev. 46 (1969).

CASE NOTES

The provisions of this Article are to be construed liberally in favor of finding personal jurisdiction, as long as such a finding is consistent with due process. Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976).

A prima facie presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in a matter. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Section 1A-1, Rule 4(j) is tied closely to this Article, and the two are complementary to one another. While this Article greatly liberalizes the grounds for jurisdiction, the rules regarding service of process are tightened to insure as much as possible that the defendant receives actual notice of the controversy. Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971).

When cause of action arises directly from the foreign defendant's contacts with this State, the threshold for sufficiency of defendant's contacts with North Carolina is lowered. Mony Credit Corp. v. Ultra-Funding Corp., 100 N.C. App. 646, 397 S.E.2d 757 (1990).

Applied in Furbush v. Otsego Mach. Shop, Inc., 914 F. Supp. 1275 (E.D.N.C. 1996).

Cited in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984); B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

§ 1-75.2. Definitions.

In this Article the following words have the designated meanings:

(1) "Person" means any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society which may sue or be sued under a common name.

(2) "Plaintiff" means the person named as plaintiff in a civil action, and where in this Article acts of the plaintiff are referred to, the reference includes the acts of his agent within the scope of the agent's authority.

(3) "Defendant" means the person named as defendant in a civil action, and where in this Article acts of the defendant are referred to, the reference includes any person's acts for which the defendant is legally responsible. In determining for jurisdictional purposes the defendant's legal responsibility for the acts of another, the substantive liability of the defendant to the plaintiff is irrelevant.

(4) Where jurisdiction of the person is drawn into question in respect to any claim asserted under Rule 14 of the Rules of Civil Procedure, the terms "Plaintiff" and "Defendant" as above defined shall include a third-party plaintiff and a third-party defendant respectively.

(5) "Solicitation" means a request or appeal of any kind, direct or indirect, by oral, written, visual, electronic, or other communication, whether or not the communication originates from outside the State. (1967, c. 954, s. 2; 1993, c. 338, s. 1.)

Editor's Note. — The Rules of Civil Procedure, referred to in subdivision (4) of this section, are found in G.S. 1A-1.

CASE NOTES

Defendant Must Be Legal Entity. — The defendant in a civil action must be an existing legal entity, either natural or artificial; however, it is not necessary to allege in the complaint what type of legal entity the defendant is. Rollins v. Junior Miller Roofing Co., 55 N.C. App. 158, 284 S.E.2d 697 (1981).

Applied in Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

Cited in Lemon v. Combs, 164 N.C. App. 615, 596 S.E.2d 344, 2004 N.C. App. LEXIS 964 (2004).

§ 1-75.3. Jurisdictional requirements for judgments against persons, status and things.

(a) Jurisdiction of Subject Matter Not Affected by This Article. — Nothing in this Article shall be construed to confer, enlarge or diminish the subject matter jurisdiction of any court.

(b) Personal Jurisdiction. — A court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in G.S. 1-75.4 or G.S. 1-75.7 and in addition either:

(1) Personal service or substituted personal service of summons, or service of publication of a notice of service of process is made upon the defendant pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure; or

(2) Service of a summons is dispensed with under the conditions in G.S. 1-75.7.

(c) Jurisdiction in Rem or Quasi in Rem. — A court of this State having jurisdiction of the subject matter may render a judgment in rem or quasi in rem upon a status or upon a property or other things pursuant to G.S. 1-75.8 and the judgment in such action may affect the interests in the status, property or thing of all persons served pursuant to Rule 4(k) of the Rules of Civil Procedure. (1967, c. 954, s. 2; 1983, c. 231.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

Legal Periodicals. — For note, "Burnham v. Superior Court: The Supreme Court Agrees on Transient Jurisdiction in Practice, But Not in Theory," see 69 N.C.L. Rev. 1271 (1991).

CASE NOTES

"Minimum Contacts." — The nonresident defendant must have "minimum contacts" with the state before any court of that state may render, consistent with the due process clause, a valid child custody order. Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

The issue of in personam jurisdiction involves a two-stage inquiry: First, do the "long-arm" statutes allow the courts to assume jurisdiction over defendant? Second, assuming they do, does the exercise of such jurisdiction comport with due process? Gro-Mar Pub. Relations, Inc. v. Billy Jack Enter., Inc., 36 N.C. App. 673, 245 S.E.2d 782 (1978).

The parent-child relationship is a status. In re Trueman, 99 N.C. App. 579, 393 S.E.2d 569 (1990).

Personal Jurisdiction Required for Personal Judgment. — Pursuant to subsection (b) of this section, a court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in G.S. 1-75.4. Without personal "jurisdictional grounds," a trial court lacks the authority to render a child custody order against a nonresident defendant. Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

Applied in Bowdach v. Frontierland, Inc., 347 F. Supp. 233 (W.D.N.C. 1972); Bowdach v. Frontierland, Inc., 347 F. Supp. 237 (W.D.N.C. 1972); Coastland Corp. v. North Carolina Wildlife Resources Comm'n, 134 N.C. App. 343, 517 S.E.2d 661 (1999); Croom v. State Dep't of Commerce, 143 N.C. App. 493, 547 S.E.2d 87, 2001 N.C. App. LEXIS 297 (2001).

Cited in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

§ 1-75.4. Personal jurisdiction, grounds for generally.

A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j), Rule 4(j1), or Rule 4(j3) of the Rules of Civil Procedure under any of the following circumstances:

(1) Local Presence or Status. — In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
  a. Is a natural person present within this State; or
  b. Is a natural person domiciled within this State; or
  c. Is a domestic corporation; or
  d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

(2) Special Jurisdiction Statutes. — In any action which may be brought under statutes of this State that specifically confer grounds for personal jurisdiction.

(3) Local Act or Omission. — In any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant.

(4) Local Injury; Foreign Act. — In any action for wrongful death occurring within this State or in any action claiming injury to person or property within this State arising out of an act or omission outside this State by the defendant, provided in addition that at or about the time of the injury either:
  a. Solicitation or services activities were carried on within this State by or on behalf of the defendant;
  b. Products, materials or thing processed, serviced or manufactured by the defendant were used or consumed, within this State in the ordinary course of trade; or
  c. Unsolicited bulk commercial electronic mail was sent into or within this State by the defendant using a computer, computer network, or the computer services of an electronic mail service provider in contravention of the authority granted by or in violation of the policies set by the electronic mail service provider. Transmission of commercial electronic mail from an organization to its members shall not be deemed to be unsolicited bulk commercial electronic mail.

(5) Local Services, Goods or Contracts. — In any action which:
  a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or
  b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such perfor-

mance within this State was authorized or ratified by the defendant; or

c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; or

d. Relates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction; or

e. Relates to goods, documents of title, or other things of value actually received by the plaintiff in this State from the defendant through a carrier without regard to where delivery to the carrier occurred.

(6) Local Property. — In any action which arises out of:

a. A promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to create in either party an interest in, or protect, acquire, dispose of, use, rent, own, control or possess by either party real property situated in this State; or

b. A claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced; or

c. A claim that the defendant return, restore, or account to the plaintiff for any asset or thing of value which was within this State at the time the defendant acquired possession or control over it; or

d. A claim related to a loan made in this State or deemed to have been made in this State under G.S. 24-2.1, regardless of the situs of the lender, assignee, or other holder of the loan note and regardless of whether the loan payment or fee is received through a loan servicer, provided that: (i) the loan was made to a borrower who is a resident of this State, (ii) the loan is incurred by the borrower primarily for personal, family, or household purposes, and (iii) the loan is secured by a mortgage or deed of trust on real property situated in this State upon which there is located or there is to be located a structure or structures designed principally for occupancy of from one to four families.

(7) Deficiency Judgment on Local Foreclosure or Resale. — In any action to recover a deficiency judgment upon an obligation secured by a mortgage, deed of trust, conditional sale, or other security instrument executed by the defendant or his predecessor to whose obligation the defendant has succeeded and the deficiency is claimed either:

a. In an action in this State to foreclose such security instrument upon real property, tangible personal property, or an intangible represented by an indispensable instrument, situated in this State; or

b. Following sale of real or tangible personal property or an intangible represented by an indispensable instrument in this State under a power of sale contained in any security instrument.

(8) Director or Officer of a Domestic Corporation. — In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer.

(9) Taxes or Assessments. — In any action for the collection of taxes or assessments levied, assessed or otherwise imposed by a taxing authority of this State after the date of ratification of this act.

(10) Insurance or Insurers. — In any action which arises out of a contract of insurance as defined in G.S. 58-1-10 made anywhere between the plaintiff or some third party and the defendant and in addition either:

a. The plaintiff was a resident of this State when the event occurred out of which the claim arose; or

b. The event out of which the claim arose occurred within this State, regardless of where the plaintiff resided.

(11) Personal Representative. — In any action against a personal representative to enforce a claim against the deceased person represented, whether or not the action was commenced during the lifetime of the deceased, where one or more of the grounds stated in subdivisions (2) to (10) of this section would have furnished a basis for jurisdiction over the deceased had he been living.

(12) Marital Relationship. — In any action under Chapter 50 that arises out of the marital relationship within this State, notwithstanding subsequent departure from the State, if the other party to the marital relationship continues to reside in this State. (1967, c. 954, ss. 2, 10; 1969, c. 803; 1981, c. 815, s. 4; 1983, c. 231; 1995, c. 389, s. 1; 1999-212, s. 1; 2007-351, s. 2; 2008-187, s. 1.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

Effect of Amendments. — Session Laws 2008-187, s. 1, effective August 7, 2008, made a minor stylistic change in subdivision (6)c.

Legal Periodicals. — For note on constitutionality of constructive service of process on missing defendants, see 48 N.C.L. Rev. 616 (1970).

For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For article, "Statutes of Limitations in the Conflict of Laws," see 52 N.C.L. Rev. 489 (1974).

For survey of 1973 case law with regard to in personam jurisdiction over out-of-state corporations, see 52 N.C.L. Rev. 850 (1974).

For comment discussing the conflict of this section with G.S. 1-21 prior to the 1979 amendment to G.S. 1-21, see 12 Wake Forest L. Rev. 1041 (1976).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For article on long-arm jurisdiction and minimum contacts, see 58 N.C.L. Rev. 407 (1980).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For comment on jurisdiction based upon attachment, see 16 Wake Forest L. Rev. 377 (1980).

For article, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

For survey of 1981 law on civil procedure, see 60 N.C.L. Rev. 1214 (1982).

For survey of 1983 law on civil procedure, see 62 N.C.L. Rev. 1107 (1984).

For civil procedure note, "North Carolina Adopts the Stream of Commerce Theory of Jurisdiction: A Step in the Right Direction," see 20 Wake Forest L. Rev. 737 (1984).

For note, "Miller v. Kite, 313 N.C. 474, 329 S.E.2d 663 (1985): Should Domestic Disputes Require the Maximum or Minimum Contacts?," see 64 N.C.L. Rev. 825 (1986).

For note on the North Carolina Supreme Court's rejection of the minimum contacts analysis under the "transient rule" of jurisdiction, see 66 N.C.L. Rev. 1051 (1988).

For note, "Burnham v. Superior Court: The Supreme Court Agrees on Transient Jurisdiction in Practice, But Not in Theory," see 69 N.C.L. Rev. 1271 (1991).

For article, "Jurisdiction Over Those Who Breach Their Contracts: The Lessons of Burger King," see 72 N.C.L. Rev. 55 (1993).

CASE NOTES

I. General Consideration.

II. Due Process Considerations.
    A. In General.
    B. Determining Minimum Contacts.
III. Cases in Which Minimum Contacts Requirement Met.
IV. Cases in Which Minimum Contacts Requirement Not Met.
V. Local Presence or Status.
VI. Local Act or Omission.
VII. Local Injury; Foreign Act.
VIII. Local Services, Goods or Contracts.
IX. Cases Decided Under Prior Law.
    A. General Consideration.
    B. Minimum Contacts.
    C. Solicitation of Business in State.
    D. Goods Expected to Be Used or Consumed in State.

I. GENERAL CONSIDERATION.

This section is commonly referred to as the "long-arm" statute. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 289 S.E.2d 607, cert. denied, 306 N.C. 385, 294 S.E.2d 209 (1982).

And is based on the Wisconsin "long-arm" statute. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974).

Purpose of Section. — Provisions of this section are a legislative attempt to assert in personam jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the United States Constitution. First-Citizens Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973), overruled on other grounds in United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979); Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974); First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Forman & Zukerman v. Schupak, 31 N.C. App. 62, 228 S.E.2d 503 (1976), cert. denied and appeal dismissed, 292 N.C. 264, 233 S.E.2d 391, appeal dismissed, 434 U.S. 804, 98 S. Ct. 32, 54 L. Ed. 2d 61 (1977); Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Stephenson v. Jordan Volkswagen, Inc., 428 F. Supp. 195 (W.D.N.C. 1977); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980); Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 289 S.E.2d 607, cert. denied, 306 N.C. 385, 294 S.E.2d 209 (1982); Marion v. Long, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985).

The long-arm statute is designed to confer jurisdiction over nonresident defendants to the fullest extent possible under the due process clause of the Fourteenth Amendment. Tart v. Prescott's Pharmacies, Inc., 118 N.C. App. 516, 456 S.E.2d 121 (1995).

North Carolina's long-arm statute was enacted to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process. Regent Lighting Corp. v. Galaxy Elec. Mfg., Inc, 933 F. Supp. 507 (M.D.N.C. 1996).

This section is a procedural law which does not affect substantive rights. Federal Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973).

Intent. — The intent of the North Carolina long-arm statute is to assert in personam jurisdiction to the full extent permitted by the Due Process Clause of the United States Constitution. Superguide Corp. v. Kegan, 987 F. Supp. 481 (W.D.N.C. 1997).

Accordingly, it can properly be applied retroactively. Federal Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973).

Liberal Construction. — There is a clear mandate that the North Carolina long-arm statute be given a liberal construction, making available to the North Carolina courts the full jurisdictional powers permissible under federal due process. Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062 (4th Cir. 1982).

Both the wording of this section and applicable case law accord liberal construction to this long-arm statute, thereby favoring finding personal jurisdiction. Thus, the prevailing law in North Carolina presumes the existence of in personam jurisdiction. Southern Case, Inc. v. Management Recruiters Int'l, Inc., 544 F. Supp. 403 (E.D.N.C. 1982).

This section should receive liberal construction, in favor of finding jurisdiction. Marion v. Long, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985); Schofield v. Schofield, 78 N.C. 657, 338 S.E.2d 132 (1986).

Federal courts will give the statutory provisions a liberal construction in order to ensure that North Carolina courts maintain the full jurisdictional powers permissible under federal due process. General Latex & Chem. Corp. v. Phoenix Medical Technology, Inc., 765 F. Supp. 1246 (W.D.N.C. 1991).

Given the liberal construction of the North Carolina long-arm statute, the prevailing law in North Carolina presumes the existence of in personam jurisdiction. General Latex & Chem. Corp. v. Phoenix Medical Technology, Inc., 765 F. Supp. 1246 (W.D.N.C. 1991).

There is a clear mandate that the North Carolina Long-Arm Statute be given a liberal construction, thereby favoring a finding of personal jurisdiction. FDIC v. Kerr, 637 F. Supp. 828 (W.D.N.C. 1986).

In determining whether the "long-arm" statute permits the court to entertain an action against a particular defendant, the statute should be liberally construed in favor of finding jurisdiction. Strother v. Strother, 120 N.C. App. 393, 462 S.E.2d 542 (1995).

A clear mandate exists that the North Carolina "long-arm" statute be given a liberal construction, making available to the North Carolina courts the full jurisdictional powers permissible under federal due process. Crown Cork & Seal Co. v. Dockery, 886 F. Supp. 1253 (M.D.N.C. 1995).

Both the wording of this section and applicable case law accord liberal construction to this long-arm statute. Plant Genetic Sys. v. Ciba Seeds, 933 F. Supp. 519 (M.D.N.C. 1996).

This section should receive liberal construction, favoring the finding of jurisdiction. Starco, Inc. v. AMG Bonding & Ins. Servs., Inc., 124 N.C. App. 332, 477 S.E.2d 211 (1996).

The North Carolina long-arm statute specifically requires "substantial activity" within the state. Superguide Corp. v. Kegan, 987 F. Supp. 481 (W.D.N.C. 1997).

Findings of Trial Court. — Absent request by a party, the trial court is not required to make findings as to which statutory grounds it utilized in finding personal jurisdiction, rather, it is presumed that the court, upon proper evidence, found facts sufficient to support its decision. Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473, cert. granted, 341 N.C. 419, 461 S.E.2d 757 (1995).

Judgment entered against a defendant over which court does not have in personam jurisdiction is void and subject to being set aside pursuant to G.S. 1A-1, Rule 60(b)(4). Hayes v. Evergo Tel. Co. Ltd., 100 N.C. App. 474, 397 S.E.2d 325 (1990).

The resolution of the question of in personam jurisdiction involves a two-fold determination. First, do the statutes of North Carolina permit the courts of this jurisdiction to entertain this action against defendant? Second, if so, does the exercise of this power by the North Carolina courts violate due process of law? Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Gro-Mar Pub. Relations, Inc., v. Billy Jack Enter., Inc., 36 N.C. App. 673, 245 S.E.2d 782 (1978); Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978); Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979); Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 289 S.E.2d 607 (1982); Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986); ETR Corp. v. Wilson Welding Serv., Inc., 96 N.C. App. 666, 386 S.E.2d 766 (1990).

Before the court may exercise jurisdiction over a nonresident defendant, it must have statutory authorization and its exercise of such jurisdiction must comport with the requirements of due process. United Buying Group, Inc. v. Coleman, 37 N.C. App. 26, 245 S.E.2d 402 (1978), aff'd in part and rev'd in part on other grounds, 296 N.C. 510, 251 S.E.2d 610 (1979).

The resolution of a question of in personam jurisdiction over a foreign corporation, as with any determination of personal jurisdiction, involves a two-part determination: (1) Does a statutory basis for personal jurisdiction exist, and (2) if so, does the exercise of this jurisdiction violate constitutional due process. However, since the statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert in personam jurisdiction over a defendant is whether the assertion comports with due process. J.M. Thompson Co. v. Doral Mfg. Co., 72 N.C. App. 419, 324 S.E.2d 909, cert. denied, 313 N.C. 602, 330 S.E.2d 611 (1985).

To determine if foreign defendants may be subjected to in personam jurisdiction in this State, the court must apply a two-pronged test. First, it must be determined whether North Carolina jurisdictional statutes allow North Carolina courts to entertain the action. Second, it must be determined whether North Carolina courts can constitutionally exercise such jurisdiction consistent with due process of law. Marion v. Long, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985); DeSoto Trail, Inc. v. Covington Diesel, Inc., 77 N.C. App. 637, 335 S.E.2d 794 (1985).

In order to determine whether North Carolina may properly exercise jurisdiction over the person of a foreign defendant, the court applies a two-part test: (1) Do the "long-arm" jurisdiction statutes, when liberally construed, permit the exercise of jurisdiction? (2) If so, does the exercise of jurisdiction unconstitutionally violate due process of law? B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

Challenges to in personam jurisdiction present a two-part inquiry; first, whether the statutes of North Carolina permit the exercise of jurisdiction, and second, whether exercising in personam jurisdiction over defendant violates due process of law. Hayes v. Evergo Tel. Co. Ltd., 100 N.C. App. 474, 397 S.E.2d 325 (1990).

North Carolina has adopted a two-part test to determine whether a court may exercise in personam jurisdiction over a nonresident defendant. First, the court must determine whether the "long-arm" statute, confers jurisdiction over defendant. Second, the court must determine whether the exercise of personal jurisdiction violates defendant's right to due process. Mony Credit Corp. v. Ultra-Funding Corp., 100 N.C. App. 646, 397 S.E.2d 757 (1990).

Personal Service Suffices When Party Is Present in State. — The rule continues to be that personal service on a nonresident party, at a time when that party is present in the forum state, suffices in and of itself to confer personal jurisdiction over that party. Lockert v. Breedlove, 321 N.C. 66, 361 S.E.2d 581 (1987); Jenkins v. Jenkins, 89 N.C. App. 705, 367 S.E.2d 4 (1988).

Subdivision (1)a of this section permits our state courts, having subject matter jurisdiction, to exercise in personam jurisdiction over a person served with process in accordance with G.S. 1A-1, Rule 4(j) or 4(j1), while present within the state. Brookshire v. Brookshire, 89 N.C. App. 48, 365 S.E.2d 307 (1988).

Subdivision (2) of this section confers personal jurisdiction whenever any special jurisdiction statutes apply. Mony Credit Corp. v. Ultra-Funding Corp., 100 N.C. App. 646, 397 S.E.2d 757 (1990).

Section 66-192(c) is a "Special Jurisdictional Statute" as that term is used in this section. D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

For case holding that subdivision (2) of this section and former § 55-145 did not violate federal due process as applied to a foreign corporation, see Mony Credit Corp. v. Ultra-Funding Corp., 100 N.C. App. 646, 397 S.E.2d 757 (1990).

Personal Service Held to Establish Jurisdiction in Child Custody and Support Action. — The singular fact that defendant was served with process while present within this state was sufficient to establish in personam jurisdiction over him for purposes of a child custody and support action. Brookshire v. Brookshire, 89 N.C. App. 48, 365 S.E.2d 307 (1988).

Alias and pluries summons served personally on a nonresident defendant while present in this state were held not to be issued on a different person and therefore related back to the original summons where the original summons had been properly served upon the Commissioner of Motor Vehicles pursuant to G.S. 1-105. Smith v. Schraffenberger, 90 N.C. App. 589, 369 S.E.2d 90, cert. denied, 323 N.C. 366, 373 S.E.2d 549 (1988).

Applicability of Subdivision (12). — Subdivision (12) of this section, entitled "Marital Relationship," applies to an action under Chapter 50 only if the action for absolute divorce in the relationship was filed on or after October 1, 1981. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Jurisdiction over Alimony Modification. — Section 50-16.9 provides only that an alimony order entered by a court of another jurisdiction may be modified by a court of this State "upon gaining jurisdiction over the person of both parties"; therefore, statutory jurisdiction arises, if at all, under this section, the North Carolina "long-arm" statute. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Allegation of Injury Is Sufficient. — The statute is satisfied if the plaintiff merely claims an injury occurred, not that the plaintiff has actually proven the injury. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

But the burden of plaintiff in establishing in personam jurisdiction requires more than conjecture on the court's part. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

Cause of Action Need Not Be Related to Activities Giving Rise to Jurisdiction. — There is no requirement that the cause of action pursuant to which the jurisdictional claim is raised be related to the activities of the defendant which give rise to the in personam jurisdiction. Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973); Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

The burden is on the plaintiffs to prove the existence of jurisdiction, but that burden can be met by a prima facie showing that jurisdiction is conferred by a statute such as this one. Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976). See also, Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973); Gro-Mar Pub. Relations, Inc. v. Billy Jack Enter., Inc., 36 N.C. App. 673, 245 S.E.2d 782 (1978).

The burden is on plaintiff to establish a prima facie showing that one of the statutory grounds enumerated in this section applies. Marion v. Long, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985); DeSoto Trail, Inc. v. Covington Diesel, Inc., 77 N.C. App. 637, 335 S.E.2d 794 (1985); Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Appellate court vacated a default judgment which the trial court entered in favor of an injured party because, although the injured party showed that an entertainer he sued was properly served, neither the injured party's complaint nor other evidence in the record showed that he had personal knowledge of the circumstances surrounding the hiring of two bodyguards who assaulted him, and the record did not provide a basis for holding the entertainer vicariously liable for the bodyguards' actions. Lemon v. Combs, 164 N.C. App. 615, 596 S.E.2d 344, 2004 N.C. App. LEXIS 964 (2004).

There is no need for a tolling statute when a nonresident defendant is amenable to process. But this does not place the tolling statute in hopeless conflict with the long-arm jurisdictional statute. Full effect can be given to both of the statutes. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976), decided prior to the 1979 amendment to § 1-21.

The application of a tolling statute such as G.S. 1-21 when defendant has at all times been subject to the service of process under subdivision (5) of the present section by which the court would have acquired personal jurisdiction is inimical to the general purposes of statutes of limitations. Those statutes exist to eliminate the injustice which may result from the assertion of stale claims by providing a reasonable but definite time within which a claim must be prosecuted in the courts or be forever barred. Duke Univ. v. Chestnut, 28 N.C. App. 568, 221 S.E.2d 895, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976), decided prior to the 1979 amendment to § 1-21.

The "borrowing provision" of § 1-21 is not applicable if a defendant is subject to long-arm jurisdiction under this section. Laurent v. USAIR, Inc., 124 N.C. App. 208, 476 S.E.2d 443 (1996), cert. denied, 346 N.C. 178, 486 S.E.2d 205 (1997).

Child Custody Order. — Pursuant to G.S. 1-75.3(b), a court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in this section. Without personal "jurisdictional grounds," a trial court lacks the authority to render a child custody order against a nonresident defendant. Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

Contract Right Is "Asset or Thing of Value." — A contract right is a property right. A fortiori, it is an "asset or thing of value". Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

Situs of Contract Right. — Where the holder of the contract right alleged is a North Carolina resident, the situs of the "asset or thing of value" is in this State. Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

Agency Relationship. — While a corporate entity is liable for any wrongful act or omission of an agent acting with proper authority, it does not follow an agent may be held liable under the jurisdiction of courts for acts or omissions allegedly committed by the corporation; jurisdiction may not be asserted over a corporate agent without some affirmative act committed in his individual official capacity. Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473, cert. granted, 341 N.C. 419, 461 S.E.2d 757 (1995).

Fact that defendant was acting within the scope and course of employer-employee and agency relationship with a North Carolina company at the time of collision, did not mean that North Carolina courts could exercise personal jurisdiction over him. Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473, cert. granted, 341 N.C. 419, 461 S.E.2d 757 (1995).

Applied in Bowdach v. Frontierland, Inc., 347 F. Supp. 233 (W.D.N.C. 1972); Bowdach v. Frontierland, Inc., 347 F. Supp. 237 (W.D.N.C. 1972); McCoy Lumber Indus., Inc. v. Niedermeyer-Martin Co., 356 F. Supp. 1221 (M.D.N.C. 1973); William R. Andrews Assocs. v. Sodibar Systems, 25 N.C. App. 372, 213 S.E.2d 411 (1975); Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975); North Brook Farm Lines v. McBrayer, 35 N.C. App. 34, 241 S.E.2d 74 (1978); Gemini Enters., Inc. v. WFMY Television Corp., 470 F. Supp. 559 (M.D.N.C. 1979); In re Smith, 45 N.C. App. 123, 263 S.E.2d 23 (1980); Russell v. Tenore, 55 N.C. App. 84, 284 S.E.2d 521 (1981); Robinson v. Robinson, 56 N.C. App. 737, 289 S.E.2d 612 (1982); Park v. Sleepy Creek Turkeys, Inc., 60 N.C. App. 545, 299 S.E.2d 670 (1983); Moore v. Wilson, 62 N.C. App. 746, 303 S.E.2d 564 (1983); Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983); Bush v. BASF Wyandotte Corp., 64 N.C. App. 41, 306 S.E.2d 562 (1983); McMahan v. McMahan, 68 N.C. App. 777, 315 S.E.2d 536 (1984); Miller v. Kite, 69 N.C. App. 679, 318 S.E.2d 102 (1984); Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 101 F.R.D. 779 (W.D.N.C. 1984); Jellen v. Ernest Smith Ins. Agency, Inc., 72 N.C. App. 51, 323 S.E.2d 401 (1984); Stokes v. Wilson & Redding Law Firm, 72 N.C. App. 107, 323 S.E.2d 470 (1984); DeArmon v. B. Mears Corp., 312 N.C. 749, 325 S.E.2d 223 (1985); Thompson v. National Grange Mut. Ins. Co., 620 F. Supp. 644 (W.D.N.C. 1985); Fraser v. Littlejohn, 96 N.C. App. 377, 386 S.E.2d 230 (1989); Med-Therapy Rehabilitation Servs., Inc. v. Diversicare Corp. of Am., 768 F. Supp. 513 (W.D.N.C. 1991); Capstar Corp. v. Pristine Indus., Inc., 768 F. Supp. 518 (W.D.N.C. 1991); Cox v. Hozelock, Ltd., 105 N.C. App. 52, 411 S.E.2d 640 (1992); Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991); Climatological Consulting

Corp. v. Trattner, 105 N.C. App. 669, 414 S.E.2d 382 (1992); Glaxo, Inc. v. Genpharm Pharmaceuticals, Inc., 796 F. Supp. 872 (E.D.N.C. 1992); Tutterrow v. Leach, 107 N.C. App. 703, 421 S.E.2d 816 (1992); Centura Bank v. Pee Dee Express, Inc., 119 N.C. App. 210, 458 S.E.2d 15 (1995); Better Bus. Forms, Inc. v. Davis, 120 N.C. App. 498, 462 S.E.2d 832 (1995); Boon Partners v. Advanced Fin. Concepts, Inc., 917 F. Supp. 392 (E.D.N.C. 1996); Honeycutt v. Tour Carriage, Inc., 997 F. Supp. 694 (W.D.N.C. 1996); Eluhu v. Rosenhaus, 159 N.C. App. 355, 583 S.E.2d 707, 2003 N.C. App. LEXIS 1525 (2003); Setra of N. Am. v. Motorcoach Fin., Inc., 367 F. Supp. 2d 853, 2005 U.S. Dist. LEXIS 7935 (M.D.N.C. 2005); Pfizer Inc. v. Synthon Holding, B.V., 386 F. Supp. 2d 666, 2005 U.S. Dist. LEXIS 24544 (M.D.N.C. Sept. 7, 2005).

Cited in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972); Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972); Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974); Guthrie v. Ray, 31 N.C. App. 142, 228 S.E.2d 471 (1976); Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978); Broughton v. DuMont, 43 N.C. App. 512, 259 S.E.2d 361 (1979); Harrelson Rubber Co. v. Layne, 69 N.C. App. 577, 317 S.E.2d 737 (1984); Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986); Gualtieri v. Burleson, 84 N.C. App. 650, 353 S.E.2d 652 (1987); Glynn v. Stoneville Furn. Co., 85 N.C. App. 166, 354 S.E.2d 552 (1987); North Carolina ex rel. Long v. Alexander & Alexander Servs., Inc., 685 F. Supp. 114 (E.D.N.C. 1988); Allied Mechanical Contractors v. Industrial Relations Council, 685 F. Supp. 552 (W.D.N.C. 1988); Richmar Dev., Inc. v. Midland Doherty Servs., Ltd., 717 F. Supp. 1107 (W.D.N.C. 1989); Buck v. Heavner, 93 N.C. App. 142, 377 S.E.2d 75 (1989); Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989); Hargett v. Reed, 95 N.C. App. 292, 382 S.E.2d 791 (1989); Copley Triangle Assocs. v. Apparel Am., Inc., 96 N.C. App. 263, 385 S.E.2d 201 (1989); Liberty Fin. Co. v. North Augusta Computer Store, Inc., 100 N.C. App. 279, 395 S.E.2d 709 (1990); Deadwyler v. Volkswagen of Am., Inc., 134 F.R.D. 128 (W.D.N.C. 1991); Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993); Broussard v. Meineke Disct. Muffler Shops, Inc., 945 F. Supp. 901 (W.D.N.C. 1996); Burlington Indus. v. Yanoor Corp., 178 F. Supp. 2d 562, 2001 U.S. Dist. LEXIS 23842 (M.D.N.C. 2001); United States v. Coleman, — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 23682 (E.D.N.C. July 26, 2001); Butler v. Butler, 152 N.C. App. 74, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002); Sawyers v. Farm Bureau Ins. Co. of N.C., Inc., 170 N.C. App. 17, 612 S.E.2d 184, 2005 N.C. App. LEXIS 893 (2005); Deer Corp. v. Carter, 177 N.C. App. 314, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006); Simpson v. Snyder's of Hanover, Inc., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 42091 (W.D.N.C. June 12, 2006).

II. DUE PROCESS CONSIDERATIONS.

A. In General.

This section should be liberally construed in favor of finding personal jurisdiction, subject to due process limitations. Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973); Dillon v. Numismatic Funding Corp., 29 N.C. App. 513, 225 S.E.2d 137 (1976), rev'd on other grounds, 291 N.C. 674, 231 S.E.2d 629 (1977); Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978); Modern Globe, Inc. v. Spellman, 45 N.C. App. 618, 263 S.E.2d 859, cert. denied, 300 N.C. 373, 267 S.E.2d 677 (1980); Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc., 46 N.C. App. 235, 264 S.E.2d 753 (1980); Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521, cert. denied, 303 N.C. 314, 281 S.E.2d 651 (1981); Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 289 S.E.2d 607, cert. denied, 306 N.C. 385, 294 S.E.2d 209 (1982); DeSoto Trail, Inc. v. Covington Diesel, Inc., 77 N.C. App. 637, 335 S.E.2d 794 (1985); Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985); Monroe Hdwe. Co. v. Robinson, 621 F. Supp. 1166 (W.D.N.C. 1985).

This statute is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

Provisions of G.S. 1-75.4 are to be given a liberal construction, making available to the North Carolina courts the full jurisdictional powers permissible under federal due process. Ward v. Wavy Broad., LLC, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 3097 (M.D.N.C. Feb. 25, 2003).

Analysis Under This Section and Federal Due Process Clause. — Analysis under the long-arm statute and the federal due process clause is one and the same since the statute extends to the outer bound of due process. General Latex & Chem. Corp. v. Phoenix Medical Technology, Inc., 765 F. Supp. 1246 (W.D.N.C. 1991).

North Carolina's long-arm statute has been construed as reaching as far as the due process limits of the United States Constitution will allow it. Waller v. Butkovich, 584 F. Supp. 909 (M.D.N.C. 1984).

This section is to be construed liberally in favor of finding jurisdiction, and makes available to North Carolina courts the full jurisdictional powers permissible under federal due process. Wilson v. Wilson-Cook Medical, Inc., 720 F. Supp. 533 (M.D.N.C. 1989).

Several North Carolina courts have deemphasized the determination of whether minimum contacts exist. The North Carolina long-arm statute extends to the outer bounds of due process, making analysis under the statute and the due process clause one and the same. Thus, given the liberal construction of the North Carolina long-arm statute, the prevailing law in North Carolina presumes the existence of in personam jurisdiction. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

North Carolina's long-arm statute, G.S. 1-75.4(1)(d), has been interpreted as extending to the full extent permitted by the Constitution. Burleson v. Toback, 391 F. Supp. 2d 401, 2005 U.S. Dist. LEXIS 29822 (M.D.N.C. Sept. 30, 2005).

But Courts Cannot Expand Jurisdiction Beyond Due Process Limitations. — While the provisions of the "long-arm" statute are to be liberally construed in favor of finding personal jurisdiction, a court cannot expand the permissible scope of state jurisdiction over nonresident parties beyond due process limitations. First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985); Monroe Hdwe. Co. v. Robinson, 621 F. Supp. 1166 (W.D.N.C. 1985).

Regardless of the statutory ground, a court cannot expand the permissible scope of state jurisdiction over nonresident parties beyond due process limitations. There must be a showing that the defendant had sufficient minimum contacts with North Carolina. FDIC v. Kerr, 637 F. Supp. 828 (W.D.N.C. 1986).

Trial court properly dismissed machine purchaser's complaint against foreign corporation for failure to appropriately allege that North Carolina had personal jurisdiction over the corporation; while it was true that jurisdiction under the long-arm statute, G.S. 1-75.4(5)(e), existed because the foreign corporation shipped its machine to North Carolina via common carrier, due process considerations required that the foreign corporation have minimum contacts with the forum, and such minimum contacts were not shown. Charter Med., Ltd. v. Zigmed, Inc., 173 N.C. App. 213, 617 S.E.2d 352, 2005 N.C. App. LEXIS 1917 (2005).

Legislature Intended Full Jurisdictional Powers Permissible Under Federal Due Process. — From the enactment of subdivision (1)d of this section, it is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979); Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Subdivision (1)d of this section represents a legislative codification permitting the assertion of in personam jurisdiction over nonresident defendants to the full extent allowed by due process. Southern Case, Inc. v. Management Recruiters Int'l, Inc., 544 F. Supp. 403 (E.D.N.C. 1982).

This section was designed to extend jurisdiction over nonresident defendants to the full extent permitted by the due process clause of U.S. Const., Amend. XIV. Pope v. Pope, 38 N.C. App. 328, 248 S.E.2d 260 (1978).

Subdivision (1)d of this section grants the courts of North Carolina the opportunity to exercise jurisdiction over a foreign corporation to the extent allowed by due process. H.V. Allen Co. v. Quip-Matic, Inc., 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980).

The legislature, by way of subdivision (8) of this section and former G.S. 55-33, has expressed a substantial interest in bringing nonresident directors of corporations before the North Carolina courts, and has given to the courts the fullest jurisdiction allowable under the Constitution. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

This statute is a legislative attempt to assert in personam jurisdiction over nonresident defendants to the full extent permitted by the due process clause of the United States Constitution. Thus it is possible that a defendant's contact with this forum may be sufficient to satisfy the requirements of this section, but yet be insufficient to satisfy the requirements of due process. Lane v. WSM, Inc., 575 F. Supp. 1246 (W.D.N.C. 1983).

While the due process mandates of fairness apply with equal force to actions in rem and quasi in rem as well as to action in personam, it is also clear that the General Assembly in enacting G.S. 1-75.8(3) intended to confer on the North Carolina courts the full jurisdictional powers permissible under federal due process as they relate to in rem and quasi in rem jurisdiction for divorce and annulment proceedings of North Carolina residents. Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670, cert. denied, 312 N.C. 621, 323 S.E.2d 921 (1984).

By enacting subdivision (4) of this section, the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process. American Rockwool, Inc. v. Owens-

Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

The provisions of this section authorize the exercise of in personam jurisdiction over nonresident defendants to the fullest extent, tempered only by the due process clause of U.S. Const., Amend. XIV. Brookshire v. Brookshire, 89 N.C. App. 48, 365 S.E.2d 307 (1988).

The courts of this state construe this section as conveying personal jurisdiction upon the courts to the full extent allowed by the due process clause of the United States Constitution. Farbman v. Esskay Mfg. Co., 676 F. Supp. 666 (W.D.N.C. 1987).

Due process, and not language of statute, is ultimate test of "long-arm" jurisdiction over a nonresident. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974); Dillon v. Numismatic Funding Corp., 29 N.C. App. 513, 225 S.E.2d 137 (1976), rev'd on other grounds, 291 N.C. 674, 231 S.E.2d 629 (1977); Modern Globe, Inc. v. Spellman, 45 N.C. App. 618, 263 S.E.2d 859, cert. denied, 300 N.C. 373, 267 S.E.2d 677 (1980); Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 348 S.E.2d 782 (1986).

The crucial inquiry and the ultimate determinative factor in assessing whether jurisdiction may be asserted under the "long-arm" statute is due process. Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

Since the requisite statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert in personam jurisdiction over a defendant is whether the assertion thereof comports with due process. Kaplan School Supply Corp. v. Henry Wurst, Inc., 56 N.C. App. 567, 289 S.E.2d 607, cert. denied, 306 N.C. 385, 294 S.E.2d 209 (1982).

Whether the exercise of jurisdiction pursuant to the long-arm statute comports with due process is the critical inquiry. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

Once plaintiff has met requirements of this section, he must also satisfy constitutional requirement of due process by showing that defendant has sufficient minimum contacts with North Carolina to confer jurisdiction. Speizman Knitting Mach. Co. v. Terrot Strickmaschinen GmBH, 505 F. Supp. 200 (W.D.N.C. 1981); Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985).

In addition to meeting the statutory requirements, in order for a court to exercise its jurisdiction the defendant must be found to have certain minimum contacts with the State in compliance with due process requirements. Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521, cert. denied, 303 N.C. 314, 281 S.E.2d 651 (1981).

The due process requirement of "minimum contacts" applies with equal force to actions quasi in rem as it does to actions in personam. Cameron-Brown Co. v. Daves, 83 N.C. App. 281, 350 S.E.2d 111 (1986).

Consent to Jurisdiction. — Where a confirmation letter clearly stated that a recruiter's services would be performed in North Carolina and that North Carolina courts would have jurisdiction, the appellate court did not have to determine whether jurisdiction under the long-arm statute, G.S. 1-75.4(5)(d), comported with due process requirements because the out-of-state publisher consented to jurisdiction in North Carolina; as a result, the trial court properly denied the publisher's G.S. 1A-1, N.C. R. Civ. P. 12(b)(2) motion to dismiss. MRI/Sales Consultants of Asheville, Inc. v. Edwards Publ'ns, Inc., 156 N.C. App. 590, 577 S.E.2d 393, 2003 N.C. App. LEXIS 239 (2003).

B. Determining Minimum Contacts.

Due process requires that defendant have certain minimum contacts with the forum state such that maintenance of suit therein not offend "traditional notions of fair play and substantial justice." First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Forman & Zukerman v. Schupak, 31 N.C. App. 62, 228 S.E.2d 503 (1976), cert. denied and appeal dismissed, 292 N.C. 264, 233 S.E.2d 391, appeal dismissed, 434 U.S. 804, 98 S. Ct. 32, 54 L. Ed. 2d 61 (1977); Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976); Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978); United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979); Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979); Modern Globe, Inc. v. Spellman, 45 N.C. App. 618, 263 S.E.2d 859, cert. denied, 300 N.C. 373, 267 S.E.2d 677 (1980); Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980); DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd, 312 N.C. 749, 325 S.E.2d 223 (1985); Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

The North Carolina courts carefully follow the "minimum contacts" standards set in International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Unless a nonresident defendant has had "minimum contacts" with the forum state, that state may not exercise jurisdiction over him.

Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974); H.V. Allen Co. v. Quip-Matic, Inc., 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980).

The North Carolina Supreme Court has simplified the task of determining whether there is a long-arm statute authorizing the assertion of personal jurisdiction by holding that subdivision (1)d of this section applies to any defendant who meets the minimal contact requirements of International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); Western Steer — Mom 'N' Pop's, Inc. v. FMT Invs., Inc., 578 F. Supp. 260 (W.D.N.C. 1984).

Due process requires only that in order to subject a defendant to a judgment in personam, if he is not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp., 70 N.C. App. 737, 321 S.E.2d 28 (1984).

The exercise of statutory jurisdiction must satisfy elementary constitutional due process, as embodied in the familiar "minimum contacts" test. Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp., 70 N.C. App. 737, 321 S.E.2d 28 (1984).

Although the minimum contacts analysis has been consistently applied to cases in which nonresident defendants were served with process outside this State, such minimum contacts analysis is not necessary when the defendant is personally served while present within this State. Lockert v. Breedlove, 321 N.C. 66, 361 S.E.2d 581 (1987).

The existence of minimum contacts is a question of fact. Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979); Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc., 46 N.C. App. 235, 264 S.E.2d 753 (1980); Speizman Knitting Mach. Co. v. Terrot Strickmaschinen GmBH, 505 F. Supp. 200 (W.D.N.C. 1981).

Determination of whether minimum contacts are present cannot be effected by using a mechanical formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980); Speizman Knitting Mach. Co. v. Terrot Strickmaschinen GmBH, 505 F. Supp. 200 (W.D.N.C. 1981); DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

The minimum contacts test is not mechanical, but requires consideration of the facts of each case. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

But Depends on the Particular Facts. — Whether the type of defendant's activity conducted within the State is adequate to satisfy the requirements of due process depends upon the facts of the particular case. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

The presence of minimum contacts is not to be determined by automatic application of per se rules; rather, the existence of minimum contacts depends upon the particular facts of each case. United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979); Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980); H.V. Allen Co. v. Quip-Matic, Inc., 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980).

The minimum contacts test is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present. Southern Case, Inc. v. Management Recruiters Int'l, Inc., 544 F. Supp. 403 (E.D.N.C. 1982).

And Varies with the Quality and Nature of Defendant's Activities. — Application of the minimum contracts theory varies with the quality and nature of a particular defendant's activities. Southern Case, Inc. v. Management Recruiters Int'l, Inc., 544 F. Supp. 403 (E.D.N.C. 1982).

Fairness to Both Plaintiff and Defendant Must Be Considered. — In determining whether subjection of a corporation to in personam jurisdiction in a foreign forum offends traditional notions of fair play and substantial justice, the interests of and fairness to both the plaintiff and the defendant must be considered and weighed. Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977).

Where the conduct giving rise to the cause of action against nonresident defendant occurred in North Carolina, material evidence and crucial witnesses are more likely to be located within this state. Further, the inconvenience to a corporate defendant in being forced to defend suit away from home is not overwhelming in today's mobile society. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

What contacts with the forum state constitute minimum contacts for jurisdictional purposes is ultimately a fairness determination: The defendant's conduct and connection with the forum state must be such that it reasonably anticipates being haled into court there. J.M. Thompson Co. v. Doral Mfg. Co., 72 N.C. App.

419, 324 S.E.2d 909, cert. denied, 313 N.C. 602, 330 S.E.2d 611 (1985).

Factors in Determining Minimum Contacts and Fairness. — There are a number of factors, some essential and others only having some weight, to be considered in determining whether the tests of "minimum contacts" and "fair play" have been met. The essential requirements are: (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) There must be some act by which the defendant purposely avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its law; and (3) The legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement. Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977).

The criteria for analyzing whether minimum contacts are present include: the quantity of the contacts, the nature and quality of the contacts, the source and connection of the cause of action with those contacts, the interest of the forum state and convenience. Fieldcrest Mills, Inc. v. Mohasco Corp., 442 F. Supp. 424 (M.D.N.C. 1977); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

Other factors to be considered in determining whether minimum contacts exist are: (1) Any legitimate interest the forum state has in protecting its residents with respect to the activities and contacts of the defendant; (2) An estimate of the inconvenience to the defendant in being forced to defend a suit away from his home; (3) The location of crucial witnesses and material evidence; and (4) The existence of a contact which has a substantial connection with the forum state. Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

The United States Supreme Court has recognized the types of activities which can constitute sufficient contacts that would allow a state to exercise jurisdiction. First, a defendant may avail itself of the privileges and benefits of a state's laws; second, it may solicit business there either through sales persons or through advertising reasonably calculated to reach a particular state; and finally, a defendant may indirectly, through others, serve or seek to serve the state's market. The receipt of financial benefits from a collateral relation to the forum state will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that state. These considerations provide the paradigm through which any decision concerning a state's exercise of long-arm jurisdiction must be made. Southern Case, Inc. v. Management Recruiters Int'l, Inc., 544 F. Supp. 403 (E.D.N.C. 1982).

The criteria for determining whether sufficient minimum contacts exist include: the quantity, quality and nature of the contacts, the source and connection of the cause of action with the contacts and with the forum state; the interest of the forum state with respect to the activities and contacts of the defendant; an estimate of the inconvenience to the defendant in being forced to defend suit away from home; and the location of crucial witnesses and material evidence. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

The primary factors utilized in analyzing whether minimum contacts are present are the quantity of the contacts, the nature and quality of the contacts, and the source and connection of the cause of action with those contacts and two others, interest of the forum state and convenience. Western Steer — Mom 'N' Pop's, Inc. v. FMT Invs., Inc., 578 F. Supp. 260 (W.D.N.C. 1984).

The existence of minimum contacts cannot be ascertained by mechanical rules, but rather by consideration of the facts of each case in light of traditional notions of fair play and justice. The factors to be considered are (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties. Marion v. Long, 72 N.C. App. 585, 325 S.E.2d 300, cert. denied and appeal dismissed, 313 N.C. 604, 330 S.E.2d 612 (1985).

In light of modern business practices, the quantity, or even the absence, of actual physical contacts with the forum state merely constitutes a factor to be considered and is not of controlling weight in determining whether minimum contacts exists. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

The criteria for determining whether minimum contacts exists include: (1) The quantity of contacts, (2) the nature and quality of contacts, (3) the source and connection of the cause of action with those contacts, (4) the interests of the forum state and convenience, and (5) whether the defendant invoked benefits and protections of law of the forum state. Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985); FDIC v. Kerr, 637 F. Supp. 828 (W.D.N.C. 1986).

Certain primary and secondary factors are used in determining minimum contacts questions. These include three primary factors: (1) Quantity of contacts, (2) nature and quality of contacts, and (3) the source and connection of the cause of action with these contacts; and two secondary factors, interests of the forum state and convenience to the parties. No single factor controls, but they all must be weighed in light of fundamental fairness and the circumstances of the case. B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

Since the legislature designed the long-arm statute to extend personal jurisdiction to the limits permitted by due process, the two-step inquiry merges into one question: whether the exercise of jurisdiction comports with due process. Regent Lighting Corp. v. Galaxy Elec. Mfg., Inc, 933 F. Supp. 507 (M.D.N.C. 1996).

Contacts with a state should be viewed all together, not in isolation. Superguide Corp. v. Kegan, 987 F. Supp. 481 (W.D.N.C. 1997).

Minimum contacts do not arise ipso facto from actions of a defendant having an effect in the forum state. There must be some act or acts by which the defendant purposely availed himself of the privilege of doing business there, such that he or she should reasonably anticipate being haled into court there. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

Mere fortuitous contact with the forum state in the course of business dealings will not suffice to meet the minimum contacts test. There must be some act or acts by which the defendant has purposefully availed itself of the privilege of doing business there. B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

Lack of action by defendant in the jurisdiction is not fatal to the exercise of long-arm jurisdiction. Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 348 S.E.2d 782 (1986).

Defendant Must Have Invoked Benefits and Protections of Law of Forum. — While application of the minimum contacts standard will vary with the quality and nature of defendant's activity, it is essential in each case that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979); Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979); Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc., 46 N.C. App. 235, 264 S.E.2d 753 (1980); Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980); H.V. Allen Co. v. Quip-Matic, Inc., 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980); Speizman Knitting Mach. Co. v. Terrot Strickmaschinen GmBH, 505 F. Supp. 200 (W.D.N.C. 1981).

In cases of contract disputes, the touchstone in ascertaining the strength of the connection between the cause of action and the defendant's contacts is whether the cause arises out of attempts by the defendant to benefit from the laws of the forum state by entering the market in the forum state. Fieldcrest Mills, Inc. v. Mohasco Corp., 442 F. Supp. 424 (M.D.N.C. 1977); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

With regard to determining the existence of minimum contacts, it is essential that defendant purposely act to avail himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; additionally, defendant's contacts with the forum state must be such that he or she should reasonably anticipate being haled into court there. Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

Where foreign corporation obviously uses, benefits from or can easily use the laws of North Carolina, jurisdiction will lie. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

When the defendant has "purposefully directed" his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities, then minimum contacts are more likely to be found. Watson v. Graf Bae Farm, Inc., 99 N.C. App. 210, 392 S.E.2d 651 (1990).

Single Contract May Be Sufficient Minimal Contact. — A single contract executed in North Carolina or to be performed in North Carolina may be a sufficient minimal contact in this State upon which to base in personam jurisdiction, with respect to the parties so contracting. First-Citizens' Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973), overruled on other grounds, United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979); Chadbourn, Inc. v. Katz, 21 N.C. App. 284, 204 S.E.2d 201, aff'd, 285 N.C. 700, 208 S.E.2d 676 (1974); Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985); Monroe Hdwe. Co. v. Robinson, 621 F. Supp. 1166 (W.D.N.C. 1985).

A single contract is sufficient under subdivision (5)c of this section to satisfy the minimal contacts requirement. Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977).

It is sufficient for the purpose of due process if the suit is based on a contract which has substantial connection with the forum state. Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977); Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978).

If a contract is to be actually performed in North Carolina and has a substantial connection with this State, jurisdiction will lie. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974); Phoenix Am. Corp. v. Brissey, 46 N.C.

App. 527, 265 S.E.2d 476 (1980); Monroe Hdwe. Co. v. Robinson, 621 F. Supp. 1166 (W.D.N.C. 1985).

A single contract may constitutionally support jurisdiction over a nonresident corporate defendant, especially when the defendant also does substantial other business in the forum state. B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

A single contract made in North Carolina can be sufficient to subject a nonresident defendant to suit here. Brickman v. Codella, 83 N.C. App. 377, 350 S.E.2d 164 (1986).

A single contract executed in North Carolina or performed in North Carolina may be a sufficient contact upon which to base personal jurisdiction. Regent Lighting Corp. v. Galaxy Elec. Mfg., Inc, 933 F. Supp. 507 (M.D.N.C. 1996).

But a Single Noncontractual Contact Is Not Sufficient. — If there is only one contact with North Carolina and such contact does not involve a contract to be performed here, there is no jurisdiction. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Jurisdiction over Corporate Officers. — Allegations that corporate officers were the alter ego of the nonresident corporation were deemed true and controlling in determining if the court had personal jurisdiction over the officers under this section where such allegations in a fraud action were uncontested. Inspirational Network, Inc. v. Combs, 131 N.C. App. 231, 506 S.E.2d 754 (1998).

If a foreign company's activity is regular, or systematic, or continuous, minimum contacts exist. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

The court properly exercised personal jurisdiction over defendant where the defendant owned real property in North Carolina, was engaged in at least one substantial and ongoing profit-making venture in the State through the leasing of that property, and had obtained authority to do business and maintained a registered agent in North Carolina. Such contacts with the state satisfied the requirements of due process, in particular the higher threshold of "general jurisdiction," by their "continuous and systematic" nature. Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 532 S.E.2d 215 (2000).

Personal jurisdiction existed because the German company maintained continuous and systematic presence in North Carolina where its managing director was located in North Carolina and the company negotiated and signed agreements in North Carolina. Jaeger v. Applied Analytical Indus. Deutschland GMBH, 159 N.C. App. 167, 582 S.E.2d 640, 2003 N.C. App. LEXIS 1416 (2003).

If a foreign corporation has never had any interest in North Carolina or contacts here, even if it can reasonably be expected that its product will be used or consumed here, to grant jurisdiction for that reason would be unconstitutional. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Principal May Be Subjected to "Long-Arm" Jurisdiction for Acts of Agent. — A principal may be subjected to "long-arm" jurisdiction on account of the acts of his agent within the course and scope of his authority, since this is reasonable and just according to our traditional conception of fair play and substantial justice. Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974); DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

A nonresident owner-principal is liable for his agent's acts, even though the principal has never entered this State. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984), rev'd on other grounds, 312 N.C. 749, 325 S.E.2d 223 (1985).

Jurisdiction over Principal Shareholder Conducting Business as Agent for Corporation. — Where defendant is a principal shareholder of a corporation and conducts business in North Carolina as principal agent for the corporation, then his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him. United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979).

Test for Nonresidents Who Allegedly Abused High Governmental Powers. — For those who have allegedly abused high governmental powers, the test is whether they reasonably could have anticipated that their activity would have consequences in the forum state. Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974).

As to due process requirements for jurisdiction over nonresident directors of domestic corporations in shareholders' derivative actions, see Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

Jurisdiction Held to Exist Over Former Employee. — Where a copyright holder sued its former employee, alleging that the former employee worked for the copyright holder for approximately two months in its Charlotte, North Carolina office, and stole the software code at issue from its Charlotte office, the court found that exercising personal jurisdiction over the former employee comported with due process. Innovative Multimedia Solutions v. Sulit, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 31257 (W.D.N.C. May 16, 2006).

G.S. 1-75.4(6) provided a basis to exercise long-arm jurisdiction over an insurance broker who chose to assume an interstate obligation to provide insurance coverage for North Carolina property, represented that it had fulfilled that obligation by providing coverage, and was paid for undertaking that obligation. The broker had sufficient contacts with North Carolina and availed itself of North Carolina's laws. Wells Fargo Bank, N.A. v. Affiliated FM Ins. Co., — N.C. App. —, 666 S.E.2d 774, 2008 N.C. App. LEXIS 1766 (2008).

III. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT MET.

Internet Contacts Constitute Substantial Activity. — Where defendant had a website through which products were offered, and the only alleged contacts were via the internet, the internet contacts, viewed together, amounted to substantial activity within the State so that there was a nexus between the contacts and the source of lawsuit. Superguide Corp. v. Kegan, 987 F. Supp. 481 (W.D.N.C. 1997).

Catalog Solicitation and Sales. — Where defendant mailed at least 1,937 of its sales catalogs to North Carolina residents, sold products to 239 residents, generating over $12,000 in sales, and could rely on North Carolina courts to enforce those sales contracts, minimum contact requirements were met and due process satisfied. Fran's Pecans, Inc. v. Greene, 134 N.C. App. 110, 516 S.E.2d 647 (1999).

Breach of Contract for Sale of Real Estate. — Where the record showed that defendant entered into a contract to purchase real property situated in North Carolina, formed a corporation in this State to receive the title, and thus invoked the benefits and protection of its laws, and the suit in question arose out of an alleged breach of that contract, assumption of in personam jurisdiction over defendant by the courts of this State did not offend traditional notions of fair play and substantial justice within the contemplation of the due process clause of U.S. Const., Amend. XIV, and defendant's contacts with the State were sufficient to satisfy due process requirements. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974).

Promise to Pay Debt of Another. — Where nonresident defendant promised to pay the debt of another, which debt was owed to North Carolina creditors, such promise was a contract to be performed in North Carolina and was sufficient minimal contact upon which this State could assert personal jurisdiction over the defendant. First-Citizens Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973).

A promise to pay the debt of another which is owed to a North Carolina creditor is a contract to be performed in North Carolina. Brickman v. Codella, 83 N.C. App. 377, 350 S.E.2d 164 (1986).

Guaranty of Corporate Obligations. — While the mere guaranty by a nonresident of a debt owed to a North Carolina corporation does not per se constitute a sufficient minimal contact upon which this State may assert personal jurisdiction, the circumstances surrounding defendant's guaranty of the obligations of the out-of-state corporation of which he was president, incident to a contract to sell and lease back a houseboat, were such that his contacts with North Carolina justified the assertion of jurisdiction. Brickman v. Codella, 83 N.C. App. 377, 350 S.E.2d 164 (1986).

Defendant purposely entered into a contract with plaintiff promising to ship its product to North Carolina through a carrier, where plaintiff's president called defendant from North Carolina to make the offer, and defendant mailed the contract to North Carolina, accepted payment mailed from North Carolina, and mailed a confirmation of the contract to North Carolina. These acts manifested a willingness by defendant to conduct business in North Carolina. Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

An out-of-state supplier's promise to deliver equipment to a carrier for delivery to North Carolina, and a North Carolina contractor's execution of the relevant contract in North Carolina, along with assumption of the risk of loss once the equipment was delivered to the carrier and assumption of the cost of shipment, arising from the supplier's advertisement in a nationally-circulated magazine, established minimum contacts for the purpose of the exercise of long-arm jurisdiction over the supplier. Hanes Constr. Co. v. Hotmix & Bituminous Equip. Co., 146 N.C. App. 24, 552 S.E.2d 177, 2001 N.C. App. LEXIS 786 (2001).

The sale and use of out-of-state defendant's products in North Carolina was sufficient to constitute the minimum contacts required by the due process clause, so as to permit the exercise of in personam jurisdiction over defendant. Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986).

The flow of a large amount of goods from North Carolina to a nonresident defendant and the anticipated flow of money to North Carolina were more than sufficient to establish the minimum contacts requirements of the long-arm statute. General Latex & Chem. Corp. v. Phoenix Medical Technology, Inc., 765 F. Supp. 1246 (W.D.N.C. 1991).

Divorce Action Involving Couple with No Permanent Residence. — The trial court properly exercised jurisdiction, pursuant to subsection (12), over the defendant husband who lived in Bangkok, Thailand, where the parties were married in North Carolina and the plaintiff wife "continued to reside" in North Carolina although the couple never established a permanent home there, and where the action arose under Chapter 50, "Divorce and Alimony," and sought resolution solely of issues pertaining to the dissolution of their marriage. The minimum contacts requirement was further satisfied by the fact that the parties administered their important legal, civic, personal, and financial affairs primarily from North Carolina, which clearly served as their headquarters, since they failed to establish permanent residence anywhere else. Sherlock v. Sherlock, 143 N.C. App. 300, 545 S.E.2d 757, 2001 N.C. App. LEXIS 262 (2001).

Action for Alimony Based on Abandonment. — The trial court obtained personal jurisdiction over the nonresident defendant in an action for alimony based on abandonment and for child custody and support where defendant was served with process by registered mail, since an action for alimony on the ground of abandonment was a claim of "injury to person or property" under the long-arm statute, and defendant's acts of living with and abandoning plaintiff-wife in this State met the "minimum contacts" test. Brown v. Brown, 47 N.C. App. 323, 267 S.E.2d 345 (1980), decided prior to enactment of subdivision (12).

Support Payment Arrearages. — Where the parties entered into a separation agreement in North Carolina while both parties were citizens and residents of this State, the agreement providing, among other things, that the defendant would pay $350.00 per month to the plaintiff for support, the parties were divorced in North Carolina, and some time after the separation agreement was entered into, defendant moved to Florida and continued to reside there since that date, the court had in personam jurisdiction over the defendant under subdivision (5)c of this section in an action for arrearages. Pope v. Pope, 38 N.C. App. 328, 248 S.E.2d 260 (1978), decided prior to enactment of subdivision (12).

Organ Procurement Organization. — Maintenance of action in North Carolina against out of state organ procurement organization would not offend traditional notions of fair play and substantial justice, where that organization was engaged in sending organs to North Carolina on a regular basis for nearly ten years, directed its activities at North Carolina by its membership in organ procurement network and participation in nationwide electronic database, and harvested, packaged and shipped kidney to North Carolina. Slaughter v. Life Connection, 907 F. Supp. 929 (M.D.N.C. 1995).

Production of Church Directories. — The courts of this State had in personam jurisdiction over defendant, an Illinois corporation, where defendant agreed to purchase the assets and take over the liabilities of the church pictorial directories division of a certain North Carolina corporation, which corporation had contracted with plaintiff, another North Carolina corporation, engaged in the printing business, for the production of certain church directories, and defendant agreed that it would pay plaintiff for its work in printing such directories; such conduct fell within that covered by subdivision (5)a of this section. Other conduct by defendant, including the writing of five memoranda on defendant's stationery requesting that plaintiff ship books to churches in five different states, also gave the courts of this State in personam jurisdiction over defendant. Moreover, defendant had sufficient minimum contacts with North Carolina so that the exercise of in personam jurisdiction would not violate due process of law. Delprinting Corp. v. C.P.D. Corp., 49 N.C. App. 449, 271 S.E.2d 548 (1980).

Contract Actions. — District court sitting in North Carolina had jurisdiction over contract action initiated by a seller, a North Carolina corporation, against a buyer, a Tennessee corporation, because the parties had an ongoing relationship for two years, the buyer had visited North Carolina and communicated with the seller in North Carolina during the course of the contract, and the contract contained a provision that North Carolina law applied to any dispute. Z. Bavelloni U.S.A., Inc. v. Marble Showroom, Inc., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 25243 (M.D.N.C. Oct. 31, 2002).

Where a builder's customers lived in North Carolina, executed the contract in North Carolina, and conducted negotiations and discussions in the state, North Carolina could exercise personal jurisdiction over the builder without violating due process. Carson v. Brodin, 160 N.C. App. 366, 585 S.E.2d 491, 2003 N.C. App. LEXIS 1801 (2003).

Franchise Contract. — Where defendant agreed in a franchise contract to pay plaintiff a 20-cent royalty and service fee on every pound of materials essential to a manufacturing process, in exchange for plaintiff's development of the process and for technical services plaintiff would render to defendant, jurisdiction over defendant was conferred under subdivisions (5)a and b of this section in an action arising from defendant's failure to pay the promised royalties. Harrelson Rubber Co. v. Dixie Tire & Fuels, Inc., 62 N.C. App. 450, 302 S.E.2d 919 (1983).

In action for alleged breach of franchise agreement which specifically stated that it was made and executed in North Carolina and was to be governed by North Carolina law, where defendant franchisee had not only agreed to pay for services to be performed in North Carolina by franchisor under an ongoing ten-year contract, but such services in fact were provided, and where defendant personally appeared in North Carolina to take advantage of training provided pursuant to the franchise agreement, personal jurisdiction existed over out-of-state defendant, who had sufficient minimum contacts with North Carolina to meet the mandates of due process; fact that plaintiff was the assignee of the franchisor and was a Pennsylvania corporation with no office in North Carolina would not cause North Carolina to lose its power to entertain litigation over the franchise agreement. Wiener King Sys. v. Brooks, 628 F. Supp. 843 (W.D.N.C. 1986).

Defendants' contacts with this state were not so isolated or attenuated that an exercise of personal jurisdiction would offend due process, where they entered into franchise agreements with North Carolina corporation, which required them to make payments to plaintiff in this state, and defendants made purchases of equipment and other items shipped to them from this state. Hardee's Food Sys. v. Beardmore, 169 F.R.D. 311 (E.D.N.C. 1996).

Manufacturing Contract. — In an action to recover a deposit paid pursuant to a manufacturing contract, jurisdiction existed over defendant, a foreign corporation, where plaintiff, a domestic corporation, had contracted with it to manufacture products using components supplied by plaintiff, and it was contemplated that some of the products would be sold in North Carolina. Styleco, Inc. v. Stoutco, Inc., 62 N.C. App. 525, 302 S.E.2d 888, cert. denied, 309 N.C. 825, 310 S.E.2d 358 (1983).

Nonresident defendant, a clothing distributor, who made an offer to North Carolina manufacturer for specially manufactured shirts, the contract to be substantially performed in this State, had sufficient minimum contacts with this State to justify the exercise of personal jurisdiction in an action on the contract brought by plaintiff manufacturer. Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 348 S.E.2d 782 (1986).

Settlement Agreement Negotiations. — Florida corporation's negotiations, with a company whose principal place of business is in North Carolina, over a settlement agreement and the consequences of that agreement were clear evidence that the corporation purposefully created a substantial connection to North Carolina. Regent Lighting Corp. v. Galaxy Elec. Mfg., Inc, 933 F. Supp. 507 (M.D.N.C. 1996).

Since the underlying lawsuit was based on business transactions entered into by the second partner's North Carolina business and the fraudulent statements allegedly made to the first partner by the second partner to settle the first partner's North Carolina state court lawsuit were made in North Carolina, the second partner had sufficient minimum contacts with North Carolina such that personal jurisdiction existed over the second partner. George v. McClure, 266 F. Supp. 2d 413, 2001 U.S. Dist. LEXIS 25274 (M.D.N.C. 2001).

Fraudulent Transactions. — Where although the quality of two of the defendants' contacts was insignificant, the nature and quality of their contacts and their connection with the cause of action were substantial, the interest of this forum in the litigation of lawsuits for fraudulent transactions of million dollar proportions which occurred here was substantial, and most importantly, the defendants invoked the benefits and protections of the law of this forum by their actions, both the statutory and due process requirements for asserting personal jurisdiction over defendants were satisfied. FDIC v. Kerr, 637 F. Supp. 828 (W.D.N.C. 1986).

Patent Infringement. — Defendant corporation's activity constituted "substantial activity" where agreement signed by defendant as managing general partner provided for direct infringement of plaintiff's patent in North Carolina. Plant Genetic Sys. v. Ciba Seeds, 933 F. Supp. 519 (M.D.N.C. 1996).

By selling its allegedly infringing smoke detectors through distributors in the instant district and by offering the detectors for sale on its interactive website, the competitor purposefully directed its activities to residents of North Carolina; venue was proper there under 28 U.S.C.S. § 1400(b) and G.S. 1-75.4, the patent owner's infringement action pursuant to 35 U.S.C.S. § 271(a) survived summary judgment, and its motion to transfer under 28 U.S.C.S. § 1404(a) was denied. Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc., 304 F. Supp. 2d 769, 2004 U.S. Dist. LEXIS 1593 (M.D.N.C. 2004).

Use of Trade Secrets. — The alleged use of a North Carolina corporation's trade secrets by a foreign corporation subjected it to specific jurisdiction in North Carolina, where defendant allegedly used the information to address mail to at least 50 North Carolina businesses, had entered into numerous sales contracts with the North Carolina corporation, and the contracts were substantially performed in North Carolina. Replacements, Ltd. v. MidweSterling, 133 N.C. App. 139, 515 S.E.2d 46 (1999).

Sale of Securities. — Exercise of personal jurisdiction over nonresident directors of a North Carolina corporation on a complaint relating to sales of securities by the corporation was authorized by statute and would not violate the due process clause of the United States Constitution. Pasquinelli v. Wilson, 89 N.C. App. 341, 365 S.E.2d 702 (1988).

Registering as a Mortgage Banker. — Wisconsin limited liability companies' (LLCs') actions of registering as a mortgage banker in North Carolina and accepting payments on loans it sold to a bank from the bank's North Carolina offices were sufficient to satisfy the due process requirement for minimum contacts in North Carolina. First Union Nat'l Bank of Del. v. Bankers Whsle. Mtg., LLC, 153 N.C. App. 248, 570 S.E.2d 217, 2002 N.C. App. LEXIS 1129 (2002).

G.S. 1-75.4(6)(a) can provide a basis for asserting long-arm jurisdiction over an insurance broker. Wells Fargo Bank, N.A. v. Affiliated FM Ins. Co., — N.C. App. —, 666 S.E.2d 774, 2008 N.C. App. LEXIS 1766 (2008).

Where defendant salesman knowingly submitted allegedly fraudulent documents to his employer, located in this state, over a period of two years, causing substantial damage to the corporation, and it was clear that the alleged tort would have its damaging effect in North Carolina, simply because defendant was able to cause the injury without physically coming to this state did not defeat the jurisdiction of this state in a tort action brought by his employer. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

In a civil action in which plaintiff agricultural chemical company, with its home office in Greensboro, sought damages allegedly incurred as a result of tortious conduct by defendant salesman, its employee, who lived in Indiana and worked in sales territories in Indiana and Ohio, between 1980 and 1982, in submitting falsified customer complaints and refund requests, then converting the credits or replacement products to his own use, the court had jurisdiction under subdivision (5) of this section. Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985).

In breach of warranty action by buyer corporation domiciled in North Carolina against seller out-of-state corporation for clothing purchased in Denver, Colorado, shipped F.O.B. Denver, received by the buyer's subsidiary in North Carolina and, without being opened, shipped to Germany for resale, the court had in personam jurisdiction, both under state statute and the federal Constitution. W. Conway Owings & Assocs. v. Karman, Inc., 75 N.C. App. 559, 331 S.E.2d 279 (1985).

Formation of Partnership. — Although defendant's contacts with state were few in number, the nature and quality of contacts, his soliciting of partners here, the formation of the partnership here, defendant's receipt of monies sent to him from North Wilkesboro, and the partnership's taking out a loan for which defendant signed a guaranty agreement with a North Carolina bank, were such that due process was not offended by this state's exercising jurisdiction over him. Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

Partnership Contract. — The parties' execution of and conduct of business pursuant to a North Carolina partnership contract was sufficient for in personam jurisdiction. Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

Out-of-state defendant, as partner in an accounting firm with offices in North Carolina, had a quantity of other "systematic and continuous" contacts with North Carolina sufficient to show general jurisdiction, where defendant returned to North Carolina for yearly corporate meetings, participated in partnership management decisions as managing partner of Mobile, Alabama office, and consulted by telephone and corresponded with plaintiff in North Carolina concerning business matters on a continuous and prolonged basis; moreover, each of these circumstances also illustrated that defendant sought, obtained and exercised the privilege of conducting activities in this State. Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

Where defendant received benefits from a partnership contract and could have enforced the contract against plaintiff in North Carolina courts, personal jurisdiction was proper. Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

Participation in the drafting of a North Carolina partnership agreement and the supervision of the closing of a transaction by the partnership within this State is conduct which invokes the protection of the law of this State to such an extent that traditional notions of fair play and substantial justice are not offended by requiring the defendants to defend in this State an action growing out of the partnership. Park Ave. Partners v. Johnson, 80 N.C. App. 537, 342 S.E.2d 570, cert. denied, 317 N.C. 706, 347 S.E.2d 438 (1986).

Nonresident Driver of Truck Owned by North Carolina Resident. — North Carolina trial court had personal jurisdiction under the long-arm statute, G.S. 1-75.4(5)b, over a nonresident driver of a truck owned by a North Carolina resident, under a policy issued by a North Carolina insurer, that the driver authorized, ratified, and accepted, and the exercise of personal jurisdiction was consistent with due process requirements. N.C. Farm Bureau Mut. Ins. Co. v. Holt, 154 N.C. App. 156, 574 S.E.2d 6, 2002 N.C. App. LEXIS 1413 (2002), cert. denied, appeal dismissed, 357 N.C. 63, 579 S.E.2d 391 (2003).

West Virginia corporation whose sole business function was to process tire orders and forward them to B.F. Goodrich Co. in Ohio, and which paid a commission to the person who obtained the orders, had adequate minimum contacts with North Carolina to be sued in this state. B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986).

Attribution of Subsidiary's Contacts to

Parent Corporation. — For case holding that the business relationship between an English corporation and its Tennessee subsidiary was sufficiently analogous to a manufacturer-distributor relationship to attribute the subsidiary's contacts with this State to the parent corporation, see Fieldcrest Mills, Inc. v. Mohasco Corp., 442 F. Supp. 424 (M.D.N.C. 1977).

Presence in State by Subsidiary. — Foreign insurance company could not hold itself out to its shareholders and the public as doing business in North Carolina and, at the same time, selectively avoid process from North Carolina courts by arguing that its only presence in this State was by its subsidiary, where the subsidiary was formed for the very purpose of carrying on the business of the parent company, which had formerly been carried on by the parent in the Bahamas, and where the parent's principal officers lived and transacted business in Raleigh and nearly all of the parent's business activities were carried on in this State, albeit in the name of its subsidiary under a "consulting" agreement. FDIC v. British-American Corp., 726 F. Supp. 622 (E.D.N.C. 1989).

Piercing the Corporate Veil. — In a supplier's suit against a purchasing company, a related company, and a chief executive officer, personal jurisdiction existed over the related company because the supplier's complaint sufficiently stated a basis for a claim of piercing the corporate veil based on allegations that (1) defendants violated certain corporate laws and formalities, (2) individual defendants exercised control over the finances, policies, and business practices of both corporate defendants, and (3) assets were diverted from the purchasing company to the related company, leaving the purchasing company inadequately capitalized. Saft Am., Inc. v. Plainview Batteries, Inc., 189 N.C. App. 579, 659 S.E.2d 39, 2008 N.C. App. LEXIS 694 (2008), rev'd in part, 363 N.C. 5, 673 S.E.2d 864 (2009).

In an action for fraud concerning the sale of a defective aircraft, where, among other things, defendant, a New Jersey resident, advertised the sale of the airplane in a trade magazine which was mailed to offices of plaintiff in this state, defendant initiated and placed numerous telephone calls to plaintiff, and mailed brochures, information, specifications, and photographs of the aircraft to plaintiff in this state, plaintiff forwarded funds from a North Carolina bank in response to these solicitations and at defendant's request, and witnesses to the condition of and repairs to the aircraft and expenses incurred subsequent to defendant's delivery of the aircraft to plaintiff were all residents of North Carolina, defendant had sufficient minimum contacts with this state and maintenance of plaintiff's action did not offend traditional notions of fair play and substantial jurisdiction; therefore, the trial court had proper in personam jurisdiction over defendant. New Bern Pool & Supply Co. v. Graubart, 94 N.C. App. 619, 381 S.E.2d 156, appeal of right allowed pursuant to N.C.R.A.P. 16(b) and petition denied as to additional issues, 325 N.C. 546, 385 S.E.2d 499 (1989), aff'd, Todd, Schenck & Co. v. Outlaw, 79 N.C. 235 (1878).

In a buyer's suit against a seller and manufacturer, based on the sale of an allegedly defective motor coach, personal jurisdiction was properly exercised over the seller, a Georgia limited liability company, under G.S. 1-75.4(1)(d) because the seller made numerous telephone calls to the buyer at her North Carolina residence to negotiate and close the deal, the seller mailed the contract to the buyer at her North Carolina residence, and the buyer signed the sales contract in North Carolina. Scholl v. Sagon RV Supercenter, LLC, 249 F.R.D. 230, 2008 U.S. Dist. LEXIS 18941 (W.D.N.C. 2008).

Where defendant Georgia corporation engaged in several North Carolina business arrangements, and on three occasions entered this State and conducted relations with North Carolina businesses, defendant had sufficient minimum contacts with this State to justify the exercise of personal jurisdiction over it without violating the due process clause. ETR Corp. v. Wilson Welding Serv., Inc., 96 N.C. App. 666, 386 S.E.2d 766 (1990).

Multiple contacts by defendant Michigan corporation with North Carolina, including the physical presence of defendant's corporate officers in the State, as well as the use of the State's banking system for defendant's economic transactions, were sufficient to establish a "substantial connection" with North Carolina such that in personam jurisdiction could be exercised over defendant. Lexington Aerolina, Inc. v. Murray Aviation, Inc., 100 N.C. App. 254, 394 S.E.2d 838 (1990).

Acts by Officers of Foreign Corporation. — An allegation that officers of a Massachusetts corporation impliedly or expressly knew of false and fraudulent representations made by corporation in North Carolina was insufficient to confer jurisdiction over those officers under this section where those officers filed affidavits denying the allegation, had never travelled to North Carolina, and had no involvement in the matters complained of. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

Out-of-State Injury to Trucker Employed by Out-of-State Company. — Industrial Commission did not have jurisdiction over a workers' compensation claim arising from a tractor-trailer driver's out-of-state injury, where, although the trucking company which employed him had business contacts with North Carolina sufficiently substantial to meet minimum due process requirements, the company's principal place of business was in Indiana. Thomas v. Overland Express, Inc., 101 N.C. App. 90, 398 S.E.2d 921 (1990), discretionary review denied, 328 N.C. 576, 403 S.E.2d 522 (1991).

Out-of-state defendant's affirmative efforts to obtain and renew a CPA license from North Carolina and using the license to provide accounting services for North Carolina residents showed defendant's purposeful acts in obtaining and using the privilege of doing business in this State. Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

Technical Support and Purchases from North Carolina Company. — Where defendants contacted plaintiff in North Carolina for technical support via an 800 number, plaintiff modified software and computer programs for defendants' computer in North Carolina, and plaintiff shipped computers, forms, and computer supplies from its office in North Carolina to defendants, this section provided the statutory basis for the exercise of personal jurisdiction over the nonresident defendants. Dataflow Cos. v. Hutto, 114 N.C. App. 209, 441 S.E.2d 580 (1994).

Where the defendant admitted the existence of jurisdiction in her answer, that fact was conclusively established and could not be disputed. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

Where action arose out of the defendant's failure to honor promise to deliver cash due under contract to a North Carolina business, subdivision (5)c of this section applied and North Carolina's "long-arm statute" allowed jurisdiction. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

Issuance of Bid Bonds. — Where defendant made promises to defendant to, and did, issue bid bonds to various businesses, including plaintiff corporation, defendant was within the personal jurisdiction of the North Carolina courts. Starco, Inc. v. AMG Bonding & Ins. Servs., Inc., 124 N.C. App. 332, 477 S.E.2d 211 (1996).

Single Payment Held Statutorily, But Not Constitutionally, Sufficient. — Jurisdiction over defendants/veterinarians was found statutorily proper under subdivision (5)d of this section, since money payment was a "thing of value"; nevertheless, defendants' contacts with this state did not satisfy the constitutional minimum needed to justify the exercise of personal jurisdiction where there was no evidence that they purposely availed themselves of the privilege of conducting activities within this forum. Hiwassee Stables, Inc. v. Cunningham, 135 N.C. App. 24, 519 S.E.2d 317 (1999).

Contacts Held Sufficient. — Defendant purposely directed its contacts with North Carolina by entering into contract with lessee and availing itself of the privilege of doing business in this State. Because plaintiff's claim arose directly from defendant's contacts with North Carolina, it would not offend traditional notions of fair play and substantial justice to have defendant haled into court in North Carolina. Mony Credit Corp. v. Ultra-Funding Corp., 100 N.C. App. 646, 397 S.E.2d 757 (1990).

Canadian corporation had more than sufficient contacts with North Carolina to satisfy due process considerations, where its officers made repeated phone calls and wrote several letters to a North Carolina corporation regarding leasing services that were to be performed in North Carolina, and the two corporations entered into a guaranty agreement governed by North Carolina law. Barclays Leasing, Inc. v. National Bus. Sys., 750 F. Supp. 184 (W.D.N.C. 1990).

Contacts with out-of-state seller of trailer involved in collision with plaintiff with North Carolina were adequate to meet the due process requirements associated with the exercise of personal jurisdiction. In addition, North Carolina had an interest in adjudicating the dispute as plaintiff was a resident of the State, his alleged injuries occurred in the State, and North Carolina law governed his claims as well as the cross-claims asserted by his widow. Murphy v. Glafenhein, 110 N.C. App. 830, 431 S.E.2d 241, appeal dismissed, 335 N.C. 176, 436 S.E.2d 382 (1993).

Exercise of personal jurisdiction over defendant who made agreement with plaintiffs to build and operate a specialty hospital in Texas comported with due process where defendant established minimum contacts in North Carolina by playing an active role in the formation of North Carolina company and negotiating with plaintiffs in North Carolina. Cornerstone Orthopedic Hosp. v. Marquez, 944 F. Supp. 451 (W.D.N.C. 1996).

In a support enforcement action, the trial court properly concluded that the exercise of personal jurisdiction over the ex-husband and father complied with both the long-arm statute and due process because the father's activity of engaging in the real estate business in North Carolina, which the trial court's findings showed was systematic and continuous, was sufficient to support the conclusion that he purposefully availed himself of the privilege of conducting activities within North Carolina, thus invoking the benefits and protections of its laws and could therefore have reasonably anticipated being haled into court in North Carolina. Lang v. Lang, 157 N.C. App. 703, 579 S.E.2d 919, 2003 N.C. App. LEXIS 947 (2003).

Because a doctor, a citizen and resident of

Alabama, owned a medical practice doing business in North Carolina, G.S. 1-75.4(4)(a) applied to confer jurisdiction over the doctor in a suit alleging that the doctor allowed improper access to a patient's medical records. Acosta v. Byrum, 180 N.C. App. 562, 638 S.E.2d 246, 2006 N.C. App. LEXIS 2503 (2006).

Exercise of personal jurisdiction over a president and a chief executive officer of a corporation was proper, as their conduct within and without North Carolina induced an investor to pay $1,000,000 in loan proceeds to another corporation, from which their affiliates obtained benefits of about $239,000, and allowed them to obtain increased benefits through a share exchange; the contacts with North Carolina supported the exertion of "specific" jurisdiction, and the exercise of personal jurisdiction did not violate the Due Process Clause. A claim that the actions they took while acting as agents of corporate entities did not "count" as part of the determination of jurisdiction was rejected. Brown v. Refuel Am., Inc., 186 N.C. App. 631, 652 S.E.2d 389, 2007 N.C. App. LEXIS 2242 (2007).

Buyers' assertion of jurisdiction over the sellers complied with due process; North Carolina had a "manifest interest" in providing the buyer a convenient forum for redressing injuries inflicted by the seller, an out-of-state merchant, and there was no evidence in the record to suggest that it was more convenient for the parties to try the matter in Georgia than in North Carolina. Baker v. Lanier Marine Liquidators, Inc., 187 N.C. App. 711, 654 S.E.2d 41, 2007 N.C. App. LEXIS 2571 (2007).

Seller was subject to jurisdiction under North Carolina's long-arm statute, where the seller personally coordinated the delivery of the boat to the buyer, located in North Carolina, through an independent third party, and the buyer transferred $9,812 from North Carolina to the seller, in Georgia, for payment of the boat. Baker v. Lanier Marine Liquidators, Inc., 187 N.C. App. 711, 654 S.E.2d 41, 2007 N.C. App. LEXIS 2571 (2007).

Wire transfer sent from plaintiff buyer in North Carolina to defendant seller in Georgia for payment of a boat constituted a "thing of value" shipped from the state by the buyer to the seller on the seller's order or direction pursuant to G.S. 1-75.4(5)(d). Baker v. Lanier Marine Liquidators, Inc., 187 N.C. App. 711, 654 S.E.2d 41, 2007 N.C. App. LEXIS 2571 (2007).

Finance company had minimum contacts in North Carolina for purposes of G.S. 1-75.4 as the company purposefully availed itself of the privilege of conducting activities within North Carolina as the company engaged in a consistent and continuous two-year interaction with a seller in reference to the sale of furniture from the seller to a buyer, which included numerous communications, "frequent" payments for the furniture purchased by the buyer, and the alleged attempted sale of the seller's furniture without payment. Rossetto United States, Inc. v. Greensky Fin., LLC, 191 N.C. App. 196, 662 S.E.2d 909, 2008 N.C. App. LEXIS 1227 (2008).

Court had personal jurisdiction over a dealership by way of North Carolina's long arm statute, G.S. 1-75.4(1)(d), because (1) the dealership's contacts with the state included letters, phone calls, a request for a contract, parts orders, and allowances for returned parts; (2) the contacts amounted to certain minimum contacts with North Carolina such that the maintenance of the suit did not offend traditional notions of fair play and substantial justice; and (3) the contacts also showed continuous, systematic, and substantial connections with North Carolina. Volvo Road Mach., Inc. v. J. D. Evans, Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 103460 (W.D.N.C. Oct. 16, 2008).

For additional cases holding the evidence sufficient to establish minimum contacts, see Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976); Forman & Zuckerman v. Schupak, 31 N.C. App. 62, 228 S.E.2d 503 (1976), appeal dismissed, 292 N.C. 264, 233 S.E.2d 391, 434 U.S. 804, 98 S. Ct. 32, 54 L. Ed. 2d 61 (1977); Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976), cert. denied, 429 U.S. 1041, 97 S. Ct. 740, 50 L. Ed. 2d 753 (1976); Dillon v. Numismatic Funding Corp., 291 N.C. 674, 231 S.E.2d 629 (1977); Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977); Stephenson v. Jordan Volkswagen, Inc., 428 F. Supp. 195 (W.D.N.C. 1977); Fieldcrest Mills, Inc. v. Mohasco Corp., 442 F. Supp. 424 (M.D.N.C. 1977); Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979); Mabry v. Fuller-Schuwayer Co., 50 N.C. App. 245, 273 S.E.2d 509, cert. denied, 302 N.C. 398, 279 S.E.2d 352 (1981); Johnston v. Gilley, 50 N.C. App. 274, 273 S.E.2d 513 (1981); Speizman Knitting Mach. Co. v. Terrot Strickmaschinen GmBH, 505 F. Supp. 200 (W.D.N.C. 1981); Williams v. Institute for Computational Studies, 85 N.C. App. 421, 355 S.E.2d 177 (1987); Hayes v. Evergo Tel. Co. Ltd., 100 N.C. App. 474, 397 S.E.2d 325 (1990).

IV. CASES IN WHICH MINIMUM CONTACTS REQUIREMENT NOT MET.

Electronic Communications Over The Internet. — District court dismissed a complaint for trademark infringement and related claims against a Belgian corporation where that corporation's contacts with the forum, primarily consisting of electronic communications over the Internet, were minimal, thus, the court lacked personal jurisdiction over the foreign corporation. B.E.E. Int'l, Ltd. v. Hawes, 267 F. Supp. 2d 477, 2003 U.S. Dist. LEXIS 10161 (M.D.N.C. 2003).

Defendant's motion to dismiss plaintiff's unfair business practices action for lack of personal jurisdiction was granted because defendant's website, accessible to North Carolina residents, was informational and passive, with interactivity limited to links that allowed a user to email defendant's employees and to access the site of an unrelated financing company; such interactivity was not enough to tip the scale in favor of finding personal jurisdiction. Accu-Sport Int'l, Inc. v. Swing Dynamics, Inc., 367 F. Supp. 2d 923, 2005 U.S. Dist. LEXIS 6999 (M.D.N.C. 2005).

Passive, non-interactive website maintained by defendant did not indicate a manifest intent to target and focus on North Carolina when viewed in conjunction with the overall character of the website, and could not support the exercise of specific jurisdiction; the website did not accept orders, and instead simply described defendant's products and gave contact information for her in Indiana. Woods Int'l, Inc. v. McRoy, 436 F. Supp. 2d 744, 2006 U.S. Dist. LEXIS 43776 (M.D.N.C. 2006).

In a buyer's suit against a seller and manufacturer, based on the sale of an allegedly defective motor coach, personal jurisdiction based on the seller's advertising over the Internet and participation in a national dealer referral service were not sufficient to exercise personal jurisdiciton over the seller under G.S. 1-75.4(1)(d). Scholl v. Sagon RV Supercenter, LLC, 249 F.R.D. 230, 2008 U.S. Dist. LEXIS 18941 (W.D.N.C. 2008).

Personal jurisdiction did not exist in North Carolina courts as to an internet poster in Georgia because the alleged victim in North Carolina failed to establish that the internet poster posted the allegedly defamatory material at bulletin board discussions on the internet with the intent to direct the content to a North Carolina audience. Dailey v. Popma, 191 N.C. App. 64, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (2008).

Purchase of Insurance. — Responding to solicitation by a North Carolina insurance company by purchasing coverage for property located in another jurisdiction was not an act by which insured "purposefully availed" himself of the privilege of conducting activities within North Carolina. Cameron-Brown Co. v. Daves, 83 N.C. App. 281, 350 S.E.2d 111 (1986).

Where insured's only contact with the state of North Carolina was the mailing of premium payments to insurer's Charlotte office pursuant to insurance contracts, this, standing alone, was insufficient contact to justify requiring him to litigate here. Cameron-Brown Co. v. Daves, 83 N.C. App. 281, 350 S.E.2d 111 (1986).

No Purposeful Action Directed Toward State. — Accounting firm's motion to dismiss for lack of personal jurisdiction was granted; plaintiffs' contention that the accounting firm, in preparing audit reports that it knew a Delaware corporation with offices in Ohio and Missouri would use in marketing materials distributed throughout the United States, placed its product in the stream of commerce such that personal jurisdiction was appropriate in North Carolina was without merit because the accounting firm took no action purposefully directed toward the forum state. Allison v. Lomas, 387 F. Supp. 2d 516, 2005 U.S. Dist. LEXIS 26345 (M.D.N.C. Aug. 26, 2005).

Plaintiffs failed to demonstrate that the court had personal jurisdiction over an attorney and a law firm where the attorney drafted, approved, and recommended for use a Delaware corporation's offering materials and prepared a legal opinion that was distributed to investors in a mobile billboard scheme, the services were not purposefully directed toward the state of North Carolina and plaintiffs' claims could not have been said to arise out of any contact the attorney or the law firm had with North Carolina, the attorney was not licensed to conduct business in North Carolina and plaintiffs had neither asserted nor identified any contacts with the state whatsoever, and plaintiffs failed to establish that the attorney or the law firm maintained the continuous and systematic contacts required to exercise general jurisdiction in North Carolina. Allison v. Lomas, 387 F. Supp. 2d 516, 2005 U.S. Dist. LEXIS 26345 (M.D.N.C. Aug. 26, 2005).

Chemical company and a related corporation (defendants) were subject to personal jurisdiction under G.S. 1-75.4(4)(b) as the resins and the chemical compounds used to manufacture the vinyl siding were processed by defendants and were used in North Carolina in the ordinary course of trade; however, there were not minimum contacts to support personal jurisdiction under the Due Process Clause as the company's only connection to North Carolina arose from its relationship with the corporation, and although the corporation knew its chemical compound would be used in the manufacture of vinyl siding, there was no evidence that the corporation was aware that the siding would be sold outside of Korea. Cambridge Homes of N.C. L.P. v. Hyundai Constr., Inc., — N.C. App. —, 670 S.E.2d 290, 2008 N.C. App. LEXIS 2242 (2008).

The mere act of entering into a contract with a resident will not provide the necessary minimum contacts with the forum state, especially when all the elements of the defendant's performance are to take place outside the forum. Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980).

The courts of North Carolina did not have any statutory basis for personal jurisdiction over a nonresident defendant who made occasional purchases and related trips in this State, but did not engage in regular and systematic business in North Carolina, and who hired the resident plaintiff to sell some equipment, without any expectation of performance in North Carolina, and without any actual performance being apparently done in North Carolina. Patrum v. Anderson, 75 N.C. App. 165, 330 S.E.2d 55 (1985).

Where the plaintiff, a corporation authorized to do business in North Carolina, initiated contact with and solicited the services of the defendant Maryland corporation, contract negotiations occurred outside of this state, the services to be performed under the contract were to occur outside North Carolina, and the defendant's only contact with North Carolina appeared to have been through phone calls, the shipment of office chairs to North Carolina and receipt of one commission check were insufficient to support the exercise of in personam jurisdiction. Curvcraft, Inc. v. J.C.F. & Assocs., 84 N.C. App. 450, 352 S.E.2d 848 (1987).

Trial court did not have in personam jurisdiction over out-of-state corporation that purchased materials from an in-state supplier and signed a promissory note to the supplier, since the materials were all made and delivered to the supplier from another state, the corporation was not active in the forum state, and the note, which contained only a choice of law clause for the forum state, was signed in the corporation's home state. Corbin Russwin, Inc. v. Alexander's Hdwe., Inc., 147 N.C. App. 722, 556 S.E.2d 592, 2001 N.C. App. LEXIS 1230 (2001).

Cease and Desist Letter Insufficient to Assert Personal Jurisdiction. — Cease and desist letter sent by defendant to plaintiff was not sufficient to support the assertion of personal jurisdiction over defendant, as defendant did not attempt to solicit business in North Carolina or enter into any agreement or business relationship in North Carolina. Woods Int'l, Inc. v. McRoy, 436 F. Supp. 2d 744, 2006 U.S. Dist. LEXIS 43776 (M.D.N.C. 2006).

The mere ownership of property in the forum state is insufficient to establish the "minimum contacts" necessary to satisfy the requirements of due process. Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Contract to Perform Consulting Services. — Where a contract made in North Carolina required that defendant, a nonresident, perform certain consulting services for a company having its home office and two manufacturing plants in North Carolina, and in fact defendant did perform such services on two occasions via long distance telephone conversations placed outside the State, and the contract was silent as to whether services were to be performed in North Carolina, the court did not need to determine whether the contract was in accord with subdivision (5)a of this section, since even if such paragraph was satisfied, due process was not. Modern Globe, Inc. v. Spellman, 45 N.C. App. 618, 263 S.E.2d 859, cert. denied, 300 N.C. 373, 267 S.E.2d 677 (1980).

Signing of Guaranty or Endorsement. — Mere signing by a nonresident of a guaranty or endorsement of a debt owed to a North Carolina creditor does not in and of itself constitute a sufficient contact upon which to base in personam jurisdiction over a nonresident. Rather, the circumstances surrounding the signing of such obligation must be closely examined in each case to determine whether the quality and nature of defendant's contacts with North Carolina justify the assertion of personal jurisdiction over him in an action on the obligation. United Buying Group, Inc. v. Coleman, 296 N.C. 510, 251 S.E.2d 610 (1979), rejecting the rule adopted in First-Citizens Bank & Trust Co. v. McDaniel, 18 N.C. App. 644, 197 S.E.2d 556 (1973).

Placing of Advertisements in National Magazines. — Even assuming that the statutory requirement of "solicitation within the State" is satisfied, the placing of advertisements in national magazines, without more, is not sufficient contact to fall within "traditional notions of fair play and substantial justice" as a basis for the exercise of personal jurisdiction. Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

Placement of advertisements in a national publication cannot by itself support jurisdiction. Stallings v. Hahn, 99 N.C. App. 213, 392 S.E.2d 632 (1990).

Where the only contacts between defendant and this state were an advertisement placed in a national publication, telephone calls between plaintiff and defendant, and cashier's check sent by plaintiff to defendant, and where defendant never came to North Carolina, received the check in Pennsylvania, and delivery of the cars was to take place in Pennsylvania, there were not sufficient minimum contacts to support jurisdiction. Stallings v. Hahn, 99 N.C. App. 213, 392 S.E.2d 632 (1990).

Advertisements defendant published in golf magazines with national circulations was not the type of continuous, systematic, and forum-directed contact that warranted the exercise of general jurisdiction. Accu-Sport Int'l, Inc. v. Swing Dynamics, Inc., 367 F. Supp. 2d 923, 2005 U.S. Dist. LEXIS 6999 (M.D.N.C. 2005).

Nonresident Holder of Part Interest in Note Secured by Deed of Trust on Property Within State. — This section does not give a North Carolina district court jurisdiction in personam over the out-of-state holder of a part interest in a note secured by a deed of trust on property in North Carolina, for to do so would violate the rule expressed by the United States Supreme Court in Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977); Whitener v. Whitener, 56 N.C. App. 599, 289 S.E.2d 887, cert. denied, 306 N.C. 393, 294 S.E.2d 221 (1982).

Out-of-State Credit Trust and Trustee. — Long-arm jurisdiction did not exist over an out-of-state credit trust and its trustee under G.S. 1-75.4(1)(d), (5)(d), or (6)(b) as the trust did not engage in substantial activity within North Carolina, it did not receive shipped goods, documents of title, or other things of value from North Carolina, and the few mortgage notes it held that were secured by North Carolina property were insufficient to constitute a holding of tangible property in North Carolina. Skinner v. Preferred Credit, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005).

North Carolina courts lack personal jurisdiction over a nonresident trust that has no connections to the state other than holding mortgage loans secured by deeds of trust on North Carolina property; because the state courts lacked personal jurisdiction over the trust, the dismissal of a suit brought by two mortgagors asserting excessive loan origination fees, usurious interest, and unfair trade practices was upheld on appeal. Skinner v. Preferred Credit, 361 N.C. 114, 638 S.E.2d 203, 2006 N.C. LEXIS 1328 (2006).

Single executed contract to repair single piece of personal property for nonresident corporation with no other contracts does not constitutionally allow exercise of personal jurisdiction. Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp., 70 N.C. App. 737, 321 S.E.2d 28 (1984).

Advertising Availability for Employment in Trade Magazine. — Contract for employment in Texas as to which plaintiff initiated the negotiations by advertising his availability for employment in a trade magazine could not form the basis of general jurisdiction over defendant employer. Farbman v. Esskay Mfg. Co., 676 F. Supp. 666 (W.D.N.C. 1987).

Presence in this State of an independent showroom displaying defendant's products was not sufficient contact with the forum to give the federal district court general jurisdiction over defendant. Farbman v. Esskay Mfg. Co., 676 F. Supp. 666 (W.D.N.C. 1987).

Copyright Validity. — Where a manufacturer alleged that a Colorado copyright holder's copyright was invalid, personal jurisdiction did not exist over the copyright holder in North Carolina because it did not have any offices, accounts, employees, or agents in North Carolina, it never paid taxes in North Carolina, and the complaint did not allege that the validity of the copyright caused any injury to a person or property in North Carolina. Caraustar Custom Packaging Group (Maryland), Inc. v. Stockart.com, LLC, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 56573 (W.D.N.C. Aug. 1, 2006).

Corporation's Alter Ego Conducting Business in State. — Where defendant manufactured and sold its products exclusively in Michigan to its only customer, another Michigan corporation, and plaintiff presented no evidence defendant initiated a business relationship with any North Carolina resident, but plaintiff alleged that defendant had been "doing business" in North Carolina through its alter ego, the mere fact that the alter ego did business in North Carolina was an insufficient basis for invoking personal jurisdiction over defendant, which otherwise had no contacts with the forum state. DP Envtl. Servs., Inc. v. Bertlesen, 834 F. Supp. 162 (M.D.N.C. 1993).

Corporate Officers. — In a supplier's suit against a purchasing company, a related company, and a chief executive officer (CEO), personal jurisdiction did not exist over the CEO, because the supplier wholly failed to allege any act the CEO committed occurred within the CEO's individual capacity. Saft Am., Inc. v. Plainview Batteries, Inc., 189 N.C. App. 579, 659 S.E.2d 39, 2008 N.C. App. LEXIS 694 (2008), rev'd in part, 363 N.C. 5, 673 S.E.2d 864 (2009).

Manufacture of Textiles in State. — While it appeared that defendant, a California corporation, was subject to personal jurisdiction under subdivision (5)b of this section, since plaintiff performed services for defendant within this state by manufacturing certain textiles, and the record indicated that defendant was well aware that the textiles ordered were to be manufactured by plaintiff in this state, the exercise of jurisdiction over defendant also had to comport with due process requirements, and there were insufficient minimum contacts with this state to satisfy the requirements of due process. Taurus Textiles, Inc. v. John M. Fulmer Co., 91 N.C. App. 553, 372 S.E.2d 735 (1988).

Manufacturer's Contacts Held Not Sufficiently Continuous and Systematic. — Exercise of in personam jurisdiction over a boiler manufacturer, a New York corporation which was not authorized to do business in North Carolina, which in 1984 sold approximately $520,000 worth of boilers to North Carolina customers, accounting for about one-half percent of its total boiler sales for the year, which sales were solicited by independent contractors who acted as sales representatives for defendant and other manufacturers, which had placed advertisements in several national magazines which reached North Carolina, and which had a wholly owned subsidiary, which was engaged in the business of greenhouse construction, and which was authorized to do business in North Carolina, was not warranted, as defendant's contacts with North Carolina were not so "continuous and systematic" as to warrant the exercise of in personam jurisdiction. Ash v. Burnham Corp., 80 N.C. App. 459, 343 S.E.2d 2, aff'd, 318 N.C. 504, 349 S.E.2d 579 (1986).

Nonresident Plaintiff and Nonresident Corporate Defendant. — Evidence did not support a finding of minimum contacts or purposeful availment. Nonresident plaintiff's claim alleged a single incident of negligence by defendant's employees, which incident occurred in Nebraska. Defendant dairy company was a nonresident corporation which neither owned nor rented any property in North Carolina, did not maintain any employees, offices, telephone listings, or mailing addresses in the state; the company never solicited or sold any of its dairy products directly in North Carolina. Furthermore, defendant's only connection with North Carolina was the sporadic resale of its product by an independent third party. Considine v. West Point Dairy Prods., 111 N.C. App. 427, 432 S.E.2d 412 (1993).

Nonresident Employees of a Corporation Subject to Personal Jurisdiction. — In an action in which plaintiff's claims for fraud and unfair and deceptive trade practices arose out of a stock transaction between plaintiff and a corporation, G.S. 1-75.4(1)(d) did not provide the court with personal jurisdiction over nonresident employees of the corporation because the employees were not subject to personal jurisdiction based solely on the corporation being subject to personal jurisdiction, and there was no evidence showing that the employees independently and purposefully availed themselves of the privilege of conducting activities within the forum state. Smith v. Dade Behring Holdings, Inc., — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 3493 (W.D.N.C. Jan. 12, 2007).

Check Cashed by Plaintiff. — Facts that (1) a check drawn on a joint investment account of the defendant, a Florida resident, payable through a Pennsylvania bank, was cashed by plaintiff bank in North Carolina and then shredded by plaintiff, and that (2) defendant refused to honor plaintiff's demand that the check be replaced did not meet the minimum contacts requirement for personal jurisdiction. First Charter Nat'l Bank v. Taylor, 80 N.C. App. 315, 341 S.E.2d 747 (1986).

Criminal Conversion and Alienation of Affections. — In a suit alleging claims for criminal conversation and alienation of affections based upon an alleged affair that occurred outside of the forum state, personal jurisdiction did not exist pursuant to the long-arm statute. Grant v. Shields, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 25677 (E.D.N.C. Nov. 22, 2002).

The mere fact that a marriage is still in existence at the time an action for alimony is initiated cannot of itself constitute sufficient contacts to establish personal jurisdiction over a foreign defendant. Tompkins v. Tompkins, 98 N.C. App. 299, 390 S.E.2d 766 (1990).

Equitable Distribution. — Assuming arguendo that the North Carolina "long-arm" statutes gave the North Carolina courts jurisdiction over defendant for purposes of equitable distribution, application of those statutes would violate the due process clause of U.S. Const., Amend. XIV, where defendant had not lived in this State for any part of the marriage, and where, although certain property of the parties was located in this State, there was no indication of any action by defendant purposely directed towards this State. Carroll v. Carroll, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

Alimony Reduction. — Money payments are "things of value" within the meaning of subdivision (5)d of this section; thus in an action brought by resident husband against nonresident wife to have alimony obligation reduced or terminated, statutory jurisdiction existed. However, under the circumstances, defendant did not have sufficient minimum contacts with North Carolina and her motion to dismiss for lack of personal jurisdiction was improperly denied. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Child Support Suit. — Assuming arguendo that this section would give North Carolina courts in personam jurisdiction over defendant father in suit seeking an increase in child support, application of this section to him would violate the due process clause of U.S. Const., Amend. XIV, where defendant's only contacts with North Carolina were that his daughter had lived here for nine years, during which time he had sent child support payments to plaintiff at her North Carolina residence, that he had come to North Carolina on several occasions to visit his daughter, and that the child had attended North Carolina public schools and had otherwise enjoyed the benefits and protections of the laws of this State. Miller v. Kite, 313 N.C. 474, 329 S.E.2d 663 (1985).

Out-of-State Attorney Fees. — Trial court properly granted out-of-state law clients' motion to dismiss an action by a law firm seeking fees for work done on an appeal, pursuant to theories of breach of contract and quantum meruit, where there was a statutory basis under this section that supported a finding of personal jurisdiction, but there was no minimum contacts established to satisfy the grounds for specific jurisdiction; the court noted that unsolicited letters sent by the firm to the clients, which were never responded to, did not satisfy minimum contacts, nor was there proof that the clients had authorized another to contract with the firm on their behalf, or that the clients ever ratified the work that was allegedly done by the firm. Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC v. Jacobs, 158 N.C. App. 376, 581 S.E.2d 798, 2003 N.C. App. LEXIS 1195 (2003).

Mississippi Third Party Defendants. — Claims against third party defendants were dismissed for lack of personal jurisdiction where (1) the third party defendants never conducted business in North Carolina but instead all transactions and occurrences pertaining to their dealings with the third party plaintiff took place in Mississippi, (2) such defendants did not have systematic or continuous contacts with North Carolina and did not benefit from the laws of the state, and (3) the contract they allegedly breached was entered into and was to be performed in Mississippi. Jordan v. Bridges, 978 F. Supp. 659 (E.D.N.C. 1997).

Tortious Interference with a Contract. — No minimum contacts were found to justify long-arm jurisdiction pursuant to this section over a minority shareholder and his attorneys who wrote a letter to a company which had made a take-over bid in order to alert that company of pending litigation. Filmar Racing v. Stewart, 141 N.C. App. 668, 541 S.E.2d 733, 2001 N.C. App. LEXIS 16 (2001).

Former employee's tortious interference action against Virginia employers arising out of a Virginia settlement agreement of a Title VII action was dismissed pursuant to Fed. R. Civ. P. 12(b)(2) because the employee failed to satisfy the North Carolina long-arm statute, G.S. 1-75.4, to establish personal jurisdiction; the employee did not allege that the employers, Delaware corporations, had any local presence or status, that any special jurisdiction statutes applied, that the employers solicited in, carried on activities in, or sent unsolicited bulk commercial electronic mail into North Carolina at any time, any injury arising out of an act or omission within North Carolina by the employers, or that the employers promised to perform services within North Carolina. Ward v. Wavy Broad., LLC, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 3097 (M.D.N.C. Feb. 25, 2003).

Failure to Make Prima Facie Case. — Defendant's motion to dismiss for a lack of personal jurisdiction should have been granted where the plaintiff, who was injured while a passenger in a parked car, failed to meet his burden of proving prima facie a statutory basis for personal jurisdiction over Missouri corporation and Illinois driver. Golds v. Central Express, Inc., 142 N.C. App. 664, 544 S.E.2d 23, 2001 N.C. App. LEXIS 192 (2001), cert. denied, 353 N.C. 725, 550 S.E.2d 775 (2001).

Acts not occurring in state. — In an employment dispute, the court granted defendants' alternative motion to transfer the suit to the Western District of Louisiana, because the former employee's claims did not arise from acts by defendants in North Carolina, as two defendants—the former employer and a corporate officer—had no contacts with North Carolina, and the third defendant—a corporation—had only a few contacts with the state. Zellinger v. Control Servs., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 24935 (M.D.N.C. Dec. 27, 2002).

Single $150 shipment of defendant's products was sold by one of defendant's Indiana customers to a North Carolina resident at a trade show in Kentucky did not form the basis for specific jurisdiction because the claims in plaintiff's declaratory judgment action did not "arise out of" that prior shipment of products. Woods Int'l, Inc. v. McRoy, 436 F. Supp. 2d 744, 2006 U.S. Dist. LEXIS 43776 (M.D.N.C. 2006).

When a patient sued a pharmacy for negligence, breach of implied warranties, liability under G.S. 99B-6, and to pierce the pharmacy's corporate veil and hold its president liable, the president did not have sufficient contacts with North Carolina for the trial court to exercise personal jurisdiction over him because he had not been in the state since age 18, and he signed an application for the pharmacy to do business in North Carolina in his capacity as the pharmacy's president. Rauch v. Urgent Care Pharm., Inc., 178 N.C. App. 510, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006).

Minimum Contacts Not Found. — In a suit by investors, the trial court properly held that it lacked personal jurisdiction under G.S. 1-75.4(4) or (5) over a Isle of Guernsey resident who was a director of a Guernsey corporation, as the investors had not been solicited by the resident or on his behalf and money had not been transferred to him on his order or direction; moreover, there were no minimum contacts, as the resident's uncontradicted affidavit indicated that he had never met or spoken with the investors, visited North Carolina, or given investment advice to the investors. Robbins v. Ingham, — N.C. App. —, 635 S.E.2d 610, 2006 N.C. App. LEXIS 2160 (2006), cert. denied, appeal dismissed, 361 N.C. 221 (2007).

In an action filed by the State against a foreign corporation under G.S. 66-291, the trial court properly dismissed the action for lack of personal jurisdiction, because: (1) the State's conclusory allegation was insufficient to establish an alter ego theory of liability for personal jurisdiction purposes; (2) there was no evidence of any act or omission by the foreign corporation within North Carolina in the record; and (3) the trial court specifically found that the foreign corporation was not in the State of North Carolina when it received the alleged fraudulent funds from the North Carolina corporation. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 188 N.C. App. 302, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008).

Furniture company (LLC) did not have minimum contacts in North Carolina for purposes of G.S. 1-75.4 as: (1) the LLC passively received a shipment of furniture from a seller, intended for a buyer; (2) the LLC allegedly made one phone call to the seller in North Carolina; and (3) the LLC attempted to sell the furniture on the Internet. Rossetto United States, Inc. v. Greensky Fin., LLC, 191 N.C. App. 196, 662 S.E.2d 909, 2008 N.C. App. LEXIS 1227 (2008).

Sale of a single piece of equipment to a North Carolina customer by defendant's predecessor in interest fell far short of the level required to support a finding of general jurisdiction; the $16,000 sale accounted for a mere 1.3 per cent of defendant's annual sales, and such de minimis sales of defendant's products were not the purposefully directed, continuous and systematic contacts within North Carolina required to satisfy the elevated threshold for general jurisdiction. Accu-Sport Int'l, Inc. v. Swing Dynamics, Inc., 367 F. Supp. 2d 923, 2005 U.S. Dist. LEXIS 6999 (M.D.N.C. 2005).

For additional cases holding the evidence insufficient to establish minimum contacts, see Marshall Exports, Inc. v. Phillips, 385 F. Supp. 1250 (E.D.N.C. 1974), aff'd, 507 F.2d 47 (4th Cir. 1974); William R. Andrews Assocs. v. Sodibar Sys., 28 N.C. App. 663, 222 S.E.2d 922, cert. denied, 289 N.C. 726, 224 S.E.2d 676 (1976); First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Bryson v. Northlake Hilton, 407 F. Supp. 73 (M.D.N.C. 1976); Dillard v. USAir, Inc., 114 N.C. App. 791, 443 S.E.2d 80 (1994).

V. LOCAL PRESENCE OR STATUS.

The words "domicile" and "inhabitant" mean substantially the same thing. One is an inhabitant of or domiciled in a given place if he resides there actually and permanently. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Asset Purchase Agreement Created Substantial Connection. — Where buyer of business had an asset purchase agreement with two owners of business, although owners had never been physically in the state, agreement created a substantial connection to North Carolina which supported court's exercise of personal jurisdiction over two owners; the owners were parties to the agreement as individual shareholders and as officers, the agreement provided for closing in Charlotte, North Carolina, and was in fact closed in Charlotte, the agreement was largely performed in Charlotte, owners were aware or should have been aware that a large part of the bargaining occurred in North Carolina, and the parties assumed continuing responsibilities toward one another. Hanes Cos. v. Ronson, 712 F. Supp. 1223 (M.D.N.C. 1988).

Volume and Temporal Requirements Inferred. — Where plaintiffs alleged the misrepresentations which induced their own purchase of a lifetime partnership were pursuant to a scheme or artifice to defraud which over time resulted in the fraudulent sale of over 55,000 such partnerships through defendants' solicitation activities originating in part in the State of North Carolina, it was readily inferable, under the tolerant prima facie test, that the activities required to sell such a volume of partnerships were sufficiently substantial in volume and long in duration to bring them within the volume and temporal requirements of paragraph (1)d. Combs v. Bakker, 886 F.2d 673 (4th Cir. 1989).

Substantial Activities in State Shown. — In a breach of contract action, defendant Georgia corporation had engaged in "substantial activities" within this State so as to invoice the court's in personam jurisdiction under subdivision (1)d where the evidence showed telephone conversations between defendant's representatives located in Georgia and plaintiff's representatives in North Carolina, and where an invoice was mailed by defendant from Georgia to plaintiff in North Carolina and payment of this invoice by check was mailed from North Carolina to defendant in Georgia, and where the evidence also showed other activities not related directly to the action in question, namely, a service called to perform emergency boiler repairs for another company, and the delivery of boiler parts by defendant to another company in North Carolina. ETR Corp. v. Wilson Welding Serv., Inc., 96 N.C. App. 666, 386 S.E.2d 766 (1990).

Where defendant flew to North Carolina and stayed for several days to discuss and finalize a business relationship, received fees for his services as financial, investment and tax advisor to North Carolina residents, prepared monthly statements which he regularly mailed to North Carolina, prepared tax returns, was the incorporator of and claims to own two-thirds of the stock of two North Carolina corporations, and was the trustee of pension plan, these activities constituted "substantial activity" within the meaning of subdivision (1)(d). Strother v. Strother, 120 N.C. App. 393, 462 S.E.2d 542 (1995).

Where a seaman was injured while working on a fishing vessel docked in South Carolina, and the vessel owners continued to reside in South Carolina but, shortly after the injury, began selling all of their fish in North Carolina, the owners were subject to personal jurisdiction in North Carolina in the seaman's subsequent action for maintenance and cure; the owners had substantial contacts with the forum state at the time the owners were served with the summons and complaint to support personal jurisdiction under G.S. 1-75.4(1), and the owners' contacts with North Carolina were sufficiently substantial to extend the general jurisdiction of North Carolina to the seaman's action for the injury which occurred prior to the contacts. Young v. Hair, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 6551 (E.D.N.C. Jan. 26, 2004).

Substantial Activities in State Not Shown. — Where record was devoid of evidence which would support the trial court's presumed finding of "substantial activity within this state" by defendant when service of process was made upon him, subdivision (1) was inapplicable to him. Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473, cert. granted, 341 N.C. 419, 461 S.E.2d 757 (1995).

Because a student did not assert that a school president performed any actions in North Carolina or that she purposefully availed herself of the privilege of conducting activities within North Carolina and invoked the benefits and protections of the laws of North Carolina, and the president stated she was a Florida resident, the North Carolina court did not have personal jurisdiction over the president. Eaker v. Gower, 189 N.C. App. 770, 659 S.E.2d 29, 2008 N.C. App. LEXIS 691 (2008).

Right of Resident to Maintain Action. — After a cause of action has been barred in the jurisdiction where it arose, only a plaintiff who was a resident of North Carolina at the time the cause of action originally accrued has the right to maintain an action in the courts of North Carolina. Laurent v. USAIR, Inc., 124 N.C. App. 208, 476 S.E.2d 443 (1996), cert. denied, 346 N.C. 178, 486 S.E.2d 205 (1997).

For discussion as to application of this section, see Fireman's Fund Ins. Co. v. Washington, 65 N.C. App. 38, 308 S.E.2d 758 (1983), cert. denied and appeal dismissed, 310 N.C. 624, 315 S.E.2d 690 (1984).

VI. LOCAL ACT OR OMISSION.

The term "injury to the person or property," as used in subdivision (3) of this section, should be given a broad meaning, consistent with the legislative intent to enlarge the concept of personal jurisdiction to the limits of fairness and due process, which negates the intent to limit actions thereunder to traditional claims for bodily injury and property damages. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Action for alimony on the ground of abandonment is a claim of "injury to person or property" under subdivision (3) of this section. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

Alienation of Affection. — Under G.S. 1-75.4, a trial court lacked personal jurisdiction over a nonresident co-worker of a wife in a husband's alienation of affection lawsuit against the co-worker because: (1) there was no allegations that telephone calls from the co-worker to the wife were received in North Carolina; (2) there was no allegation that the wife was physically in the state when she received the co-worker's solicitations; and (3) the co-worker never visited the state. Brown v. Ellis, 184 N.C. App. 547, 646 S.E.2d 408, 2007 N.C. App. LEXIS 1470 (2007), appeal dismissed, cert. denied, 362 N.C. 679, 669 S.E.2d 743 (2008).

Allegations set forth in a complaint by a husband, alleging alienation of affections and criminal conversation by the wife's boyfriend, were sufficient to permit the exercise of personal jurisdiction over the boyfriend under the long-arm statute of G.S. 1-75.4(4)(a), as his telephone and electronic contact of the wife occurred within North Carolina, even though their adulterous relationship occurred outside of the State. Brown v. Ellis, 363 N.C. 360, 678 S.E.2d 222, 2009 N.C. LEXIS 619 (June 18, 2009).

Action for alienation of affections and for criminal conversation is an action ex delicto and involves "injury to person or property" within the contemplation of this section. Golding v. Taylor, 19 N.C. App. 245, 198 S.E.2d 478, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

Defamatory Material. — Virginia defendants' alleged publication of defamatory material in North Carolina would constitute a claim for injury to person within this State arising out of an act within this State, thus conferring personal jurisdiction over defendants under subdivision (3) of this section. Saxon v. Smith, 125 N.C. App. 163, 479 S.E.2d 788 (1997).

Tortious Interference With Contract. — Third party nonresident defendant's motion to dismiss for lack of personal jurisdiction was denied in part because the court had jurisdiction over the nonresident under North Carolina's Long Arm Statute, G.S 1-75.4 where it was alleged that her actions in the state tortiously interfered with a contract with resident insurer; however, the nonresident's motion to dismiss was granted with respect to two breach of contract claims that arose out of conduct occurring outside of North Carolina and were not part of the common nucleus the other claims involving the resident insurer. N.C. Mut. Life Ins. Co. v. McKinley Fin. Serv., Inc., 386 F. Supp. 2d 648, 2005 U.S. Dist. LEXIS 24913 (M.D.N.C. Sept. 2, 2005).

VII. LOCAL INJURY; FOREIGN ACT.

This section was intended to embrace "intangible injuries." Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

In order to find personal jurisdiction under subdivision (4)(a) of this section, a plaintiff (1) must claim that it suffered an injury within North Carolina which injury arose by a defendant's acts outside the state, and (2) must show that the defendant solicited within North Carolina. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

Because plaintiff must establish that a provision of the long-arm statute confers jurisdiction as well as demonstrate that defendants had minimal contacts with North Carolina, plaintiff's failure to meet the first prong of the test under subdivision (4)(a) of this section alleviates the need to consider the due process considerations. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

Subdivision (4)a of this section requires that plaintiff only claim injury, not prove injury. Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062 (4th Cir. 1982); Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473, cert. granted, 341 N.C. 419, 461 S.E.2d 757 (1995).

Long-arm personal jurisdiction under subdivision (4)a was established against defendant where plaintiff alleged injuries involving misappropriated trade secrets, interfered with business relations and unfair trade practices, incident to sales and solicitation activities to North Carolina customers by defendant outside North Carolina at the proximate time of the injuries; proof of actual injury was not required. Fran's Pecans, Inc. v. Greene, 134 N.C. App. 110, 516 S.E.2d 647 (1999).

Subdivision (4) of this section, as applied to defining the reach of § 75-1.1, requires an in-state injury to plaintiff before plaintiff can state a valid unfair trade claim. The 'In' Porters v. Hanes Printables, Inc., 663 F. Supp. 494 (M.D.N.C. 1987).

Showing that defendant truck driver picked up or delivered pharmaceuticals in North Carolina on approximately two occasions per week was a sufficient prima facie showing that he was engaged in "service activity" as required by subdivision (4) at or about the time of the claimed injury. Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473, cert. granted, 341 N.C. 419, 461 S.E.2d 757 (1995).

The defendant need not be physically present in this State to solicit in this State within the meaning of this section. Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062 (4th Cir. 1982).

It is not necessary for the defendant to be physically present in North Carolina to solicit in the state within the meaning of the statute. Uniprop Manufactured Hous. Communities Income Fund II v. Home Owners Funding Corp., 753 F. Supp. 1315 (W.D.N.C. 1990).

Magazine advertisements are solicitations within the meaning of subdivision (4)a of this section. Federal Ins. Co. v. Piper Aircraft Corp., 341 F. Supp. 855 (W.D.N.C. 1972), aff'd, 473 F.2d 909 (4th Cir. 1973).

Claims for negligent infliction of emotional distress and loss of consortium are injuries to person or property within the purview of subdivision (4). Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473, cert. granted, 341 N.C. 419, 461 S.E.2d 757 (1995).

Injury to Real Property. — In action arising out of the Comprehensive Environmental Response, Compensation, and Liability Act, plaintiffs who brought action seeking contribution for response costs incurred by them and paid to the United States and a declaratory judgment that each defendant was jointly and severally liable to plaintiffs for future necessary response costs, established a prima facie case conferring jurisdiction over each of the defendants; plaintiff claimed injury to two parcels of real property in North Carolina and alleged that the injury to the real property in North Carolina arose out of defendants' actions outside North Carolina, namely defendants' arrangements for the disposal of waste oil. Crown Cork & Seal Co. v. Dockery, 886 F. Supp. 1253 (M.D.N.C. 1995).

Mere allegations are sufficient to satisfy the statutory requirements of subdivision (4)b of this section. Accordingly, plaintiff's prima facie showing, with no rebuttal by defendant, was sufficient to establish jurisdiction under subdivision (4)b. Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986).

Plaintiff's claims of injury from out-of-state defendants' misappropriation of his idea for improvement of defendant's product were sufficient to meet the local injury requirement of subdivision (4)b. Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986).

Allegations Held Sufficient to Satisfy Subdivision (4). — The allegations that defendants were engaged in the business of selling wire art products, and that such products were sold and used in North Carolina in the ordinary course of trade to a substantial extent, were sufficient to satisfy subdivision (4) of this section and the requirements of due process. Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

Plaintiff's claims of injury from out-of-state defendants' misappropriation of his idea for improvement of defendant's product were sufficient to meet the local injury requirement of subdivision (4)b. Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986).

Where company supplied drug to defendant pharmacies, plaintiff's injuries were caused by his consumption of the product, and the company manufactured, marketed and distributed the drug, the court had statutory authority to exercise jurisdiction over defendants. Tart v.

Prescott's Pharmacies, Inc., 118 N.C. App. 516, 456 S.E.2d 121 (1995).

Where Virginia defendants communicated complaints and information regarding plaintiff to law enforcement officials in Virginia, which caused North Carolina criminal process to be issued against plaintiff and plaintiff to be arrested in North Carolina, this action, along with defendants' contacts with North Carolina, supported imposition of personal jurisdiction over defendants pursuant to subdivision (4) of this section as to plaintiff's abuse of process claim. Saxon v. Smith, 125 N.C. App. 163, 479 S.E.2d 788 (1997).

Virginia defendants' distribution of a newsletter in North Carolina and registering of a complaint with law enforcement authorities were actions directed at plaintiff within North Carolina, and the resultant harm occurred in North Carolina, which was enough to confer personal jurisdiction over defendants under subdivision (4) for plaintiff's claims of intentional infliction of emotional distress and malicious prosecution. Saxon v. Smith, 125 N.C. App. 163, 479 S.E.2d 788 (1997).

Plaintiff had established the existence of jurisdiction by a prima facie showing that the requirements of North Carolina's long-arm statute had been met; plaintiff alleged injuries resulting from defendants' unfair and deceptive trade practices and trademark infringement (both injuries had been recognized as claims of injury under G.S. 1-75.4(4)), local injury resulted from defendants' actions outside of North Carolina, and plaintiff alleged that defendants owned, operated and managed 20 radio stations in North Carolina. Ray Communs., Inc. v. Clear Channel Communs., Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 4746 (E.D.N.C. Jan. 19, 2009).

Activities of a nonresident corporation owning a basketball team are included within subdivision (4) of this section. Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

Criminal Solicitations and Alienation of Affections. — The plaintiff's complaint charging that defendant engaged in solicitations of and criminal conversation with plaintiff's husband via phone and e-mail, which resulted in the alienation of the affections of her husband, satisfied the requirements of the North Carolina long-arm statute and established the necessary minimum contacts between the South Carolina defendant and North Carolina sufficient to meet due process requirements; the plaintiff's allegations that there were sexual relations between the two and that she was injured in North Carolina due to the telephone and e-mail solicitations brought her claims within the purview of this section; although the quantity of defendant's contacts were not extensive, the injury occurred within North Carolina which had an interest in providing a forum for plaintiff's cause of action, not recognized in South Carolina, and the exercise of jurisdiction imposed only a minimal burden on the defendant who lives in a neighboring state. Cooper v. Shealy, 140 N.C. App. 729, 537 S.E.2d 854, 2000 N.C. App. LEXIS 1265 (2000).

VIII. LOCAL SERVICES, GOODS OR CONTRACTS.

Execution of Guaranty Contract as Promise to Pay for Services Under Subdivision (5)a. — The execution by the defendant of a guaranty contract by which he guaranteed performance and payment in the event that another defendant should default on a lease was a promise to pay for services to be performed in this State under subdivision (5)a. Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978).

Organ Procurement Service. — Under the Uniform Anatomical Gift Act the procurement of organs is expressly considered a service, and where out of state organ procurement organization was responsible for the transportation of a kidney to the destination of a recipient member of organ procurement network, packaged and shipped the kidney to North Carolina so that its service was not complete until the kidney was delivered to North Carolina, and directly billed a North Carolina entity for its services, the exercise of jurisdiction over the organ procurement organization pursuant to subdivision (5)(a) was proper. Slaughter v. Life Connection, 907 F. Supp. 929 (M.D.N.C. 1995).

Development of Specialty Hospital. — Defendant's agreement with plaintiffs to build and operate a specialty hospital in Texas fell within the purview of subdivisions (5)(a) and (5)(c), where entities formed to carry out parties' agreement were created under North Carolina law, and defendant made promises in furtherance of their enterprise to plaintiffs who were residents of North Carolina. Cornerstone Orthopedic Hosp. v. Marquez, 944 F. Supp. 451 (W.D.N.C. 1996).

The promise to deliver goods to a carrier for shipment to North Carolina is sufficient to confer statutory jurisdiction. Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

Subdivision (5)c of this section confers jurisdiction when a foreign corporation promises to deliver goods to this State. Defendant's promise to deliver the product through a carrier does not deprive North Carolina courts of jurisdiction when the parties to the contract contemplated shipment to North Carolina. Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

Receipt of Goods in this State. — Subdivision (5)e of this section gives jurisdiction over a foreign corporation when title to goods passed upon delivery to a carrier in another state, but the plaintiff did not take actual possession until the goods arrived in North Carolina. Collector Cars of Nags Head, Inc. v. G.C.S. Elecs., 82 N.C. App. 579, 347 S.E.2d 74 (1986).

Unsupported Allegation of Contract for Hire. — The plaintiff's allegation that the defendant "engaged" him to procure real estate in North Carolina and other states for investment purposes was insufficient to establish a prima facie showing of long-arm jurisdiction under this section where defendants denied this allegation by means of special counsel's affidavit and plaintiffs made no attempt to support the allegation with affidavits or otherwise. Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 532 S.E.2d 215 (2000).

Defendant to Pay for Services Performed by Plaintiff. — Where Tennessee defendant agreed to make sales calls on potential customers and solicit orders on behalf of North Carolina plaintiff in several states other than North Carolina, this case fell within the long-arm statute's requirements for personal jurisdiction; the record showed that the defendant had promised to receive and convey payment for plaintiff's services to plaintiff and the plaintiff performed these services in North Carolina. CFA Medical, Inc. v. Burkhalter, 95 N.C. App. 391, 383 S.E.2d 214 (1989).

Promise to Pay for Services to Be Performed. — Based on plaintiff's allegations that the individual defendants promised to pay for services to be performed by plaintiff in North Carolina, subsection (5)a of this section authorized the assertion of personal jurisdiction over the individual defendants. Ellison Windows & Doors, Inc. v. Vinyl Prods., — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 5000 (M.D.N.C. Jan. 20, 2000).

Because defendant promised to pay for services to be performed by plaintiff in North Carolina, subsection (5)a of this section authorized the assertion of personal jurisdiction over the defendant. Triad Motorsports, L.L.C. v. Pharbco Mktg. Group, Inc., 104 F. Supp. 2d 590, 2000 U.S. Dist. LEXIS 5123 (M.D.N.C. 2000).

Promise by Representative to Reimburse Plaintiff for Services. — Subdivision (5)a provides statutory authority for the exercise of personal jurisdiction over the nonresident defendant whose representative promised to reimburse plaintiff for services. Chapman v. Janko, U.S.A., Inc., 120 N.C. App. 371, 462 S.E.2d 534 (1995).

Promise to Provide Insurance Coverage for Real Property in North Carolina. — G.S. 1-75.4(6)(a) provided a basis for asserting long-arm jurisdiction over an insurance broker. The trial court's findings indicated the existence of a promise made by the broker to a bank's predecessor to provide insurance coverage to protect real property in North Carolina; that promise fell within the G.S. 58-1-10 definition of a contract of insurance. Wells Fargo Bank, N.A. v. Affiliated FM Ins. Co., — N.C. App. —, 666 S.E.2d 774, 2008 N.C. App. LEXIS 1766 (2008).

Attendance at Corporate Meetings. — Where, in a suit to enforce covenants not to compete, defendants personally appeared in North Carolina to take advantage of job training provided by plaintiff for corporate management meetings and training, defendants accepted and ratified the rendition of services (meetings and training) provided by the plaintiff in this state and fell within reach of the long-arm statute. Century Data Sys. v. McDonald, 109 N.C. App. 425, 428 S.E.2d 190 (1993).

Where plaintiff and defendants entered into a sales representation agreement whereby plaintiff agreed to act as a sales representative for defendants in this and other states, and defendants agreed to pay commissions to plaintiff, defendants were within the provisions of subdivisions (5)a and (5)b of this section. D.P. Riggins & Assocs. v. American Bd. Cos., 796 F. Supp. 205 (W.D.N.C. 1992).

Placement of Purchase Orders in State. — The exercise of personal jurisdiction over the defendant was proper since the defendant had substantial and sustained contacts with the forum that satisfied both North Carolina's long-arm statute and federal due process where, since April 1999, the defendant had placed 18 purchase orders in North Carolina with a company affiliated with the plaintiff and much of the equipment it purchased was also manufactured in North Carolina. Volvo Trademark Holding Aktiebolaget v. Nueces Farm Ctr., Inc., — F. Supp. 2d —, 2001 U.S. Dist. LEXIS 17635 (W.D.N.C. Oct. 26, 2001).

Unreasonable to Assume Bank Anticipated Litigation Everywhere Customers Resided. — Where defendant was an Illinois bank, doing business in Illinois, did not solicit or transact business in North Carolina, and did not have an office or agents in North Carolina, defendant conceded that customers did use funds in North Carolina and some customers were residents of North Carolina, and it was foreseeable to defendant that some customers would use loan proceeds in North Carolina, it was unreasonable to assume that defendant anticipated being hauled into court in every jurisdiction in which its customers resided or used funds. Occidental Fire & Cas. Co. v. Continental Ill. Nat'l Bank & Trust Co., 689 F. Supp. 564 (E.D.N.C. 1988).

Money payment is clearly a thing of value within the meaning of subdivisions (5)c of this section. Pope v. Pope, 38 N.C. App. 328, 248 S.E.2d 260 (1978).

Money is a thing of value, and defendant's promise in the note to make payments to plaintiff in North Carolina was clearly a promise to deliver a thing of value within this State, and thus within the purview of this section. Wohlfahrt v. Schneider, 66 N.C. App. 691, 311 S.E.2d 686 (1984).

Money payments are a "thing of value" within the meaning of subdivisions (5)c and (5)d of this section. ETR Corp. v. Wilson Welding Serv., Inc., 96 N.C. App. 666, 386 S.E.2d 766 (1990).

Support Payments Are a "Thing of Value" Under Subdivision (5)c. — Since support payments are exchanged for, and in consideration of, an asset or a thing of value, i.e., a release of marital rights, support payments are clearly a "thing of value." Pope v. Pope, 38 N.C. App. 328, 248 S.E.2d 260 (1978).

Money Sent to Defendant to Acquire Options on Real Property. — Where plaintiffs alleged they advanced $67,500 to defendant, at his direction, to be used by him to acquire options on certain real property in South Carolina and to obtain a mobile home for use in the partnership business and plaintiffs maintained that these monies were sent to defendant from Wilkes County, plaintiffs shipped "things of value" to defendant at his direction, and statutory jurisdiction was thus established under subdivision (5)d. Church v. Carter, 94 N.C. App. 286, 380 S.E.2d 167 (1989).

"Shipment from This State to Defendant on His Order or Direction." — Where defendant directed plaintiff to send monies owed pursuant to a partnership agreement to him in Alabama and plaintiff distributed the money from North Carolina, the money paid was "shipped from this state by the plaintiff to defendant on his order or direction." Cherry Bekaert & Holland v. Brown, 99 N.C. App. 626, 394 S.E.2d 651 (1990).

Subdivision (5)d Provided Basis for Exercise of Personal Jurisdictional over Defendant. — Where there was no question that the valves, seals, pumps, etc. which plaintiff sent to defendant, pursuant to defendant's purchase order, constituted goods shipped from this State by the plaintiff to the defendant on the defendant's order or direction, since plaintiff's action for breach of contract related to those goods, subdivision (5)d of this section plainly provided a statutory basis for this State's exercise of personal jurisdiction over the nonresident defendant. Combustion Sys. Sales v. Hatfield Heating & Air Conditioning Co., 102 N.C. App. 751, 403 S.E.2d 600 (1991).

Letters of Credit Were Not "Other Things of Value". — Letters of credit issued by an Illinois bank and delivered to a North Carolina resident did not constitute "other things of value" under subdivision (5)e and, therefore, no specific jurisdiction was found to bring defendant bank into court in North Carolina. Occidental Fire & Cas. Co. v. Continental Ill. Nat'l Bank & Trust Co., 689 F. Supp. 564 (E.D.N.C. 1988).

IX. CASES DECIDED UNDER PRIOR LAW.

A. General Consideration.

Editor's Note. — *The cases cited below were decided under former G.S. 55-145 and prior law. Former G.S. 55-145 related to jurisdiction over foreign corporations not transacting business in the State.*

Burden of Suing Away from Home Need Not Always Fall on Plaintiff. — There is almost always some hardship to the party required to litigate away from home. But there is no constitutional requirement that this hardship must invariably be borne by the plaintiff whenever the defendant is a nonresident. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Benefit and Protection of State Law Gives Rise to Obligations. — To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of and are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Where foreign corporation obviously uses, benefits from, or can easily use the laws of North Carolina, jurisdiction will lie. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Defendant Must Have Purposely Availed Itself of Privilege of Conducting Activities. — It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its law. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965); Equity Assocs. v. Society for Sav., 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

Regardless of what other contacts may be present. Equity Assocs. v. Society for Sav., 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

Invoking Privilege of Conducting Business. — By entering into a contract made in this State and to be performed in part in this State, a defendant foreign corporation avails itself of the privilege of conducting its business in this State, thus invoking the benefits and protection of its laws. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

Right of State to Require Answer to Claims. — Where the solicited circulation of a corporation's publications account for a relatively significant portion of the corporation's revenue, notions of fair play and substantial justice support the right of the State to require the corporation to answer nonfrivolous claims arising out of its contacts with the State, even though it has managed to reduce its physical presence in the State to a minimum. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

Size of Claim Is Pertinent. — When claims are small or moderate, individual claimants frequently cannot afford the cost of bringing an action in a foreign forum, thus placing the foreign corporation beyond the reach of the claimant. Whether this is the situation in a given case is pertinent. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

As Is Presence of Witnesses and Evidence. — Consideration should be given to the question whether the crucial witnesses and material evidence are to be found in the forum state. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

And Inconvenience to Corporation. — An estimate of the inconveniences which would result to the corporation from a trial away from its home or principal place of business is relevant. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

And State's Interest in Protecting Residents. — Consideration should be also given to any legitimate interest the State has in protecting its residents with respect to the activities and contacts of the foreign corporation. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

This State has a legitimate interest in the establishment and operation of enterprises and trade within its borders and the protection of its residents in the making of contracts with persons and agents who enter the State for that purpose. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

And Whether State's Courts Are Open to Suits by Foreign Corporation. — Consideration should be given to the question whether the courts of the forum state are open to the foreign corporation to enforce obligations of residents of such state created by the activities and contacts of the corporation. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

As They Are in This State. — The courts of the State have been and now are open to a foreign corporation for protection of its activities and to enforce the valid obligations which residents of this State have assumed by reason of defendant's contacts and activities. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Nonresident has access to the courts of this State and can sue a foreign corporation. Marshville Rendering Corp. v. Gas Heat Eng'r Corp., 10 N.C. App. 39, 177 S.E.2d 907 (1970).

In Personam Jurisdiction. — The resolution of a question of in personam jurisdiction over a foreign corporation, as with any determination of personal jurisdiction, involves a two-part determination: (1) Does a statutory basis for personal jurisdiction exist, and (2) if so, does the exercise of this jurisdiction violate constitutional due process? However, it has been held that long-arm legislation was intended to make available to North Carolina courts the full jurisdictional powers permissible under due process. Therefore, since the statutory authorization for personal jurisdiction is coextensive with federal due process, the critical inquiry in determining whether North Carolina may assert in personam jurisdiction over a defendant is whether the assertion comports with due process. J.M. Thompson Co. v. Doral Mfg. Co., 72 N.C. App. 419, 324 S.E.2d 909, cert. denied, 313 N.C. 603, 330 S.E.2d 611 (1985).

Plaintiff has the initial burden of showing the existence of jurisdiction. The burden is met by a prima facie showing that jurisdiction is conferred by the statute. Styleco, Inc. v. Stoutco, Inc., 62 N.C. App. 525, 302 S.E.2d 888, cert. denied, 309 N.C. 825, 310 S.E.2d 358 (1983).

Personal Service Alone Insufficient to Subject Foreign Corporation to Jurisdiction. — The mere fact that there is personal service upon an officer of a foreign corporation who is present in the State is insufficient to subject a foreign corporation to the jurisdiction of the court. Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960).

Federal court in a diversity action is bound by the jurisdictional limits placed on the North Carolina courts by the State Legislature. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Casual Presence or Isolated Activity of Agent. — The casual presence of the corporate agent or even his conduct of single or isolated activity in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

If a corporation had insufficient contact or relations with North Carolina to warrant the assertion of jurisdiction over it, the entry of its agent on an isolated occasion to discuss the claim could not supply the necessary tie to give the State power. Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956).

Agent's Activities Not Amounting to Doing Business. — A mere salesman or broker who takes orders and sends them to a foreign corporation for acceptance, or a distributor who buys and takes title to the chattels, is not a managing or local agent and does not result in the corporation doing business in this State. Edwards v. Scott & Fetzer, Inc., 154 F. Supp. 41 (M.D.N.C. 1957).

Considerations of U.S. Const., Amend. I Are Relevant But Do Not Bar Jurisdiction. — New York Times Co. v. Conner, 365 F.2d 567 (5th Cir. 1966), does not stand for the proposition that, because of the constitutional protection of the dissemination of ideas, a publisher may never be sued for libel in a state other than that of publication. Rather, Conner indicates that considerations under U.S. Const., Amend. I are a factor relevant to a determination of the jurisdictional question; and the discussion of that factor in Conner must be viewed in its factual context. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

And Such Considerations Are Minimized. — In a libel action against a national magazine publisher, U.S. Const., Amend. I was not totally disregarded in the context of the jurisdictional question under this section, but the consideration given it was minimized. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

In the jurisdictional context, a nonresident defendant publisher has the protection of the rights guaranteed to it by the due process clause of U.S. Const., Amend. XIV, and to interject U.S. Const., Amend. I, with its full impact, into the discussion at this point would unnecessarily confuse an already complex issue. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

Since They May Impose Vague Standards on Long-Arm Statutes. — Hazards to publishers from libel actions have been much mitigated by the development of substantive principles under U.S. Const., Amend. I. It is a legitimate question whether this will not sufficiently protect communications media without superimposing a necessarily vague standard under U.S. Const., Amend. I, upon the application of long-arm statutes and thereby possibly creating undue hardship for a plaintiff. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

B. Minimum Contacts.

Sufficiency of Contacts and Manner of Service Present Due Process Question. — Whether a foreign corporation has sufficient contacts within the State to subject it to service of process in an action in personam, and whether the manner of service is a reasonable method of notification to it of the action, present a question of due process which must be decided in accordance with the decisions of the Supreme Court of the United States upon the facts of each particular case upon the basis of what is fair and reasonable and just under the circumstances. Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963).

Requirements of Due Process. — Due process requires only that, in order to subject a defendant to a judgment in personam if he be not present within the territory of the forum, he have certain minimum contacts with it, such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Long v. Burdette Mfg. Co., 294 F. Supp. 784 (W.D.N.C. 1968), rev'd on other grounds, 460 F.2d 448 (4th Cir. 1972); Epps v. Golden, 295 F. Supp. 520 (W.D.N.C. 1968); Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970); Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971); Equity Assocs. v. Society for Sav., 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

A State court may acquire in personam jurisdiction over a nonresident defendant under principles established by the United States Supreme Court where the nonresident defendant has minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15, aff'd, 277 N.C. 223, 176 S.E.2d 784 (1970).

It is sufficient for the purposes of due process if the suit is based on a contract which has substantial connection with the forum state. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965); Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970); Equity Assocs. v. Society for Sav., 31 N.C. App. 182, 228 S.E.2d 761 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977); Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977); Gro-Mar Pub. Relations, Inc. v. Billy Jack Enters., Inc., 36 N.C. App. 673, 245 S.E.2d 782 (1978); Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978); Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc., 46 N.C. App. 235, 264 S.E.2d 753 (1980); Canterbury v. Monroe Lange Hardwood

Imports, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

Due process requires that defendant have certain minimum contacts with the forum state such that maintenance of suit therein not offend "traditional notions of fair play and substantial justice." Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978).

Whether the exercise of jurisdiction under former G.S. 55-145(a)(1) comported with due process hinged on whether the nonresident defendant had certain "minimum contacts" with North Carolina such that the maintenance of the suit did not offend traditional notions of fair play and substantial justice. These contacts could not be the result of the "unilateral activity" of those who claimed some relationship with the defendant; rather, it was essential that there be some act by which the defendant purposefully availed itself of the privilege of conducting activities within this State. Unitrac, S.A. v. Southern Funding Corp., 75 N.C. App. 142, 330 S.E.2d 44 (1985).

However minimal the burden of defending in a foreign tribunal, a defendant foreign corporation may not be called upon to do so unless he has had the "minimal contacts" with that state that are prerequisite to its exercise of power over him. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970).

Criteria for Subjecting Corporation to Suit Generally. — The criteria by which the boundary line is marked between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure. Long v. Burdette Mfg. Co., 294 F. Supp. 784 (W.D.N.C. 1968), rev'd on other grounds, 460 F.2d 448 (4th Cir. 1972).

Essential requirements of "minimum contacts" for obtaining jurisdiction under this section are: (1) The form of substituted service adopted by the forum state must give reasonable assurance that notice to defendant will be actual; (2) there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, invoking the benefits and protection of its law; and (3) the legislature of the forum state must have given authority to its courts to entertain litigation against a foreign corporation to the extent permitted by the due process requirement. Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970); Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977); Tom Togs, Inc. v. Ben Elias Indus. Corp., 76 N.C. App. 663, 334 S.E.2d 105 (1985), rev'd on other grounds, 318 N.C. 361, 348 S.E.2d 782 (1986).

The criteria for determining whether minimum contacts exist include: (1) The quantity of contacts, (2) the nature and quality of contacts, (3) the source and connection of the cause of action with those contacts, (4) the interests of the forum state and convenience, and (5) whether the defendant invoked benefits and protections of law of the forum state. Hardin v. DLF Computer Co., 617 F. Supp. 70 (W.D.N.C. 1985).

Contact Is Crux of Jurisdictional Investigation. — While the forum state's impact upon the defendant's business is a relevant factor which cannot be overlooked, far greater weight should be given to the contact that the defendant's business has with the markets of the forum state. The latter is the crux of the jurisdictional investigation. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

Question of Minimum Contacts Is Determined by Applying Fact Situation to Law. — The question of whether there are, in fact, sufficient minimum contacts with a territorial entity by a defendant must be determined by applying the fact situation before the court to the law as it has been set forth by the legislative and judicial authorities. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

Substantial contacts with the State would be required to bring a corporation within former G.S. 55-145(a). Goldman v. Parkland of Dallas, Inc., 7 N.C. App. 400, 173 S.E.2d 15, aff'd, 277 N.C. 223, 176 S.E.2d 784 (1970).

Minimum contacts exist if foreign company's activity is regular, or systematic, or continuous. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Where Activity Continuous and Systematic, No Doubt of Presence in State. — Presence in this State has never been doubted when the activities of the corporation there have not only been continuous and systematic, but have also given rise to the liabilities sued on, even though no consent to be sued or authorization to accept service has been given. Babson v. Clairol, Inc., 256 N.C. 227, 123 S.E.2d 508 (1962); Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

And No Violation of Due Process. — When the activities of the foreign corporation in the forum state have not only been continuous and systematic, but also give rise to the liabilities sued on, the forum state does not violate due process by taking jurisdiction of the suit instituted by a resident of such state, even though no consent to be sued or authorization to an agent to accept service of process has been given. Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965).

Continuing Business with Substantial Contacts Affords Jurisdiction. — Where the defendant's business was a continuing one and a substantial portion of the plaintiff's alleged cause of action arose out of substantial contacts within the State, the minimum contacts necessary to the jurisdiction of this State's courts exist. Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970).

Substantial Contacts Make Exercise of Jurisdiction Just. — Direct, substantial and uninterrupted contacts by a foreign corporation with this State make it reasonable and just for the court to exercise its jurisdiction over such foreign corporation as authorized by this section. Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963).

Reducing Physical Contacts to Minimum Does Not Bar Suit. — Clearly it would not comport with notions of fair play and substantial justice to allow a business enterprise, whose overriding business purpose is maximum exploitation of the national market, to be free from suit as a matter of law in all states but that of publication simply because physical contacts with the other states had been reduced to a minimum. Johnston v. Time, Inc., 321 F. Supp. 837 (M.D.N.C. 1970), aff'd in part and vacated in part, 448 F.2d 378 (4th Cir. 1971).

Activity Held Not to Establish Minimum Contacts. — Where a real estate corporation never had an office or agent in this State, it has never advertised or solicited business here, and the cause of action did not result from a sale by the corporation to someone then in this State, nor could the corporation expect to benefit from or use the laws of this State to enforce any obligations, this would not establish the minimum contacts required to ensure due process. Staley v. Homeland, Inc., 368 F. Supp. 1344 (E.D.N.C. 1974).

Occasional visits by an out-of-state car dealer to the regional office of the manufacturer in this State, for the purpose of viewing new model automobiles, or taking customers who wished to purchase some particular type of automobile or truck which the defendant did not have at its place of business, and occasional communications with said regional office by telephone, telegram, or letter, fall far short of the "minimum contacts" required to subject a foreign corporation to jurisdiction of the courts of this State. Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960).

Service of Abusive Process. — If an out-of-state defendant causes abusive process to be served upon an in-state plaintiff, and the plaintiff subsequently sues the defendant in plaintiff's state, the state wherein the alleged abusive process was served, on a cause of action arising out of such abusive service of process, personal jurisdiction exists over the out-of-state defendant. Vishay Intertechnology, Inc. v. Delta Int'l Corp., 696 F.2d 1062 (4th Cir. 1982).

Jurisdiction Held to Exist. — In an action to recover a deposit paid pursuant to a manufacturing contract, jurisdiction existed over defendant foreign corporation where plaintiff domestic corporation had contracted with it to manufacture products using components supplied by plaintiff, and it was contemplated that some of the products would be sold in North Carolina. Styleco, Inc. v. Stoutco, Inc., 62 N.C. App. 525, 302 S.E.2d 888, cert. denied, 309 N.C. 825, 310 S.E.2d 358 (1983).

Defendant's Sexual Activity in North Carolina Satisfied Minimum Contacts Requirement. — Trial court properly denied a girlfriend's motion to dismiss a wife's claim that the girlfriend alienated the affections of the wife's husband, because the girlfriend's acts of calling, e-mailing, and engaging in sex acts with the husband in North Carolina satisfied the longarm statute, G.S. 1-75.4(3), and due process. Fox v. Gibson, 176 N.C. App. 554, 626 S.E.2d 841, 2006 N.C. App. LEXIS 534 (2006).

C. Solicitation of Business in State.

Contract Evidenced by Telegraph and Mail Communication. — In an action by plaintiff to recover the balance of payments allegedly due it by defendant, a California corporation, for goods shipped from plaintiff's manufacturing plant in this State, the trial court did not err in denying defendant's motion to dismiss for lack of in personam jurisdiction where the evidence tended to show that all communication concerning the transaction was conducted by telegraph and by mail and that both parties considered themselves to have executed a contract since such evidence was sufficient to show that a contract was made in this State so that defendant had sufficient contacts with North Carolina to subject it to suit here. General Time Corp. v. Eye Encounter, Inc., 50 N.C. App. 467, 274 S.E.2d 391 (1981).

Patent holder's patent infringement action against a key-cutting machine manufacturer was dismissed for lack of personal jurisdiction pursuant to G.S. 1-75.4(1)(d) and the due process clause because, although the manufacturer sold its key-cutting machine in North Carolina via its representative, the manufacturer did not have an established place of business in North Carolina, its representative was an independent, manufacturing representative who purchased the manufacturer's products in Illinois and sold them in North Carolina, the representative was not an employee of the manufacturer, and the manufacturer had no control over the representative. Kaba Ilco, Inc. v. HPC, Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 34279 (E.D.N.C. Apr. 25, 2008).

D. Goods Expected to Be Used or Consumed in State.

Constitutionality of Former § 55-145(a) Involved Due Process Question. — The constitutionality of former G.S. 55-145(a) involved a question of due process of law, to be determined in accordance with the decisions of the Supreme Court of the United States, and in this connection International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 (1945), was decisive. Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959), distinguishing Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957) and Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) on the facts.

Former § 55-145(a)(3) Was Not Violative of Any Provision of the North Carolina Constitution. Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959), distinguishing Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957) and Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956) on the facts.

Liability for Defective Goods Sold to Wholesaler in State. — A foreign corporation selling home appliances to wholesalers in North Carolina was subject to service of process under former G.S. 55-145(a)(3) in an action by a resident of this State to recover for personal injury allegedly resulting from a defective appliance manufactured by the foreign corporation, notwithstanding that title to appliances sold by the corporation in this State passed to the wholesalers at the point of shipment outside of this State and notwithstanding that the foreign corporation maintained no agents or employees here except agents for the solicitation of orders which were subject to approval by the home office, and such service subjected the foreign corporation to a judgment in personam. Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959).

Former § 55-145(a)(3) Was Inapplicable Where Machine Sold Never Entered State. — Former G.S. 55-145(a)(3) was not applicable to an action for breach of a sales contract by a seller in another state, where the machine sold to buyers in this State under the contract had never entered this State nor been used here. Bowman v. Curt G. Joa, Inc., 361 F.2d 706 (4th Cir. 1966).

Contacts Held Insufficient for Jurisdiction. — Where the parties were both commercial concerns dealing on equal footing at arm's length, and the defendant had never solicited, advertised, or transacted business in this State, and its only contact with this State was the contract in suit, which was made and substantially performed in another state, it was held that to subject the defendant to the in personam jurisdiction of the courts in this State under former G.S. 55-145(a)(3) would violate due process. Golden Belt Mfg. Co. v. Janler Plastic Mold Corp., 281 F. Supp. 368 (M.D.N.C. 1967), aff'd, 391 F.2d 266 (4th Cir. 1968).

Former G.S. 55-145(a)(3) was unconstitutional as applied to an action for libel against a foreign publishing corporation which delivered magazines to a common carrier for shipment to a wholesale dealer in this State for resale by the dealer, and which employed sales promotion representatives who made only occasional visits in this State, since such corporation had no contacts, ties or relations within this State so as to make it amenable to service of process here for the purpose of a judgment in personam. Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957).

§ 1-75.5. Joinder of causes in the same action.

In any action brought in reliance upon jurisdictional grounds stated in subdivisions (2) to (10) of G.S. 1-75.4 there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under G.S. 1-75.4 for personal jurisdiction over the defendant as to the claim or cause to be joined. (1967, c. 954, s. 2.)

CASE NOTES

Cited in Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995).

§ 1-75.6. Personal jurisdiction — Manner of exercising by service of process.

A court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4 may exercise personal jurisdiction over a defendant by service of process in accordance with the provisions of Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure. (1967, c. 954, s. 2; 1983, c. 231.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

CASE NOTES

Jurisdictional Defect. — Plaintiff had ample opportunity to cure any jurisdictional defects and was not unfairly prejudiced by defendant's actions. Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 242, 468 S.E.2d 600 (1996).

Applied in Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

§ 1-75.7. Personal jurisdiction — Grounds for without service of summons.

A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:

(1) Who makes a general appearance in an action; provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance; or

(2) With respect to any counterclaim asserted against that person in an action which he has commenced in the State. (1967, c. 954, s. 2; 1975, c. 76, s. 1.)

Legal Periodicals. — For survey of 1974 case law on general appearance waiver, see 53 N.C.L. Rev. 1026 (1975).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

CASE NOTES

This section codifies the long-standing rule that a person making a voluntary appearance is subject to the court's jurisdiction irrespective of whether jurisdiction over his person has been acquired previously in the manner prescribed by law. Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972), rev'd on other grounds, 285 N.C. 689, 208 S.E.2d 649 (1974).

This section has no counterpart in federal practice. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

There is no counterpart to this section in the Federal Rules of Civil Procedure. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

This section and § 1A-1, Rule 12 must be construed together, since they are a part of the same enactment. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974); Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

In determining whether a general appearance was made in any proceeding, this section must be construed with G.S. 1A-1, Rule 12, since these statutes are part of the same enactment. Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212, modified on rehearing, 303 N.C. 367, 279 S.E.2d 840 (1981).

Section 1A-1, Rule 12 Does Not Abolish Concept of General Appearance. — When G.S. 1A-1, Rule 12 and this section are construed together, it is apparent that G.S. 1A-1, Rule 12 does not abolish the concept of the voluntary or general appearance. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769

(1974); Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

If a general appearance is made in conjunction with or after a § 1A-1, Rule 12(b)(2) motion, properly filed, the right to challenge personal jurisdiction is preserved. Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212, modified on rehearing, 303 N.C. 367, 279 S.E.2d 840 (1981).

"General Appearance" to Be Given Liberal Construction. — Although this section was amended specifically to allow motions for extensions of time, otherwise the concept of a "general appearance" remains the same, and the concept should be given a liberal interpretation. Alexiou v. O.R.I.P., Ltd., 36 N.C. App. 246, 243 S.E.2d 412, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978).

The concept of a general appearance should be given a liberal construction. Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

Meaning of "General Appearance". — The term "general appearance," as used in this section, should be held to refer generally to appearances made either before the filing of jurisdictional motions under G.S. 1A-1, Rule 12(b) before pleading or, if no such motions are filed, to appearances made before the defense is raised in responsive pleadings. Smith v. Pacific Intermountain Express Co., 34 N.C. App. 694, 239 S.E.2d 614 (1977), vacated, 295 N.C. 92, 244 S.E.2d 260 (1978).

A general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979); Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984); State v. Sealey, 41 N.C. App. 175, 254 S.E.2d 238 (1979).

An appearance for any purpose other than to question the jurisdiction of the court is general. Alexiou v. O.R.I.P., Ltd., 36 N.C. App. 246, 243 S.E.2d 412, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978); Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

Virtually any action other than a motion to dismiss for lack of jurisdiction constitutes a general appearance in a court having subject matter jurisdiction. Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

Where defendant generally appeared in case by moving for a change of venue, by filing answers to both the complaint and amended complaint, by responding to plaintiff's motion for summary judgment, by filing three different motions or amended motions of her own for summary judgment, by moving or requesting on several different occasions that the case be calendared for trial, and by participating in summary judgment hearing, the court had jurisdiction over her. Blackwell v. Massey, 69 N.C. App. 240, 316 S.E.2d 350 (1984).

Where, before making his motion to dismiss for lack of jurisdiction, husband filed a notice of appeal, a petition for writ of supersedeas, a petition for writ of certiorari, and a notice of dismissal, the husband would be held to have entered a general appearance and waived his right to contest personal jurisdiction. Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984).

Where defendants alerted plaintiff to jurisdictional problems in their answer and engaged in discovery, neither law nor equity permitted such actions alone to be considered a general appearance within subdivision (1), and did not grant the court jurisdiction when plaintiffs did not serve a summons on them. Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 242, 468 S.E.2d 600 (1996).

Necessity of Service Obviated by General Appearance. — In this section the legislature made the policy decision that any act which constitutes a general appearance obviates the necessity of service of summons. Whether conduct which will dispense with the necessity of service of summons is denominated a general appearance or a submission to the jurisdiction or is left unlabeled is immaterial; the effect of such conduct remains the same. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

General Appearance Confers Jurisdiction Despite Absence of Service. — Defendant's general appearance before the trial court, filing an answer that failed to contest personal jurisdiction, obviated the need for plaintiff to serve defendant with a summons in order to grant the trial court jurisdiction over defendant. City of Charlotte v. Noles, 143 N.C. App. 181, 544 S.E.2d 585, 2001 N.C. App. LEXIS 217 (2001).

Where the person who was served with a summons directed to a corporation attended the Small Claims Division proceedings and fully participated on the corporation's behalf, the corporation thereby made a general appearance and thus waived its right to challenge proper service of process; the trial court erred in reversing a judgment entered by a Small Claims Division magistrate based on invalid service. Woods v. Billy's Auto., 174 N.C. App. 808, 622 S.E.2d 193, 2005 N.C. App. LEXIS 2595 (2005).

In filing a motion to claim exempt property defendant made a general appearance, and her subsequent motion for relief from judgment on the grounds of the invalidity of service of process was properly dismissed. Faucette v. Dickerson, 103 N.C. App. 620, 406 S.E.2d 602 (1991).

Objections to lack of jurisdiction over the person may be waived by voluntary appearance. This includes objections. Glesner v. Dembrosky, 73 N.C. App. 594, 327 S.E.2d 60 (1985).

General Appearance Confers Jurisdiction Despite Defect in Service. — If defendant makes a "general appearance," the court has jurisdiction over his person, even if service of process was defective. Alexiou v. O.R.I.P., Ltd., 36 N.C. App. 246, 243 S.E.2d 412, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978).

Where defendant and his counsel appeared in court and proceeded with the matter without contesting the court's jurisdiction for lack of service of process, defendant submitted himself to the jurisdiction of the court and thus, effectively waived any defect in service of process and service thereof. Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994).

General appearance by a party's attorney will dispense with process and service. Williams v. Williams, 46 N.C. App. 787, 266 S.E.2d 25 (1980).

But participation by defendant's counsel in a contempt hearing would not invoke personal jurisdiction over the defendant, since a contempt proceeding is a collateral matter that does not directly bear upon the subject matter of the controversy. Williams v. Williams, 46 N.C. App. 787, 266 S.E.2d 25 (1980).

Waiver of Jurisdictional Defense by General Appearance. — After a defendant has submitted himself to the jurisdiction of the court by conduct constituting a general appearance, he may not assert the defense that the court has no jurisdiction over his person either by motion or answer under G.S. 1A-1, Rule 12(b). Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974); Williams v. Williams, 46 N.C. App. 787, 266 S.E.2d 25 (1980).

Where defendant made a general appearance before filing a motion contesting personal jurisdiction, he waived his right to challenge the court's exercise of personal jurisdiction over him from that date forward. Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981).

Juvenile petition was filed June 11, 2004, and the summons was issued four days later, but the summons was returned by the sheriff on June 30, 2004, unserved; on July 8, 2004, the mother attended a hearing regarding the allegations her minor child was neglected and dependent. The mother was not only present in court, but also agreed to continue the matter until July 22, 2004, and there was no evidence that the mother raised any objection at that hearing regarding insufficient service of process or personal jurisdiction; thus, her actions amounted to waiver of her right to challenge the trial court's exercise of personal jurisdiction over her regardless of whether she was served with a juvenile summons in compliance with G.S. 1A-1-4. In re A.J.M., 177 N.C. App. 745, 630 S.E.2d 33, 2006 N.C. App. LEXIS 1220 (2006).

Appearance as Executor. — Where husband died prior to a hearing on wife's motion to set aside a decree of absolute divorce, there was no merit to husband's executor's contention that he had not been served with process and was therefore not properly before the court, since his appearance, as executor, was a general appearance, and accordingly the trial court properly obtained jurisdiction over his person. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Motions To Disqualify Plaintiffs' Counsel. — The defendants waived service of process by entering general appearances where motions were made by the individual defendants to disqualify plaintiffs' counsel, since these motions requested affirmative relief from the court and necessarily invoked the judgment of the court as to the issues raised, and the jurisdictional defenses were not raised prior to the filing of these motions, nor were the motions grouped or joined with any jurisdictional motions. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

Notice of Appeal and Demand for Jury Trial. — When a party gives notice of appeal and demands trial by jury prior to contesting the court's jurisdiction over his person, he has made a general appearance under this section. Alexiou v. O.R.I.P., Ltd., 36 N.C. App. 246, 243 S.E.2d 412, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978).

General Appearance in Child Custody Proceeding. — Defendant made a general appearance in a child custody proceeding and submitted herself to the jurisdiction of the court by making a motion invoking the adjudicatory power of the court to determine whether full faith and credit should be given to a custody decree entered in Illinois. Lynch v. Lynch, 45 N.C. App. 391, 264 S.E.2d 114 (1980), aff'd in part and rev'd in part, 302 N.C. 189, 274 S.E.2d 212, modified on rehearing, 303 N.C. 367, 279 S.E.2d 840 (1981).

Defendant made a general appearance in a child custody action when his counsel participated in a conference with the plaintiff and the district court judge pertaining to an order enjoining defendant from taking the child out of the jurisdiction of the court, and the court had jurisdiction over defendant's person even though no service of process was made upon either defendant or his counsel. Williams v.

Williams, 46 N.C. App. 787, 266 S.E.2d 25 (1980).

By submitting information to the court in action for child support, custody and support, defendant made a general appearance prior to his assertions of lack of personal jurisdiction. Bullard v. Bader, 117 N.C. App. 299, 450 S.E.2d 757 (1994).

Motion for Extension of Time. — For the purposes of this section, a motion for extension of time in which to plead or otherwise answer will not constitute a general appearance; however, if the defendant, by motion or otherwise, invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, he has made a general appearance and has submitted himself to the jurisdiction of the court, whether he intended to or not. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), cert. denied & appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1979).

For cases holding that obtaining an extension of time in which to plead was a general appearance which waived any defect in the jurisdiction of the court for want of valid summons or proper service thereof, decided prior to the 1975 amendment to this section, see Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974); Philpott v. Kerns, 285 N.C. 225, 203 S.E.2d 778 (1974). But see, Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

Trial court properly granted a driver's motion pursuant to G.S. 1A-1, N.C. R. Civ. P. 12, to dismiss a personal injury action arising from an automobile accident, because the injured party failed to properly serve the driver pursuant to G.S. 1A-1, N.C. R. Civ. P. 4, and the driver did not make a general appearance by requesting an extension of time pursuant to G.S. 1-75.7, so the trial court lacked personal jurisdiction. Zellars v. McNair, 166 N.C. App. 755, 603 S.E.2d 826, 2004 N.C. App. LEXIS 2024 (2004), cert. denied, — N.C. —, 614 S.E.2d 925 (2005).

Motion for Change of Venue. — The nonresident defendant, by moving for a discretionary change of venue pursuant to G.S. 1-83(2) without first or simultaneously asserting his G.S. 1A-1, Rule 12 (b) defenses relating to jurisdiction and process, made a general appearance and voluntarily submitted himself to the jurisdiction of the court. Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

Filing of Answer Without Contesting Jurisdiction. — Where defendant, in his answer, made a motion under G.S. 1A-1, Rule 12(b)(6), and a res judicata motion, without making a motion to contest personal jurisdiction, his right to challenge the court's exercise of personal jurisdiction over him was waived. Stern v. Stern, 89 N.C. App. 689, 367 S.E.2d 7 (1988).

Applied in Wiles v. Welparnel Constr. Co., 34 N.C. App. 157, 237 S.E.2d 297 (1977); Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979); Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993); Judkins v. Judkins, 113 N.C. App. 734, 441 S.E.2d 139.

Cited in Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974); Southgate v. Russ, 52 N.C. App. 364, 278 S.E.2d 313 (1981); Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985); Grimsley v. Nelson, 342 N.C. 542, 467 S.E.2d 92 (1996); Draughon v. Harnett County Bd. of Educ., 166 N.C. App. 449, 602 S.E.2d 717, 2004 N.C. App. LEXIS 1784 (2004).

§ 1-75.8. Jurisdiction in rem or quasi in rem — Grounds for generally.

A court of this State having jurisdiction of the subject matter may exercise jurisdiction in rem or quasi in rem on the grounds stated in this section. A judgment in rem or quasi in rem may affect the interests of a defendant in a status, property or thing acted upon only if process has been served upon the defendant pursuant to Rule 4(k) of the Rules of Civil Procedure. Jurisdiction in rem or quasi in rem may be invoked in any of the following cases:

(1) When the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This subdivision shall apply whether any such defendant is known or unknown.

(2) When the action is to foreclose, redeem from or satisfy a deed of trust, mortgage, claim or lien upon real or personal property in this State.

(3) When the action is for a divorce or for annulment of marriage of a resident of this State.

(4) When the defendant has property within this State which has been attached or has a debtor within the State who has been garnished. Jurisdiction under this subdivision may be independent of or supple-

mentary to jurisdiction acquired under subdivisions (1), (2) and (3) of this section.

(5) In any other action in which in rem or quasi in rem jurisdiction may be constitutionally exercised. (1967, c. 954, s. 2.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

Legal Periodicals. — For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For comment on jurisdiction based upon attachment, see 16 Wake Forest L. Rev. 377 (1980).

CASE NOTES

Subdivision (4) Is Not Constitutional. — Subdivision (4) of this section does not meet the due process standards of Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977), which held that standards of fairness, reasonableness and substantial justice and minimum contacts should govern actions in rem as well as in personam, and is unconstitutional. Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978); Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Subdivision (5) Supports Jurisdiction If Due Process Standards Are Met. — Subdivision (5) of this section extends in rem and quasi in rem jurisdiction to any action "in which in rem or quasi in rem jurisdiction may be constitutionally exercised." This statute supports jurisdiction over the property within the state of a nonresident if due process standards are met. Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978); Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Meaning of Subdivision (5). — Subdivision (5) of this section means that the ability to attach a nonresident defendant's property is not a sufficient predicate, standing alone, for the assertion of quasi in rem jurisdiction. Canterbury v. Monroe Lange Hardwood Imports, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

Effect of Subdivision (5). — The effect of subdivision (5) of this section is to permit the exercise of quasi in rem jurisdiction over the property interest of a defendant who has been served with process pursuant to G.S. 1A-1, Rule 4(k) in any action where constitutionally permitted. Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

This Section Is Based on Pennoyer v. Neff. — This section and the caselaw relating to in rem jurisdiction are based on the decision in Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 (1878), which for 100 years has provided the conceptual framework for jurisdictional matters in the United States. Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978).

State Courts Given Full Jurisdictional Powers Permissible Under Federal Due Process. — While the due process mandates of fairness apply with equal force to actions in rem and quasi in rem as well as to actions in personam, it is also clear that the General Assembly in enacting subdivision (3) of this section intended to confer on the North Carolina courts the full jurisdictional powers permissible under federal due process as they relate to in rem and quasi in rem jurisdiction for divorce and annulment proceedings of North Carolina residents. Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670, cert. denied, 312 N.C. 621, 323 S.E.2d 921 (1984).

Application of Due Process Fairness Standard. — The mandates of the due process fairness standard apply with equal force to actions in rem and quasi in rem as well as to actions in personam. Canterbury v. Monroe Lange Hardwood Imports, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

The inquiry to be used regarding jurisdiction in rem and quasi in rem is similar to that regarding in personam jurisdiction: First, do the "long-arm" statutes allow the courts to assume jurisdiction over defendant? Second, assuming they do, does the exercise of such jurisdiction comport with due process? Gro-Mar Pub. Relations, Inc. v. Billy Jack Enter., Inc., 36 N.C. App. 673, 245 S.E.2d 782 (1978).

Minimum Contacts Required. — The exercise of both personal and quasi in rem jurisdiction is subject to the due process requirement that if the defendant is not present within the territory of the forum, he must have certain minimum contacts with it, such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Existence of Minimum Contacts Depends on Facts. — Whether minimum contacts exist is not to be determined by the application of per se rules; rather, their presence depends upon the particular facts of each case, with particular scrutiny being given to the quality and the nature of defendant's contacts with the State. Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Factors in Determining Existence of Minimum Contacts. — Other factors to be considered in determining whether minimum contacts exist are: (1) Any legitimate interest the forum state has in protecting its residents with respect to the activities and contacts of the defendant; (2) An estimate of the inconveniences to the defendant in being forced to defend a suit away from his home; (3) The location of crucial witnesses and material evidence; and (4) The existence of a contract which has a substantial connection with the forum state. Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Defendant Must Invoke Benefits and Protections of State's Laws. — In each case it is essential that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Mere ownership of property in the forum state is insufficient to establish "minimum contacts" necessary to satisfy the requirements of due process. Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980).

Jurisdiction Supported Where Real Property Has Relation to Controversy. — Where real property has some relation to the controversy, the interest of the State in realty within its borders, and the defendant's substantial relationship with the forum, should support jurisdiction. Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978).

One of the parties to a divorce action based upon one year's separation must be resident of this State for six months next preceding the filing of the divorce action. This residency requirement is jurisdictional and confers the necessary subject matter jurisdiction for the trial court to proceed in rem under subdivision (3) of this section. Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670, cert. denied, 312 N.C. 621, 323 S.E.2d 921 (1984).

Jurisdiction over Out-of-State Lottery Ticket. — Where court attempted to exercise in rem jurisdiction over winning Virginia lottery ticket the order was invalid, because the ticket was in Virginia, and the court could not exercise in rem jurisdiction over personal property located outside this state. Cole v. Hughes, 114 N.C. App. 424, 442 S.E.2d 86 (1994), cert. denied, 336 N.C. 778, 447 S.E.2d 418 (1994).

Equitable Distribution. — Assuming arguendo that the North Carolina "long-arm" statutes gave North Carolina courts jurisdiction over defendant for purposes of equitable distribution, application of those statutes would violate the due process clause of U.S. Const., Amend. XIV, where defendant had not lived in this state for any part of the marriage, and where, although certain property of the parties was located in this state, there was no indication of any action by defendant purposely directed towards this state. Carroll v. Carroll, 88 N.C. App. 453, 363 S.E.2d 872 (1988).

Discretion of Court. — The exercise of jurisdiction in rem or quasi in rem is a matter for the discretion of the court. Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978); Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Jurisdiction Not Established. — The trial court did not have jurisdiction in an action to recover a money judgment on an account where both the plaintiff and the defendant were nonresidents, the cause of action arose in Maryland, and the defendant's realty in North Carolina had no relation to the account which was the subject matter of the action, since Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977), held that the standards of fairness, reasonableness and substantial justice and minimum contacts should govern actions in rem as well as in personam. Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978).

Applied in Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973); Fraser v. Littlejohn, 96 N.C. App. 377, 386 S.E.2d 230 (1989).

Cited in Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972); Harris & Gurganus, Inc. v. Williams, 37 N.C. App. 585, 246 S.E.2d 791 (1978); Lessard v. Lessard, 68 N.C. App. 760, 316 S.E.2d 96 (1984).

§ 1-75.9. Jurisdiction in rem or quasi in rem — Manner of exercising.

A court of this State exercising jurisdiction in rem or quasi in rem pursuant to G.S. 1-75.8 may affect the interests of a defendant in such an action only if process has been served upon the defendant in accordance with the provisions of Rule 4(k) of the Rules of Civil Procedure, but nothing herein shall prevent the court from making interlocutory orders for the protection of the res while the action is pending. (1967, c. 954, s. 2.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

CASE NOTES

Applied in Canterbury v. Monroe Lange Hardwood Imports, 48 N.C. App. 90, 268 S.E.2d 868 (1980).

§ 1-75.10. Proof of service of summons, defendant appearing in action.

(a) Where the defendant appears in the action and challenges the service of the summons upon him, proof of the service of process shall be as follows:

(1) Personal Service or Substituted Personal Service. —

a. If served by the sheriff of the county or the lawful process officer in this State where the defendant was found, by the officer's certificate thereof, showing place, time and manner of service; or

b. If served by any other person, his affidavit thereof, showing place, time and manner of service; his qualifications to make service under Rule 4(a) or Rule 4(j3) of the Rules of Civil Procedure; that he knew the person served to be the party mentioned in the summons and delivered to and left with him a copy; and if the defendant was not personally served, he shall state in such affidavit when, where and with whom such copy was left. If such service is made outside this State, the proof thereof may in the alternative be made in accordance with the law of the place where such service is made.

(2) Service of Publication. — In the case of publication, by the affidavit of the publisher or printer, or his foreman or principal clerk, showing the same and specifying the date of the first and last publication, and an affidavit of mailing of a copy of the complaint or notice, as the case may require, made by the person who mailed the same.

(3) Written Admission of Defendant. — The written admission of the defendant, whose signature or the subscription of whose name to such admission shall be presumptive evidence of genuineness.

(4) Service by Registered or Certified Mail. — In the case of service by registered or certified mail, by affidavit of the serving party averring:

a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;

b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and

c. That the genuine receipt or other evidence of delivery is attached.

(5) Service by Designated Delivery Service. — In the case of service by designated delivery service, by affidavit of the serving party averring all of the following:

a. That a copy of the summons and complaint was deposited with a designated delivery service as authorized under G.S. 1A-1, Rule 4, delivery receipt requested.

b. That it was in fact received as evidenced by the attached delivery receipt or other evidence satisfactory to the court of delivery to the addressee.

c. That the delivery receipt or other evidence of delivery is attached.

(6) Service by Signature Confirmation. — In the case of service by signature confirmation as provided by the United States Postal Service, by affidavit of the serving party averring all of the following:
  a. That a copy of the summons and complaint was deposited in the post office for mailing by signature confirmation.
  b. That it was in fact received as evidenced by the attached proof of delivery obtained from the United States Postal Service, or other evidence satisfactory to the court of delivery to the addressee.
  c. That the copy of the signature confirmation or other evidence of delivery is attached.

(b) As used in subdivision (5) of subsection (a) of this section, "delivery receipt" includes a facsimile receipt and a printout of an electronic receipt. (1967, c. 954, s. 2; 1969, c. 895, s. 14; 1973, c. 643; 1979, c. 525, s. 2; 1981, c. 540, ss. 9, 10; 2001-379, s. 2.3; 2005-221, s. 3; 2008-36, s. 4.)

COMMENT

Paragraph b of subdivision (1) now provides that proof of service of process may, in the alternative, be made in accordance with the law of the place where service is effected. It is intended to prevent technical objections to a return of service prepared by a foreign process server in accordance with the practices and requirements of his own jurisdiction.

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

Effect of Amendments. — Session Laws 2008-36, s. 4, effective October 1, 2008, and applicable to receipts given on or after that date, designated the previously existing provisions as subsection (a); in subdivision (a)(5), inserted "all of the following" at the end of the introductory language; in subdivision (a)(5)c., substituted "delivery receipt" for "genuine receipt"; made minor stylistic changes throughout; and added subsection (b).

Legal Periodicals. — For article on legislative changes to the new rules of civil procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

CASE NOTES

Failure to serve process in the manner prescribed by statute makes the service invalid, even though a defendant has actual notice of the lawsuit. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984).

Proof of Service Established upon Challenge. — Regarding a breach of contract action filed against an individual and his business entities, where uncontradicted evidence established that a civil summons addressed to the individual was sent to him via U.S. Postal Service by certified mail, return receipt requested; the summons was delivered and a signature was obtained on the registry receipt; and the medical center executed an affidavit attesting to such facts, attaching the registry receipt bearing a signature showing delivery of the summons, the medical center showed proof of service pursuant to G.S. 1-75.10(4)(c). Granville Med. Ctr. v. Tipton, 160 N.C. App. 484, 586 S.E.2d 791, 2003 N.C. App. LEXIS 1826 (2003).

Proof of Service Established Despite Third-Party Signature on Postal Receipt. — Where the defendant appears in an action and challenges the service of summons by the sheriff of the county where he was found, proof of service shall be "by the officer's certificate thereof, showing place, time and manner of service," and when the return upon its face shows legal service by an authorized officer, that return is sufficient, at least prima facie, to show service in fact. Williams v. Burroughs Wellcome Co., 46 N.C. App. 459, 265 S.E.2d 633 (1980).

Regarding a breach of contract action filed against an individual and his business entities, where the individual claimed that service of the civil summons had not been effected on him because a third party not employed by him had signed the postal receipt evidencing delivery of the summons, the trial court properly found that the medical center had nevertheless effected service on the individual because G.S. 1-75.10(4) did not require an affidavit showing proof of service to state the name of the individual who signed the receipt. Granville Med. Ctr. v. Tipton, 160 N.C. App. 484, 586 S.E.2d 791, 2003 N.C. App. LEXIS 1826 (2003).

Trial court erred in granting defendant's motion to dismiss plaintiff's negligence action for improper service of process because by filing a copy of the signed return receipt, along with an affidavit that comported with G.S. 1-75.10, plaintiff was entitled to a rebuttable presumption of valid service; defendant did not state or otherwise present any evidence that his mother, who signed for the civil summons and complaint, was not authorized to accept service for him. Carpenter v. Agee, 171 N.C. App. 98, 613 S.E.2d 735, 2005 N.C. App. LEXIS 1164 (2005).

Sheriff's Certificate. — When a defendant appears in the action and challenges the sufficiency of service upon him, proof of the service of process shall be by the sheriff's certificate showing place, time and manner of service. Sun Bank/South Fla. v. Tracy, 104 N.C. App. 608, 410 S.E.2d 509 (1991).

Plaintiff Not Precluded from Offering Additional Proof of Service. — Although this section provides that an officer's return shall constitute proof of service in fact, and the better practice is for officers to make their return specifying in detail upon whom and in what manner process was served, the statute does not preclude a plaintiff, in a case where the return on its face does not affirmatively disclose facts showing nonservice, from offering additional proof to establish that service was made as required by law. Williams v. Burroughs Wellcome Co., 46 N.C. App. 459, 265 S.E.2d 633 (1980).

Proof of Service on Municipality by personal delivery. — Two affidavits relevant to personal delivery to acting city manager established valid service on city for purposes of a negligence action. Crabtree v. City of Durham, 136 N.C. App. 816, 526 S.E.2d 503, 2000 N.C. App. LEXIS 151 (2000).

Officer's Return Held Insufficient on Its Face. — Homeowners were entitled to attack foreclosure proceeding against their property either by a motion in the cause or by an independent action where the officer's return was insufficient on its face to show service upon homeowner husband in that the return did not show the place where the papers were left. Hassel v. Wilson, 301 N.C. 307, 272 S.E.2d 77 (1980).

Where the affidavit and accompanying delivery receipt show only that the summons was forwarded to defendant's place of business, and there is no showing from the affidavit that defendant herself received a copy of the summons and complaint, the trial court had before it no evidence from which it could have determined that the summons was in fact delivered to defendant since there was no genuine registry receipt or "other evidence" of delivery attached to the affidavit. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984).

Execution of Affidavit by Agent of Corporate Publisher. — Subdivision (2) of this section is satisfied where an agent executes an affidavit for a publisher which is a corporation, as shown in the affidavit. Philpott v. Johnson, 38 N.C. App. 380, 247 S.E.2d 781 (1978).

An affidavit signed by the "legal advertising manager" of a newspaper constitutes an affidavit of an agent of the publisher sufficient to satisfy the requirement of this section. Love v. Nationwide Mut. Ins. Co., 45 N.C. App. 444, 263 S.E.2d 337, cert. denied, 300 N.C. 198, 269 S.E.2d 617 (1980).

Service by Person in Foreign Country. — Where no affidavit was offered as required by this section, the plaintiff was allowed to prove service by mail by "a certificate of addressing and mailing by the clerk of court" to enable the German court to obtain personal jurisdiction over defendant and the North Carolina trial court was, under comity of nations, within its power to enforce the German court's order determining defendant to be the father and ordering him to pay child support. State ex rel. Desselberg v. Peele, 136 N.C. App. 206, 523 S.E.2d 125, 1999 N.C. App. LEXIS 1307 (1999), cert. denied, 351 N.C. 479, 543 S.E.2d 509 (2000).

Proof of service established. — Evidence that a county sheriff served an entertainer by throwing copies of a summons and complaint at his feet when he tried to avoid service was sufficient to show that the entertainer was served with the summons and complaint, but the appellate court vacated a default judgment that the trial court entered against the entertainer because neither plaintiff's complaint nor other evidence in the record showed that plaintiff had personal knowledge of the circumstances surrounding the hiring of two bodyguards who assaulted him. Lemon v. Combs, 164 N.C. App. 615, 596 S.E.2d 344, 2004 N.C. App. LEXIS 964 (2004).

Affidavit Held Sufficient to Rebut Presumption of Proper Service. — Defendant store's motion to dismiss stated with sufficient particularity the grounds alleged by citing G.S. 1A-1, Rule 12(b)(4) and 12(b)(5) and specified that plaintiffs, a husband and wife, failed to properly serve it as a corporation and instead served a mailroom employee; fact that the store filed the affidavit of the mailroom employee after its motion was insignificant, because the trial court gave plaintiffs the opportunity to respond and oppose the amended motion. Lane v. Winn-Dixie Charlotte, Inc., 169 N.C. App. 180, 609 S.E.2d 456, 2005 N.C. App. LEXIS 537 (2005).

Affidavit Held Insufficient to Rebut Presumption of Proper Service. — Corporation's affidavit, submitted pursuant to G.S. 1-75.10(4), was insufficient to rebut the presumption of service of process under G.S. 1A-1, N.C. R. Civ. P. 4(j)(2) because the corporation's evidence that service was not made was equivocal in nature; because 28 U.S.C.S. § 1446(b) was to be construed narrowly, the court refused to exercise its discretion in overlooking the 30-day time limit requirement for notice of removal, found that the corporation's notice was not timely, and granted the individuals' motion to remand. Cline v. Fairbanks Capital Corp., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 9146 (M.D.N.C. May 20, 2004).

Plaintiff was entitled to the rebuttable presumption of valid service because he filed a sufficient affidavit with the court in response to defendant's motion to dismiss; under G.S. 1-75.10(4), the motion to dismiss did not unequivocally show that service was improper, and the motion to dismiss was denied. Moore v. Cox, 341 F. Supp. 2d 570, 2004 U.S. Dist. LEXIS 18979 (M.D.N.C. 2004).

Applied in In re Phillips, 18 N.C. App. 65, 196 S.E.2d 59 (1973); Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974) (1974); Warzynski v. Empire Comfort Sys., 102 N.C. App. 222, 401 S.E.2d 801 (1991); Williamson v. Galloway Buick Co., — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 13446 (M.D.N.C. July 8, 2002).

Cited in Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971); First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986); Phillips Factors Corp. v. Harbor Lane of Pensacola, Inc., 648 F. Supp. 1580 (M.D.N.C. 1986); Olschesky v. Houston, 84 N.C. App. 415, 352 S.E.2d 884 (1987); Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429 (1993); Steffey v. Mazza Constr. Group, Inc., 113 N.C. App. 538, 439 S.E.2d 241 (1994); Fender v. Deaton, 130 N.C. App. 657, 503 S.E.2d 707 (1998); Triad Motorsports, L.L.C. v. Pharbco Mktg. Group, Inc., 104 F. Supp. 2d 590, 2000 U.S. Dist. LEXIS 5123 (M.D.N.C. 2000); Adams v. Bank United of Tex. FSB, 167 N.C. App. 395, 606 S.E.2d 149, 2004 N.C. App. LEXIS 2384 (2004); Ruiz v. Mecklenburg Utils., Inc., 189 N.C. App. 123, 657 S.E.2d 432, 2008 N.C. App. LEXIS 418 (2008).

§ 1-75.11. Judgment against nonappearing defendant, proof of jurisdiction.

Where a defendant fails to appear in the action within apt time the court shall, before entering a judgment against such defendant, require proof of service of the summons in the manner required by G.S. 1-75.10 and, in addition, shall require further proof as follows:

(1) Where Personal Jurisdiction Is Claimed Over the Defendant. — Where a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, to be made and filed, of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant. The court may require such additional proof as the interests of justice require.

(2) Where Jurisdiction Is in Rem or Quasi in Rem. — Where no personal claim is made against the defendant, the court shall require such proofs, by affidavit or otherwise, as are necessary to show that the court's jurisdiction has been invoked over the status, property or thing which is the subject of the action. The court may require such additional proof as the interests of justice require. (1967, c. 954, s. 2.)

Cross References. — As to default judgments, see G.S. 1A-1, Rule 55.

Legal Periodicals. — For article on default judgments and motions to set aside, see 18 Wake Forest L. Rev. 683 (1982).

CASE NOTES

Strict Construction. — Statutes authorizing substituted service of process, service of publication, or other particular methods of service are in derogation of the common law, are strictly construed, and must be followed with particularity. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984).

Compliance with § 1A-1, Rule 55 Required. — In order for a valid judgment to be entered in an action against a nonappearing defendant, there must be compliance with the provisions of G.S. 1A-1, Rule 55, as well as this section. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

Personal Jurisdiction Must Be Proved. — Personal jurisdiction over a nonappearing defendant for the purpose of the entry of a judgment by default is not presumed by the service of summons and an unverified complaint, but must be proved and appear of record as required by this section. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

Before a court may enter judgment in a case where defendant fails to timely appear in an action, this section requires proof by affidavit or other evidence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over a defendant. Bimac Corp. v. Henry, 18 N.C. App. 539, 197 S.E.2d 262 (1973).

Appellate court vacated a default judgment that the trial court entered in favor of an injured party because, although the injured party showed that an entertainer he sued was properly served, neither the injured party's complaint nor other evidence in the record showed that he had personal knowledge of the circumstances surrounding the hiring of two bodyguards who assaulted him, and the record did not provide a basis for holding the entertainer vicariously liable for the bodyguards' actions. Lemon v. Combs, 164 N.C. App. 615, 596 S.E.2d 344, 2004 N.C. App. LEXIS 964 (2004).

Judgment Held Void for Failure to Show Jurisdiction. — Where record failed to show personal jurisdiction of the defendant by the court, the judgment entered was void and could be considered and treated as a nullity. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

A plaintiff is not required to show that defendant is not an infant and not under disability before he is entitled to obtain an entry of default and a judgment by default. General Foods Corp. v. Morris, 49 N.C. App. 541, 272 S.E.2d 17 (1980).

Nor Is Clerk Required to Make Such Finding. — Section 1A-1, Rule 55 and this section do not require the clerk to make an affirmative finding that defendant is not a minor and is under no legal disability in order to enter a default or a default judgment. General Foods Corp. v. Morris, 49 N.C. App. 541, 272 S.E.2d 17 (1980).

Default judgment by the clerk, provided for by § 1A-1, Rule 55(b)(1), is subject to the jurisdictional proofs required by this section and is still controlled by G.S. 1-209(4), which empowers the clerk to enter all judgments by default and inquiry as are authorized by G.S. 1A-1, Rule 55. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

Requirements for Default Judgment Against Nonappearing Defendant Served by Certified Mail. — This section basically requires two things before a default judgment can be entered against a nonappearing defendant who was served by certified mail. First, there must be proof of service of summons in the manner required by G.S. 1-75.10(4). Second, where a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, to be made and filed, of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant. North Brook Farm Lines v. McBrayer, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

Unlike entry of judgment by default, entry of default does not require submission of jurisdictional proof. Silverman v. Tate, 61 N.C. App. 670, 301 S.E.2d 732 (1983).

The language of this section indicates that proof of jurisdiction is required only when a judgment is to be entered against a nonappearing defendant. Such proof is not required for an entry of default. Silverman v. Tate, 61 N.C. App. 670, 301 S.E.2d 732 (1983).

Proper Service Resulted in Enforceable Default Judgment in Foreign Country. — Where no affidavit was offered as required by G.S. 1-75.10, the plaintiff was allowed to prove service by mail by "a certificate of addressing and mailing by the clerk of court" to enable the German court to obtain personal jurisdiction over defendant and the North Carolina trial court was, under comity of nations, within its power to enforce the German court's order determining defendant to be the father and ordering him to pay child support. State ex rel. Desselberg v. Peele, 136 N.C. App. 206, 523 S.E.2d 125, 1999 N.C. App. LEXIS 1307 (1999), cert. denied, 351 N.C. 479, 543 S.E.2d 509 (2000).

Auto purchasers' affidavits. — Purchasers' affidavits established the sale of the vehicle by the car dealership, who was engaged in the business of selling vehicles in North Carolina; thus, the affidavits demonstrated grounds for personal jurisdiction over the dealership and met the requirements of G.S. 1-75.11(1). Blankenship v. Town & Country Ford, Inc., 155 N.C. App. 161, 574 S.E.2d 132, 2002 N.C. App. LEXIS 1599 (2002), cert. denied, appeal dismissed, 357 N.C. 61, 579 S.E.2d 384 (2003).

Applied in Sawyer v. Cox, 36 N.C. App. 300, 244 S.E.2d 173 (1978).

Cited in Highfill v. Williamson, 19 N.C. App. 523, 199 S.E.2d 469 (1973); Hassell v. Wilson, 301 N.C. 307, 272 S.E.2d 77 (1980); Love v. Nationwide Mut. Ins. Co., 45 N.C. App. 444, 263 S.E.2d 337 (1980); Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429 (1993);

Coastland Corp. v. North Carolina Wildlife Resources Comm'n, 134 N.C. App. 343, 517 S.E.2d 661 (1999).

OPINIONS OF ATTORNEY GENERAL

Complaint Signed by an Attorney Is Not a Sufficient Basis for a Default Judgment. — See opinion of Attorney General to the Honorable Edwin S. Preston, Jr., 41 N.C.A.G. 625 (1971).

§ 1-75.12. Stay of proceeding to permit trial in a foreign jurisdiction.

(a) When Stay May be Granted. — If, in any action pending in any court of this State, the judge shall find that it would work substantial injustice for the action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State. A moving party under this subsection must stipulate his consent to suit in another jurisdiction found by the judge to provide a convenient, reasonable and fair place of trial.

(b) Subsequent Modification of Order to Stay Proceedings. — In a proceeding in which a stay has been ordered under this section, jurisdiction of the court continues for a period of five years from the entry of the last order affecting the stay; and the court may, on motion and notice to the parties, modify the stay order and take such action as the interests of justice require. When jurisdiction of the court terminates by reason of the lapse of five years following the entry of the last order affecting the stay, the clerk shall without notice enter an order dismissing the action.

(c) Review of Rulings on Motion. — Whenever a motion for a stay made pursuant to subsection (a) above is granted, any nonmoving party shall have the right of immediate appeal. Whenever such a motion is denied, the movant may seek review by means of a writ of certiorari and failure to do so shall constitute a waiver of any error the judge may have committed in denying the motion. (1967, c. 954, s. 2.)

CASE NOTES

This section does not deny litigants access to North Carolina courts in violation of N.C. Const., Art. I, § 18, but merely postpones litigation here pending the resolution of the same matter in another sovereign court. Home Indem. Co. v. Hoechst-Celanese Corp., 99 N.C. App. 322, 393 S.E.2d 118 (1990).

Discretion of Trial Judge. — The entry of an order under subsection (a) of this section is a matter within the sound discretion of the trial judge. Motor Inn Mgt., Inc. v. Irvin-Fuller Dev. Co., 46 N.C. App. 707, 266 S.E.2d 368, appeal dismissed and cert. denied, 301 N.C. 93, 273 S.E.2d 299 (1980).

Relevant facts that may be considered, pursuant to this section include: convenience and access to another forum; nature of case involved; relief sought; applicable law; possibility of jury view; convenience of witnesses; availability of compulsory process to produce witnesses; cost of obtaining attendance of witnesses; relative ease of access to sources of proof; enforceability of judgment; burden of litigating matters not of local concern; desirability of litigating matters of local concern in local courts; choice of forum by plaintiff; and all other practical considerations which would make the trial easy, expeditious and inexpensive. Motor Inn Mgt., Inc. v. Irvin-Fuller Dev. Co., 46 N.C. App. 707, 266 S.E.2d 368, appeal dismissed and cert. denied, 301 N.C. 93, 273 S.E.2d 299 (1980); Home Indem. Co. v. Hoechst-Celanese Corp., 99 N.C. App. 322, 393 S.E.2d 118 (1990).

Standard of Review. — Entry of an order under this section is a matter within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of that discretion. Home Indem. Co. v. Hoechst-Celanese Corp., 99 N.C. App. 322, 393 S.E.2d 118 (1990).

Under G.S. 1-75.12(c) defendants conceded they had no right to appeal from the trial court's failure to grant their motion to stay the action because they failed to petition for a writ of certiorari. Jaeger v. Applied Analytical Indus. Deutschland GMBH, 159 N.C. App. 167, 582 S.E.2d 640, 2003 N.C. App. LEXIS 1416 (2003).

Stay Proper Exercise of Court's Discretion. — Where the nature of the case changed from a comprehensive case concerning environmental contamination sites located in North Carolina and elsewhere into a case focused primarily on sites outside of North Carolina, the stay order was a proper and rational exercise of the court's discretion. Home Indem. Co. v. Hoechst Celanese Corp., 128 N.C. App. 113, 493 S.E.2d 806 (1997).

Actions to Quiet Title. — Trial court erred in granting defendants' motion pursuant to G.S. 1-75.12 to stay proceedings in a North Carolina quiet title action until a Georgia action was concluded; North Carolina had in rem jurisdiction, and was thus the only proper forum to quiet title. Green v. Wilson, 163 N.C. App. 186, 592 S.E.2d 579, 2004 N.C. App. LEXIS 308 (2004), cert. granted, 358 N.C. 375, 598 S.E.2d 135 (2004).

Review Denied Based On Failure to File Petition For Writ of Certiorari. — In an action to enforce a mechanic's lien, defendants' challenge to the denial of a motion to stay or dismiss failed because defendants did not file a petition for a writ of certiorari as required by subsection (c) of G.S. 1-75.12. Park East Sales, LLC v. Clark-Langley, Inc., 186 N.C. App. 198, 651 S.E.2d 235, 2007 N.C. App. LEXIS 2120 (2007).

Applied in Acorn v. Jones Knitting Corp., 12 N.C. App. 266, 182 S.E.2d 862 (1971); American Motorists Ins. Co. v. Avnet, Inc., 98 N.C. App. 385, 391 S.E.2d 50 (1990); Lawyers Mut. Liab. Ins. Co. v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 435 S.E.2d 571 (1993); Saxon v. Smith, 125 N.C. App. 163, 479 S.E.2d 788 (1997).

Cited in Allen v. Wachovia Bank & Trust Co., 35 N.C. App. 267, 241 S.E.2d 123 (1978); Wallace Butts Ins. Agency, Inc. v. Runge, 68 N.C. App. 196, 314 S.E.2d 293 (1984); Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 611 S.E.2d 179, 2005 N.C. App. LEXIS 799 (2005).

SUBCHAPTER IV. VENUE.

Article 7.

Venue.

§ 1-76. Where subject of action situated.

Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law:

(1) Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.
(2) Partition of real property.
(3) Foreclosure of a mortgage of real property.
(4) Recovery of personal property when the recovery of the property itself is the sole or primary relief demanded. (C.C.P., s. 66; Code, s. 190; 1889, c. 219; Rev., s. 419; C.S., s. 463; 1951, c. 837, s. 4.)

Cross References. — As to change of venue, see G.S. 1-83. As to removal for fair and impartial trial, see G.S. 1-84. As to venue in indictment for receiving stolen goods, see G.S. 14-71. As to venue in criminal actions, see G.S. 15-129 et seq. As to venue in partition proceedings, see G.S. 46-2.

CASE NOTES

I. In General.
II. Actions Relating to Real Property.
    A. In General.
    B. Local Actions.
    C. Transitory Actions.
III. Partition of Realty.

IV. Foreclosure of Mortgages of Real Property.
V. Recovery of Personal Property.

I. IN GENERAL.

This Subchapter is in restraint of the common law, as, without such express enactment, the plaintiff might make a choice of venue anywhere within the State. State ex rel. Snuggs v. Stone, 52 N.C. 382 (1860).

The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of the common law. Interstate Cooperage Co. v. Eureka Lumber Co., 151 N.C. 455, 66 S.E. 434 (1909).

Venue deals with procedure and is not jurisdictional, in the absence of statutory provision to that effect. State ex rel. McCullen v. Seaboard Air Line Ry., 146 N.C. 568, 60 S.E. 506 (1908); Latham v. Latham, 178 N.C. 12, 100 S.E. 131 (1919); Clark v. Carolina Homes, Inc., 189 N.C. 703, 128 S.E. 20 (1925).

Effect of Contract Stipulation Regarding Venue. — There is a difference between the venue of an action, the place of trial, and jurisdiction of the court over the subject matter of the action, and the parties to a contract may not, in advance of any disagreement arising thereunder, designate a jurisdiction exclusive of others, and confine the trial thereto in opposition to the will of the legislature expressed by this section; and a motion to remove a cause brought in the proper jurisdiction on the ground that the contract otherwise specified will be denied. Gaither v. Charlotte Motor Car Co., 182 N.C. 498, 109 S.E. 362 (1921), overruled on other grounds, Perkins v. CCH Computax, Inc., 333 N.C. 140, 423 S.E.2d 780 (1992).

Contract provision specifying an exclusive forum was of no effect. Perkins v. CCH Computax, Inc., 106 N.C. App. 210, 415 S.E.2d 755 (1992).

Venue Consideration Limited to Allegation in Plaintiff's Complaint. — For purposes of determining venue, consideration is limited to the allegations in plaintiff's complaint. Thus, the court could not consider defendants' allegations in their counterclaim in determining propriety of removal. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

As to applicability of venue provisions to trials before a justice, see Fisher v. Bullard, 109 N.C. 574, 13 S.E. 799 (1891); Mohn v. Creesey, 193 N.C. 568, 137 S.E. 718 (1927).

Venue Provisions Inapplicable to Habeas Corpus. — The sections of this Subchapter relating to venue refer to "actions" and have no reference to the writ of habeas corpus, which has been denominated a "high prerogative writ." McEachern v. McEachern, 210 N.C. 98, 185 S.E. 684 (1936).

Right to Appeal. — Trial court's grant of defendants' motion for change of venue in an action for declaratory relief regarding existence of a lease in which plaintiff was lessee and defendants were lessors was immediately appealable, as a right to venue established by statute is a substantial right. Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990).

An action by an administrator is not within any of the subdivisions of this section. Whitford v. North State Life Ins. Co., 156 N.C. 42, 72 S.E. 85 (1911).

Actions for Monetary Damages. — This section did not apply to the plaintiff's action, although his prayer for relief included a request that the defendants return "any and all" property held, because such request was ancillary to the primary purpose of the complaint, which was to recover monetary damages. Centura Bank v. Miller, 138 N.C. App. 679, 532 S.E.2d 246, 2000 N.C. App. LEXIS 780 (2000).

Action for Declaratory Relief. — Since the Declaratory Judgment Act contains no provisions regarding venue, the venue statutes and principles generally applicable to civil actions should govern venue of an action for declaratory relief. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Appeal of Denial of Motion. — Denial of a motion for change of venue as a matter of right under this section, although interlocutory, is directly appealable. Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988).

Applied in Holden v. Totten, 224 N.C. 547, 31 S.E.2d 635 (1944); Dubose v. Harpe, 239 N.C. 672, 80 S.E.2d 454 (1954); Casstevens v. Wilkes Tel. Membership Corp., 254 N.C. 746, 120 S.E.2d 94 (1961); Fisher v. Lamm, 66 N.C. App. 249, 311 S.E.2d 61 (1984).

Cited in Askew v. Bynum, 81 N.C. 350 (1879); Falls of Neuse Mfg. Co. v. Brower, 105 N.C. 440, 11 S.E. 313 (1890); Lucas v. Carolina Cent. Ry., 121 N.C. 506, 28 S.E. 265 (1897); Bridgers v. Ormond, 148 N.C. 375, 62 S.E. 422 (1908); Councill v. Bailey, 154 N.C. 54, 69 S.E. 760 (1910); Kanawha Hardwood Co. v. Waldo, 161 N.C. 196, 76 S.E. 680 (1912); Bohannon v. Virginia Trust Co., 198 N.C. 701, 153 S.E. 262 (1930); Guy v. Gould, 199 N.C. 820, 155 S.E. 925 (1930); Carolina Mtg. Co. v. Long, 205 N.C. 533, 172 S.E. 209 (1934); Miller v. Miller, 205 N.C. 753, 172 S.E. 493 (1934); Guilford County v. Estates Admin., Inc., 212 N.C. 653, 194 S.E. 295 (1937); Evans v. Morrow, 233 N.C. 562, 64

S.E.2d 842 (1951); Owens v. Boling, 274 N.C. 374, 163 S.E.2d 396 (1968); Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977); Smith v. Hudson, 48 N.C. App. 347, 269 S.E.2d 172 (1980); Atkins v. Nash, 61 N.C. App. 488, 300 S.E.2d 880 (1983); M & J Leasing Corp. v. Habegger, 77 N.C. App. 235, 334 S.E.2d 804 (1985); Roanoke Properties v. Spruill Oil Co., 110 N.C. App. 443, 429 S.E.2d 752 (1993); Stewart v. Southeastern Regional Med. Ctr., 142 N.C. App. 456, 543 S.E.2d 517, 2001 N.C. App. LEXIS 137 (2001); Conseco Fin. Servicing Corp. v. Dependable Hous., Inc., 150 N.C. App. 168, 564 S.E.2d 241, 2002 N.C. App. LEXIS 368 (2002); Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

II. ACTIONS RELATING TO REAL PROPERTY.

A. In General.

Local and Transitory Actions Distinguished. — If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies, unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action. Thompson v. Horrell, 272 N.C. 503, 158 S.E.2d 633 (1968); Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

When this section controls an action's venue, the venue is considered "local," because the action must be tried in the county which is the situs of the land whose title is affected by the action. Conversely, an action is "transitory" when it does not directly affect title to land, and it must be tried in the county in which at least one of the parties resides when plaintiff commences suit. Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990).

Principal Object Involved Determines Whether Action Is Local. — It is the principal object involved in the action which is determinative, and if title is principally involved or if the judgment or decree operates directly and primarily on the estate or title, and not alone in personam against the parties, the action will be held local. Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

Action must be tried in the county where property is located, pursuant to G.S. 1-76, when the judgment to which a plaintiff would be entitled upon the allegations of the complaint will affect title to land; the court is limited to only considering the allegations of the complaint in determining whether the action is local, based on what is the principal object sought, and where specific enforcement of a sale or lease agreement is sought and such land is in North Carolina, that action is considered local. Fox Holdings, Inc. v. Wheatly Oil Co., 161 N.C. App. 47, 587 S.E.2d 429, 2003 N.C. App. LEXIS 1977 (2003).

An action is not necessarily local because it incidentally involves the title to land or a right or interest therein. Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

Title to realty must be directly affected by the judgment, in order to render the action local. Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

When the title to real estate may be affected by an action, the action is local and is removable to the county where the land is situate by proper motion made in apt time. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 320 (1967); Goodyear Mtg. Corp. v. Montclair Dev. Corp., 2 N.C. App. 138, 162 S.E.2d 623 (1968).

Title to realty must be directly affected by a judgment, in order to render the action local, and an action is not necessarily local because it incidentally involves the title to land or a right or interest therein. It is the principal object involved in the action which determines the question. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Unless defendant waives proper venue, an action is local and must be tried in the county where the land lies if the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Pursuant to this section, an action must be tried in the county where the property is located when the judgment to which a plaintiff would be entitled upon the allegations of the complaint will affect the title to land. Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988).

Recovery of Real Property. — This section creates special, mandatory venue rules for certain actions, requiring trial in the county in which the subject of the action is situated, where the action involves: recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property. Rose's Stores, Inc. v. Bradley Lumber Co., 105 N.C. App. 91, 411 S.E.2d 638 (1992).

Allegations of Complaint to Be Considered. — In determining whether the judgment sought by plaintiff would affect title to land, the court is limited to considering only the allegations of the complaint. Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988).

Action with Principal Object of Recov-

ering Monetary Damages Is Not Local. — If the principal object involved in an action is monetary damages, and plaintiffs do not seek a judgment that would affect an interest in land, but seek a judgment in personam, the action is not a local action within the meaning of subdivision (1) of this section. Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

Docketed judgments confer no "estate or interest" in real estate within the meaning of this section, but merely the right to subject the realty to the payment of the judgments by sale under execution. Baruch v. Long, 117 N.C. 509, 23 S.E. 447 (1895); Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

Notice of Claim of Lien Confers No Greater Right in Real Estate Than Docketed Judgment. — Mere notice of a claim of lien would not confer a greater right or interest in the real estate than a docketed judgment and would not bring an action within the purview of subdivision (1) of this section. Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

What Actions May Be Brought for Cutting and Removing of Timber. — The character of trees severed by a trespasser from the lands is changed from realty to personalty, and when the trees have been carried away, the owner of the lands and trees may sue in trover and conversion, or in trespass de bonis asportatis, for the value of the trees, both of which actions are transitory, or for trespass quare clausum fregit, which is local, and should be brought in the county wherein the land is situated. Blevens v. Kitchen Lumber Co., 207 N.C. 144, 176 S.E. 262 (1934).

Action to enforce a materialmen's lien did not need to be filed in the county where the liened property was located; because the primary purpose of a contractor's suit was recovery of money damages, but also requested enforcement of a lien, venue was proper in the county where the contractor had its principal place of business, even though the liened property was located in a different county. Wellons Constr., Inc. v. Landsouth Props., LLC, 168 N.C. App. 403, 607 S.E.2d 695, 2005 N.C. App. LEXIS 255 (2005).

B. Local Actions.

An action to impress a parol trust upon lands and for an accounting involved a determination of an interest in lands, and the proper venue, under this section, was in the county in which the land was situated. Williams v. McRackan, 186 N.C. 381, 119 S.E. 746 (1923).

Suit by a purchaser of land to set aside the purchase and cancel certain notes given for the deferred payment of the purchase price, alleging a fraudulent representation by the owner as to the quantity of land, without which he would not have purchased, involved an interest in land, required by this section to be brought in the county where the land was situated. Vaughan v. Fallin, 183 N.C. 318, 111 S.E. 513 (1922).

A suit to set aside a deed of trust for lands, and to establish a prior lien thereon in plaintiff's favor, involved an estate or interest therein, within the intent and meaning of this section. Henrico Lumber Co. v. Dare Lumber Co., 180 N.C. 12, 103 S.E. 915 (1920).

Creditors' Bill to Set Aside Deed. — Where the wife of a debtor was made party defendant in an action in the nature of a creditors' bill in order to set aside debtor's deed to her for fraud and to subject the land to the satisfaction of the demands of creditors, the suit to establish the plaintiffs' claims would be considered as incidental to the essential and controlling purpose of setting aside the deed, and venue would be governed by this section. Wofford-Fain & Co. v. Hampton, 173 N.C. 686, 92 S.E. 612 (1917).

An action for subrogation to the rights of the vendor had to be tried in the county where the land was situated. Fraley v. March, 68 N.C. 160 (1873).

Action Seeking Specific Enforcement of Agreement for Sale of Store. — Trial court erred in denying a store seller's motion to change venue, pursuant to G.S. 1A-1, Rule 12(b)(3), in the store purchaser's action which alleged breach of the parties' contract, and which sought damages and specific enforcement of the agreement; the court noted that pursuant to G.S. 1-76, the outcome of the action involved a direct determination of an interest in real property of one store which was left out during the closing of the parties' agreement, and accordingly, the action was local and should have been brought in the county where that store was located. Fox Holdings, Inc. v. Wheatly Oil Co., 161 N.C. App. 47, 587 S.E.2d 429, 2003 N.C. App. LEXIS 1977 (2003).

Damages for Burning Land. — An action against a railroad company to recover damages for burning land was local in its nature and triable in the county in which the injury occurred, irrespective of G.S. 1-81. Perry v. Seaboard Air Line Ry., 153 N.C. 117, 153 N.C. 1117, 68 S.E. 1060, 68 S.E. 1060 (1910).

Trespass and Conversion. — Where the intent of the pleading was to sue for a trespass on land, and an allegation of a conversion was inserted in aggravation of damages, refusal of the lower court upon motion properly made in due time to remove the cause to the county in which the land was situated was erroneous. Richmond Cedar Works v. J.L. Roper Lumber Co., 161 N.C. 603, 77 S.E. 770 (1913).

Action to Have Leasehold Interest Declared. — In an action by plaintiff lessees to have the court declare that they held a leasehold interest in a space in a trailer park, defendant was entitled to a change of venue as a matter of right to the county where the property in question was located pursuant to subdivision (1) of this section. Gurganus v. Hedgepeth, 46 N.C. App. 831, 265 S.E.2d 922 (1980).

An action for termination of a leasehold requires removal, under this section, to the county where the leased property is situated. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Action Seeking Declaration of Nonexistence of Leasehold Interest. — Local venue was proper in a declaratory action in which the "principal object" was a determination of leasehold estate or interest in real property. It was irrelevant that the thrust of plaintiff's action was to have the court declare the nonexistence of his leasehold interest, rather than its existence, and that the judgment would operate in personam, as the judgment would also directly affect title to the property. Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990).

Venue of action against regional housing authority to determine respective rights of parties in certain land was properly the county in which the realty was situated and in which the authority had express power to act, notwithstanding that the principal office of the authority was in another county. Powell v. Eastern Carolina Regional Hous. Auth., 251 N.C. 812, 112 S.E.2d 386 (1960).

C. Transitory Actions.

An action will be transitory only if judgment operates "alone" in personam against the parties and not directly on an estate or title. Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990).

Usurious Loan Evidenced by Deed of Trust on Real Property. — The fact that an allegedly usurious loan was evidenced by a note secured by a deed of trust on real property did not make it an action affecting an interest in real property such that this section required a change of venue. River Dev. Corp. v. Parker Tree Farms, Inc., 12 N.C. App. 1, 182 S.E.2d 211 (1971).

Action to Enforce Contract Rights Under Lease. — Where plaintiff brought an action to obtain a decree in personam to enforce contractual rights under a lease, and judgment would not alter the terms of the lease, require notice to third parties, or affect title to the land, the defendant's motion to remove as a matter of right to the county in which the land was situate was properly denied. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 320 (1967).

Damages for Fraudulent Representations Inducing Conveyance of Lands. — When an action sounds in damages arising from a fraudulent representation inducing the purchase and conveyance of lands for which purchase money notes have been given, and not a foreclosure of a mortgage or the nullification of the transaction, it does not involve an interest in or title to lands under subdivision (1) of this section, and the action is not removable as a matter of the movant's right, and the plaintiff may select the county of his residence as the venue under G.S. 1-82. Causey v. Morris, 195 N.C. 532, 142 S.E. 783 (1928).

Action for Damages for Breach of Contract. — Where the plaintiff in his complaint did not undertake to allege facts to support a decree for specific performance, but on the contrary bottomed his action on the breach of the contract, and sought to recover damages resulting therefrom, such an action was not for the recovery of real property or any interest therein as contemplated by this section. Lamb v. Staples, 234 N.C. 166, 66 S.E.2d 660 (1951).

An action to recover monetary damages for breach of a contract to construct a house was transitory and not local within the meaning of subdivision (1) of this section, since plaintiff's purpose was not to recover real property, to determine an estate or interest in land, or to recover for damages to realty. Wise v. Isenhour, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

An action for the breach of covenants of seizin and the right to convey is not required to be tried in the county in which the realty is situated. Eames v. Armstrong, 136 N.C. 392, 48 S.E. 769 (1904).

Action on Note Secured by Deed of Trust. — An action against the endorser of a negotiable note, secured by a deed of trust on land, was not an action involving an estate or interest in land and did not have to be brought where the land was located. White v. Rankins, 206 N.C. 104, 173 S.E. 282 (1934).

Action to recover damages to real property is transitory. Wheatley v. Phillips, 228 F. Supp. 439 (W.D.N.C. 1964).

Action to recover for injuries to land caused by backing water upon it is transitory. Cox v. Oakdale Cotton Mills, Inc., 211 N.C. 473, 190 S.E. 750 (1937).

An action to recover the value or "worth" of timber cut, removed and converted to its own use by the defendant is an action of trover and conversion, or of trespass de bonis asportatis, and is therefore transitory. Blevens v. Kitchen Lumber Co., 207 N.C. 144, 176 S.E. 262 (1934). See also, Hilton Lumber Co. v. Estate Corp., 215 N.C. 649, 2 S.E.2d 869 (1939); Bunting v. Henderson, 220 N.C. 194, 16 S.E.2d 836 (1941).

Damages to Clay Mining Machine from Pollution of Stream. — An action for damages caused by the pollution of a stream resulting in forcing the plaintiff to shut down his clay mining machine was not such as is contemplated by this section. Harris Clay Co. v. Carolina China Clay Co., 203 N.C. 12, 164 S.E. 341 (1932).

Interpretation of Lease. — In a case in which plaintiffs sought a declaratory judgment as to the parties' rights under a lease agreement and sought to enjoin defendant from bringing a separate ejectment action pending a determination of rights under the lease, and the primary question to be resolved was interpretation of the lease in light of certain legislative changes, resolution of which question would not directly affect title or interest in the property, the action did not have to be tried in the county in which the property was located. Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988).

Judicial declaration as to whether plaintiff was obligated to make rental payments for rock quarried from land adjacent to leased premises would not directly affect title to the land, and thus did not, for venue purposes, involve the recovery of an interest in real property. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Setting Aside Judgment. — An action to set aside judgments as fraudulent and for the appointment of a receiver did not need to be brought in the county where the property upon which such judgments were liens was situated. Baruch v. Long, 117 N.C. 509, 23 S.E. 447 (1895).

III. PARTITION OF REALTY.

Land situated in two counties could be sold for partition by a decree of the county of equity of either county. In re Skinner's Heirs, 22 N.C. 63 (1838), decided prior to the merger of the courts of law and equity.

IV. FORECLOSURE OF MORTGAGES OF REAL PROPERTY.

A foreclosure sale of land lying in two counties under a mortgage registered in but one is authorized by subdivision (3) of this section. King v. Portis, 81 N.C. 382 (1879).

An action by the holder of certain notes given for the purchase of land against the purchaser of the land and others, to be subrogated to the rights of the vendor, in the contract of sale of the land, which was substantially the same as an action "for the foreclosure of a mortgage of real estate," and had to be tried in the county in which the land was situate within the meaning of subdivision (3) of this section. Fraley v. March, 68 N.C. 160 (1873).

Where it appeared from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partook in substance of the nature of a suit for the foreclosure of a mortgage, and was within subdivision (3) of this section. Councill v. Bailey, 154 N.C. 54, 69 S.E. 760 (1910).

For additional cases relating to venue in foreclosure of mortgages of real property, see Fraley v. March, 68 N.C. 160 (1873); Falls of Neuse Mfg. Co. v. Brower, 105 N.C. 440, 11 S.E. 313 (1890); McLean v. Shaw, 125 N.C. 491, 34 S.E. 634 (1899); Gammon v. Johnson, 126 N.C. 64, 35 S.E. 185 (1900); Connor v. Dillard, 129 N.C. 50, 39 S.E. 641 (1901).

V. RECOVERY OF PERSONAL PROPERTY.

Venue of actions for recovery of personalty is in the county where the property is situated, though the ancillary remedy of claim and delivery is not resorted to. Brown v. Cogdell, 136 N.C. 32, 48 S.E. 515 (1904).

But Recovery Must Be Sole or Chief Relief. — Where the recovery of personal property is the sole relief demanded or even the chief, main or primary relief, other matters being incidental, the county in which the personal property or some part thereof is situated is the proper venue. Marshburn v. Purifoy, 222 N.C. 219, 22 S.E.2d 431 (1942).

Where it appears that the relief sought is not the recovery of the debt or to enjoin a sale, but the recovery of the specific personal property with an injunctive restraint as an incident thereto, the cause is within subdivision (4) of this section. Fairley Bros. v. Abernathy, 190 N.C. 494, 130 S.E. 184 (1925).

If an action is one in which the recovery of personal property is not the sole or chief relief demanded, it is not removable to the county in which the personal property is located; but, if the recovery of specific personal property is the principal relief sought, the action is removable to the county where the property is situated. House Chevrolet Co. v. Cahoon, 223 N.C. 375, 26 S.E.2d 864 (1943).

Where the recovery of personal property is not the sole or chief relief demanded, an action need not necessarily be brought in the county in which the property is located. Woodard v. Sauls, 134 N.C. 274, 46 S.E. 507 (1904); Bowen Piano Co. v. Newell, 177 N.C. 533, 98 S.E. 774 (1919).

Section Does Not Apply to Actions for Monetary Recovery. — This section applies to action for the recovery of specific tangible articles of personal property, and not to actions for monetary recovery. Flythe v. Wilson, 227 N.C. 230, 41 S.E.2d 751 (1947).

Where an action was brought for an accounting, and the question of ownership of notes and bonds was raised only incidentally, it was not necessary that it be brought in the county in which the notes and bonds were situated. Clow v. McNeill, 167 N.C. 212, 83 S.E. 308 (1914).

An action to set aside the transfer of personal property as fraudulent, and for the appointment of a receiver, is not an action for the recovery of such property, and hence need not be brought in the county where the same is located, as provided by subdivision (4) of this section. Baruch v. Long, 117 N.C. 509, 23 S.E. 447 (1895).

Action to Set Aside Contract or Recover for Breach of Fiduciary Relationship. — Where the subject of an action is a contract which plaintiff seeks to set aside, or a fiduciary relationship which plaintiff alleges was breached and for which he seeks monetary damages, and recovery of personal property is neither the sole nor the primary relief demanded, this section is not controlling. Klass v. Hayes, 29 N.C. App. 658, 225 S.E.2d 612 (1976).

In an action for wrongful conversion of oysters taken from oyster beds, the defendant was not entitled to a change of venue to the county in which the beds were situated. Makely v. Boothe Co., 129 N.C. 11, 39 S.E. 582 (1901).

Stock certificates, while tangible personal property, are merely tangible evidence, or symbols, of the shares they represent, and are not the kind of personal property which would require a change of venue under subdivision (4) and G.S. 1-83(1). Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

Removal for Convenience of Witnesses. — Once a cause involving recovery of personal property is properly instituted, this section does not prevent the seeking of a removal for the convenience of witnesses, and whether the motion to remove should be granted is a matter in the discretion of the court. Moody v. Warren-Robbins, Inc., 251 N.C. 172, 110 S.E.2d 866 (1959).

Action Held to be One for the Recovery of Real Property. — The trial court properly determined that mortgage successor's pursuit of a judgment declaring an option agreement pursuant to which realty company was given the opportunity to purchase outright at a discount the note and deed of trust held by seller's trustee, constituted an action for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest pursuant to this section and therefore required that the action be tried in county where the land was located. Neil Realty Co. v. Medical Care, Inc., 110 N.C. App. 125, 431 S.E.2d 225 (1993).

Prior Law. — For case holding that subdivision (4) of this section was restricted to personalty "distrained for any cause," prior to the 1889 amendment to this section, see Smithdeal v. Wilkerson, 100 N.C. 52, 6 S.E. 71 (1888).

Intangible Personal Property and Disputed Purchase of Company. — The trial court's denial of the motion to dismiss or transfer pursuant to this section was proper where the specific performance claim was neither the sole nor the primary relief requested and where the assets it sought to recover pursuant to the specific performance claim largely included intangible assets such as stock, good will, contract rights, consumer lists, and exclusive sales territory—intangible personal property not subject to the venue requirements of this section. Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 141 N.C. App. 569, 541 S.E.2d 157, 2000 N.C. App. LEXIS 1298 (2000), cert. denied, 353 N.C. 370, 547 S.E.2d 433 (2001).

§ 1-76.1. Where deficiency debtor resides or where loan was negotiated.

Subject to the power of the court to change the place of trial as provided by law, actions to recover a deficiency, which remains owing on a debt after secured personal property has been sold to partially satisfy the debt, must be brought in the county in which the debtor or debtor's agent resides or in the county where the loan was negotiated. (1977, c. 383, s. 1.)

CASE NOTES

This section did not apply where the leased property had not yet been sold and there was, therefore, no deficiency owing on a debt. Centura Bank v. Miller, 138 N.C. App. 679, 532 S.E.2d 246, 2000 N.C. App. LEXIS 780 (2000).

Trial court correctly denied debtors' motion, based on G.S. 1-76.1 and 1-83(1), to change the venue of a complaint alleging breach of contract, personal guaranty, and seeking possession of inventory securing a debt, because the inventory had not been sold at the time the complaint was filed, so the complaint was properly framed and was not actually seeking a deficiency judgment. Conseco Fin. Servicing

Corp. v. Dependable Hous., Inc., 150 N.C. App. 168, 564 S.E.2d 241, 2002 N.C. App. LEXIS 368 (2002).

Trial court did not err in granting defendant's motion for change of venue pursuant to G.S. 1-83 and 1-76.1 in action for deficiencies resulting from foreclosure sales of personal property. First S. Sav. Bank v. Tuton, 114 N.C. App. 805, 443 S.E.2d 345, cert. denied, 338 N.C. 309, 452 S.E.2d 309 (1994).

Cited in M & J Leasing Corp. v. Habegger, 77 N.C. App. 235, 334 S.E.2d 804 (1985).

§ 1-77. Where cause of action arose.

Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:

(1) Recovery of a penalty or forfeiture, imposed by statute; except that, when it is imposed for an offense committed on a sound, bay, river, or other body of water, situated in two or more counties, the action may be brought in any county bordering on such body of water, and opposite to the place where the offense was committed.

(2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer. (C.C.P., s. 67; Code, s. 191; Rev., s. 420; C.S., s. 464.)

Cross References. — As to quo warranto, see G.S. 1-514 et seq. As to actions against registers of deeds, see G.S. 161-16 and 161-27.

CASE NOTES

I. In General.
II. Recovery of Penalty or Forfeiture.
III. Against Public Officers, etc.

I. IN GENERAL.

Quo Warranto and Mandamus. — This section should apply in the writs of quo warranto (no longer used in this State) and mandamus, where an official act of usurpation, or failure to do some act which the duties of the office require, constitutes the charge, and in effect amounts to a criminal action, or an action to subject the parties to pains and penalties. Johnston v. Board of Comm'rs, 67 N.C. 101 (1872).

Applied in State ex rel. McCullen v. Seaboard Air Line Ry., 146 N.C. 568, 60 S.E. 506 (1908).

Cited in Harvey v. Rich, 98 N.C. 95, 3 S.E. 912 (1887); Shaver v. Huntley, 107 N.C. 623, 12 S.E. 316 (1890); Whitford v. North State Life Ins. Co., 156 N.C. 42, 72 S.E. 85 (1911); McFadden v. Maxwell, 198 N.C. 223, 151 S.E. 250 (1930); Banks v. Joyner, 209 N.C. 261, 183 S.E. 273 (1936); Godfrey v. Tidewater Power Co., 223 N.C. 647, 27 S.E.2d 736 (1943); Flythe v. Wilson, 227 N.C. 230, 41 S.E.2d 751 (1947); Mitchell v. Jones, 272 N.C. 499, 158 S.E.2d 706 (1968); Vinson v. Wallace, 96 N.C. App. 372, 385 S.E.2d 810 (1989); Leandro v. State, 346 N.C. 336, 488 S.E.2d 249, 1996 N.C. App. LEXIS 201 (1997); Stewart v. Southeastern Regional Med. Ctr., 142 N.C. App. 456, 543 S.E.2d 517, 2001 N.C. App. LEXIS 137 (2001); Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

II. RECOVERY OF PENALTY OR FORFEITURE.

Section Not Applicable to Actions Within Jurisdiction of Justices of the Peace. — This section, providing that actions for recovery of penalties must be brought in the county where the cause of action arose, applies to those actions of which the superior court has jurisdiction; it does not embrace those within the jurisdiction of justices of the peace. Fisher v. Bullard, 109 N.C. 574, 13 S.E. 799 (1891); Dixon v. Haar, 158 N.C. 341, 74 S.E. 1 (1912).

An action for the penalty against a register of deeds for unlawfully issuing a marriage license is controlled by this section. Dixon v. Haar, 158 N.C. 341, 74 S.E. 1 (1912).

III. AGAINST PUBLIC OFFICERS, ETC.

"By His Command or in His Aid". — The words "in his aid" were meant to extend the immunity to all who assisted and took part in the act with assent, though not by direct orders, for all such stand upon the same footing. Harvey v. Brevard, 98 N.C. 93, 3 S.E. 911 (1887).

Any consideration of subdivision (2) of this section involves two questions: (1) Is defendant a "public officer or person especially appointed to execute his duties"? (2) In what county did the cause of action in suit arise? Coats v. Sampson County Mem. Hosp., 264 N.C. 332, 141 S.E.2d 490 (1965); Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Counties. — Actions against counties must be brought in the county sued. Coats v. Sampson County Mem. Hosp., 264 N.C. 332, 141 S.E.2d 490 (1965).

Negligent Acts in Two Counties. — In a case brought against both a transferring county and a receiving county, based on an inmate's suicide while being held in the receiving county's jail shortly after being transferred from the transferring county's jail, the trial court's order that venue was proper in the transferring county was correct because, although some of the alleged negligence occurred in the receiving county, "some part" of claim arose in the transferring county. Frink v. Batten, 184 N.C. App. 725, 646 S.E.2d 809, 2007 N.C. App. LEXIS 1612 (2007).

Municipal Corporations. — An action against a municipality is governed by this section where the cause of action is the factor controlling venue in such a case. Pitts Fire Safety Serv., Inc. v. City of Greensboro, 42 N.C. App. 79, 255 S.E.2d 615 (1979).

Since a municipality may act only through its officers and agents, an action against a municipality is an action against "a public officer" within the meaning of this section. Murphy v. City of High Point, 218 N.C. 597, 12 S.E.2d 1 (1940); Godfrey v. Tidewater Power Co., 224 N.C. 657, 32 S.E.2d 27 (1944); Lee v. Poston, 233 N.C. 546, 64 S.E.2d 835 (1951). See also, Jones v. Town of Statesville, 97 N.C. 86, 2 S.E. 346 (1887); Brevard Light & Power Co. v. Board of Light & Water Comm'rs, 151 N.C. 558, 66 S.E. 569 (1909).

The proper venue of an action against a municipality is the county where the cause of action, or some part thereof, arose. Murphy v. City of High Point, 218 N.C. 597, 12 S.E.2d 1 (1940); Godfrey v. Tidewater Power Co., 224 N.C. 657, 32 S.E.2d 27 (1944).

Ordinarily, the proper venue for an action against a municipality would be the county where the cause of action arose and if an action is instituted in some other county, the municipality has the right to have the action removed to the proper county. Jarrell v. Town of Topsail Beach, 105 N.C. App. 331, 412 S.E.2d 680 (1992).

An Action Against a Railroad and a City Is Subject to This Section. — Section 1-81 is only applicable when a railroad is the sole defendant; in a case brought jointly against railroad and city, venue is properly determined pursuant to this section. Thompson v. Norfolk S. Ry., 140 N.C. App. 115, 535 S.E.2d 397, 2000 N.C. App. LEXIS 1100 (2000).

Officers of Counties and Cities. — Actions against county commissioners and other officers must be brought in the county of which they are officers; moreover, cities and towns are of like nature, and should stand upon the same footing as to actions against them. Johnston v. Board of Comm'rs, 67 N.C. 101 (1872); Alexander v. Commissioners of McDowell, 67 N.C. 330 (1872); Jones v. Board of Comm'rs, 69 N.C. 412 (1873); Steele v. Commissioners of Rutherford, 70 N.C. 137 (1874); Jones v. Town of Statesville, 97 N.C. 86, 2 S.E. 346 (1887).

Deputy sheriffs of a county are "public officers" for purposes of the change of venue statute. Galligan v. Smith, 10 N.C. App. 536, 179 S.E.2d 193 (1971).

Nature of Acts of Officer. — An action is controlled by this section irrespective of whether the damages arose from a negligent discharge by the officer of an administrative duty or a technically governmental one. Brevard Light & Power Co. v. Board of Light & Water Comm'rs, 151 N.C. 558, 66 S.E. 569 (1909).

Acts Done by Virtue of Office. — Where defendant is a public officer and the action arises from acts done or to be done by him in a county by virtue of his office, subdivision (2) of this section applies. King v. Buck, 21 N.C. App. 221, 203 S.E.2d 643 (1974).

Actions against public officers for acts done by virtue of their office were required to be tried in county where cause, or some part thereof, arose, regardless of whether the public officer was engaged in a proprietary or a governmental function. Hyde v. Anderson, 158 N.C. App. 307, 580 S.E.2d 424, 2003 N.C. App. LEXIS 1035 (2003), cert. denied, 357 N.C. 459, 585 S.E.2d 759 (2003).

Acts Not Done by Virtue of Office. — In an action in Catawba County, residence of plaintiff, for damages for an alleged wrongful conspiracy which occurred in Wilkes County, against a corporation and two individuals acting as a corporation's agents, one of the individuals being described as a deputy sheriff of Wilkes County, a motion for change of venue to Wilkes County under this section was properly denied, as there was no allegation that the acts complained of were done by the deputy sheriff by virtue of his office. Potts v. United Supply Co., 222 N.C. 176, 22 S.E.2d 255 (1942).

For case holding a county hospital an agency of the county, see Coats v. Sampson County Mem. Hosp., 264 N.C. 332, 141 S.E.2d 490 (1965).

Hospital authority was a "public officer" under G.S. 1-77(2), and therefore the proper venue for an action against it alleging medical negligence was in the county where the action arose. Wells v. Cumberland County Hosp. Sys., 150 N.C. App. 584, 564 S.E.2d 74, 2002 N.C. App. LEXIS 586 (2002).

Hospital Not Agency of County. — Hospital was not entitled to a change of venue in a medical malpractice action under G.S. 1-77(2) since statutory revisions diminished ties between the hospital and a county after a prior judicial decision which determined that the hospital's predecessor was an agency of the county for purposes of venue; the hospital held no county bonds, the hospital did not benefit from county taxes, the hospital followed anti-discrimination policies, and the hospital's bylaws identified the hospital as a private, nonprofit corporate hospital. Odom v. Clark, — N.C. App. —, 668 S.E.2d 33, 2008 N.C. App. LEXIS 1554 (2008).

For case holding that this section was not applicable to a religious corporation, see Lee v. Poston, 233 N.C. 546, 64 S.E.2d 835 (1951).

This section does not apply to actions against the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Obligors on Bond. — The obligors on a bond to indemnify a sheriff against loss, etc., in seizing and selling property under execution are not included in that class of persons "who by his command or in his aid shall do anything touching the duties of such office." Harvey v. Brevard, 98 N.C. 93, 3 S.E. 911 (1887).

Cause of action arises in the county where the acts or omissions constituting the basis of the action occurred. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

When Cause of Action Accrues. — A cause of action may be said to accrue, within the meaning of a statute fixing venue of actions, when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Injurious Results Taking Effect in Another County. — Where the cause of an alleged grievance is situate or exists in one state or county, and the injurious results take effect in another, the courts of the former have jurisdiction. Powell v. Eastern Carolina Regional Hous. Auth., 251 N.C. 812, 112 S.E.2d 386 (1960).

Forsyth County was a proper venue in a negligence and medical malpractice against paramedics, Rockingham County and the Rockingham County Emergency Medical Services because the alleged injuries occurred in Forsyth County when the head of the stretcher that the injured party was transported on bounced off a stair of the ambulance and hit the ground. Morris v. Rockingham County, 170 N.C. App. 417, 612 S.E.2d 660, 2005 N.C. App. LEXIS 997 (2005).

Trial of Whole Controversy in County Where Offense Occurred. — Where in an action against the clerk of the superior court of one county and the sheriff of another county the clerk moved for removal of the cause as to him to the county of his office under this section, the motion should have been denied in order to avoid the possibility of conflicting verdicts and judgments and to dispose of the controversy in one action, the spirit of this section being effected in such instances by trial of the whole controversy in the county where the offense occurred. Kellis v. Welch, 201 N.C. 39, 158 S.E. 742 (1931).

Erroneous Denial of Motion to Remove. — Denial of defendant city's motion to remove case to the county where the cause arose was erroneous, because an action against a municipality is an action against "a public officer" pursuant to this section, and when the initial venue is not proper, the court's duty to remove the case to the proper venue, pursuant to G.S. 1-83, is not discretionary; once the defendant timely moved to have the action removed, pursuant to G.S. 1-83, the court was required to change the county of proper venue. Thompson v. Norfolk S. Ry., 140 N.C. App. 115, 535 S.E.2d 397, 2000 N.C. App. LEXIS 1100 (2000).

Motion to Change Venue Properly Denied. — Motion pursuant to G.S. 1-77(2) to change venue to Wake County, North Carolina, of a suit alleging that a department and an agency were negligent in placing a minor child for adoption was properly denied because the death of the child, the adoption, and the placement of the child by the department occurred in Johnston County; the complaint alleged that the department committed acts of negligence in Johnston County and that the agency acted as an agent of the department and committed acts of negligence in Johnston County. The complaint also alleged that there were negligent omissions by the department and the agency of acts which should have taken place in Johnston County. Ford v. Paddock, — N.C. App. —, 674 S.E.2d 689, 2009 N.C. App. LEXIS 355 (2009).

Right to Have Case Moved Does Not Preclude Change of Venue Under § 1-83. — The fact that defendant is entitled under this section to have his case moved to a certain county does not preclude the court from changing the venue from that county to another county, in the exercise of sound discretion, for the convenience of witnesses and the promotion of the ends of justice, upon motion properly made under G.S. 1-83. King v. Buck, 21 N.C. App. 221, 203 S.E.2d 643 (1974).

Recovery Against City for Price of Equipment. — Proper venue in an action against a city to recover the price of equipment installed in its municipal building lies in the county in which the city is located, since the contract was performed and the failure to pay occurred in that county. Pitts Fire Safety Serv., Inc. v. City of Greensboro, 42 N.C. App. 79, 255 S.E.2d 615 (1979).

A cause of action for damages for breach of a contract made by a board of a municipal corporation is within the meaning of this section. Brevard Light & Power Co. v. Board of Light & Water Comm'rs, 151 N.C. 558, 66 S.E. 569 (1909).

Negligent Operation of Sewage Disposal Plant. — Where complaint alleged damage to plaintiff's land resulting from negligent operation of defendant municipality's sewage disposal plant, and the action was instituted in the county in which the land was situated and in which the municipality maintained and operated its sewage disposal plant, the alleged negligent acts resulting in the injury to the land occurred at the point where defendant municipality maintained its sewage disposal plant, the cause of action arose there, and municipality's motion for change of venue was erroneously granted. Murphy v. City of High Point, 218 N.C. 597, 12 S.E.2d 1 (1940).

Damages from Emptying of Sewage into Stream. — Venue of an action to recover from an incorporated town damages to lands situated in another county, caused by emptying its sewage into an insufficient stream of water, was properly in the county wherein the town was situated, for such cause arose by reason of the official conduct of municipal officers and consequently was regulated by this section. Cecil v. City of High Point, 165 N.C. 431, 81 S.E. 616 (1914).

§ 1-78. Official bonds, executors and administrators.

All actions against executors and administrators in their official capacity, except where otherwise provided by statute, and all actions upon official bonds must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county. (1868-9, c. 258; Code, s. 193; Rev., s. 421; C.S., s. 465.)

CASE NOTES

Legislative Intent. — It was the intent of the legislature to require all actions against executors and administrators in their official or representative capacity to be instituted in the county where the letters of administration were taken out, except where otherwise provided by statute. And all actions against executors and administrators upon their official bonds must be instituted in the county where the bonds were given, if the maker or any surety thereon lives in the county, and if not, then the plaintiff's county. Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950); Stanley v. Miller, 42 N.C. App. 232, 256 S.E.2d 308 (1979).

The object of the statute was to have suits against these persons, whether upon their bonds or not, in the county where they took out letters and where they make their returns and settlements and transact all the business of the estate in their hands. Stanley v. Mason, 69 N.C. 1 (1873); Foy v. Morehead, 69 N.C. 512 (1873); Bidwell v. King, 71 N.C. 287 (1874); Farmers' State Alliance v. Murrell, 119 N.C. 124, 25 S.E. 785 (1896).

This section applies to all actions against executors and administrators in their official capacity, whether upon their bonds or not. Godfrey v. Tidewater Power Co., 224 N.C. 657, 32 S.E.2d 27 (1944).

Section Includes Guardians. — This section includes guardians, notwithstanding the only words used are "executors" and "administrators." Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963); see also, State ex rel. Cloman v. Staton, 78 N.C. 235 (1878).

And All Court-Appointed Fiduciaries Required to Account to Court Appointing Them. — The Legislature intended under this section to encompass all fiduciaries, irrespective of technical titles, who act by reason of a court appointment and are by law required to account to the court appointing them. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

A personal action against an administrator is not within the meaning of this section. Craven v. Munger, 170 N.C. 424, 87 S.E. 216 (1915).

Representative Is Not Entitled to Removal if Not Sued in Official Capacity. — That fact that an executor or administrator is sued and is named as executor or administrator in the summons caption and complaint does not entitle such defendant to an order of removal to the county in which he qualified if the complaint discloses that the alleged cause of action is not against him in his official capacity. Davis v. Singleton, 256 N.C. 596, 124 S.E.2d 563 (1962); Stanley v. Miller, 42 N.C. App. 232, 256 S.E.2d 308 (1979).

When Action Is Against Representative

in Official Capacity. — An action is against the representative in his official capacity if it (1) Asserts a claim against the estate; (2) Involves the settlement of his accounts; or (3) Involves the distribution of the estate. Davis v. Singleton, 256 N.C. 596, 124 S.E.2d 563 (1962).

Section Inapplicable to Actions by Administrators. — This section applies only to actions against administrators and not to actions brought by them. Whitford v. North State Life Ins. Co., 156 N.C. 42, 72 S.E. 85 (1911). See also, Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

The proper venue for actions against executors and administrators is the county in which they qualify. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

Under this section, if an action is against an executor in his official capacity, it must be instituted in the county in which he qualified. DesMarais v. Dimmette, 70 N.C. App. 134, 318 S.E.2d 887 (1984).

This section applies to original actions "instituted," i.e., originally commenced, against personal representatives, and not to actions already pending in which it may be proper or necessary to make them parties. Evans v. Morrow, 233 N.C. 562, 64 S.E.2d 842 (1951).

Section Not Applicable Where Administrator Substituted as Party. — This section has no application where an action is commenced in another county against a defendant, and upon his death his administrator is made a party. Latham v. Latham, 178 N.C. 12, 100 S.E. 131 (1919).

Where plaintiff instituted an action in the county of his residence to collect damages resulting from an automobile collision, and defendant died prior to service of process, and thereupon defendant's administratrix was joined as a party defendant, the administratrix was not entitled to claim that the action was not properly pending because it was not instituted in the county in which she had given bond, since venue is governed by the status of the parties at the commencement of the action; however, defendant administratrix could move for removal of the cause to the county of her residence and the scene of the collision for the convenience of witnesses and the promotion of the ends of justice. Johnson v. Smith, 215 N.C. 322, 1 S.E.2d 834 (1939).

Right to Move for Change of Venue. — The right of an administratrix in regard to motions for change of venue under this section may not be invoked by another party to the action. Herring v. Queen City Coach Co., 231 N.C. 430, 57 S.E.2d 307 (1950).

Institution of Action in County Mandated Does Not Prevent Motion for Removal. — Where a plaintiff was compelled to institute his action in a particular county by reason of the mandate of this section, his act in doing so could not be imputed to him as a voluntary choice of venue so as to prevent him from lodging a motion for removal under G.S. 1-83, subdivision (2). Pushman v. Dameron, 208 N.C. 336, 180 S.E. 578 (1935).

The fact that an individual was joined as a defendant with an executor or administrator, and that the individual defendant was a resident of the county in which the cause of action was brought was held not to affect the executor's or administrator's right of removal to the county in which it qualified. Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

Discretion of Judge to Remove Cause. — The trial judge in the exercise of a sound discretion has the power to remove the cause to another county for trial since the wording of this section does not necessarily mean that the cause should be actually tried in the county where the cause was instituted. Pushman v. Dameron, 208 N.C. 336, 180 S.E. 578 (1935).

Action for Account and Settlement. — Where an action involves an account and settlement of an estate, by the express words of this section such an action must be instituted in the county where the administrator qualified. Thomas v. Ellington, 162 N.C. 131, 78 S.E. 12 (1913), distinguishing Roberts v. Connor, 125 N.C. 45, 34 S.E. 107 (1899).

Foreclosure of Tax Sale Certificate. — An action against the estate of a deceased person to foreclose a tax sale certificate must be brought in the county where the land is situate. Guilford County v. Estates Admin., Inc., 212 N.C. 653, 194 S.E. 295 (1937).

Action Dependent upon Settlement of Accounts. — In an action against defendant executors, where the ultimate determination of the rights of the respective parties in a joint savings account necessarily depended upon the proper settlement of the accounts of the defendant executors, the action was against the defendant executors in their representative capacity. Stanley v. Miller, 42 N.C. App. 232, 256 S.E.2d 308 (1979).

Suits Against Administratrix of Deceased Administrator. — Where A qualified as administrator of B in Halifax County, and gave bond there, and afterwards A died in Northampton, and C qualified as his administratrix in that county, and C, administratrix, along with D, one of the sureties on the bond of A, resided in Northampton, and were sued in Halifax County on the bond of A, by a resident of Halifax, it was held that the action was properly brought in Halifax, under this section. State ex rel. Clark v. Peebles, 100 N.C. 348, 6 S.E. 798 (1888).

Action against executrix to recover on a guardianship bond executed by testator was properly brought in the county in which the bond was given and the sureties thereon resided and in which the administrators of the sureties qualified, and the motion of defendant executrix to remove as a matter of right to the county in which she qualified was properly denied, the primary and controlling intent of this section being that actions on official bonds should be instituted in the county in which the bonds were given if the principal or any surety on the bond was in the county. State ex rel. Thomasson v. Patterson, 213 N.C. 138, 195 S.E. 389 (1938).

In an action on a guardianship bond instituted in the county in which the bond was given and the sureties resided, the contention that the sureties were insolvent and that their administrators were joined to prevent removal to the county in which the executrix of the principal on the bond qualified was untenable, since the controlling factors were the place where the bond was given and the residence of the sureties and not the solvency or insolvency of the sureties. State ex rel. Thomasson v. Patterson, 213 N.C. 138, 195 S.E. 389 (1938).

A national bank, by qualifying as a testamentary trustee, waives any right to have an action for an accounting that is instituted against it in the county in which the will was probated removed to the county in which it maintains its principal office. Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

Applied in Moseley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36 (1973).

Cited in Bohannon v. Wachovia Bank & Trust Co., 210 N.C. 679, 188 S.E. 390 (1936); Evans v. Morrow, 234 N.C. 600, 68 S.E.2d 258 (1951); Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952); Kimrey v. Dorsett, 10 Bankr. 466 (M.D.N.C. 1981).

§ 1-79. Domestic corporations, limited partnerships, limited liability companies, and registered limited liability partnerships.

(a) For the purpose of suing and being sued the residence of a domestic corporation, limited partnership, limited liability company, or registered limited liability partnership is as follows:

(1) Where the registered or principal office of the corporation, limited partnership, limited liability company, or registered limited liability partnership is located, or

(2) Where the corporation, limited partnership, limited liability company, or registered limited liability partnership maintains a place of business, or

(3) If no registered or principal office is in existence, and no place of business is currently maintained or can reasonably be found, the term "residence" shall include any place where the corporation, limited partnership, limited liability company, or registered limited liability partnership is regularly engaged in carrying on business.

(b) For purposes of this section, the term "domestic" when applied to an entity means:

(1) An entity formed under the laws of this State, or

(2) An entity that (i) is formed under the laws of any jurisdiction other than this State, and (ii) maintains a registered office in this State pursuant to a certificate of authority from the Secretary of State. (1903, c. 806; Rev., s. 422; C.S., s. 466; 1951, c. 837, s. 5; 1957, c. 492; 1973, c. 885; 1975, c. 111; 1999-362, s. 1.)

Cross References. — As to actions against railroads, see G.S. 1-81.

CASE NOTES

Purpose of Section. — The purpose of this section was not to change the provisions of G.S. 1-81 or to deny plaintiff's right to sue a domestic corporation in the county of his residence, but to remedy the defect of G.S. 1-81 so that a domestic corporation could be sued in the same venue as an individual, excepting railroads in certain specified instances, and where the venue is fixed by G.S. 1-76, 1-77 and 1-78. Roberson v. Greenleaf Johnson Lumber Co., 153 N.C. 120, 68 S.E. 1064 (1910).

Residence Fixed by Charter. — The residence of a corporation for the purpose of suing and being sued is where the governing power is exercised, and is fixed by the charter, without power on the part of the corporation to affect it by a change of its principal place of business. Garrett & Co. v. Bear, 144 N.C. 23, 56 S.E. 479 (1907).

The residence of a corporation executor or administrator for the purpose of determining venue of an action instituted by it, like that of other domestic corporations, is the county in which it maintains its principal office and not the county of its qualification. Branch Banking & Trust Co. v. Finch, 232 N.C. 485, 61 S.E.2d 377 (1950).

The fact that the principal place of business of a corporate executor or administrator is a county other than the one in which the letters testamentary were issued does not affect the question of venue of an action against such executor or administrator in its official capacity. Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

Domesticated foreign corporations are residents of the State for purposes of venue of the State courts. Hill v. Atlantic Greyhound Corp., 229 N.C. 728, 51 S.E.2d 183 (1949); Travelers Indem. Co. v. Marshburn, 91 N.C. App. 271, 371 S.E.2d 310 (1988).

A foreign corporation which duly domesticates in this State pursuant to former G.S. 55-138(a)(5) (see now G.S. 55-15-03(a)(5)) is to be treated like a domestic corporation for venue purposes. Moore Golf, Inc. v. Shambley Wrecking Contractors, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

A domesticated foreign corporation may sue and be sued under the rules and regulations which apply to domestic corporations, and is entitled to have an action against it, instituted by a nonresident, removed to the county of its main place of business in this State. In such a case, G.S. 1-80 does not apply. Hill v. Atlantic Greyhound Corp., 229 N.C. 728, 51 S.E.2d 183 (1949).

Section Does Not Apply to Foreign Insurance Companies. — While statutes relating to suits in behalf of or against domestic corporations and foreign corporations which have submitted to domestication must be read in pari materia, the provisions of this section have no application to foreign insurance companies, since G.S. 58-150 (see now G.S. 58-16-5) does not require a foreign insurance company to file a statement in the office of the Commissioner of Insurance setting forth its principal place of business. Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

As to the domesticated foreign insurance corporation exception to the general rule that domesticated foreign corporations are treated like domestic corporations, see Moore Golf, Inc. v. Shambley Wrecking Contractors, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

Section Held Inapplicable to Creditor's Bill. — This section is for the purpose of determining the residence of domestic corporations, and does not affect the question of the venue of an action in the nature of a creditors' bill to set aside a husband's deed to his wife alleged to be in fraud of the creditors' rights. Wofford-Fain & Co. v. Hampton, 173 N.C. 686, 92 S.E. 612 (1917).

Removal Upheld. — Where a corporate administrator instituted suit in the county of its qualification, in which it maintained a branch office, against a defendant who was a resident of another county in which the corporate administrator maintained its principal office, it was held that the action was properly removed upon motion to the county in which the corporate administrator maintained its principal office and in which defendant resided. Branch Banking & Trust Co. v. Finch, 232 N.C. 485, 61 S.E.2d 377 (1950).

Removal Held Improper. — Under G.S. 1A-1, Rule 15(c), when an amended complaint is filed as a matter of right before any responsive pleading is filed by the original defendant, and the original complaint gave notice of the transactions or occurrences referred to in the amended complaint, the claims asserted in the amended complaint are deemed to have been interposed at the time the claim in the original pleading was interposed. Thus, since corporate defendant was a resident of Wake County for venue purposes, because it had a place of business there, and was deemed to have been a defendant in the action at its commencement by operation of G.S. 1A-1, Rule 15(c), although it was not added until later, venue there was not improper, and order of removal was erroneous. Oak Manor, Inc. v. Neil Realty Co., 88 N.C. App. 402, 363 S.E.2d 382, cert. denied, 322 N.C. 482, 370 S.E.2d 226 (1988).

General contractor stated that its principal place of business was in Mecklenburg County, and as such Mecklenburg County was the general contractor's principal place of business and the proper venue for its suit against a subcontractor. Barrier Geotechnical Contrs., Inc. v. Radford Quarries of Boone, Inc., 184 N.C. App. 741, 646 S.E.2d 840, 2007 N.C. App. LEXIS 1599 (2007).

As to venue in actions against domestic corporations prior to passage of this section, see Cline v. Bryson City Mfg. Co., 116 N.C. 837, 21 S.E. 791 (1895); Farmers' State Alliance v. Murrell, 119 N.C. 124, 25 S.E. 785 (1896).

Action to Recover Money Damages and

Enforce Lien. — Action to enforce a materialmen's lien did not need to be filed in the county where the liened property was located; because the primary purpose of a contractor's suit was recovery of money damages, but also requested enforcement of a lien, venue was proper in the county where the contractor had its principal place of business, even though the liened property was located in a different county. Wellons Constr., Inc. v. Landsouth Props., LLC, 168 N.C. App. 403, 607 S.E.2d 695, 2005 N.C. App. LEXIS 255 (2005).

Applied in Eastern Cotton Oil Co. v. New Bern Oil & Fertilizer Co., 204 N.C. 362, 168 S.E. 411 (1933); First Union Nat'l Bank v. Northwestern Bank, 18 N.C. App. 113, 196 S.E.2d 38 (1973); Centura Bank v. Miller, 138 N.C. App. 679, 532 S.E.2d 246, 2000 N.C. App. LEXIS 780 (2000).

Cited in Roberson v. Greenleaf Johnson Lumber Co., 153 N.C. 120, 68 S.E. 1064 (1910); McCue v. Times-News Co., 199 N.C. 802, 156 S.E. 129 (1930); Occidental Life Ins. Co. v. Lawrence, 204 N.C. 707, 169 S.E. 636 (1933); Howle v. Twin States Express, Inc., 237 N.C. 667, 75 S.E.2d 732 (1953); Haworth v. GMAC, 238 F.2d 203 (4th Cir. 1956); Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959); Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968); Stewart v. Southeastern Regional Med. Ctr., 142 N.C. App. 456, 543 S.E.2d 517, 2001 N.C. App. LEXIS 137 (2001).

§ 1-80. Foreign corporations.

An action against a corporation created by or under the law of any other state or government may be brought in the appropriate trial court division of any county in which the cause of action arose, or in which the corporation usually did business, or has property, or in which the plaintiffs, or either of them, reside, in the following cases:

(1) By a resident of this State, for any cause of action.
(2) By a nonresident of this State in any county where he or they are regularly engaged in carrying on business.
(3) By a plaintiff, not a resident of this State, when the cause of action arose or the subject of the action is situated in this State. (C.C.P., s. 361; 1876-7, c. 170; Code, s. 194; Rev., s. 423; 1907, c. 460; C.S., s. 467; 1971, c. 268, s. 1.)

Cross References. — As to domesticated foreign corporations, see case notes to G.S. 1-79. As to actions against railroads, see G.S. 1-81.

CASE NOTES

Section Does Not Affect Jurisdiction. — This section is under the subject of venue and not jurisdiction, and though it enumerates certain cases, it does not purport to restrict the jurisdiction of the court or to prevent the exercise of such jurisdiction as theretofore existed; hence, under North Carolina decisions and those of New York, from which the statute was adopted, it does not interfere with the jurisdiction of North Carolina courts of transitory causes of actions. Ledford v. Western Union Tel. Co., 179 N.C. 63, 101 S.E. 533 (1919).

Effect of § 1-81. — The enactment of G.S. 1-81 does not repeal this section, but this section will be confined to corporations other than railway companies which have been chartered by any other state, government or county. Propst v. Railroad, 139 N.C. 397, 51 S.E. 920 (1905).

Garnishment Against Salesmen. — The courts of this State have jurisdiction to proceed against a foreign corporation in garnishment proceedings in an action brought in the State against its salesmen, the cause of action against it and in favor of the salesmen having arisen here, and the subject of the action being situated here. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

An action for a penalty can be brought against a foreign defendant before a justice of the peace in any county in which the defendant does business or has property, or where plaintiff resides. Allen-Fleming Co. v. Southern Ry., 145 N.C. 37, 58 S.E. 793 (1907).

Suit to Recover for Value of Timber. — Where a nonresident plaintiff sued to recover from a nonresident defendant the value of timber alleged to have been cut and removed by the defendant to a different county from that wherein the lands were situated, and brought his action in the county where the conversion was alleged to have occurred, to maintain his action in the latter county he had to show that the defendant conducted business or had property therein, or the cause would be removable to the county where the land was situated, that being the county wherein the cause of action arose. Richmond Cedar Works v. J.L. Roper Lumber Co., 161 N.C. 603, 77 S.E. 770 (1913).

Suit Against Fraternal Lodge. — Where defendant, the head lodge, had a local lodge in the county of venue, in which members were received, the usual business of such lodges was transacted and membership fees were collected and remitted to it, the transactions of the local lodge were such usual or continuous business as is contemplated by the statute, and the cause was improperly transferred to the county in which the plaintiff resided and the injury was alleged to have been received. Ange v. Sovereign Camp, W.O.W., 171 N.C. 40, 87 S.E. 955 (1916).

Claim of State for License Fees. — Where a receiver of an insolvent foreign corporation was appointed under the Corporation Act of 1901, a claim by the State which chartered the corporation, for annual license fees, was provable; this section, as to actions against foreign corporations, did not apply to the proceeding. Holshouser v. Copper Co., 138 N.C. 248, 50 S.E. 650 (1905).

Action by Administrator for Death by Wrongful Act. — A foreign corporation may be sued by an administrator for the wrongful death of his intestate either in the county wherein the cause of action arose or that of the personal representative of the deceased. Hannon v. Southern Power Co., 173 N.C. 520, 92 S.E. 353 (1917).

Cited in Troy Lumber Co. v. State Sewing Mach. Corp., 233 N.C. 407, 64 S.E.2d 415 (1951); Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959).

§ 1-81. Actions against railroads.

In all actions against railroads the action must be tried either in the county where the cause of action arose or where the plaintiff resided at that time or in some county adjoining that in which the cause of action arose, subject to the power of the court to change the place of trial as provided by statute. (Rev., s. 424; C.S., s. 468.)

CASE NOTES

History. — This section was first enacted as a proviso to § 424 of the Revisal. Section 424 of the Revisal is now § 1-82; it contains the language "in all other cases." It was held that this language modified the proviso, this section, and that the proviso did not operate as a repeal or modification of § 1-76. In view of this pronouncement of the legislative intent, it is to be presumed that the language of § 1-82 still applies to this section, although the two sections are now apparently independent.

The act of 1905, c. 367, amending the Code, § 192 (Revisal, § 424), now §§ 1-81 and 1-82, expressly included actions for injury to lands by making it apply to other cases than those specified in the previous sections, and does not repeal or modify § 1-76, in regard to the venue of actions of this character, since it is for damages for personal injuries. Propst v. Railroad, 139 N.C. 397, 51 S.E. 920 (1905); Perry v. Seaboard Air Line Ry., 153 N.C. 117, 153 N.C. 1117, 68 S.E. 1060, 68 S.E. 1060 (1910).

Effect of Section in General. — This section does not affect the bringing of an action in the county where the plaintiff resides, but only prohibits the selection at will of any county where the defendant has a track for that purpose, unless the injury occurred, or plaintiff resides, therein. Watson v. North Carolina R.R., 152 N.C. 215, 67 S.E. 502 (1910).

This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a non-resident plaintiff against a railroad company incorporated in North Carolina. McGovern & Co. v. Atlantic Coast Line R.R., 180 N.C. 219, 104 S.E. 534 (1920).

This section applies to all railroad companies, both domestic and foreign. Forney v. Black Mt. R.R., 159 N.C. 157, 74 S.E. 884 (1912).

As to actions against railroads under federal control, see Alabama & V. Ry. v. Journey, 257 U.S. 111, 42 S. Ct. 6, 66 L. Ed. 154 (1921).

Section Inapplicable Where Railroad is Not Sole Defendant. — This section should be construed and held to apply to cases where a railroad company alone is defendant, and the venue in actions where there are other parties defendant is not controlled by the section. Smith v. Patterson, 159 N.C. 138, 74 S.E. 923 (1912).

This section is only applicable when the railroad is the sole defendant; in a case brought jointly against railroad and city, the venue is properly determined pursuant to G.S. 1-77. Thompson v. Norfolk S. Ry., 140 N.C. App. 115, 535 S.E.2d 397, 2000 N.C. App. LEXIS 1100 (2000).

Where both plaintiff and defendant were nonresident corporations, an action concerning land brought in a different county from the situs of the property, wherein neither had property nor conducted its business, fell within the intent and meaning of § 1-80 and this section. Henrico Lumber Co. v. Dare Lumber Co., 180 N.C. 12, 103 S.E. 915 (1920).

Residence of Administrator for Purposes of Section. — Authoritative interpretations of this and legislation of similar import elsewhere would seem to favor the position that in respect to actions instituted by an administrator and coming within the effect of this section, the term "where plaintiff resided at the time the cause of action arose" has reference to the residence of the individual holding the office and not to the official residence or place where he may have qualified. Roberson v. Greenleaf Johnson Lumber Co., 153 N.C. 120, 68 S.E. 1064 (1910); Whitford v. North State Life Ins. Co., 156 N.C. 42, 72 S.E. 85 (1911); Smith v. Patterson, 159 N.C. 138, 74 S.E. 923 (1912).

Applied in John P. Nutt Corp. v. Southern Ry., 214 N.C. 19, 197 S.E. 534 (1938); Poteat v. Southern Ry., 33 N.C. App. 220, 234 S.E.2d 447 (1977).

Cited in Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

§ 1-81.1. Venue in apportionment or redistricting cases.

(a) Venue in any action concerning any act of the General Assembly apportioning or redistricting State legislative or congressional districts lies exclusively with the Wake County Superior Court.

(b) Any action brought concerning an act of the General Assembly apportioning or redistricting the State legislative or congressional districts shall be filed in the Superior Court of Wake County. (2003-434, 1st Ex. Sess., s. 11(a).)

CASE NOTES

Constitutionality. — Supreme Court of North Carolina found no constitutional bar under N.C. Const. art. IV, § 13(2) to the General Assembly's setting venue for redistricting challenges in the county where the capital of North Carolina is located, pursuant to G.S. 1-81.1; the court found that the provision did not affect jurisdiction, but instead, it merely established venue for challenges to redistricting. Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

§ 1-82. Venue in all other cases.

In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement, or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute; provided that any person who has resided on or been stationed in a United States army, navy, marine corps, coast guard or air force installation or reservation within this State for a period of one (1) year or more next preceding the institution of an action shall be deemed a resident of the county within which such installation or reservation, or part thereof, is situated and of any county adjacent to such county where such person stationed at such installation or reservation lives in such adjacent county, for the purposes of this section. The term person shall include military personnel and the spouses and dependents of such personnel. (C.C.P., s. 68; 1868-9, cc. 59, 277; Code, s. 192; 1905, c. 367; Rev., s. 424; C.S., s. 469; 1957, c. 1082.)

Cross References. — As to venue of domesticated foreign corporations, see case notes to G.S. 1-79.

Legal Periodicals. — For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

Purpose of Section. — The purpose of this section as originally enacted and as amended was primarily to serve the convenience of resident parties. Palmer v. Lowe, 194 N.C. 703, 140 S.E. 718 (1927).

What Section Requires. — This section requires that venue in civil actions not specifically provided for in G.S. 1-76 through 1-81 must be in the county where either the plaintiff or the defendant resides at the commencement of the suit. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Effect of Other Venue Provisions — Section 1-76. — This section is general in its terms and is subject to the provisions of G.S. 1-76. Wofford-Fain & Co. v. Hampton, 173 N.C. 686, 92 S.E. 612 (1917).

Same — Section 1-77. — Section 1-77 relates to particular cases, while this section is intended to cover all cases for which provision is not otherwise made. Hence, in the event of conflict, G.S. 1-77, expressing a particular intention, will be taken as an exception to the general provision. Godfrey v. Tidewater Power Co., 224 N.C. 657, 32 S.E.2d 27 (1944). But see Hannon v. Southern Power Co., 173 N.C. 520, 92 S.E. 353 (1917), wherein it was held that this section should be construed as an exception to § 1-77.

This section relates to venue as opposed to jurisdiction. Shaw v. Stiles, 13 N.C. App. 173, 185 S.E.2d 268 (1971).

This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a nonresident plaintiff against a railroad company incorporated in North Carolina. McGovern & Co. v. Atlantic Coast Line R.R., 180 N.C. 219, 104 S.E. 534 (1920).

Venue means a place where the trial of a cause may be held by a court with jurisdiction. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Local and Transitory Actions Distinguished. — If the judgment to which plaintiff would be entitled upon the allegations of the complaint will affect the title to land, the action is local and must be tried in the county where the land lies unless defendant waives the proper venue; otherwise, the action is transitory and must be tried in the county where one or more of the parties reside at the commencement of the action. Thompson v. Horrell, 272 N.C. 503, 158 S.E.2d 633 (1968).

Venue of Transitory Actions. — Where an action is transitory, either the county of residence of the plaintiff or that of the defendant is the proper venue. First Union Nat'l Bank v. Northwestern Bank, 18 N.C. App. 113, 196 S.E.2d 38 (1973).

The word "parties" as used in this section means parties to the record. Rankin v. Allison, 64 N.C. 673 (1870).

This section governs suits against the State on contracts generally since there is no venue statute specifically applicable to the State. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

Domesticated Foreign Corporations Are Treated Like Domestic Corporations. — A foreign corporation which duly domesticates in this State pursuant to former G.S. 55-138(a)(5) (see now G.S. 55-15-03(a)(5)) is to be treated like a domestic corporation for venue purposes. Moore Golf, Inc. v. Shambley Wrecking Contractors, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

Except for Insurance Corporations. — Moore Golf, Inc. v. Shambley Wrecking Contractors, 22 N.C. App. 449, 206 S.E.2d 789 (1974).

Residence of Fiduciaries for Venue Purposes. — In determining the residence of fiduciaries for the purpose of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to receivers, trustees, executors and administrators, including statutory receivers of banks. Hartford Accident & Indem. Co. v. Hood, 225 N.C. 361, 34 S.E.2d 204 (1945).

Action by Receiver. — Where a receiver of a corporation resided in a different county from the concern he represented, the venue of the action brought by him for breach of contract would be determined by the place of residence of the receiver and not necessarily that of the insolvent corporation. Biggs v. Bowen, 170 N.C. 34, 86 S.E. 692 (1915).

This section governs the venue of actions instituted by an executor or administrator in his official capacity. Branch Banking & Trust Co. v. Finch, 232 N.C. 485, 61 S.E.2d 377 (1950).

Under this section an action by an administrator is properly brought in the county where he resides rather than in the county where the decedent lived or in which the administrator qualified. Klass v. Hayes, 29 N.C. App. 658, 225 S.E.2d 612 (1976).

An action by an administrator upon a life insurance policy of his intestate is properly brought in the county where the administrator resides, not necessarily where the bond is filed. Whitford v. North State Life Ins. Co., 156 N.C. 42, 72 S.E. 85 (1911).

Action for Personal Services Rendered to Administrator. — An action brought to recover for services rendered personally to an administrator is a personal action against the administrator, and can be brought at the election of the plaintiff in the county where either he or the defendant resides. Craven v. Munger, 170 N.C. 424, 87 S.E. 216 (1915).

Actions Brought by Nonresidents. — The venue of an action brought by a nonresident of the State in a different county from that where the defendant resides or does business and wherein the defendant has no property is an improper one. Roberts v. Moore, 185 N.C. 254, 116 S.E. 728 (1923).

In an action for breach of contract brought by a nonresident plaintiff, the county of residence of the defendant is the proper venue. Southern Cotton Oil Co. v. Grimes, 183 N.C. 97, 112 S.E. 598 (1922).

Where plaintiff was a nonresident and defendants were residents of North Carolina, the proper venue for trial of an action for false arrest was a county in this State in which the defendants, or any of them, resided at its commencement. Chow v. Crowell, 15 N.C. App. 733, 190 S.E.2d 647 (1972).

Action Brought by Migrant Worker. — Venue was proper where plaintiff, a migrant farm worker, filed an action in the county where he resided when the action was filed. State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

Action Against Foreign Corporation and Resident Defendant. — Where a nonresident plaintiff brought an action to recover damages for negligence against a foreign corporation, with joinder of a resident defendant, and the venue in the action was laid in a different county from that of the resident defendant, the venue was in the county of the resident defendant, and the action was removable thereto upon his motion duly made. Sections 1-76, 1-80 and 1-81 did not apply. Palmer v. Lowe, 194 N.C. 703, 140 S.E. 718 (1927); Brown v. Brevard Auto Serv. Co., 195 N.C. 647, 143 S.E. 258 (1928).

Where Principal Office of Corporation Is in County Other Than Residence of Defendants. — Where the plaintiff was a corporation, organized and doing business under the laws of the United States, with its principal office in the city of Durham, in Durham County, North Carolina, and the defendants were citizens of this State, and residents of Sampson County, Durham County was the proper venue for the trial of the action. North Carolina Joint Stock Land Bank v. Kerr, 206 N.C. 610, 175 S.E. 102 (1934).

An action on a note by the Commissioner of Banks, etc., is properly brought in the county in which the insolvent bank is situate and of which the liquidating agent is a resident, and defendants' motion for change of venue to the county of their residence is properly refused. Hood ex rel. United Bank & Trust Co. v. Progressive Stores, Inc., 209 N.C. 36, 182 S.E. 694 (1935).

As to venue of suits against national banks, see Security Mills of Asheville, Inc. v. Wachovia Trust Co., 281 N.C. 525, 189 S.E.2d 266 (1972).

An unemancipated illegitimate child sues in the county of his mother's residence, even though he is living in a different county with his grandparents. Thayer v. Thayer, 187 N.C. 573, 122 S.E. 307 (1924).

An action to enforce a lien for materials furnished and used in a building is not specifically required to be brought in the county wherein the building is situated, but comes within the provisions of this section. Sugg v. Pollard, 184 N.C. 494, 115 S.E. 153 (1922).

Action to Recover Damages and Enforce Lien. — Action to enforce a materialmen's lien did not need to be filed in the county where the liened property was located; because the primary purpose of a contractor's suit was recovery of money damages, but also requested enforcement of a lien, venue was proper in the county where the contractor had its principal place of business, even though the liened property was located in a different county. Wellons Constr., Inc. v. Landsouth Props., LLC, 168 N.C. App. 403, 607 S.E.2d 695, 2005 N.C. App. LEXIS 255 (2005).

Effect of Change of Residence. — The defendant by a mere change of residence cannot change the venue as fixed by this section. Taylor v. Sharp, 108 N.C. 377, 13 S.E. 138 (1891); Hannon v. Southern Power Co., 173 N.C. 520, 92 S.E. 353 (1917).

Facts Found by Trial Judge in Determining Residency Are Conclusive on Appeal. — Facts found by the trial judge in determining questions of residency raised in a motion to remove a case on grounds of improper venue are conclusive on appeal if supported by competent evidence. Clarke v. Clarke, 15 N.C. App. 576, 190 S.E.2d 390 (1972).

Venue Proper in a County Other than Where the Corporation Has Its Principle Office. — The trial court did not err by refusing to grant the defendant's motion to transfer the plaintiff's case, pursuant to this section, from the county in which the plaintiff had a place of business to the county in which it had its principle office. Centura Bank v. Miller, 138 N.C. App. 679, 532 S.E.2d 246, 2000 N.C. App. LEXIS 780 (2000).

Removal Held Improper. — Under G.S. 1A-1, Rule 15(c), when an amended complaint is filed as a matter of right before any responsive pleading is filed by the original defendant, and the original complaint gave notice of the transactions or occurrences referred to in the amended complaint, the claims asserted in the amended complaint are deemed to have been interposed at the time the claim in the original pleading was interposed. Thus, since corporate defendant was a resident of Wake County for venue purposes, because it had a place of business there, and was deemed to have been a defendant in the action at its commencement by operation of G.S. 1A-1, Rule 15(c), though not added until later, venue there was not improper, and order of removal was erroneous. Oak Manor, Inc. v. Neil Realty Co., 88 N.C. App. 402, 363 S.E.2d 382, cert. denied, 322 N.C. 482, 370 S.E.2d 226 (1988).

Motion for Removal Properly Denied. — Where judgment was rendered against the estate of plaintiff's deceased guardian for money due the guardianship estate, and after reaching his majority plaintiff instituted an action alleging that defendant as executrix of the deceased guardian had paid over to herself, as sole devisee and legatee, money sufficient to discharge plaintiff's claim, the action was not against defendant as executrix but against her individually on a liability imposed upon her as legatee and devisee, and defendant's motion to remove from the county of plaintiff's residence to the county in which she qualified as executrix was properly denied. Rose v. Patterson, 218 N.C. 212, 10 S.E.2d 678 (1940).

In an action on a judgment of another state, plaintiff's attachment of lands of defendant situated in a county of this State was rendered immaterial by defendant's general appearance. The court found that both parties were nonresidents. Hence, plaintiff was entitled to maintain the action in any court of this State that she might designate, and the defendant's motion to remove to the county in which the real estate attached was situated and of which he asserted he was a resident was properly denied. Clement v. Clement, 216 N.C. 240, 4 S.E.2d 434 (1939).

When an action was amended as of right under G.S. 1A-1-15 to add new plaintiffs, who unlike the existing parties lived in the county in question, defendants' motion for a change of venue was properly denied; as the claims of the new plaintiffs were virtually identical to those of the existing plaintiffs, and the new plaintiffs and the original ones were similarly situated, the claims would be deemed interposed as of the filing of the original complaint for venue purposes. Baldwin v. Wilkie, 179 N.C. App. 567, 635 S.E.2d 431, 2006 N.C. App. LEXIS 1977 (2006).

General contractor stated that its principal place of business was in Mecklenburg County, and as such Mecklenburg County was the general contractor's principal place of business and the proper venue for its suit against a subcontractor. Barrier Geotechnical Contrs., Inc. v. Radford Quarries of Boone, Inc., 184 N.C. App. 741, 646 S.E.2d 840, 2007 N.C. App. LEXIS 1599 (2007).

With regard to a third civil action filed in Mecklenburg County, North Carolina, by a property association for unpaid maintenance fees against two property owners, the trial court did not abuse its discretion by denying the owners' motion for change of venue to Montgomery County, North Carolina, where the two prior actions had been filed, because the evidence established (and the owners did not dispute) that they were residents of Mecklenburg County. Further, the owners' second assertion that the association changed venue of the third action in an "obvious manipulation of the courts...in a clear attempt to circumvent exposure to a trial by jury" was no basis to grant or deny a change of venue motion since G.S. 1-83(2) focused on convenience of the parties and witnesses, and G.S. 1-84 required proof that the moving party could not obtain a fair and impartial trial in the county where the action is currently pending, both of which grounds that argument did not support. Carolina Forest Ass'n v. White, — N.C. App. —, 678 S.E.2d 725, 2009 N.C. App. LEXIS 1066 (July 7, 2009).

Motion for Removal Improperly Denied. — Where plaintiff declared in her complaint alleging assault, battery, and intentional infliction of emotional distress that she was a resident of Vance County, North Carolina, and that defendant was a resident of Granville County, North Carolina, and where all of the events alleged in the complaint occurred in Granville County, North Carolina, Wake County was not the proper venue. Hawley v. Hobgood, 174 N.C. App. 606, 622 S.E.2d 117, 2005 N.C. App. LEXIS 2478 (2005).

An order granting a motion for a change of venue is interlocutory and not immediately appealable. Kennon v. Kennon, 72 N.C. App. 161, 323 S.E.2d 741 (1984).

Applied in Carolina Mtg. Co. v. Long, 205 N.C. 533, 172 S.E. 209 (1934); Atlantic Coast Line R.R. v. Thrower, 213 N.C. 637, 197 S.E. 197 (1938); Brendle v. Stafford, 246 N.C. 218, 97 S.E.2d 843 (1957); Barker v. Hicks, 12 N.C. App. 407, 183 S.E.2d 431 (1971); Poteat v. Southern Ry., 33 N.C. App. 220, 234 S.E.2d 447 (1977).

Cited in McCue v. Times-News Co., 199 N.C. 802, 156 S.E. 129 (1930); Lawson v. Langley, 211 N.C. 526, 191 S.E. 229 (1937); Howard v. Queen City Coach Co., 212 N.C. 201, 193 S.E. 138 (1937); Lee v. Poston, 233 N.C. 546, 64 S.E.2d 835 (1951); Crain & Denbo, Inc. v. Harris & Harris Constr. Co., 250 N.C. 106, 108 S.E.2d 122 (1959); Aetna Cas. & Sur. Co. v. Petroleum Transit Co., 266 N.C. 756, 147 S.E.2d 229 (1966); Doss v. Nowell, 268 N.C. 289, 150 S.E.2d 394 (1966); Mitchell v. Jones, 272 N.C. 499, 158 S.E.2d 706 (1968); Jewel Box Stores Corp. v. Morrow, 272 N.C. 659, 158 S.E.2d 840 (1968); Clarke v. Clarke, 15 N.C. App. 576, 190 S.E.2d 390 (1972); First Union

Nat'l Bank v. Northwestern Bank, 18 N.C. App. 113, 196 S.E.2d 38 (1973); Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975); Miller v. Miller, 38 N.C. App. 95, 247 S.E.2d 278 (1978); Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979); Harrington Mfg. Co. v. Powell Mfg. Co., 44 N.C. App. 347, 260 S.E.2d 814 (1979); Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980); Holland v. Gryder, 54 N.C. App. 490, 283 S.E.2d 792 (1981); Vinson v. Wallace, 96 N.C. App. 372, 385 S.E.2d 810 (1989); Locklear v. Nixon, 129 N.C. App. 105, 497 S.E.2d 310 (1998); Stewart v. Southeastern Regional Med. Ctr., 142 N.C. App. 456, 543 S.E.2d 517, 2001 N.C. App. LEXIS 137 (2001).

§ 1-83. Change of venue.

If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

(1) When the county designated for that purpose is not the proper one.

(2) When the convenience of witnesses and the ends of justice would be promoted by the change.

(3) When the judge has, at any time, been interested as party or counsel.

(4) When motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons. (R.C., c. 31, ss. 115, 118; C.C.P., s. 69; 1870-1, c. 20; Code, s. 195; Rev., s. 425; C.S., s. 470; 1945, c. 141.)

Cross References. — As to time and manner of pleading defense of improper venue, see G.S. 1A-1, Rule 12.

Legal Periodicals. — For case law survey on venue, see 41 N.C.L. Rev. 525 (1963).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

CASE NOTES

I. In General.
II. Where County Designated Is Not Proper.
III. Where Convenience of Witnesses and Ends of Justice Would Be Promoted.
IV. Application for Removal.

I. IN GENERAL.

This Section Is All Inclusive. — This section indiscriminately embraces all the previously enumerated actions of this Subchapter, both those for the recovery of real estate, which under the former system of pleading were called local actions, as well as those which were transitory or personal actions; all are embraced in the sweeping enactment. Lafoon v. Shearin, 91 N.C. 370 (1884).

Construction with § 1A-1, Rule 12(b)(3). — Defendant's motion for change of venue properly was filed after the answer was filed because, although motions for change of venue based on improper venue, pursuant to section 1A-1, Rule 12(b)(3), must be filed prior to or with the answer, motions for change of venue based on the convenience of witnesses, pursuant to subsection (2) of this section, must be filed after the answer is filed, and defendant's motion was based on the convenience of the witnesses. McCullough v. Branch Banking & Trust Co., 136 N.C. App. 340, 524 S.E.2d 569 (2000).

The word "venue," as used in this section, means place of trial, the place or county where the trial of a cause is to be held. The authority thus vested in the superior court judge to remove a cause instituted in a county which is not the proper one, as provided by the statute fixing the venue of actions, is the power to change the place of trial. The trial, nonetheless, is to be had in the same court which ordered its removal, i.e., the superior court. Lovegrove v. Lovegrove, 237 N.C. 307, 74 S.E.2d 723 (1953).

Venue is not jurisdictional, but is only ground for removal to the proper county upon a timely objection made in the proper manner. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952); Casstevens v. Wilkes Tel. Membership Corp., 254 N.C. 746, 120 S.E.2d 94 (1961); Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975);

Miller v. Miller, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

Where an action is brought in the wrong county, defendant is not entitled to abatement or dismissal, since venue is not jurisdictional, but is entitled only to removal to the proper county if motion therefor is made in apt time, since otherwise the question of venue is waived. Davis v. Davis, 179 N.C. 185, 102 S.E. 270 (1920); Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

When an action is instituted in the wrong county, the superior court should, upon apt motion, remove the action, not dismiss it. Coats v. Sampson County Mem. Hosp., 264 N.C. 332, 141 S.E.2d 490 (1965).

And venue may be waived because it is not jurisdictional, and is available to the objecting party by motion in the cause. Shaffer v. Morris Bank, 201 N.C. 415, 160 S.E. 481 (1931).

Venue cannot be jurisdiction and it may always be waived. Clark v. Carolina Homes, Inc., 189 N.C. 703, 128 S.E. 20 (1925). See also, Wynne v. Conrad, 220 N.C. 355, 17 S.E.2d 514 (1941).

Sections 1-76 through 1-83 relate to venue, not jurisdiction, and an objection to the wrong venue is waived if not made in apt time. Collyer v. Bell, 12 N.C. App. 653, 184 S.E.2d 414 (1971).

By Any Party, Including the Government. — Venue, not being jurisdictional, may be waived by any party, including the government. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

By Failure to Comply with Requirements of Section. — The matter of venue is not jurisdictional in the first instance, and the defendant will lose his right to have an action against him removed from an improper to the proper county by failing to comply with the requirements of this section that before the expiration of the time for filing his answer he must demand in writing that the trial be conducted in the proper county. Roberts v. Moore, 185 N.C. 254, 116 S.E. 728 (1923).

Venue may be waived unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county. Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

A defendant's failure to press his motion to remove has been found to be a waiver. Miller v. Miller, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

Waiver occurs when motion was neither "made in writing" nor "before the time of answering expired." McMinn v. Hamilton, 77 N.C. 300 (1819); Lafoon v. Shearin, 91 N.C. 370 (1884) (which was an action of ejectment); Morgan v. First Nat'l Bank, 93 N.C. 352 (1885), aff'd, 132 U.S. 141, 10 S. Ct. 37, 33 L. Ed. 282 (1889); Granville County Bd. of Educ. v. State Bd. of Educ., 106 N.C. 81, 10 S.E. 1002 (1890); Baruch v. Long, 117 N.C. 509, 23 S.E. 447 (1895); Lucas v. Carolina Cent. Ry., 121 N.C. 506, 28 S.E. 265 (1897), modified on rehearing, 122 N.C. 937, 29 S.E. 414 (1898).

Where the county designated for the purpose of summons and complaint is not the proper one, the action may nevertheless be tried therein unless the defendant, before the time for answering expires, demands in writing that the trial be conducted in the proper county and the place of trial is thereupon changed by consent of the parties or by order of the court. Nelms v. Nelms, 250 N.C. 237, 108 S.E.2d 529 (1959).

Motion for Change of Venue Properly Denied. — When an action was amended as of right under G.S. 1A-1-15 to add new plaintiffs, who unlike the existing parties lived in the county in question, defendants' motion for a change of venue was properly denied; as the claims of the new plaintiffs were virtually identical to those of the existing plaintiffs, and the new plaintiffs and the original ones were similarly situated, the claims would be deemed interposed as of the filing of the original complaint for venue purposes. Baldwin v. Wilkie, 179 N.C. App. 567, 635 S.E.2d 431, 2006 N.C. App. LEXIS 1977 (2006).

In a case brought against both a transferring county and a receiving county, based on an inmate's suicide while being held in the receiving county's jail shortly after being transferred from the transferring county's jail, the trial court's order that venue was proper in the transferring county was correct because, although some of the alleged negligence occurred in the receiving county, "some part" of claim arose in the transferring county. Frink v. Batten, 184 N.C. App. 725, 646 S.E.2d 809, 2007 N.C. App. LEXIS 1612 (2007).

Waiver May Be Express or Implied. — Since venue is not jurisdictional it may be waived by express or implied consent. Miller v. Miller, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

Delay in Ruling on Motion for Change of Venue. — Where defendant sought removal of the action due to improper venue in his answer, the fact that it was plaintiff's motion to compel discovery that prodded defendant into action on the motion was immaterial; the nine month delay, standing alone, did not constitute an implied waiver by defendant, and since defendant timely filed a demand for change of venue, he was entitled to show that venue was improper. Hawley v. Hobgood, 174 N.C. App. 606, 622 S.E.2d 117, 2005 N.C. App. LEXIS 2478 (2005).

Filing Answer to Merits as Waiver of Venue Defense. — The defendant who files a formal answer to the merits within the time allowed thereby waives his privilege of amendment. Trustees of Catawba College v. Fetzer, 162 N.C. 245, 78 S.E. 152 (1913); Stevens Lumber Co. v. Arnold, 179 N.C. 269, 102 S.E.

409 (1920); Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

Withdrawing Answer. — Where answer has been filed and withdrawn for the purpose of the motion to remove at the proper term, the right to remove will be taken as waived. Trustees of Catawba College v. Fetzer, 162 N.C. 245, 78 S.E. 152 (1913).

An agreement between counsel for time to file answer is an acceptance of jurisdiction and a waiver of any right to remove. Garrett v. Bear, 144 N.C. 23, 56 S.E. 479 (1907); Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

Accepting Continuances. — A defendant who has moved to transfer a cause to another county waives his right to the same by accepting continuances from time to time. Oettinger v. Hill Live Stock Co., 170 N.C. 152, 86 S.E. 957 (1915).

Demand for change of venue must be made by defendant. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

And Not by Plaintiff. — By adding subdivision (4) to this section, the legislature construed the existing statute as not giving a plaintiff the right to have an action voluntarily instituted by him in an improper county removed to one of proper venue. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

Motion by Plaintiff to Remove Cause Back to Original County. — The fact that a motion for change of venue is allowed as a matter of right does not preclude plaintiff from thereafter moving that the cause be removed back to the original county for the convenience of witnesses and the promotion of the ends of justice. Wiggins v. Finch, 232 N.C. 391, 61 S.E.2d 72 (1950).

Institution of Action Under § 1-78 Does Not Prevent Motion for Change. — Where the plaintiff under G.S. 1-78 is bound to institute the action in the county in which defendant gave bond, his act in so doing cannot be imputed to him as a voluntary choice of venue, so as to prevent the lodging of a motion under this section. Pushman v. Dameron, 208 N.C. 336, 180 S.E. 578 (1935).

Power of Court Limited After Proper Motion for Change of Venue. — Where a motion asserting improper venue is made in writing and in apt time, the question of removal becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

In the absence of waiver or consent of the parties, express or implied, when a motion for change of venue as a matter of right has been properly made in apt time, the court is in error thereafter to enter any order affecting the rights of the parties, save the order of removal. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

But Additional Change Is Not Precluded by Right to Have Case Moved. — The fact that defendant is entitled under G.S. 1-77 to have this case moved to a certain county does not preclude the court from changing the venue from that county to another county, in the exercise of sound discretion, for the convenience of witnesses and the promotion of the ends of justice, upon motion properly made under this section. King v. Buck, 21 N.C. App. 221, 203 S.E.2d 643 (1974).

Trial Court Free to Believe or Disbelieve Affidavits. — The trial court, in ruling upon a motion for change of venue, is entirely free to either believe or disbelieve affidavits, without regard to whether they have been controverted by evidence introduced by the opposing party. Godley Constr. Co. v. McDaniel, 40 N.C. App. 605, 253 S.E.2d 359 (1979).

This section allows removal to a nonadjoining county. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

Trial court did not abuse its discretion by denying defendant's motion for change of venue for convenience in action brought by developer of a marina. Roanoke Properties v. Spruill Oil Co., 110 N.C. App. 443, 429 S.E.2d 752 (1993).

Actions Against Public Officers. — Actions against public officers for acts done by virtue of their office were required to be tried in the county where cause, or some part thereof, arose, regardless of whether the public officer was engaged in a proprietary or a governmental function. Hyde v. Anderson, 158 N.C. App. 307, 580 S.E.2d 424, 2003 N.C. App. LEXIS 1035 (2003), cert. denied, 357 N.C. 459, 585 S.E.2d 759 (2003).

An action for wrongful conversion of severed timber is not removable as a matter of right to the county in which the land from which the trees were severed is situated. Foreman-Blades Lumber Co. v. Tunis Heading & Stave Co., 196 N.C. 38, 144 S.E. 297 (1928).

An order granting a motion for a change of venue is interlocutory and not immediately appealable. Kennon v. Kennon, 72 N.C. App. 161, 323 S.E.2d 741 (1984).

Trial court did not err in granting defendant's motion for change of venue pursuant to G.S. 1-83 and 1-76.1 in action for deficiencies resulting from foreclosure sales personal property. First S. Sav. Bank v. Tuton, 114 N.C. App. 805, 443 S.E.2d 345, cert. denied, 338 N.C. 309, 452 S.E.2d 309 (1994).

Duty to Remove Not Discretionary Once Defendant Correctly Disputes Venue. — Denial of defendant city's motion to remove case to the county where the cause arose was erroneous, because an action against a municipality is an action against "a public officer" pursuant to G.S. 1-77, and, when the initial venue is not proper, the court's duty to remove the case to the proper venue, pursuant to this section, is not discretionary; once defendant timely moved to have the action removed, pursuant to this section, the court was required to change the county of proper venue. Thompson v. Norfolk S. Ry., 140 N.C. App. 115, 535 S.E.2d 397, 2000 N.C. App. LEXIS 1100 (2000).

Discretion Regarding Whether to Transfer or Not. — The trial court committed no gross improprieties by denying the plaintiff's motion to transfer venue for convenience of witnesses and to promote the ends of justice where venue was proper under G.S. 1-82; such transfer is purely a matter of the court's discretion. Centura Bank v. Miller, 138 N.C. App. 679, 532 S.E.2d 246, 2000 N.C. App. LEXIS 780 (2000).

Applied in Davis v. Singleton, 256 N.C. 596, 124 S.E.2d 563 (1962); Slater v. Lovick, 257 N.C. 619, 127 S.E.2d 273 (1962); Barker v. Hicks, 12 N.C. App. 407, 183 S.E.2d 431 (1971); Shaw v. Stiles, 13 N.C. App. 173, 185 S.E.2d 268 (1971); Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979).

Cited in Riley v. Pelletier, 134 N.C. 316, 46 S.E. 734 (1904); Garrett v. Bear, 144 N.C. 23, 56 S.E. 479 (1907); Oettinger v. Hill Live Stock Co., 170 N.C. 152, 86 S.E. 957 (1915); Ludwick v. Uwarra Mining Co., 171 N.C. 60, 87 S.E. 949 (1916); Southern Cotton Oil Co. v. Grimes, 183 N.C. 97, 112 S.E. 598 (1922); Roberts v. Moore, 185 N.C. 254, 116 S.E. 728 (1923); Murchison Nat'l Bank v. Broadhurst, 197 N.C. 365, 148 S.E. 452 (1929); Miller v. Miller, 205 N.C. 753, 172 S.E. 493 (1934); Bohannon v. Wachovia Bank & Trust Co., 210 N.C. 679, 188 S.E. 390 (1936); Lawson v. Langley, 211 N.C. 526, 191 S.E. 229 (1937); Cox v. Oakdale Cotton Mills, Inc., 211 N.C. 473, 190 S.E. 750 (1937); Howard v. Queen City Coach Co., 212 N.C. 201, 193 S.E. 138 (1937); Guilford County v. Estates Admin., Inc., 212 N.C. 653, 194 S.E. 295 (1937); Atlantic Coast Line R.R. v. Thrower, 213 N.C. 637, 197 S.E. 197 (1938); Boney v. Parker, 227 N.C. 350, 42 S.E.2d 222 (1947); Doss v. Nowell, 268 N.C. 289, 150 S.E.2d 394 (1966); Thompson v. Horrell, 272 N.C. 503, 158 S.E.2d 633 (1968); Owens v. Boling, 274 N.C. 374, 163 S.E.2d 396 (1968); Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976); Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978); Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980); Atkins v. Nash, 61 N.C. App. 488, 300 S.E.2d 880 (1983); DesMarais v. Dimmette, 70 N.C. App. 134, 318 S.E.2d 887 (1984); Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987); York v. Northern Hosp. Dist., 88 N.C. App. 183, 362 S.E.2d 859 (1987); Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988); Travelers Indem. Co. v. Marshburn, 91 N.C. App. 271, 371 S.E.2d 310 (1988); Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990); Neil Realty Co. v. Medical Care, Inc., 110 N.C. App. 125, 431 S.E.2d 225 (1993); United Servs. Auto. Ass'n v. Simpson, 126 N.C. App. 393, 485 S.E.2d 337 (1997); State Auto Ins. Cos. v. McClamroch, 129 N.C. App. 214, 497 S.E.2d 439 (1998); Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004); Odom v. Clark, — N.C. App. —, 668 S.E.2d 33, 2008 N.C. App. LEXIS 1554 (2008).

II. WHERE COUNTY DESIGNATED IS NOT PROPER.

Construction of "May" in Subdivision (1). — The provision in this section that the court "may change" the place of trial when the county designated is not the proper one has been interpreted to mean "must change." Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952); Miller v. Miller, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

The question of removal, when the action is not brought in the proper county, is not one of discretion; rather, "may, in this connection," means shall or must, as it is construed in every act imposing a duty. Pelletier v. Saunders, 67 N.C. 261 (1872); Jones v. Town of Statesville, 97 N.C. 86, 2 S.E. 346 (1887); Falls of Neuse Mfg. Co. v. Brower, 105 N.C. 440, 11 S.E. 313 (1890). See also, Lewis v. Sanger, 216 N.C. 724, 6 S.E.2d 494 (1940).

The trial court has no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952); Mitchell v. Jones, 272 N.C. 499, 158 S.E.2d 706 (1968); Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975); Miller v. Miller, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

When the venue where the action was filed is not the proper one, the trial court does not have discretion, but must upon a timely motion and upon appropriate findings transfer the case to the proper venue. Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

And an appeal lies from an order denying a motion for removal of a case to the proper county for trial. Falls of Neuse Mfg. Co. v. Brower, 105 N.C. 440, 11 S.E. 313 (1890); Connor v. Dillard, 129 N.C. 50, 39 S.E. 641 (1901); Brown v. Cogdell, 136 N.C. 32, 48 S.E. 515 (1904); Perry v. Seaboard Air Line Ry., 153 N.C. 117, 153 N.C. 1117, 68 S.E. 1060, 68 S.E. 1060 (1910); Richmond Cedar Works v. J.L. Roper Lumber Co., 161 N.C. 603, 77 S.E. 770 (1913); Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

Such Appeal Is Not Premature. — An appeal from the refusal of the superior court judge to remove a case to the proper county is not premature. Dixon v. Haar, 158 N.C. 341, 74 S.E. 1 (1912); Coats v. Sampson County Mem. Hosp., 264 N.C. 332, 141 S.E.2d 490 (1965).

Costs of Transporting Witnesses of Adverse Party. — While in the exercise of its discretionary power to remove a cause for the convenience of witnesses and to promote the ends of justice, the trial judge has no authority to impose upon movant an obligation for which he is not legally liable, the court may incorporate in the order of removal, with movant's consent, a provision that movant pay the reasonable costs of transporting the witnesses of the adverse party when the court is of the opinion that removal, even though required for the convenience of witnesses, would not promote the ends of justice unless movant should pay such expense. Nichols v. Goldston, 231 N.C. 581, 58 S.E.2d 348 (1950).

Stock certificates, while tangible personal property, are merely tangible evidence, or symbols, of the shares they represent, and are not the kind of personal property which would require a change of venue under G.S. 1-76(4) and subdivision (1). Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

Trial court correctly denied a debtor's motion to change venue, under G.S. 1-76.1 and 1-83(1), of a complaint alleging breach of contract, personal guaranty, and seeking possession of inventory securing a debt, because the inventory had not been sold at the time the complaint was filed, so the complaint was properly framed and was not actually seeking a deficiency judgment. Conseco Fin. Servicing Corp. v. Dependable Hous., Inc., 150 N.C. App. 168, 564 S.E.2d 241, 2002 N.C. App. LEXIS 368 (2002).

III. WHERE CONVENIENCE OF WITNESSES AND ENDS OF JUSTICE WOULD BE PROMOTED.

Motion Is Addressed to Discretion of Court. — A motion to remove when the convenience of witnesses and the ends of justice would be promoted is addressed to the sound discretion of the trial judge. Belding v. Archer, 131 N.C. 287, 42 S.E. 800 (1902), petition for rehearing dismissed, 132 N.C. 1151, 45 S.E. 1036 (1903); Eames v. Armstrong, 136 N.C. 392, 48 S.E. 769 (1904); Oettinger v. Hill Live Stock Co., 170 N.C. 152, 86 S.E. 957 (1915); Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969). See also, Garrett v. Baar, 144 N.C. 23, 56 S.E. 479 (1907); Craven v. Munger, 170 N.C. 424, 87 S.E. 216 (1915); Byrd v. Carolina Spruce Co., 170 N.C. 429, 87 S.E. 241 (1915); Ludwick v. Uwarra Mining Co., 171 N.C. 60, 87 S.E. 949 (1916); Perry v. Perry, 172 N.C. 62, 89 S.E. 999 (1916); Causey v. Morris, 195 N.C. 532, 142 S.E. 783 (1928); Western Carolina Power Co. v. Klutz, 196 N.C. 358, 145 S.E. 681 (1928); Farmers Coop. Exch. v. Trull, 255 N.C. 202, 120 S.E.2d 438 (1961).

When the trial court finds that the convenience of witnesses and the ends of justice would be promoted by a change of venue, subdivision (2) of this section permits, but does not require, the trial court in its discretion to order such a change of venue. Godley Constr. Co. v. McDaniel, 40 N.C. App. 605, 253 S.E.2d 359 (1979).

A decision to change venue to promote the convenience of witnesses and ends of justice is addressed to the sound discretion of the trial judge and will not be overturned unless there is a showing of abuse. State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

And Is Not Reviewable Absent Abuse. — A motion for change of venue for the convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the trial judge, and his action thereon is not reviewable on appeal unless an abuse of discretion is shown. Phillips v. Currie Mills, Inc., 24 N.C. App. 143, 209 S.E.2d 886 (1974). See also, Craven v. Munger, 170 N.C. 424, 87 S.E. 216 (1915); Ludwick v. Uwarra Mining Co., 171 N.C. 60, 87 S.E. 949 (1916); Grimes v. Fulton, 197 N.C. 84, 147 S.E. 680 (1929).

Motion for change of venue pursuant to subdivision (2) of this section to promote the convenience of witnesses and the ends of justice presents a question of venue and not jurisdiction. Rulings on such questions are within the sound discretion of the trial court and are not subject to reversal except for manifest abuse of such discretion. Godley Constr. Co. v. McDaniel, 40 N.C. App. 605, 253 S.E.2d 359 (1979); Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985), cert. denied, Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966).

When Refusal to Remove Will Constitute Abuse of Discretion. — The trial court does not manifestly abuse its discretion in refusing to change the venue for trial of an action pursuant to subdivision (2) of this section unless it appears from the matters and things in evidence before the trial court that the ends of justice will not merely be promoted by, but in addition demand, the change of venue or that failure to grant the change of venue will deny the movant a fair trial. Godley Constr. Co. v. McDaniel, 40 N.C. App. 605, 253 S.E.2d 359 (1979); Holland v. Gryder, 54 N.C. App. 490, 283 S.E.2d 792 (1981); Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985), cert. denied, Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Motions by Different Defendants. — The trial court is necessarily required to exercise discretion in choosing between two motions to remove by two different defendants in the same case. Chow v. Crowell, 15 N.C. App. 733, 190 S.E.2d 647 (1972).

For case dismissing appeal from interlocutory order denying defendant's motion for a change of venue pursuant to subdivision (2) of this section, see Furches v. Moore, 48 N.C. App. 430, 269 S.E.2d 635 (1980).

IV. APPLICATION FOR REMOVAL.

Demand to Be Made Before Time to Answer Expires. — This section is explicit and the cases are uniform in holding that the demand to remove to the proper county must be made before the time for answering expires. See Lafoon v. Shearin, 91 N.C. 370 (1884); Riley v. Pelletier, 134 N.C. 316, 46 S.E. 734 (1904); Garrett v. Bear, 144 N.C. 23, 56 S.E. 479 (1907); Calcagno v. Overby, 217 N.C. 323, 7 S.E.2d 557 (1940); Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

And Before Answering to Merits. — The objection must be taken not only "before the time of answering expires," as required by this section, but it must also be taken in limine and before answering to the merits. Granville County Bd. of Educ. v. State Bd. of Educ., 106 N.C. 81, 10 S.E. 1002 (1890); Shaver v. Huntley, 107 N.C. 623, 12 S.E. 316 (1890). See also, Farmers' State Alliance v. Murrell, 119 N.C. 124, 25 S.E. 785 (1896); Richmond Cedar Works v. J.L. Roper Lumber Co., 161 N.C. 603, 77 S.E. 770 (1913).

A motion for removal made before the time for the filing of an answer to the complaint has expired is made in apt time. Carolina Mtg. Co. v. Long, 205 N.C. 533, 172 S.E. 209 (1934); Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952); Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 320 (1967).

The defendant who files answer to the merits before raising his objection to venue, waives the right. Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

In a custody and paternity action, the trial court properly denied the mother's motion to change venue, filed pursuant to G.S. 1-83(2), as it was filed before she filed an answer. Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

Father's answer contained his motion to change venue and thus, the motion came almost two months after service of the complaint and summons, well outside the 30-day "time of answering" period; accordingly, any objection concerning venue was waived. Chillari v. Chillari, 159 N.C. App. 670, 583 S.E.2d 367, 2003 N.C. App. LEXIS 1515 (2003).

But the defense of improper venue may be raised in the answer if no pre-answer motions have been made. Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

And Discretionary Motions May Be Raised at Any Time. — Motions for removal, which may be allowed or disallowed, in the discretion of the court, should be made before the judge, at any time during a term of the court. Howard v. Hinson, 191 N.C. 366, 131 S.E. 748 (1926); Causey v. Morris, 195 N.C. 532, 142 S.E. 783 (1928).

If a motion is based on subdivision (2) of this section, i.e., when the convenience of witnesses and the ends of justice demand, the motion may be made at any time in the progress of the cause. Riley v. Pelletier, 134 N.C. 316, 46 S.E. 734 (1904).

Subdivision (2) Motion Not Entertained Until Answer Is Filed. — The court has no authority to entertain a motion under subdivision (2) of this section until an answer has been filed. Poteat v. Southern Ry., 33 N.C. App. 220, 234 S.E.2d 447 (1977).

Unlike motions for change of venue based upon allegations of improper venue, which must be made a part of the answer or filed as separate motions prior to answering, motions for change of venue made pursuant to subdivision (2) of this section are properly made only after an answer has been filed. Godley Constr. Co. v. McDaniel, 40 N.C. App. 605, 253 S.E.2d 359 (1979).

Where defendant's counterclaim is the only claim left to be adjudicated, defendant is not entitled under this section to a change of venue as a matter of right from the county of plaintiff's residence to the county of defendant's residence, since the county of plaintiff's residence is a proper venue under G.S. 1-82. Harrington Mfg. Co. v. Powell Mfg. Co., 44 N.C. App. 347, 260 S.E.2d 814 (1979).

The demand must be in writing. Nello L. Teer Co. v. Hitchcock Corp., 235 N.C. 741, 71 S.E.2d 54 (1952).

But Motion Need Not Be Verified. — Nothing in the Rules of Civil Procedure requires that motion for removal be verified. Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

If the motion in writing is not made within the time prescribed by statute, defendant waives his right to object to venue. Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985).

§ 1-84. Removal for fair trial.

In all civil actions in the superior and district courts, when it is suggested on oath or affirmation on behalf of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed for trial to any adjacent county, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by oral evidence or affidavits. (1806, c. 693, s. 12, P.R.; 1879, s. 45; Code, s. 196; 1899, cc. 104, 508; Rev., s. 426; 1917, c. 44; C.S., s. 471; 1957, c. 601; 1969, c. 44, s. 1; 1971, c. 268, s. 2; 1977, c. 12.)

Cross References. — As to removal of action under Chapter 50 for alimony or divorce, see G.S. 50-3.

CASE NOTES

Motion Addressed to Discretion of Trial Court. — A motion for change of venue or, in the alternative, that a jury be summoned from another county, on the ground that a fair and impartial trial cannot be obtained in the county in which the action is pending, is addressed to the sound discretion of the trial court. Everett v. Town of Robersonville, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

A motion to remove for prejudice under this section is addressed to the sound discretion of the trial judge. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

Change of venue on ground of local prejudice is addressed to the discretion of the trial judge. Stroud v. United States, 251 U.S. 15, 40 S. Ct. 50, 64 L. Ed. 103 (1919), rehearing denied, 251 U.S. 380, 40 S. Ct. 176, 64 L. Ed. 317 (1920).

Exercise of Discretion on Renewed Motion in Light of Changed Situation. — On a motion for change of venue the court must exercise its discretion in the light of the situation existing when the decision is made. Should some significant change occur thereafter, it may become necessary, in the interest of assuring a fair trial, that the trial court be called upon again to exercise its discretion. In such case the court's discretion should be exercised in the light of the changed situation, and there is nothing in this section or in the rule which limits the power of one superior court judge to reverse a judgment of another which prevents this being done. Everett v. Town of Robersonville, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

Inherent Power of Trial Judge to Order Removal Ex Mero Motu. — In addition to the express statutory authority granted in this section, the judge of the superior court has the inherent discretionary power to order a change of venue ex mero motu when, because of existing circumstances, a fair and impartial trial cannot be had in the county in which the action is pending. Everett v. Town of Robersonville, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

The fact that plaintiffs filed and later renewed a motion to remove would not compel the court to proceed only under the statutory authority and to forego exercise of its inherent judicial power. Everett v. Town of Robersonville, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

Review of Trial Court's Ruling. — Where facts are set forth in the affidavit, their sufficiency rests in the discretion of the judge and his decision upon them is final; but where no facts are stated in the affidavit as grounds for removal, the ruling of the trial court may be reviewed on appeal. Phillips v. Lentz, 83 N.C. 240 (1880); Gilliken v. Norcom, 193 N.C. 352, 137 S.E. 136 (1927); Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969); Everett v. Town of Robersonville, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

The findings of fact by the court that the defendants could secure a fair trial is conclusive, and the granting or refusal of a motion to remove under this section is not reviewable. Albertson v. Terry, 109 N.C. 8, 13 S.E. 713 (1891). See also, Gilliken v. Norcom, 193 N.C. 352, 137 S.E. 136 (1927).

Removal Must Be to Adjoining County. — Removal of a case for a "fair trial" under the provisions of this section is limited to removal to an adjoining county. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

Admission of or Agreement to Facts. — The affidavit is required to make the facts appear to the court, but if they are admitted, or agreed on by the parties, this is sufficient, and it is not necessary that they should appear in the record or order of removal. Emry v. Hardee, 94 N.C. 787 (1886).

It is within the power of counsel to consent that the court might hear and consider the facts as if stated in an affidavit. Emry v. Hardee, 94 N.C. 787 (1886).

Motion for Removal Properly Denied. — With regard to a third civil action filed in Mecklenburg County, North Carolina, by a property association for unpaid maintenance fees against two property owners, the trial court did not abuse its discretion by denying the owners' motion for change of venue to Montgomery County, North Carolina, where the two prior actions had been filed, because the evidence established (and the owners did not dispute) that they were residents of Mecklenburg County. Further, the owners' second assertion that the association changed venue of the third action in an "obvious manipulation of the courts...in a clear attempt to circumvent exposure to a trial by jury" was no basis to grant or deny a change of venue motion since G.S. 1-83(2) focused on convenience of the parties and witnesses, and G.S. 1-84 required proof that the moving party could not obtain a fair and impartial trial in the county where the action is currently pending, both of which grounds that argument did not support. Carolina Forest Ass'n v. White, — N.C. App. —, 678 S.E.2d 725, 2009 N.C. App. LEXIS 1066 (July 7, 2009).

For criminal cases decided under this section prior to the 1977 amendment, which deleted all references to criminal actions, see State v. Turtty, 9 N.C. 248 (1822); State v. Johnson, 104 N.C. 780, 10 S.E. 257 (1889); State v. Smarr, 121 N.C. 669, 28 S.E. 549 (1897); State v. Turner, 143 N.C. 641, 57 S.E. 158 (1907); State v. Davis, 203 N.C. 13, 164 S.E. 737, cert. denied, 287 U.S. 649, 53 S. Ct. 95, 77 L. Ed. 561 (1932); State v. Godwin, 216 N.C. 49, 3 S.E.2d 347 (1939); State v. Bell, 228 N.C. 659, 46 S.E.2d 834 (1948); State v. Perry, 248 N.C. 334, 103 S.E.2d 404 (1958); State v. Perry, 250 N.C. 119, 108 S.E.2d 447 (1959); State v. Moore, 258 N.C. 300, 128 S.E.2d 563 (1962); State v. Arnold, 258 N.C. 563, 129 S.E.2d 229 (1963); State v. Porth, 269 N.C. 329, 153 S.E.2d 10 (1967); State v. Ray, 274 N.C. 556, 164 S.E.2d 457 (1968); State v. Ledbetter, 4 N.C. App. 303, 167 S.E.2d 68 (1969); State v. Penley, 6 N.C. App. 455, 170 S.E.2d 632 (1969); State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971), cert. denied, 280 N.C. 723, 186 S.E.2d 925 (1972); State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973); State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973), rev'd on other grounds, 284 N.C. 573, 201 S.E.2d 878 (1974); State v. Halton, 19 N.C. App. 646, 199 S.E.2d 708 (1973), cert. denied, 284 N.C. 619, 201 S.E.2d 691 (1974); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1206 (1976); State v. Jackson, 287 N.C. 470, 215 S.E.2d 123 (1975); State v. Jackson, 24 N.C. App. 394, 210 S.E.2d 876, rev'd on other grounds, 287 N.C. 470, 215 S.E.2d 123 (1975); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

Cited in Benton v. North Carolina R.R., 122 N.C. 1007, 30 S.E. 333 (1898); McFadden v. Maxwell, 198 N.C. 223, 151 S.E. 250 (1930); Codley Constr. Co. v. McDaniel, 40 N.C. App. 605, 253 S.E.2d 359 (1979); York v. Northern Hosp. Dist., 88 N.C. App. 183, 362 S.E.2d 859 (1987).

§ 1-85. Affidavits on hearing for removal; when removal ordered.

No action, civil or criminal, shall be removed, unless the affidavit sets forth particularly and in detail the ground of the application. It is competent for the other side to controvert the allegations of fact in the application, and to offer counter affidavits to that end. The judge shall order the removal of the action, if he is satisfied after thorough examination of the evidence as aforesaid that the ends of justice demand it. (1879, c. 45; Code, s. 197; 1899, c. 104, s. 2; Rev., s. 427; C.S., s. 472.)

CASE NOTES

This section refers only to § 1-84 (removal for fair trial) and not to G.S. 1-83 (removal where county designated not proper). Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

When a motion to remove is made, facts must be stated particularly and in detail in the affidavit, or judicially admitted, showing the grounds for such removal. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969); State v. Halton, 19 N.C. App. 646, 199 S.E.2d 708 (1973), cert. denied, 284 N.C. 619, 201 S.E.2d 691 (1974).

The rule with respect to removal upon the grounds that the defendant cannot get a fair trial in the county where the action is pending contemplates that affidavits for the removal must "set forth particularly in detail the ground of the application." State v. Moore, 258 N.C. 300, 128 S.E.2d 563 (1962).

Cited in Godley Constr. Co. v. McDaniel, 40 N.C. App. 605, 253 S.E.2d 359 (1979).

§ 1-86: Repealed by Session Laws 1967, c. 218, s. 4.

Cross References. — For present provisions as to supplemental jurors from other counties, see G.S. 9-12.

§ 1-87. Transcript of removal; subsequent proceedings; depositions.

(a) When a cause is directed to be removed, the clerk shall transmit to the court to which it is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court.

(b) After a cause has been directed to be removed, and prior to the time that the transcript is deposited with the court to which the cause is removed, depositions may be taken in the cause, and subpoenas for the attendance of witnesses and commissions to take depositions may issue from either of the said courts, under the same rules as if the cause had been originally commenced in the court from which the subpoenas or commissions issued. (1806, c. 694, s. 12, P.R.; 1810, c. 787, P.R.; R.C., c. 31, s. 118; C.C.P., s. 69; Code, ss. 195, 198; Rev., s. 428; C.S., c. 474; 1967, c. 954, s. 3.)

CASE NOTES

Time to Deposit Transcript. — When an action is ordered removed to another county, it is error in the judge presiding in the superior court of the county from which the cause is removed, at the next term thereof, and before the term of the court in the county to which it was removed, to direct that the action be dismissed if the cost of the transcript be not paid in a time specified. The party procuring the order of removal has until the term of the court to which the cause is removed to deposit his transcript. Fisher v. Cid Copper Mining Co., 105 N.C. 123, 10 S.E. 1055 (1890).

Where the order of removal is by consent and no time is limited in the order of removal, the parties, or either of them, should have a reasonable time in which to deposit the transcript in the other court. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953).

Failure to File Transcript Within Time Allowed. — In the event that the transcript of removal is not filed within the time limited by the court, or within a reasonable time after the order of removal is entered where no time for removal is fixed, the dormant jurisdiction of the court of original venue, on proper notice, may be reactivated for exclusive control over the cause. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953); Farmers Coop. Exch. v. Trull, 255 N.C. 202, 120 S.E.2d 438 (1961).

When neither party has taken steps to perfect the removal of the cause, either party has the right to move the lower court for a reactivation of its jurisdiction, and to have it determine, on notice to the other party, whether the order of removal should be rescinded as upon abandonment of the right of removal. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953).

Failure to Transmit Copy of Entire Record. — It is not absolutely essential to the acquisition of jurisdiction by the court to which the venue is changed that a copy of the entire record be transmitted. It would seem to be sufficient to bring its power of jurisdiction into exercise if enough is transmitted to enable the court to determine what is in controversy and what is to be adjudicated by it. Once this is done, defects may be cured, if need be, by certiorari, upon suggestion of a diminution of the record. Meanwhile, the jurisdiction of the court of original venue becomes dormant, and that court is functus officio to deal with the substantive rights of the parties during the interval allowable for the filing of the transcript in the court to which the case is ordered removed. Jones v. Brinson, 238 N.C. 506, 78 S.E.2d 334 (1953).

As to power to issue subpoenas under former statute similar to subsection (b) of this section, see Commissioners of Forsyth v.

Lemly, 85 N.C. 341 (1881); Fisher v. Cid Copper Mining Co., 105 N.C. 123, 10 S.E. 1055 (1890).

Cited in State ex rel. Clark v. Peebles, 100 N.C. 348, 6 S.E. 798 (1888); Snow v. Yates, 99 N.C. App. 317, 392 S.E.2d 767 (1990); Conseco Fin. Servicing Corp. v. Dependable Hous., Inc., 150 N.C. App. 168, 564 S.E.2d 241, 2002 N.C. App. LEXIS 368 (2002).

§ 1-87.1: Repealed by Session Laws 1967, c. 954, s. 4.

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 8.

Summons.

§§ 1-88 through 1-91: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to commencement of action, see G.S. 1A-1, Rule 3. As to service of process, see G.S. 1A-1, Rule 4.

§§ 1-92, 1-93: Repealed by Session Laws 1971, c. 268, s. 34.

§§ 1-94 through 1-98: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to service of process, see G.S. 1A-1, Rule 4.

§§ 1-98.1 through 1-98.4: Repealed by Session Laws 1971, c. 1093, s. 19.

Cross References. — For North Carolina's "long arm statute," see G.S. 1-75.1 et seq. As to service of process by publication, see now G.S. 1A-1, Rule 4 (j1).

§ 1-99: Repealed by Session Laws 1967, c. 954, s. 4.

§§ 1-99.1 through 1-99.4: Repealed by Session Laws 1971, c. 1093, s. 19.

Cross References. — As to service by publication, see now G.S. 1A-1, Rule 4 (j1).

§§ 1-100 through 1-104: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-105. Service upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles.

The acceptance by a nonresident of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this State, or at any other place in this State, or the operation by such nonresident of a motor vehicle on the public highways of this State or at any other place in this State, other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Motor Vehicles, or his successor in office, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process in any action or proceeding against him or his executor or administrator, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highways of this State, or at any other place in this State, and said acceptance or operation shall be a signification of his agreement that any such process against him or his executor or administrator shall be of the same legal force and validity as if served on him personally, or on his executor or administrator.

Service of such process shall be made in the following manner:

(1) By leaving a copy thereof, with a fee of ten dollars ($10.00), in the hands of the Commissioner of Motor Vehicles, or in his office. Such service, upon compliance with the other provisions of this section, shall be sufficient service upon the said nonresident.

(2) Notice of such service of process and copy thereof must be forthwith sent by certified or registered mail by plaintiff or the Commissioner of Motor Vehicles to the defendant, and the entries on the defendant's return receipt shall be sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant, on which date service on said defendant shall be deemed completed. If the defendant refuses to accept the certified or registered letter, service on the defendant shall be deemed completed on the date of such refusal to accept as determined by notations by the postal authorities on the original envelope, and if such date cannot be so determined, then service shall be deemed completed on the date that the certified or registered letter is returned to the plaintiff or Commissioner of Motor Vehicles, as determined by postal marks on the original envelope. If the certified or registered letter is not delivered to the defendant because it is unclaimed, or because he has removed himself from his last known address and has left no forwarding address or is unknown at his last known address, service on the defendant shall be deemed completed on the date that the certified or registered letter is returned to the plaintiff or Commissioner of Motor Vehicles.

(3) The defendant's return receipt, or the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by the plaintiff that notice of mailing the registered letter and refusal to accept was forthwith sent to the defendant by ordinary mail, together with the plaintiff's affidavit of compliance with the provisions of this section, must be appended to the summons or other process and filed with said summons, complaint and other papers in the cause.

Provided, that where the nonresident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident motorist in the same manner and on the same notice as is provided in the case of a nonresident motorist.

The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action. (1929, c. 75, s. 1; 1941, c. 36, s. 4; 1951, c. 646; 1953, c. 796; 1955, c. 1022; 1961, c. 1191; 1963, c. 491; 1967, c. 954, s. 4; 1971, c. 420, ss. 1, 2; 1975, c. 294; 1989, c. 645, s. 1.)

Legal Periodicals. — For comment on the 1953 amendment, see 31 N.C.L. Rev. 395 (1953).

For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 530 (1955).

For case law survey on process, see 41 N.C.L. Rev. 524 (1963).

For case law survey on pleading and parties, see 43 N.C.L. Rev. 873 (1965).

For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

For article, "Modern Statutory Approaches to Service of Process outside the State — Comparing the North Carolina Rules of Civil Procedure with the Uniform Interstate and International Procedure Act," see 49 N.C.L. Rev. 235 (1971).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

CASE NOTES

I. General Consideration.
II. Proof to Sustain Service of Process.
III. Procedure for Service and Notice.

I. GENERAL CONSIDERATION.

This section is constitutional and valid. Bigham v. Foor, 201 N.C. 14, 158 S.E. 548 (1931); Wynn v. Robinson, 216 N.C. 347, 4 S.E.2d 884 (1939); Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951); Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951).

The fundamental requisites of due process are notice and opportunity to be heard, both of which are adequately provided for by this section. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

This section has been considered against a constitutional background and upheld as giving adequate notice to the defendant and as a reasonable exercise of jurisdiction. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

A state may, in the exercise of its police power, provide that a nonresident motorist using its highways shall be deemed to have appointed a state official his agent to receive service of process in any action growing out of such use, if the statute provides a proper method for notifying the defendant of such service. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

The requirement of this section for mailing a copy of the process to a nonresident motorist's last known address provides sufficient assurance of actual notice so as to meet minimum due process requirements and to provide a constitutional basis for personal jurisdiction of a nonresident motorist who is served in conformity with this section. Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

It Affects a Substantial Right. — This section is not remedial or curative, but affects a substantial right. Ashley v. Brown, 198 N.C. 369, 151 S.E. 725 (1930).

And Is Not Retroactive. — Appointment of the Commissioner under this section is contractual, and the statute is not to be given retroactive effect; hence, service of process under this section in an action accruing before the effective force thereof is void. Ashley v. Brown, 198 N.C. 369, 151 S.E. 725 (1930).

Purpose of Section. — The broad purpose of this section is to enable a resident motorist to bring a nonresident motorist, who would otherwise be beyond this jurisdiction by the time suit could be instituted, within the jurisdiction of our courts to answer for a negligent injury inflicted while the nonresident was using the highways of this State. Hart v. Queen City Coach Co., 241 N.C. 389, 85 S.E.2d 319 (1955).

The evident purpose of this section is to extend the State's judicial power broadly to permit North Carolina residents to acquire jurisdiction over nonresidents who may be held responsible for injuries or death caused by their automobiles. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

Although this section enables a North Carolina resident to obtain personal jurisdiction over any nonresident involved in an automobile accident in this state by virtue of the operation of a motor vehicle in North Carolina, the purpose of the statute is to provide jurisdiction over the driver who inflicted the injuries. Riddick v. Myers, 131 N.C. App. 871, 509 S.E.2d 469 (1998).

A narrow interpretation of this section would defeat its purpose. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

This Section Must Be Strictly Construed. — Substituted or constructive service of process is a radical departure from the rule of the common law, and therefore statutes authorizing it must be strictly construed, both as to the proper grant of authority for such service and in determining whether effective service under the statute has been made. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

And Strictly Complied With. — The provisions of this section are in derogation of the common law and must be strictly complied with. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

The provisions of this section are in derogation of the common law and must be strictly complied with, to the extent that actual notice given in any manner other than that prescribed by the statute cannot supply constitutional validity to it or to service under it. Philpott v. Kerns, 285 N.C. 225, 203 S.E.2d 778 (1974).

While this section must be strictly construed because it is in derogation of the common law, where the possibility of confusion among people of ordinary intelligence is virtually impossible, a summons should not be found invalid simply because of technical mistakes or poor wording. Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

This section does not in any way change or amend the law governing the commencement of actions or the contents of a summons. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

But Provides Artificial Method of Serving Process. — This section provides a statutory and artificial method by which duly issued process may be served on nonresident motorists. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Statutes in Pari Materia. — Sections 20-22, 20-37, 20-38 (now repealed) and 20-78, dealing with the privilege and responsibilities of persons operating motor vehicles on the public highways of the State, and this section relating to service of process on a nonresident who has committed a tort in the operation of a vehicle on the public highways of the State, deal with the same subject matter and must be considered in pari materia. Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956).

This section and former § 1-89, relating to contents and return of summons, were to be construed together and strictly complied with. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967). As to summons, see now § 1A-1, Rule 4.

Section Not in Conflict with § 1-21. — This section and G.S. 1-105.1 are not in conflict with and do not repeal G.S. 1-21, even though there is no need for a tolling statute when a nonresident defendant is amenable to process. Travis v. McLaughlin, 29 N.C. App. 389, 224 S.E.2d 243, cert. denied, 290 N.C. 555, 226 S.E.2d 513 (1976).

This section does not warrant service upon a nonresident owner in an action for abuse of process based upon such owner's arrest of plaintiff after a collision between their cars in this State, since the action for abuse of process does not arise out of a collision in which defendant was involved by reason of the operation of his automobile in this State. Lindsay v. Short, 210 N.C. 287, 186 S.E. 239 (1936).

Section Applies to Action on Judgment Entered in Another State. — This section applies to an action against an alleged joint tort-feasor based upon judgments entered in courts of other states, arising from an accident in this State. Carolina Coach Co. v. Cox, 337 F.2d 101 (4th Cir. 1964).

Nonresident wife living with her husband in another state may serve summons on him by service on Commissioner in her action instituted in a county in this State, to recover for injuries sustained in an automobile accident which occurred in this State and which resulted from his alleged negligence. Alberts v. Alberts, 217 N.C. 443, 8 S.E.2d 523 (1940).

Where plaintiff is the wife of defendant, both are nonresidents, and the action was instituted to recover for injuries sustained by plaintiff in an automobile accident which occurred in this State, service of process on defendant by service on the Commissioner under the provisions of this section is valid. Bogen v. Bogen, 219 N.C. 51, 12 S.E.2d 649 (1941), rev'd on other grounds, 220 N.C. 648, 18 S.E.2d 162 (1942).

Section 1-105.1 makes this section applicable to residents of the State who leave and remain without the State subsequent to an accident. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

Before the enactment of G.S. 1-105.1, the method of serving process on a nonresident provided in this section and former G.S. 1-106 was ineffective to obtain service of process on a citizen and resident of this State while such citizen was residing temporarily outside the State, or was in the armed services of the United States and stationed in another state or foreign country. Foster v. Holt, 237 N.C. 495, 75 S.E.2d 319 (1953).

Before the 1953 amendment, this section made no provision for service on the personal representative of a deceased automobile owner who died after an accident occurring in this State and before service of process, and service under the statute upon such personal representative conferred no jurisdiction on our courts, since an agency, unless coupled with an interest, is terminated by the death of the principal. Dowling v. Winters, 208 N.C. 521, 181 S.E. 751 (1935).

Purpose and Scope of 1953 Amendment. — Except for changes in respect of the manner of service, it seems clear that the authorization of an action and service of process upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles was the only purpose and significant effect of the 1953 amendment. Franklin v. Standard Cellulose Prods., Inc., 261 N.C. 626, 135 S.E.2d 655 (1964).

1953 Amendment Authorizes Service on Personal Representative of Deceased Nonresident. — The 1953 amendment to this section authorizes service of process on and the maintenance of an action against a foreign administrator of a nonresident driver fatally injured in a collision in this State to recover for the alleged negligent operation of the vehicle by the nonresident. Franklin v. Standard Cellulose Prods., Inc., 261 N.C. 626, 135 S.E.2d 655 (1964).

This section clearly permits nonresident administrators to be sued in the State, in actions "growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle [anywhere within the State]." Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

The overwhelming weight of authority sustains the assertion of jurisdiction over personal representatives of nonresident motorists. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

While North Carolina, by virtue of this section, permits a suit against the nonresident administrator of a motorist who became involved in an auto accident in North Carolina, nonresident administrators are otherwise held to lack the capacity to sue or be sued. However, the argument that the lack of capacity to initiate suit, while having capacity to be sued, renders a statute like this section "grossly unfair" has been specifically rejected. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

The legislature, by the 1955 amendment, intended only to broaden the area of vehicular operation to include private ways and places on land not within the confines of public highways. Byrd v. Piedmont Aviation, Inc., 256 N.C. 684, 124 S.E.2d 880 (1962).

And did not intend to enlarge and extend the meaning of the words "motor vehicle." The 1955 amendment did not undertake to change the type of vehicle, but merely enlarged the sphere of its operation. Byrd v. Piedmont Aviation, Inc., 256 N.C. 684, 124 S.E.2d 880 (1962).

Meaning of "Motor Vehicle". — The ordinary, popular and common acceptance of the term "motor vehicle" has no relation to machines used in travel by air; it involves only motor-driven devices used in travel by land. Byrd v. Piedmont Aviation, Inc., 256 N.C. 684, 124 S.E.2d 880 (1962).

An airplane is not a "motor vehicle" within the purview of this section. Byrd v. Piedmont Aviation, Inc., 256 N.C. 684, 124 S.E.2d 880 (1962).

Term "Public Highways" Includes Public Streets. — When the legislature authorized the service of process on a nonresident in an action for damages growing out of an accident occurring on the "public highways" of North Carolina, it covered accidents on public streets as well as public roads, for both are public highways. Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956).

Applied in MacClure v. Accident & Cas. Ins. Co., 229 N.C. 305, 49 S.E.2d 742 (1948); Todd v. Thomas, 202 F. Supp. 45 (E.D.N.C. 1962); Lamb v. McKibbon, 15 N.C. App. 229, 189 S.E.2d 547 (1972); Hargett v. Reed, 95 N.C. App. 292, 382 S.E.2d 791 (1989).

Cited in Howard v. Queen City Coach Co., 212 N.C. 201, 193 S.E. 138 (1937); Townsend v. Carolina Coach Co., 231 N.C. 81, 56 S.E.2d 39 (1949); Hodges v. Home Ins. Co., 232 N.C. 475, 61 S.E.2d 372 (1950); Ellington v. Milne, 14 F.R.D. 241 (E.D.N.C. 1953); Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Franklin v. Standard Cellulose Prods., Inc., 261 N.C. 626, 135 S.E.2d 655 (1964); DeArmon v. B. Mears Corp., 312 N.C. 749, 325 S.E.2d 223 (1985); Seabrooke v. Hagin, 83 N.C. App. 60, 348 S.E.2d 614 (1986); Gibson v. Mena, 144 N.C. App. 125, 548 S.E.2d 745, 2001 N.C. App. LEXIS 332 (2001).

II. PROOF TO SUSTAIN SERVICE OF PROCESS.

To sustain service of process upon defendant under this section pursuant to § 1-105.1, the plaintiffs must show either: (1) That defendant had established a residence outside the State subsequent to the accident or collision, or (2) That he had left the State subsequent to the collision complained of and remained absent from the State for 60 days or more continuously. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Defendant Held Sufficiently Identified in Summons. — In an action for damages against a nonresident arising from his operation of a motor vehicle in this state, where summons was served to the Commissioner of Motor Vehicles pursuant to this statute, there was no possibility of misunderstanding as to who the true defendant was where defendant's name and address were listed directly under the Commissioner and defendant's name appeared both in the caption of the case and in the accompanying complaint. Smith v. Schraffenberger, 90 N.C. App. 589, 369 S.E.2d 90, cert. denied, 323 N.C. 366, 373 S.E.2d 549 (1988).

Residence of defendant at time of accident controlled the application of this section, G.S. 1-105.1 and former G.S. 1-107 under federal Rule 4(d)7. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

Resident of Canada Is "Nonresident". — A resident of Canada who operated an automobile involved in an accident on a public highway in this State was a "nonresident" within the purview of this section. Ewing v. Thompson,

233 N.C. 564, 65 S.E.2d 17 (1951).

Member of Armed Services and Wife Stationed Here Under Military Orders. — Where the evidence tended to show that a member of the armed services, accompanied by his wife, was stationed in this State under military orders at the time of the accident in suit, that prior to his entry into service he was a resident of another state, and that at the time of the service of summons both had moved to another state incident to his orders, without evidence that they were in this State for any purpose other than that contemplated by his military service or that they ever formed any intention of making this State their place of residence, was sufficient to support the trial court's finding of fact that at the time of the accident they were nonresidents so as to subject them to service of summons under this section. Hart v. Queen City Coach Co., 241 N.C. 389, 85 S.E.2d 319 (1955).

Conclusive Effect of Finding of Nonresidence on Appeal. — The finding of the trial court that defendants were nonresidents on the date of the automobile collision in suit, and were, therefore, subject to service under this section, is conclusive on appeal if such finding is supported by evidence. Hart v. Queen City Coach Co., 241 N.C. 389, 85 S.E.2d 319 (1955).

Upon motion to dismiss an action on the ground that the defendant was a resident of this State and was served with summons under a statute authorizing service on nonresidents, the finding of fact by the superior court judge that the defendant was a nonresident, based upon competent evidence, was conclusive on appeal. Bigham v. Foor, 201 N.C. 14, 158 S.E. 548 (1931).

State May Assert Jurisdiction over Owner As Well As Driver. — The State has a strong interest in being able to provide a convenient forum where its citizens may be able to seek, from the owner as well as from the actual operator, compensation for injuries that will often be extremely serious. Jurisdiction over the driver who inflicted the injury does not exhaust the State's interest; it is not pushing the matter too far to recognize that the State may also assert the jurisdiction of its courts over the owner who placed the vehicle in the driver's hands to take it onto the State's highways. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

Ownership of property, particularly that which is capable of inflicting serious injury, may fairly be coupled with an obligation upon the owner to stand suit where the property is or has been taken with his consent. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

But Neither Ownership Nor Physical Presence Is Necessary. — By the express language of this section, the operation of a motor vehicle by a nonresident on the highways is the equivalent of the appointment of the Commissioner of Motor Vehicles as process agent for the nonresident. Neither ownership nor physical presence in the motor vehicle is necessary for valid service. It is sufficient if the nonresident had the legal right to exercise control at the moment the asserted cause of action arose. Pressley v. Turner, 249 N.C. 102, 105 S.E.2d 289 (1958).

Under this section, the ownership or lack of ownership by the nonresident defendant of the motor vehicle involved in the accident is of no legal consequence insofar as his amenability to constructive service of process is concerned. Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951).

Car Must Be Operated by, for or Under Direction or Control of Nonresident Defendant. — This section provides for constructive service of process upon a nonresident defendant in either of the following situations: (1) Where the nonresident was personally operating the vehicle; or (2) Where the vehicle was being operated for the nonresident, or under his control or direction, express or implied. Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951).

To sustain service of process under this section there must be a finding to the effect that the owner's motor vehicle, on the occasion of the collision, was being operated "for him, or under his control or direction." Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960).

In order to hold an attempted service upon a nonresident valid under this section there must be sufficient evidence to support a finding that the automobile was operated under the "control or direction, express or implied" of the nonresident defendant. Smith v. Haughton, 206 N.C. 587, 174 S.E. 506 (1934); Howard v. Sasso, 253 N.C. 185, 116 S.E.2d 341 (1960).

Owner May Be Presumed to Have Right of Control. — An automobile owner may not unreasonably be presumed to have a right to exercise control. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

And Unlikelihood That He Will Exercise It Is Immaterial. — The unlikelihood that the owner will in fact exercise his legal right to control the operation of the automobile is immaterial. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

Owner Need Not Be Physically in a Position to Direct Driver. — This section does not require that the owner be physically in a position to direct the driver's every move. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

The words "express or implied" suggest only a minimal connection between the driver and the owner, which is satisfied if the owner has a legal right to control the operation of the automobile. Davis v. St. Paul-Mercury

Indem. Co., 294 F.2d 641 (4th Cir. 1961).

Driver Need Not Be Acting for Pecuniary Benefit of Owner. — This section does not require that the driver be acting for the pecuniary benefit of the owner. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

The "family purpose" doctrine is not determinative in interpreting this section where "control or direction" are the standards. Davis v. St. Paul-Mercury Indem. Co., 294 F.2d 641 (4th Cir. 1961).

Family-Purpose Automobile Operated by Son of Owner. — A family-purpose automobile, owned by a resident of Canada, and operated by her son on a public highway in this State, is operated for the owner, or under her control or direction, express or implied, within the purview of this section. Ewing v. Thompson, 233 N.C. 564, 65 S.E.2d 17 (1951).

Evidence Held Sufficient to Show Control by Nonresident Defendant. — An affidavit of a salesman that the details of his schedule and the control of his automobile were determined by him, subject to the approval of his corporate employer, supported the finding of the court that the automobile was being operated for the corporate employer and under its control and direction, express or implied, within the meaning of this section, and in an action to recover for alleged negligent operation of the car, service of process on the corporate employer through the Commissioner was valid. Wynn v. Robinson, 216 N.C. 347, 4 S.E.2d 884 (1939). See also, Queen City Coach Co. v. Chattanooga Medicine Co., 220 N.C. 442, 17 S.E.2d 478 (1941).

Averments in affidavits that the automobile causing the injury in suit, admittedly owned by the nonresident corporate defendant and driven in this State by its salesman, was being driven here with the corporation's permission for the purpose of effecting a sale, was sufficient evidence to support the court's finding that the automobile was being driven at the time of the injury for the corporation or was under its implied control and direction so as to support service of process on it by service on the Commissioner. Crabtree v. Burroughs-White Chevrolet Sales Co., 217 N.C. 587, 9 S.E.2d 23 (1940).

For additional case holding evidence sufficient to show control of motor vehicle by nonresident defendant, see Davis v. Martini, 233 N.C. 351, 64 S.E.2d 1 (1951).

Evidence Held Insufficient to Show Control. — Where a deputy sheriff of the state of South Carolina was traveling through this State to return a prisoner to that state in his own car, which was driven by another whom he engaged to drive the car and to assist in returning the prisoner, it was held that the deputy sheriff was without authority to designate another to act for the sheriff, and the driver of the car was not operating same for the sheriff and under the sheriff's direction and control within the purview of this section, and therefore service of process on the sheriff by service on the Commissioner was void. Blake v. Allen, 221 N.C. 445, 20 S.E.2d 552 (1942).

For case holding findings of fact sufficient to support service under this section, see Winborne v. Stokes, 238 N.C. 414, 78 S.E.2d 171 (1953).

III. PROCEDURE FOR SERVICE AND NOTICE.

Either service under this section or under former paragraph (j)(9) of § 1A-1, Rule 4 is available to serve a nonresident operator of a motor vehicle under appropriate circumstances, since validity of this section does not make it exclusive. House v. House, 22 N.C. App. 686, 207 S.E.2d 339 (1974).

The issuance of a valid summons is necessary for there to be compliance with the provisions of this section. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

The summons must command the sheriff or other proper officer to summon the defendant or defendants. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Summons which was directed to the Commissioner of Motor Vehicles rather than to defendant was not fatally defective where it was clearly directed to the Commissioner in his representative capacity as process agent for defendant. Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

Summons Held Defective Where Directed to Commissioner Rather Than Defendants. — A summons was held patently defective when it was directed not to the nonresident defendants as required by G.S. 1A-1, Rule 4(c), but instead was directed to the Commissioner of Motor Vehicles, who was summoned and notified to appear and answer the complaint. Philpott v. Kerns, 285 N.C. 225, 203 S.E.2d 778 (1974).

Where the summons commanded the sheriff to summons the Commissioner of Motor Vehicles only and did not command the sheriff to summons the defendants at all, and the Commissioner duly mailed a copy to the nonresident defendants, the nonresidents were not summoned and the court had no jurisdiction in the absence of a general appearance by them. Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Meaning of Subdivision (2). — The provision in subdivision (2) of this section making the defendant's return receipt "sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant" does not mean that all that is required to effect service upon a nonresident motorist is the return of a receipt for registered mail signed by the defendant. This provision did not replace the statutory scheme for substituted service; rather, it merely provided a conclusive means of determining when that service had been accomplished. Service is still to be made "by leaving" the process with the Commissioner of Motor Vehicles. Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

"Unclaimed" Requirement Not Predicated on Opportunity to Claim. — Because the plain language of subdivision (2) of this section does not expressly predicate the classification of a forwarded package as "unclaimed" on non-resident defendants' first being afforded an opportunity to claim it, constructive service on defendant was complete under this section. Coiner v. Cales, 135 N.C. App. 343, 520 S.E.2d 61 (1999).

Unlike service by publication, there appears to be no due diligence requirement under subdivision (2); all that is required is "sufficient compliance," and using the address on a three-year old accident report was deemed sufficient. Coiner v. Cales, 135 N.C. App. 343, 520 S.E.2d 61 (1999).

Service Held Insufficient Despite Defendant's Receipt of Notice. — Where, apparently through inadvertence, the order for service of process upon a nonresident motorist under this section was directed to the sheriff of one county, but was forwarded by the plaintiff's attorneys to the sheriff of another county and by him served upon the Commissioner of Motor Vehicles, service was insufficient, notwithstanding that notice of service of process upon the Commissioner and a copy thereof did reach the defendant by registered mail as required by subdivision (2) of this section. Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

What Sheriff's Return Must Show. — When service of process on a nonresident through the Commissioner of Motor Vehicles, as provided in this section, is sought, it is essential that the sheriff's return show that such service was made as specifically required, and that a copy of the process be sent defendant by registered mail and return receipt therefor and plaintiff's affidavit of compliance be attached to summons and filed. Propst v. Hughes Trucking Co., 223 N.C. 490, 27 S.E.2d 152 (1943).

Default Judgment Not Vacated by Defendants' Refusal to Accept Registered Mail. — A default judgment will not be vacated where nonresident defendants knew plaintiff was injured by a truck owned and operated by them, and was demanding damages, and they refused to accept registered mail in order to avoid service. Morrisey v. Crabtree, 143 F. Supp. 105 (M.D.N.C. 1956).

Requirement in subdivision (3) that refused registered letter be sent by ordinary mail applies only to those letters which were in fact "refused," and does not apply to those which are unclaimed or marked "moved, not forwardable." Ridge v. Wright, 35 N.C. App. 643, 242 S.E.2d 389, cert. denied, 295 N.C. 467, 246 S.E.2d 10 (1978).

Effect of Filing Affidavit of Compliance After Hearing on Motion to Dismiss. — Failure of plaintiff to file an affidavit of compliance required under subdivision (3) of this section until after the hearing on the motion to dismiss, which was more than three years after the accident and 114 days after service of the summons on the Commissioner of Motor Vehicles, did not render service on the nonresident defendant invalid, since filing of the affidavit did not affect the completeness of the service but rather merely perfected the record and furnished proof of compliance with this section for the guidance of the courts. Quattrone v. Rochester, 46 N.C. App. 799, 266 S.E.2d 40, cert. denied, 301 N.C. 95, 273 S.E.2d 300 (1980).

Affidavit Held Sufficient to Support Service by Certified Mail. — Where the plaintiff filed an affidavit of compliance, as required by subdivision (3) of this section, showing that a copy of summons and complaint was mailed to the defendant at her last known address by certified mail, return receipt requested, and that it was returned undelivered because it was unclaimed, the plaintiff showed sufficient compliance with subdivision (2) of this section, to confer jurisdiction, notwithstanding his use of certified rather than registered mail. Humprey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

Affidavit Held Insufficient to Support Service Under This Section and § 1-105.1. — Where plaintiffs' affidavits, stripped of incompetent evidence, were left with the statement of deputy sheriff that he went to defendant's last-known address on two occasions and defendant was not there and that he made further investigations and could not locate the whereabouts of defendant, conceding, for the purpose of argument only, that this might be held sufficient to support an averment of due diligence under the requirements of former G.S. 1-98.2, it was insufficient to make out a prima facie case to support service of process under this section and G.S. 1-105.1. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Service Under Federal Rule. — If the requirements of this section and G.S. 1-105.1 are met, service under Rule 4 of the federal Rules of Civil Procedure is valid. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

Amendment of Process and Pleading. — When the procedural requirements of this section are strictly complied with, the process and pleading are subject to amendment in accordance with general rules. Bailey v. McPherson, 233 N.C. 231, 63 S.E.2d 559 (1951); Carolina Plywood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

Procedural Error Corrected When Another Summons Served and Returned. — If the initial service failed to comply with this section, the procedural error is corrected when another summons, dated subsequently, is served and returned as having been served on defendant by leaving a copy with the Commissioner of Motor Vehicles as process agent for defendant. Tolson v. Hodge, 411 F.2d 123 (4th Cir. 1969).

Service Held Sufficient. — Where the person sought to be sued personally received notice by registered mail of summons and complaint giving him unmistakable notice that it was he who was intended to be sued, although the process ran against a nonexistent corporation of the same name as the firm operated by him, it was held that the service in strict accord with this section was sufficient to meet the requirements of due process of law. Bailey v. McPherson, 233 N.C. 231, 63 S.E.2d 559 (1951).

Where defendant refused to accept a copy of the complaint and summons because the word "Jr." was not included after his name, the Supreme Court held that the suffix "Jr." is no part of a person's name; it is a mere descriptio personae; names are to designate persons, and where the identity is certain a variance in the name is immaterial. Sink v. Schafer, 266 N.C. 347, 145 S.E.2d 860 (1966).

Motion to Quash Service Denied. — Where, in an action against a nonresident bus owner to recover for the negligent operation of a bus in this State, service on the nonresident was had by service on the Commissioner of Motor Vehicles, the nonresident's motion to quash the service would be denied when the nonresident offered no evidence in support of its allegations that it had leased the bus to be operated solely by and under the exclusive control of a resident corporation and under the resident corporation's franchise right. Israel v. Baltimore & A.R.R., 262 N.C. 83, 136 S.E.2d 248 (1964).

Extension of Time to Plead. — The statutes pertaining to service of process upon a nonresident motorist contemplate giving such a defendant an opportunity to defend even beyond the right of the judge in his discretion to extend the time. Mills v. McCuen, 1 N.C. App. 403, 161 S.E.2d 628 (1968).

OPINIONS OF ATTORNEY GENERAL

Service of Process. — Service upon the Commissioner of Motor Vehicles, in a manner consistent with G.S. 1A-1, Rule 4, meets the requirement of this section. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

Service of process pursuant to this section and G.S. 1-105.1 upon the Commissioner of Motor Vehicles may be made by leaving a copy thereof with a fee of three dollars ($3.00) in the hands of the Commissioner of Motor Vehicles, or in his office. Service by Sheriff or Marshal is not required. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

§ 1-105.1. Service on residents who establish residence outside the State and on residents who depart from the State.

The provisions of G.S. 1-105 of this Chapter shall also apply to a resident of the State at the time of the accident or collision who establishes residence outside the State subsequent to the accident or collision and to a resident of the State at the time of the accident or collision who departs from the State subsequent to the accident or collision and remains absent therefrom for 60 days or more, continuously whether such absence is intended to be temporary or permanent. (1955, c. 232; 1967, c. 954, s. 4; 1971, c. 420, ss. 1, 2.)

CASE NOTES

Strict Construction of Section. — Substituted or constructive service of process is a radical departure from the rule of the common law, and therefore statutes authorizing it must be strictly construed, both as to the proper grant of authority for such service and in determining whether effective service under the statute has been made. Coble v. Brown, 1 N.C.

App. 1, 159 S.E.2d 259 (1968).

Section Not in Conflict with § 1-21. — This section and G.S. 1-105, providing for substitute service of a nonresident motorist by service upon the Commissioner of Motor Vehicles, are not in conflict with and do not repeal G.S. 1-21, even though there is no need for a tolling statute when a nonresident defendant is amenable to process. Travis v. McLaughlin, 29 N.C. App. 389, 224 S.E.2d 243, cert. denied, 290 N.C. 555, 226 S.E.2d 513 (1976).

Domicile in State Brings Defendant Within Reach of State's Jurisdiction. — Domicile in the State is alone sufficient to bring an absent defendant within the reach of the State's jurisdiction for purposes of a personal judgment by means of appropriate substituted service, provided proper notice and opportunity for hearing were given. Denton v. Ellis, 258 F. Supp. 223 (E.D.N.C. 1966).

When Plaintiff Must Show Facts Bringing Defendant Within Purview of Section. — This section does not require that plaintiffs must set forth in their complaint or by affidavit the facts giving rise to the conclusion that defendant comes within the purview of the statute; nevertheless, upon attack by special appearance and motion to quash, a showing is required of the facts essential to jurisdiction. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Mere Averment of Due Diligence Is Insufficient. — A mere averment of due diligence such as is sufficient to support service by publication in an in rem action is not sufficient for a case which arises under this section. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Affidavits Held Insufficient to Support Service. — Where plaintiffs' affidavits, stripped of incompetent evidence, were left with the statement of the deputy sheriff that he went to defendant's last known address on two occasions and defendant was not there and that he made further investigations and could not locate the whereabouts of defendant, conceding, for the purpose of argument only, that this might be held sufficient to support an averment of due diligence under the requirements of former G.S. 1-98.2, it was insufficient to make out a prima facie case to support service of process under this section and G.S. 1-105. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Averment and Affidavit Based on Hearsay. — Where one plaintiff simply averred that he was informed and believed that defendant had removed himself from his last known address and had left the State and remained absent for more than 60 days continuously subsequent to the collision complained of and was residing somewhere in Florida, and the deputy sheriff's affidavit averred that he talked with a woman who he was informed and believed was defendant's sister, who told him that it was her information and belief that defendant was living in Florida and that he was informed and believed that the only information he was able to obtain concerning the whereabouts of defendant indicated that the said defendant was residing in the state of Florida, address unknown, this evidence was manifestly inadmissible hearsay evidence and defendant's objection thereto was entirely proper. Coble v. Brown, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Cited in Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965); Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966); Kennedy v. Starr, 62 N.C. App. 182, 302 S.E.2d 497 (1983).

OPINIONS OF ATTORNEY GENERAL

Service of process pursuant to G.S. 1-105 and this section upon the Commissioner of Motor Vehicles may be made by leaving a copy thereof with a fee of three dollars ($3.00) in the hands of the Commissioner of Motor Vehicles, or in his office. Service by Sheriff or Marshal is not required. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

§§ 1-106 through 1-107.3: Repealed by Session laws 1967, c. 954, s. 4.

§ 1-108. Defense after judgment set aside.

If a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. No fiduciary officer or trustee who has made distribution of a fund under such judgment in good faith is personally liable if the judgment is changed by reason of such defense made after its rendition; nor in case the judgment was rendered for the partition of land, and any persons receiving any of the land in such partition sell it to a third person; the title of such third person is not affected if such defense is successful, but the redress of the person so defending after judgment shall be had by proper judgment against the parties to the original judgment and their heirs and personal representatives, and in no case affects persons who in good faith have dealt with such parties or their heirs or personal representatives on the basis of such judgment being permanent. (C.C.P., s. 85; Code, s. 220; Rev., s. 449; 1917, c. 68; C.S., s. 492; 1943, cc. 228, 543; 1947, c. 817, s. 2; 1949, c. 256; 1967, c. 954, s. 3.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

CASE NOTES

Effect on Title When Judgment Is Set Aside. — This section provides that the conveyance of title to property sold pursuant to a judgment, as acquired in good faith, is not automatically affected when the judgment is subsequently set aside, but that title to such property may, in fact, be affected if the court deems it necessary in the interest of justice. Town of Cary v. Stallings, 97 N.C. App. 484, 389 S.E.2d 143 (1990).

ARTICLE 9.

Prosecution Bonds.

§ 1-109. Bond required of plaintiff for costs.

At any time after the issuance of summons, the clerk or judge, upon motion of the defendant, may, upon a showing of good cause, require the plaintiff to do one of the following things and the failure to comply with such order within 30 days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding:

(1) Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.

(2) Deposit two hundred dollars ($200.00) with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant all costs which the latter recovers of him in the action.

(3) File a copy of an order from a superior or district court judge or clerk of a superior court authorizing the plaintiff to sue as an indigent.

The requirements of this section shall not apply to the State of North Carolina or any of its agencies, commissions or institutions, or to counties, drainage districts, cities and towns; provided, further, that the State of North Carolina or any of its agencies, commissions or institutions, and counties, drainage districts, cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (R.C., c. 31, s. 40; C.C.P., s. 71; Code, s. 209; Rev., s. 450; C.S., s. 493; 1935, c. 398; 1949, c. 53; 1955, c. 10, s. 1; 1957, c. 563; 1961, c. 989; 1971, c. 268, s. 3; 1993, c. 435, s. 4; 1999-106, s. 1.)

Local Modification. — Mecklenburg: 1955, c. 877; Union: 1961, c. 506.

Cross References. — As to costs generally, see G.S. 6-1 et seq. As to bond executed or guaranteed by surety company, see G.S. 58-73-5. As to mortgage in lieu of bond, see G.S. 58-74-25.

Legal Periodicals. — For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

CASE NOTES

The object of the prosecution bond is not to secure the officers but to secure the defendant in the recovery of costs wrongfully paid out. Waldo v. Wilson, 177 N.C. 461, 100 S.E. 182 (1919).

Who Can Take Bond. — The action of the clerk in taking prosecution bonds was always held to be ministerial. Such bonds may be taken by a deputy clerk, and are habitually taken by attorneys, who have authority from the clerks for that purpose, but are not their deputies. Shepherd v. Lane, 13 N.C. 148 (1828); Croom v. Morrisey, 63 N.C. 591 (1869); Marsh & Co. v. Cohen, 68 N.C. 283 (1873).

The court has authority to set bond in an amount above the $200.00 statutory limit. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

The operative portions of this section and G.S. 1-111 have been in effect for many years, and a line of older authority, never overruled and unaffected by subsequent, merely formal amendments, has consistently construed these statutes as allowing the court in its discretion to require additional security for costs beyond the $200.00 statutory figure. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

Trial court has discretion to award prosecution bonds which are in excess of the statutory $200 amount, the purpose being to secure the defendant in the recovery of costs wrongfully paid out by the defendant; the trial court did not abuse its discretion in ordering plaintiff daughter, in her capacity as the personal representative of her father's estate, to post $10,000 to secure defendant guardian ad litem for recovery of costs in defense of the negligence action which the daughter brought, in part, as personal representative of the estate, and to post $10,000 for security as to defendants, a human services agency and a social worker, in the negligence action, because these sums were reasonable in light of the costs facing defendants for their defense of the action, as well as the daughter's history of filing frivolous lawsuits, both in general and specifically as to the claims at issue in the action. Dalenko v. Wake County Dep't of Human Servs., 157 N.C. App. 49, 578 S.E.2d 599, 2003 N.C. App. LEXIS 371 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 386 (2003), cert. denied, 540 U.S. 1178, 124 S. Ct. 1411, 158 L. Ed. 2d 79 (2004).

Power of Court to Dismiss for Failure to Post Bond. — Dismissal for failure to post a required bond is a matter "incidental to jurisdiction," not on the merits, and courts have continuing power to supervise their jurisdiction over the subject matter before them, including the power to dismiss ex mero motu. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

Notice of Effect of Noncompliance. — This section provided plaintiffs, who were ordered by the trial court to post bond, ample notice that failure to comply with the order within 30 days would make their action subject to dismissal at any time. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

When the prosecution bond has not been given, but the plaintiff has been permitted to go on and prepare his case for trial, the court will not, on motion of the defendant, dismiss the action peremptorily for want of the bond, but will permit the plaintiff to prepare and file his bond. Brittain v. Howell, 19 N.C. 107 (1836); Russell v. Saunders, 48 N.C. 432 (1856); Albertson v. Terry, 109 N.C. 8, 13 S.E. 713 (1891); Cooper v. Warlick, 109 N.C. 672, 14 S.E. 106 (1891).

A motion to dismiss for the failure of the plaintiff to file a prosecution bond required by this section, made for the first time on appeal, will be denied when it has been properly made to appear that plaintiff had filed a proper bond after the issuance of the summons. Costello v. Parker, 194 N.C. 221, 139 S.E. 224 (1927).

Discretion to Impose Lesser Sanction. — Though this section grants a trial court discretionary authority to dismiss an action as the sanction for violation of a court order imposing a prosecution bond, the court retains its inherent discretionary authority to impose a lesser sanction. Thompson v. Hank's of Carolina, Inc., 109 N.C. App. 89, 426 S.E.2d 278 (1993).

Undertaking Under Seal. — Where an undertaking to secure the costs of the defendant is given in the form of a bond, the seal does not defeat its purpose, and it will be treated as an undertaking under seal. Holly v. Perry, 94 N.C. 30 (1886).

Undertaking Written on Summons. — Where an undertaking under seal to secure the defendant's costs was written on the back of the summons, but did not specify the name of the plaintiff, the defendant or the surety, it was held to be sufficient. Holly v. Perry, 94 N.C. 30 (1886).

The court may increase the penalty on the bond, which is not an unusual procedure in the courts. Jones v. Cox, 46 N.C. 373 (1854); Adams v. Reeves, 76 N.C. 412 (1877); Rollins v. Henry, 77 N.C. 467 (1877); Vaughan v. Vincent, 88 N.C. 116 (1883); Kenney v. Seaboard Air Line R.R., 166 N.C. 566, 82 S.E. 849 (1914).

Where the defendant has been successful on his appeal, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to increase the penalty of the bond. Kenney v. Seaboard Air Line R.R., 166 N.C. 566, 82 S.E. 849 (1914).

Within Its Discretion. — Where a plaintiff has given a bond for costs which has become insufficient, the court has the power to allow him to proceed with his case without giving additional security. Holder v. Jones, 29 N.C. 191 (1847); Dale v. Presnell, 119 N.C. 489, 26 S.E. 27 (1896).

Defendant's Costs on Appeal May Be Covered. — The undertaking provided for by this section may cover the defendant's costs on appeal. Kenney v. Seaboard Air Line R.R., 166 N.C. 566, 82 S.E. 849 (1914).

Surety Not Bound for Plaintiff's Costs. — In contemplation of law, the parties pay the cost of the litigation as the action proceeds, and this bond is given entirely for the benefit of defendants. The surety is not bound for plaintiff's cost. Hallman v. Dellinger, 84 N.C. 1 (1881); Smith v. Arthur, 116 N.C. 871, 21 S.E. 696 (1895).

A prosecution bond cannot be required of a caveator in an action to contest a will. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

In property dispute requiring a survey, the trial court had authority to require plaintiffs to post a bond in the amount of $2,700.00 and to dismiss the action for failure to post that bond ex mero motu. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

No Appeal from Judge's Refusal to Require Bond. — The refusal of the trial judge to require a prosecution bond is not appealable. Christian v. Atlantic & N.C.R.R., 136 N.C. 321, 48 S.E. 743 (1904); Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

Appeal by Surety. — Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to retax. Smith v. Arthur, 116 N.C. 871, 21 S.E. 696 (1895).

Motion to Dismiss for Failure to File Security as Special Appearance. — A motion to dismiss for failure of plaintiff to file security for costs as required by this section pertains to a procedural question, and an appearance to make this motion and a motion to dismiss for want of jurisdiction is not a general appearance. Mintz v. Frink, 217 N.C. 101, 6 S.E.2d 804 (1940).

Cited in In re Will of Winborne, 231 N.C. 463, 57 S.E.2d 795 (1950); Goss v. Battle, 111 N.C. App. 173, 432 S.E.2d 156 (1993); Crutchfield v. Crutchfield, 132 N.C. App. 193, 511 S.E.2d 31 (1999); Page v. Mandel, 154 N.C. App. 94, 571 S.E.2d 635, 2002 N.C. App. LEXIS 1417 (2002); DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003); Vaden v. Dombrowski, 187 N.C. App. 433, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007).

OPINIONS OF ATTORNEY GENERAL

This section is inapplicable to actions pending in small claims court. See opinion of Attorney General to Ms. Jane M. Eason, Civil Magistrate, New Hanover County, 55 N.C.A.G. 98 (1986).

The plaintiff's prosecution bond set out in this section is one of the provisional or incidental remedies which are not obtainable while a civil action is pending before the magistrate by virtue of the last sentence of G.S. 7A-231. See opinion of Attorney General to Ms. Jane M. Eason, Civil Magistrate, New Hanover County, 55 N.C.A.G. 98 (1986).

§ 1-110. Suit as an indigent; counsel; suits filed pro se by prison inmates.

(a) Subject to the provisions of subsection (b) of this section with respect to prison inmates, any superior or district court judge or clerk of the superior court may authorize a person to sue as an indigent in their respective courts when the person makes affidavit that he or she is unable to advance the required court costs. The clerk of superior court shall authorize a person to sue as an indigent if the person makes the required affidavit and meets one or more of the following criteria:

(1) Receives electronic food and nutrition benefits.
(2) Receives Work First Family Assistance.
(3) Receives Supplemental Security Income (SSI).
(4) Is represented by a legal services organization that has as its primary purpose the furnishing of legal services to indigent persons.

(5) Is represented by private counsel working on the behalf of or under the auspices of a legal services organization under subdivision (4) of this section.

(6) Repealed by Session Laws 2002-126, s. 29A.6(d), effective October 1, 2002.

A superior or district court judge or clerk of superior court may authorize a person who does not meet one or more of these criteria to sue as an indigent if the person is unable to advance the required court costs. The court to which the summons is returnable may dismiss the case and charge the court costs to the person suing as an indigent if the allegations contained in the affidavit are determined to be untrue or if the court is satisfied that the action is frivolous or malicious.

(b) Whenever a motion to proceed as an indigent is filed pro se by an inmate in the custody of the Department of Correction, the motion to proceed as an indigent and the proposed complaint shall be presented to any superior court judge of the judicial district. This judge shall determine whether the complaint is frivolous. In the discretion of the court, a frivolous case may be dismissed by order. The clerk of superior court shall serve a copy of the order of dismissal upon the prison inmate. If the judge determines that the inmate may proceed as an indigent, service of process upon the defendant shall issue without further order of the court. (C.C.P., s. 72; 1868-9, c. 96, s. 2; Code, ss. 210, 211; Rev., ss. 451, 452; C.S., s. 494; 1971, c. 268, s. 4; 1993, c. 435, s. 1; 1995, c. 102, s. 1; 1995 (Reg. Sess., 1996), c. 591, s. 4; 1997-443, s. 12.22; 2002-126, s. 29A.6(d); 2007-97, s. 1.)

Local Modification. — Forsyth, Nash, Northampton: 1937, c. 381.

Cross References. — As to appeals in forma pauperis, see G.S. 1-288. As to costs in suits in forma pauperis, see G.S. 6-24.

Legal Periodicals. — For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

For article on indigent defendant's right to psychiatric assistance, see 17 N.C. Cent. L.J. 208 (1988).

CASE NOTES

Editor's Note. — *Many of the cases below were decided under this section as it read prior to the 1993 amendment, which formerly provided for suit as a pauper.*

Section as Exception to § 1-109. — This section is in the nature of an exception to the general rule in G.S. 1-109. Dale v. Presnell, 119 N.C. 489, 26 S.E. 27 (1896).

Motion To Proceed In Forma Pauperis Must Be Filed In Advance of Filing Suit. — N.C. Const. art. I, § 18 provides for open courts and G.S. 1-110 furthers the right by allowing access "to sue" in North Carolina's courts, notwithstanding a party's inability to advance court costs; however, the legislature's use of the words "to sue" and "advance" in G.S. 1-110 clearly indicate its intent that a motion to proceed in forma pauperis should be filed in "advance" of filing suit. Griffis v. Lazarovich, 164 N.C. App. 329, 595 S.E.2d 797, 2004 N.C. App. LEXIS 821 (2004).

Discretion of Court. — The right to sue as a pauper is a favor granted the plaintiff, and is in the power and discretion of the court. Dale v. Presnell, 119 N.C. 489, 26 S.E. 27 (1896).

The right to sue as a pauper is a favor granted by the court and remains throughout the trial in the power and discretion of the court. In re McCarroll, 313 N.C. 315, 327 S.E.2d 880 (1985).

If a defendant against whom a magistrate has rendered a judgment may appeal as a pauper, it is within the discretion of the judge as to whether it shall be allowed. Atlantic Ins. & Realty Co. v. Davidson, 82 N.C. App. 251, 346 S.E.2d 218 (1986), rev'd on other grounds, 320 N.C. 159, 357 S.E.2d 668 (1987).

Trial de Novo of Small Claims Action. — Plaintiff or defendant may petition to appear in forma pauperis in the trial de novo of cases appealed to the district court judge from judgments of a magistrate in small claims actions. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

A guardian can sue in forma pauperis. Christian v. Atlantic & N.C.R.R., 136 N.C. 321, 48 S.E. 743 (1904).

As May Nonresidents. — The words of this section are broad enough to include any litigant whatever, and hence residents of another state can sue here in forma pauperis. Porter v. Jones, 68 N.C. 320 (1873); Christian v. Atlantic & N.C.R.R., 136 N.C. 321, 48 S.E. 743 (1904).

And Personal Representatives. — It has been the unquestioned practice since the adoption of the Code that a personal representative could sue as a pauper upon proper affidavit and certificate. Allison v. Southern Ry., 129 N.C. 336, 40 S.E. 91 (1901), rev'd on other grounds, 190 U.S. 326, 23 S. Ct. 713, 47 L. Ed. 1078 (1903); Christian v. Atlantic & N.C.R.R., 136 N.C. 321, 48 S.E. 743 (1904).

When the action is by the personal representative to recover on a contract or other claim due his testator or intestate, or the action is to recover property belonging to the estate, the court may well refuse leave to sue as a pauper, under its discretion, unless it appears that the beneficiaries of the estate cannot give bond, for the officers of the court ought not needlessly be deprived of pay for their services. Christian v. Atlantic & N.C.R.R., 136 N.C. 321, 48 S.E. 743 (1904). See also, McKiel v. Cutler, 45 N.C. 139 (1853).

Refusal to Appoint Counsel in Action Under 42 U.S.C. § 1983. — Absent a showing of abuse of discretion, the trial court's refusal to appoint counsel for plaintiff in an action under 42 U.S.C. § 1983 "to obtain redress for the deprivation, under color of state law, of rights secured by the United States Constitution" was not a violation of this section. Loren v. Jackson, 57 N.C. App. 216, 291 S.E.2d 310 (1982).

Who May Authorize Suit in Forma Pauperis. — A judge or clerk of the superior court may, in cases within the jurisdiction of said court, make an order authorizing any person complying with the provisions of the said act to sue in forma pauperis. A justice of the peace has like power, in cases within the jurisdiction of his county. Rowark v. Gaston, 67 N.C. 291 (1872).

Plaintiff's Affidavit Necessary. — Whether the application is to commence the action or to appeal from an adverse determination without security, it must be supported by the affidavit of the party, and no provision is made for any other mode of proving the fact that he is unable to give security. Miazza v. Calloway, 74 N.C. 31 (1876); Stell v. Barham, 85 N.C. 88 (1881).

Affidavit Held Insufficient. — A typewritten statement, purporting to have been signed by plaintiff, that plaintiff was unable to comply with G.S. 1-109, which statement was followed by an unsigned, unsealed and unauthenticated jurat was not an affidavit, and would not support an order allowing plaintiff to prosecute the action as a pauper, but the deficiency did not necessarily require dismissal of the action, since the court could give plaintiff a reasonable time to supply the deficiency. Ogburn v. Sterchi Bros. Stores, 218 N.C. 507, 11 S.E.2d 460 (1940).

Proof of Good Cause of Action. — In granting an order for a person to sue in forma pauperis, it is sufficient compliance with this section for the presiding judge to be satisfied, by a certificate of counsel or otherwise, that the plaintiff has an honest cause of action on which he may reasonably expect to recover. Miazza v. Calloway, 74 N.C. 31 (1876).

Ownership of House. — District judge erred in entering order denying petition to appear in forma pauperis of defendant who owned a home valued at $27,150 and other unencumbered personal property in view of abundant evidence as to defendant's age, health, income, living expenses, inability to work or borrow, indebtedness and unreasonableness of selling her house. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

Statute Does Not Relieve Party From Ultimate Liability for Costs. — G.S. 1-110 provides that the trial court may relieve plaintiff from advancing the required court costs, but does not relieve a party from ultimate liability to pay costs; G.S. 1-110 only relieves a pauper from advancing costs when filing suit. Griffis v. Lazarovich, 164 N.C. App. 329, 595 S.E.2d 797, 2004 N.C. App. LEXIS 821 (2004).

Security for Costs. — Under this section the judge may, in his discretion, require a plaintiff who has been allowed to sue in forma pauperis to give security for costs. Dale v. Presnell, 119 N.C. 489, 26 S.E. 27 (1896).

Pauper Must Pay Witnesses. — Although this section, allowing a party to sue as a pauper, excuses such party from paying fees to any officer and deprives him of the right to recover costs, it does not excuse the pauper from liability for his witnesses. Morris v. Rippy, 49 N.C. 533 (1857); Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890).

No Presumption of Contingent Fee. — The bringing of a pauper suit does not raise the presumption that the attorney took the case for a contingent fee and was therefore a party in interest. Allison v. Southern Ry., 129 N.C. 336, 40 S.E. 91 (1901), rev'd on other grounds, 190 U.S. 326, 23 S. Ct. 713, 47 L. Ed. 1078 (1903).

Assignment of Interest Pending Action. — Where a plaintiff, pending an action brought in forma pauperis, assigned his interest in the land which was the subject of the action, the court would require the assignee to give security or would withdraw the privilege given to the assignor and dismiss the action. Davis v. Higgins, 91 N.C. 382 (1884); Dale v. Presnell, 119 N.C. 489, 26 S.E. 27 (1896).

Abuse of Discretion Found. — Trial court improperly abused its discretion to dismiss an inmate's complaint against a sheriff and a lieutenant, finding it frivolous pursuant to G.S.

1-110(b). The inmate, by alleging that the sheriff and lieutenant failed to follow a court order or took actions detrimental to the inmate's health, could have a cause of action if the inmate's allegations were proven. Gray v. Bryant, 189 N.C. App. 527, 658 S.E.2d 537, 2008 N.C. App. LEXIS 606 (2008).

No Abuse of Discretion Found. — Trial court did not abuse its discretion in denying an injured party's motion to proceed in forma pauperis under G.S. 1-110 as: (1) the trial court did not find that the injured party received food stamps, "Work First Family Assistance," or "Supplemental Security Income," to comply with any of the criteria of G.S. 1-110(a), (2) the injured party's affidavit indicated that she possibly received the required assistance, and (3) the fact that the injured party's motion was filed after the drivers filed their motions for costs indicated that the injured party's motion to proceed in forma pauperis was being used as a subterfuge to escape paying costs. Griffis v. Lazarovich, 164 N.C. App. 329, 595 S.E.2d 797, 2004 N.C. App. LEXIS 821 (2004).

For cases holding this section inapplicable to appeals, see Martin v. Chasteen, 75 N.C. 96 (1876); Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890); Speller v. Speller, 119 N.C. 356, 26 S.E. 160 (1896).

Cited in Costello v. Parker, 194 N.C. 221, 139 S.E. 224 (1927).

OPINIONS OF ATTORNEY GENERAL

An Individual May Institute a Special Proceeding in Forma Pauperis. — See opinion of Attorney General to Mrs. Daphene L. Cantrell, Assistant Clerk, Superior Court, Mecklenburg County, 44 N.C.A.G. 147 (1974).

§ 1-111. Defendant's, for costs and damages in actions for land.

In all actions for the recovery or possession of real property, the defendant, before he is permitted to plead, must execute and file in the office of the clerk of the superior court of the county where the suit is pending an undertaking with sufficient surety, in an amount fixed by the court, not less than two hundred dollars ($200.00), to be void on condition that the defendant pays to the plaintiff all costs and damages which the latter recovers in the action, including damages for the loss of rents and profits. (1869-70, c. 193; Code, s. 237; Rev., s. 453; C.S., s. 495.)

Legal Periodicals. — For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

CASE NOTES

Purpose of Section. — The purpose of the Legislature in passing the statute was to indemnify the plaintiff in such actions for costs, in case he should prevail. It was never intended that the requirements should be made an engine of oppression, and that a party having merit should, on technical grounds, forfeit his right to be heard when he is ready to secure costs, and when, in the opinion of the presiding judge, it is proper to give further time to plead, in order to permit the filing of the bond. Henning v. Warner, 109 N.C. 406, 14 S.E. 317 (1891).

The plain purpose of this section is to assure the plaintiff that he will suffer no damages during such period as he may be wrongfully deprived of possession. Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955).

A defense bond was never intended to be used to require forfeiture on technical grounds by a party having merit to its argument in an action for the recovery or possession of real property. Swan Quarter Farms, Inc. v. Spencer, 133 N.C. App. 106, 514 S.E.2d 735 (1999).

Bond Premium Tax. — Section 6-20, which vests the trial judge with discretionary authority to allow costs as justice may require, provided statutory authority for judge's decision to tax defendant's bond premiums, paid pursuant to G.S. 1-111, against plaintiff. Minton v. Lowe's Food Stores, 121 N.C. App. 675, 468 S.E.2d 513 (1996).

The defense bond required by this section is not an "appeal bond," but is a bond which can be required before defendant is allowed to plead to the complaint. Crockett v. Lowry, 8 N.C. App. 71, 173 S.E.2d 566 (1970).

The word "defendant" was not intended

to comprehend the State or its agencies. Kistler v. City of Raleigh, 261 N.C. 775, 136 S.E.2d 78 (1964).

A municipality is not required to file bond in defending an action for the possession of real property, since this section does not apply to the State or its agencies. Kistler v. City of Raleigh, 261 N.C. 775, 136 S.E.2d 78 (1964).

The bond required by this section does not apply to a defendant who is not in possession of the land in controversy. Hence, this section does not apply to an action by a plaintiff in possession to remove a cloud from his title. Nor does it apply to an action to establish a parol trust and to have defendant render an accounting as mortgagee in possession. Nor does it apply to a special proceeding under G.S. 38-1 et seq. to establish the location of a boundary line. The decisions point towards a restriction of its application to actions in ejectment, the defendant being in possession when the action is commenced. Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955).

This section and G.S. 1-112 do not apply unless the party against whom relief is demanded is in possession of the property, and therefore when a motion to strike a cross action on the ground of want of bond is denied, it will be assumed, in the absence of findings of record, that the court found, in accordance with allegations in the pleadings, that the parties against whom the relief was demanded were not in possession. Motley v. Thompson, 259 N.C. 612, 131 S.E.2d 447 (1963).

In an action for damages for trespass upon realty in which there is no allegation to the effect that the defendant is in actual possession of the property or any part thereof, the defendant is not required to post bond before answering, as required by this section. Wilson v. Chandler, 238 N.C. 401, 78 S.E.2d 155 (1953).

In an action to remove a cloud on the title a defense bond is not required. Tennessee River Land & Timber Co. v. Butler, 134 N.C. 50, 45 S.E. 956 (1903).

An action to establish a parol trust in lands and to have defendant render an accounting as mortgagee in possession, and for an order directing defendant to convey the lands to plaintiff upon payment of any amount found due upon the accounting, was not strictly one in ejectment, and this section, requiring defendant in ejectment actions to file bond, was inapplicable. Bryant v. Strickland, 232 N.C. 389, 61 S.E.2d 89 (1950).

An action to establish a parol trust, with prayer that defendant be directed to execute a deed to plaintiff, is not an action for recovery or possession of real property within the meaning of this section and plaintiff is not entitled to have the answer stricken and judgment by default rendered for failure of defendant to file bond. Hodges v. Hodges, 227 N.C. 334, 42 S.E.2d 82 (1947).

Where a landlord is joined as a defendant with his tenant, the tenant and landlord thus defending must under this section each give bond with good security to pay costs and damages if the plaintiff recovers, or make affidavit under G.S. 1-112, and get the certificate of an attorney practicing in the court that, in his opinion, the plaintiff is not entitled to recover. When the tenant fails to give such bond, the plaintiff may take a judgment against him; but he cannot have an execution against him until the further order of the court, which will not be made until after the trial of the issues between him and the landlord defendant. Harkey v. Houston, 65 N.C. 137 (1871).

A tenant in common in possession claiming title holds such possession for his cotenants by one common title, and in an action to recover the lands, he comes within the meaning of this section, and must file the bond therein required, according to law, before answering the complaint. Battle v. Mercer, 187 N.C. 437, 122 S.E. 4 (1924).

Vendee in Possession. — Where a vendee is let into possession before the purchase money is paid, and the vendor brings an action to recover the possession, the defendant must file the undertaking to secure rents and damages provided for by this section before he will be allowed to answer. Allen v. Taylor, 96 N.C. 37, 1 S.E. 462 (1887).

The court has authority to set bond in an amount above the $200.00 statutory limit. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

The operative portions of G.S. 1-109 and this section have been in effect for many years, and a line of older authority, never overruled and unaffected by subsequent, merely formal amendments, has consistently construed these statutes as allowing the court in its discretion to require additional security for costs beyond the $200.00 statutory figure. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

Failure to Give Undertaking. — In cases coming within the purview of this section, when an answer has been filed without any bond and has remained on file without objection, it would be improper for the trial judge to strike the answer and render judgment for plaintiff without notice to show cause or without giving the defendant the opportunity to file a defense bond. McMillan v. Baker, 92 N.C. 110 (1885); Cooper v. Warlick, 109 N.C. 672, 14 S.E. 106 (1891); Becton v. Dunn, 137 N.C. 559, 50 S.E. 289 (1905); Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968); Crockett v. Lowry, 8 N.C. App. 71, 173 S.E.2d 566 (1970). See also, Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

Where a defendant in ejectment fails to file the undertaking required by this section or to procure leave to defend without bond under G.S. 1-112, the court may strike out the answer and render judgment by default. Patrick v. Dunn, 162 N.C. 19, 77 S.E. 995 (1913).

Power of Court to Dismiss for Failure to Post Bond. — Dismissal for failure to post a required bond is a matter "incidental to jurisdiction," not on the merits, and courts have continuing power to supervise their jurisdiction over the subject matter before them, including the power to dismiss ex mero motu. Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986).

Failure to File Bond Due to Ignorance Held Not Excusable Neglect. — Ordinarily excusable neglect cannot arise out of a mistake of law, and where judgment has been rendered by default final for plaintiff for the failure of defendant to file answer as required by the statute, the ignorance of the defendant that he was required to file the bonds, before answer, required by this section, when he was in possession of and claiming title to lands, the subject of the action, was not excusable neglect on his motion to set the judgment aside, and not allowable when it appeared that the plaintiff was diligent in insisting upon his rights and had done nothing that could be regarded as a waiver thereof. Battle v. Mercer, 187 N.C. 437, 122 S.E. 4 (1924).

Waiver of Bond Requirement Generally. — The requirement that the defendant must execute and file a defense bond, or in lieu thereof a certificate and affidavit as provided by G.S. 1-112, may be waived unless seasonably insisted upon by the plaintiff. Calaway v. Harris, 229 N.C. 117, 47 S.E.2d 796 (1948); Motley v. Thompson, 259 N.C. 612, 131 S.E.2d 447 (1963); Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965); Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968); Crockett v. Lowry, 8 N.C. App. 71, 173 S.E.2d 566 (1970).

The undertaking required by this section is for the benefit of the plaintiff, and it ought to be strictly required unless waived by him; but he may waive it if he sees fit to do so. Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968).

Bond Requirement Held Waived. — The statutory requirement of bond in actions in ejectment may be waived, and therefore in plaintiffs' action in trespass in which defendants filed a counterclaim in ejectment, judgment by default in favor of defendants on the counterclaim for want of a bond was properly set aside when plaintiffs filed a reply to the counterclaim and raised no objection based on want of bond until some weeks thereafter when, without notice to plaintiffs, they moved for default judgment before the clerk. Motley v. Thompson, 259 N.C. 612, 131 S.E.2d 447 (1963).

The failure for three years to move for judgment by default for failure to file a defense bond waived the right thereto. Tennessee River Land & Timber Co. v. Butler, 134 N.C. 50, 45 S.E. 956 (1903).

Undertaking Set By Court in Lieu of Bond. — Where the trial court conducted a hearing and determined that the landlord's action to recover property for failure to pay rent should proceed on its merits upon defendant's filing an undertaking in the amount of $1,000, the landlord was not entitled to default judgment for the defendant's failure to file bond with its answer. Laing v. Lewis, 133 N.C. App. 172, 515 S.E.2d 40 (1999).

As to time for filing bond, see Jones v. Jones, 187 N.C. 589, 122 S.E. 370 (1924).

Extension of time to file a defense bond is a matter in the discretion of the judge, for which no appeal will lie. Dunn v. Marks, 141 N.C. 232, 53 S.E. 845 (1906).

Formal Order Fixing Amount of Bond Not Required. — Neither formal order fixing the amount of the defense bond required of defendant in actions for the recovery of real property, nor notice to plaintiff, is required. Privette v. Allen, 227 N.C. 164, 41 S.E.2d 364 (1947).

Remedy for Insufficient Bond. — Where, in an action in ejectment, defendant, after consultation with the clerk, tendered justified bond in the minimum amount required by this section, and the clerk accepted the bond and made notation thereof on the records, there was a substantial compliance with the statute, and plaintiff's remedy if he deemed the bond insufficient was by motion in the cause. Privette v. Allen, 227 N.C. 164, 41 S.E.2d 364 (1947).

Liability of Surety. — The surety on the bond under this section is liable only for rents and profits pending litigation and subsequent to filing the bond. Hughes v. Pritchard, 129 N.C. 42, 39 S.E. 632 (1901).

Summary Judgment Against Sureties. — Upon judgment being rendered against defendant in an action to recover land, it is not error to enter a summary judgment against the sureties on his bond. Rollins v. Henry, 84 N.C. 569 (1881).

Foreclosure of Mortgage Given for Bond. — A mortgage, given in lieu of the bond required by this section, may be foreclosed by motion, upon notice, in the original action. Ryan v. Martin, 103 N.C. 282, 9 S.E. 197, rehearing denied, 104 N.C. 176, 10 S.E. 169 (1889).

Costs on Appeal. — The defense bond and the sureties thereon, in an action of ejectment under this section, are liable to the amount of the bond for the costs on appeal as well as those incurred in the superior court. Kenney v. Seaboard Air Line R.R., 166 N.C. 566, 82 S.E. 849 (1914); Grimes v. Andrews, 171 N.C. 367, 88 S.E. 513 (1916).

Power to Appoint Receiver Not Abridged. — This section, requiring a defendant in ejectment to give bond before putting in a defense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. Kron v. Dennis, 90 N.C. 327 (1884); Durant v. Crowell, 97 N.C. 367, 2 S.E. 541 (1887); Arey v. Williams, 154 N.C. 610, 154 N.C. 910, 70 S.E. 931, 70 S.E. 931 (1911).

Appointment of Receiver Unnecessary. — In an action to recover real property or its possession, upon approval of defendant's bond by the clerk of the superior court for continued possession, given under this section, when defendant has given it in compliance with the statute, the plaintiff has an adequate and sufficient remedy at law upon the bond of the principal and surety so given and approved, and the equitable right to the appointment of a receiver under G.S. 1-502(1) is not available to the plaintiff, it appearing that a money demand will sufficiently compensate him. Jones v. Jones, 187 N.C. 589, 122 S.E. 370 (1924).

Applied in Clegg v. Canady, 213 N.C. 258, 195 S.E. 770 (1938); Moody v. Howell, 229 N.C. 198, 49 S.E.2d 233 (1948); Turner v. Weber, 16 N.C. App. 574, 192 S.E.2d 601 (1972).

Cited in Whitaker v. Raines, 226 N.C. 526, 39 S.E.2d 266 (1946); Teel v. Johnson, 228 N.C. 155, 44 S.E.2d 727 (1947); Musten v. Musten, 36 N.C. App. 618, 244 S.E.2d 699 (1978).

OPINIONS OF ATTORNEY GENERAL

The purpose of the bond is to assure the plaintiff that he will suffer no damages during such period as he may be wrongfully deprived of possession. See opinion of Attorney General to Mr. Thurman B. Hampton, Secretary of the Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

This section has no application except in actions such as common law land repossession cases, where a defendant is required to plead. See opinion of Attorney General to Mr. Thurman B. Hampton, Secretary of the Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

Summary ejectment proceedings pursuant to Chapter 42 are a landlord's "exclusive remedy" to regain possession of his property; the General Assembly did not intend for other statutory provisions, such as this section, to apply to summary ejectment proceedings. See opinion of Attorney General Mr. Thurmon B. Hampton, Secretary of the Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

In summary ejectment actions defendant's are not required to post bond before pleading. See opinion of Attorney General to Mr. Thurman B. Hampton, Secretary of the Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 1-112. Defense without bond.

(a) The undertaking prescribed in G.S. 1-111 is not necessary if an attorney practicing in the court where the action is pending certifies to the court in writing that he has examined the case of the defendant and is of the opinion that the plaintiff is not entitled to recover; and if the defendant also files an affidavit stating that he is unable to give and is not worth the amount of the undertaking in any property whatsoever.

(b) An undertaking shall not be required in any summary ejectment action brought pursuant to Articles 3 or 7 of Chapter 42 of the General Statutes. (1869-70, c. 193; Code, s. 237; Rev., s. 454; C.S., s. 496; 1997-473, s. 2.)

Legal Periodicals. — For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

CASE NOTES

Effect of Similar Prior Law. — Under the proviso formerly attached to G.S. 1-111, which was substantially the same as this section, and provided "that no such undertaking shall be required" in the case provided for, the words "no such" were used in the broad sense of not any like that required. There was nothing in the statute that suggested the contrary, or that an undertaking for a less sum than $200.00 in amount might be required in any case. The purpose was to allow persons thus poor to make defense in such actions without giving any undertaking, nor does G.S. 350 (now G.S. 58-74-25) authorize the court to require a party to execute a mortgage of real estate in the cases therein provided for. It simply allowed the party of whom an undertaking might be required in such cases to give such mortgage instead of it, and the former had to be for the same amount as the latter. Wilson v. Fowler, 104 N.C. 471, 10 S.E. 566 (1889).

Suit and Appeal in Forma Pauperis Contrasted with Defense Without Bond. — When one proposes to sue in forma pauperis, or to appeal, he is only required to swear to his inability to give the undertaking; while in order to defend an attack upon his right of possession of land, he must state not only such inability, but further, that "he is not worth the amount of the said undertaking in any property whatsoever," apparently, if not in fact, denying the privilege to one who has only sufficient exempt property to equal the amount of the bond. Taylor v. Apple, 90 N.C. 343 (1884).

Notice to Adverse Party Unnecessary. — Nothing in this section requires notice to be given to the adverse party on an application for permission to defend a suit without giving the required security. Deal v. Palmer, 68 N.C. 215 (1873). See also, Jones v. Fortune, 69 N.C. 322 (1873); Taylor v. Apple, 90 N.C. 343 (1884); Dempsey v. Rhodes, 93 N.C. 120 (1885).

The certificate of counsel applies only to the action as then constituted, and not to any other possible action that might be brought by plaintiff for the same or similar relief. Wilson v. Fowler, 104 N.C. 471, 10 S.E. 566 (1889).

Certificate of Counsel Held Sufficient. — Where counsel certified that he had examined the case of the defendant, and that in his opinion the plaintiff was not entitled to recover, this was a substantial compliance with the statute. It is not intended that the inquiry of counsel should extend beyond the information derived from the defendant. Taylor v. Apple, 90 N.C. 343 (1884).

As to payment and recovery of costs, see Lambert v. Kinnery, 74 N.C. 348 (1876); Justice v. Eddings, 75 N.C. 581 (1876); Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890); Speller v. Speller, 119 N.C. 356, 26 S.E. 160 (1896).

Applied in Turner v. Weber, 16 N.C. App. 574, 192 S.E.2d 601 (1972).

Cited in Whitaker v. Raines, 226 N.C. 526, 39 S.E.2d 266 (1946); Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955); Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965); Gates v. McDonald, 1 N.C. App. 587, 162 S.E.2d 143 (1968); Musten v. Musten, 36 N.C. App. 618, 244 S.E.2d 699 (1978); Minton v. Lowe's Food Stores, 121 N.C. App. 675, 468 S.E.2d 513 (1996).

ARTICLE 10.

Joint and Several Debtors.

§ 1-113. Defendants jointly or severally liable.

Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

(1) If the action is against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recovers judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served.

(2) If the action is against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

(3) If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action has been against them or any of them alone.

(4) If the name of one or more partners has, for any cause, been omitted in an action in which judgment has been rendered against the defendants named in the summons, and the omission was not pleaded in action, the plaintiff, in case the judgment remains unsatisfied, may

by action recover of such partner separately, upon proving his joint liability, notwithstanding he was not named in the original action; but the plaintiff may have satisfaction of only one judgment rendered for the same cause of action. (C.C.P., s. 87; Code, s. 222; Rev., s. 455; C.S., s. 497.)

Legal Periodicals. — For comment on cases decided under this section, see 13 N.C.L. Rev. 83 (1935).

For note on acquiring diversity jurisdiction over an unincorporated association, see 60 N.C.L. Rev. 194 (1981).

CASE NOTES

Common Law. — At common law in actions ex contractu, the general rule is that if the contract is joint the plaintiff must sue all the persons who either expressly or by implication of law made the contract. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

Purpose of Section. — This section was intended to prevent a partner who was not served with summons from defeating an action against him on the ground that judgment had already been taken against his copartner; and so the cause of action was merged in the judgment, and authorizes an action against him separately, provided the first judgment remains unsatisfied. Navassa Guano Co. v. Willard, 73 N.C. 521 (1875).

Subdivision (1) of this section applies to obligations that are joint only, not to obligations that are joint and several. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

Members of a partnership are jointly and severally bound for all its debts. Because of the joint liability, the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the partners. Hanstein v. Johnson, 112 N.C. 253, 17 S.E. 155 (1893).

While a creditor and also each partner has a right to demand that partnership (joint) property be applied to the satisfaction of partnership debts, each partner is severally bound to the creditor for the full amount of his claim. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

Effect of Service on Less Than All Partners. — Where, in an action against a partnership, service of summons has been made on some but not all of the partners, upon a verdict in plaintiff's favor a judgment may be properly entered that is binding upon the partnership's joint property, and upon the individual members served, but not individually upon those not so served with process. Hancock v. Southgate, 186 N.C. 278, 119 S.E. 364 (1923).

Cited in Piedmont Rebar, Inc. v. Sun Constr., Inc., 150 N.C. App. 573, 564 S.E.2d 281, 2002 N.C. App. LEXIS 583 (2002).

§ 1-114. Summoned after judgment; defense.

When a judgment is recovered against one or more of several persons jointly indebted upon a contract in accordance with the preceding section [§ 1-113], those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned. A party so summoned may answer within the time specified denying the judgment, or setting up any defense thereto which has arisen subsequent to such judgment; and may make any defense which he might have made to the action if the summons had been served on him originally. (C.C.P., ss. 318, 322; Code, ss. 223, 224; Rev., ss. 456, 457; C.S., s. 498.)

CASE NOTES

This section applies to obligations that are joint only, not to obligations that are joint and several. North State Fin. Co. v. Leonard, 263 N.C. 167, 139 S.E.2d 356 (1964).

When Motion in Cause Is Proper. — Where a judgment is taken against two of three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action and not a motion in the action in which such judgment was rendered; it is only when the liability is joint and not several that the motion in the cause is proper. Davis v. Sanderlin, 119 N.C. 84, 25 S.E. 815 (1896).

Statute of Limitations Held to Bar Action. — Where an action was begun against certain administrators and the sureties on their bond, and one surety was not served with summons until more than three years thereafter, the three-year statute of limitations was a bar to the action against such surety. Koonce v. Pelletier, 115 N.C. 233, 20 S.E. 391 (1894). See also, Rufty v. Claywell, Power & Co., 93 N.C. 306 (1885).

Where an action was instituted and judgment was obtained against A. B. & Co., upon a bill of exchange, and C, who was a secret partner in the firm, was not joined as defendant, and the plaintiff afterwards, more than three years after the cause of action accrued, discovered that C was a partner and instituted an action against him, the action was barred by the statute of limitations. Navassa Guano Co. v. Willard, 73 N.C. 521 (1875).

§ 1-115: Repealed by Session Laws 1969, c. 954, s. 4.

ARTICLE 11.

Lis Pendens.

§ 1-116. Filing of notice of suit.

(a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in all of the following cases:

(1) Actions affecting title to real property.

(2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property.

(3) Actions in which any order of attachment is issued and real property is attached.

(4) Actions seeking injunctive relief under G.S. 113A-64.1 or G.S. 113A-65 regarding sedimentation and erosion control for any land-disturbing activity that is subject to the requirements of Article 4 of Chapter 113A of the General Statutes.

(b) Notice of pending litigation shall contain:

(1) The name of the court in which the action has been commenced or is pending;

(2) The names of the parties to the action;

(3) The nature and purpose of the action; and

(4) A description of the property to be affected thereby.

(c) Notice of pending litigation may be filed:

(1) At or any time after the commencement of an action pursuant to Rule 3 of the Rules of Civil Procedure; or

(2) At or any time after real property has been attached; or

(3) At or any time after the filing of an answer or other pleading in which the pleading party states an affirmative claim for relief falling within the provisions of subsection (a) of this section.

(d) Notice of pending litigation must be filed with the clerk of the superior court of each county in which any part of the real estate is located, not excepting the county in which the action is pending, in order to be effective against bona fide purchasers or lien creditors with respect to the real property located in such county. (C.C.P., s. 90; Code, s. 229; Rev., s. 460; 1917, c. 106; C.S., s. 500; 1949, c. 260; 1959, c. 1163, s. 1; 1967, c. 954, s. 3; 2009-269, s. 1.)

Cross References. —As to filing of notice of lis pendens where court is to distribute marital property upon divorce, see G.S. 50-20.

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

Effect of Amendments. — Session Laws

2009-269, s. 1, effective October 1, 2009, and applicable to actions filed on or after that date, in subsection (a), inserted "all of" in the introductory language, added subdivision (a)(4), and made related stylistic changes.

CASE NOTES

As to the similarity of this section to English and New York statutes, see Todd, Schenck & Co. v. Outlaw, 79 N.C. 235 (1878).

The common-law rule of lis pendens has been replaced in North Carolina by this Article. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965); Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969). See also, Collingwood v. Brown, 106 N.C. 362, 10 S.E. 868 (1890).

The common-law rule was that if the real estate to be affected by the judgment or decree was situated in several counties it would all be bound by the lis pendens arising from the pendency of a suit in the county in which only a part of it was situated, since all persons were supposed to be attentive to what occurred in courts of justice, whereas the plain purpose of this section was to modify the rule so as to require notice in all counties where the real estate was situated. Collingwood v. Brown, 1Q6 N.C. 362, 10 S.E. 868 (1890).

As to the purpose of the 1959 amendment, see Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

Doctrine of Lis Pendens Stated. — The general doctrine of lis pendens is familiar and is firmly established. It may be stated to be thus: When a person buys property pending an action of which he has notice, actual or presumed, in which the title to it is in issue, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been. The rule is absolutely necessary to give effect to the judgments of courts, because if it were not so held, a party could always defeat the judgment by conveying in anticipation of it to some stranger, and the plaintiff would be compelled to commence a new action against him, and so on indefinitely. Rollins v. Henry, 78 N.C. 342 (1878); Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Lis pendens, literally "pending suit," is a statutory device by which the world is put on notice that an order of attachment has been issued with respect to certain real property owned by a party against whom a monetary judgment is sought and that the lien of attachment may be executed and the property sold in satisfaction of the judgment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Operation of Law of Lis Pendens May Be Harsh. — The rule of lis pendens, while founded upon principles of public policy and absolutely necessary to give effect to the decree of the courts, is nevertheless in many instances very harsh in its operation; and one who relies upon it to defeat a bona fide purchaser must understand that his case is strictissimi juris. Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894); Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

And Strict Compliance Is Required Therewith. — The statutory law as to lis pendens embodied in this Article provides a definite method for giving constructive notice, so that a search of known records will convert it into actual notice. Since the application of this rule may work hardship in many instances, a strict compliance with its provisions is required. Hughes v. North Carolina State Hwy. Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

When Lis Pendens May Be Filed. — Subsection (a) of this section makes clear that if neither a foreclosure nor an attachment order are involved, a lis pendens may be filed only where a legitimate interest in real property may lie. Zinn v. Walker, 87 N.C. App. 325, 361 S.E.2d 314 (1987), cert. denied, 321 N.C. 747, 366 S.E.2d 871 (1988).

The filing of lis pendens is authorized only in actions affecting the title to real property. McGurk v. Moore, 234 N.C. 248, 67 S.E.2d 53 (1951); Parker v. White, 235 N.C. 680, 71 S.E.2d 122 (1952); Wolfe v. Hewes, 41 N.C. App. 88, 254 S.E.2d 204 (1979).

"Action," as used in this section, embraces all judicial proceedings affecting the title to real property or in which title to land is at issue. Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

Subsection (a) of this section makes clear that if neither a foreclosure nor an attachment order are involved, a lis pendens may be filed only where a legitimate interest in real property may lie. Zinn v. Walker, 87 N.C. App. 325, 361 S.E.2d 314 (1987), cert. denied, 321 N.C. 747, 366 S.E.2d 871 (1988).

And in Actions Enumerated Under This Section. — There can be no valid notice of lis pendens in this State except in one of the three types of actions enumerated in subsection (a) of this section. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965); North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979).

It Is Required When Claim Is in Derogation of the Record. — The rule of lis pendens applies in actions to set aside deeds or other instruments for fraud, to establish a constructive or resulting trust, to require specific performance, to correct a deed for mutual mistake and in like cases where there is no record notice and where otherwise a prospective purchaser would be ignorant of the claim. That is, lis pendens notice is required when the claim is contra or in derogation of the record. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Lis Pendens Not Required to Protect Pension. — North Carolina law does not authorize the filing of a lis pendens against a pension; thus, this step is not required in order to protect pension rights when a former spouse receives a discharge in bankruptcy while a claim for equitable distribution is pending. Walston v. Walston, 190 Bankr. 66 (E.D.N.C. 1995).

The nature of plaintiff's action must be determined by reference to the facts alleged in the body of the complaint rather than by what is contained in the prayer for relief. Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969).

Action to establish a trust as to certain described real property is an action "affecting title to real property" within the meaning of subsection (a)(1) of this section, and a valid notice of lis pendens may be filed in connection therewith. Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969).

As Is an Action to Set Aside a Fraudulent Conveyance. — A claim for relief by a creditor seeking to set aside a fraudulent conveyance pursuant to former G.S. 39-15 constitutes an action "affecting title to real property" within the meaning of the lis pendens statute. North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979).

But an Action for Monetary Damages Is Not. — Where it is clear from a reading of the complaint, and the amendment thereto, that the action is one to recover monetary damages, the action is not one affecting the title to real property within the purview of this section. Parker v. White, 235 N.C. 680, 71 S.E.2d 122 (1952).

This section does not apply to an action the purpose of which is to secure a personal judgment for the payment of money, even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant described in the complaint. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965); Booker v. Porth, 1 N.C. App. 434, 161 S.E.2d 767 (1968); Pegram v. Tomrich Corp., 4 N.C. App. 413, 166 S.E.2d 849 (1969); Lord v. Jeffreys, 22 N.C. App. 13, 205 S.E.2d 563 (1974).

The defendant county clerk was not required by this section to cross-index the plaintiff's notice of lis pendens, filed in connection with her claim against her ex-husband, where it did not directly affect title to the real property because her primary purpose was to secure a personal money judgment. George v. Administrative Office of Courts, 142 N.C. App. 479, 542 S.E.2d 699, 2001 N.C. App. LEXIS 139 (2001).

Nor Is Action to Prevent Change in Record. — An action brought for the purpose of preventing a change in the record and not for the purpose of establishing a trust or lien upon the property is not an action of the type in which this section permits the filing of a notice of lis pendens. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Where mortgagee brings an action to recover on note secured by mortgage and to set aside a deed of the mortgagor, but not to foreclose the mortgage, the action was not one affecting the title to land within the meaning of this section, and the judgment of the lower court canceling and removing the notice of lis pendens from the records would be affirmed on appeal. Threlkeld v. Malcragson Land Co., 198 N.C. 186, 151 S.E. 99 (1930).

An action to recover damages for the breach of an option contract was not an action affecting the title to realty within this section, and the filing of notice in such case would not affect a purchaser pending that action. Horney v. Price, 189 N.C. 820, 128 S.E. 321 (1925).

Where a complaint merely alleged a diversion of partnership assets without connecting the diversion with the property on which the notice was sought, the complaint failed to state a cause of action affecting title to real property, and the trial court properly cancelled the notices of lis pendens. Wolfe v. Hewes, 41 N.C. App. 88, 254 S.E.2d 204 (1979).

U.S. Government's Interest. — Because the U.S. Government's interest under 18 U.S.C. § 981 and 21 U.S.C. § 881 (federal drug seizure and forfeiture laws) in a property relates back to the time of an illegal act, a property became attached pursuant to subdivision (c)(2) of this section prior to or shortly after the government filed the notice of lis pendens. The government's interest in the property vested as soon as the property was used in an illegal manner. Thus, a notice of lis pendens is valid and necessary to place the world on notice of the government's interest in the property. In re Certain Real Property Located at Lot 8, 763 F. Supp. 150 (W.D.N.C. 1991).

Defendants' motion to cancel notice of lis pendens was denied as the statutory prerequisites for the filing of notices of lis pendens, under G.S. 1-116(a)(1), Fla. Stat. § 48.23, and S.C. Code Ann. § 15-11-10, were met because, inter alia, pursuant to 21 USCS § 853(c), the U.S. gained an interest in all forfeitable property owned by defendants, including any identifiable substitute property, at the moment in time that the crimes alleged in the indictment occurred, and it was no consequence that the substitute property claimed as subject to forfeiture was acquired by defendants prior to the alleged illegal activity. United States v. Woods, 436 F. Supp. 2d 753, 2006 U.S. Dist. LEXIS 44917 (E.D.N.C. 2006).

This section is designed to supplement the registration law and to provide a simple and readily available means of ascertaining the existence of adverse claims to land which are not otherwise disclosed by the registry. Notice under the act is required to give constructive notice to prospective purchasers when the claim is in derogation of the record. Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

Effects of Lis Pendens and Registration Are the Same. — The effect of lis pendens and the effect of registration are in their nature the same thing. They are only different examples of the operation of the rule of constructive notice. Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945); Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

And the Law Governing Each Must Be Construed in Pari Materia. — The law of lis pendens and the statute requiring the registration of instruments affecting title to real property must be construed in pari materia. Otherwise, the one would be destructive of the other. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Lis Pendens as Notice to Purchaser. — The principle of lis pendens is that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril, and the pendency of such suit duly prosecuted is notice to a purchaser so as to bind his interest. Todd, Schenck & Co. v. Outlaw, 79 N.C. 235 (1878).

Lis Pendens As Notice to Chapter 7 Trustee. — Pursuant to G.S. 1-116, 1-118, and 47-18, the fact that a pre-petition lis pendens had been filed against property purportedly owned by a Chapter 7 debtor was sufficient to give the Chapter 7 trustee constructive notice that there was a possible cloud on the title to the property and to preserve the superior lien of a mortgagee's nominee, once the nominee perfected its lien by judgment and levy. In re Suggs, 355 B.R. 525, 2006 Bankr. LEXIS 2840 (Bankr. M.D.N.C. 2006).

Purchaser Is Entitled to Rely on Absence of Record Notice. — This section and G.S. 1-118 and 47-18 serve to provide record notice upon the absence of which a prospective innocent purchaser may rely. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974); Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

The filing of notice under this section is essential to give constructive notice to those who are not directly interested in the proceedings. Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

Res Must Be Sufficiently Described. — Cocomitant to the rule that the lis pendens notification is confined to the apparent effect of the pleadings, they must contain a description of the property affected. The res must be sufficiently described in the pleadings. Hence, the lis pendens notification will be confined to the property specified in the papers, and where a partial interest only in the property is asserted to be in issue the lis pendens notification does not extend to the entire interest. Hughes v. North Carolina State Hwy. Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

When Description Is Sufficient. — Although it is necessary in order to constitute lis pendens that the proceedings should, directly or indirectly, designate specific property, yet where the description is so definite that anyone reading it can learn thereby, either by the description or reference, what property is intended to be made subject to litigation, it is sufficient. Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894).

Notice of Lis Pendens Held Subject to Dismissal. — Notice of lis pendens relating to a civil case seeking damages from defendant bank for converting debtor's funds, causing debtor to lose its property, and thereby damaging debtor's general partners, was an attempt to indirectly challenge the sale of real property in a state court proceeding which had been removed to the bankruptcy court. Because the notice of lis pendens was not related to the type of action described in subsection (a) of this section, the notice would be dismissed. Huang v. Pioneer Sav. Bank, Inc. (In re Tara), 84 Bankr. 416 (Bankr. E.D.N.C. 1988).

Plaintiff's notice of lis pendens against defendant's land was canceled because the facts alleged in plaintiffs' complaint did not state a cause of action affecting the title of defendant's land; instead, plaintiffs asserted tort and contract claims against defendant, and while plaintiffs could ultimately secure a lien against lands owned by defendant to secure payment of a judgment, that possibility alone did not warrant a notice of lis pendens on defendant's land. Gilley v. Shoffner, 345 F. Supp. 2d 563, 2004 U.S. Dist. LEXIS 23835 (M.D.N.C. 2004).

An order denying a motion to cancel a notice of lis pendens is not immediately appealable where the property owner fails to show that a substantial right of his has been impaired. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

For cases holding that entry of lis pendens was not required when the action was in the county where the land was, see Badger v. Daniel, 77 N.C. 251 (1877); Rollins v. Henry, 78 N.C. 342 (1878); Todd, Schenck & Co. v. Outlaw, 79 N.C. 235 (1878); Spencer v. Credle, 102 N.C. 68, 8 S.E. 901 (1889); Collingwood v. Brown, 106 N.C. 362, 10 S.E. 868 (1890); Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894); Bird v. Gilliam, 125 N.C. 76, 34 S.E. 196 (1899); Morgan v. Bostic, 132 N.C. 743, 44 S.E. 639 (1903); Jarrett v. Holland, 213 N.C. 428, 196 S.E. 314 (1938). But see subsection (d) of this section.

In a suit attacking the validity of a foreclosure sale under a deed of trust, a temporary order enjoining further transfer of the property by the cestui que trust, the purchaser at the sale, was properly dissolved, since plaintiff trustor had an adequate remedy at law by filing notice of lis pendens in accordance with this and subsequent sections. Whitford v. North Carolina Joint Stock Land Bank, 207 N.C. 229, 176 S.E. 740 (1934).

Remedy for Improperly Filed Lis Pendens. — Defendant failed to prove a basis upon which to recover for damages allegedly resulting from an improperly filed lis pendens where defendant failed to allege any malicious intent on the part of plaintiff, and no evidence of malice was found in the record. Quinn v. Quinn, 111 N.C. App. 922, 433 S.E.2d 807 (1993).

Applied in Austin v. Wilder, 26 N.C. App. 229, 215 S.E.2d 794 (1975); Whyburn v. Norwood, 47 N.C. App. 310, 267 S.E.2d 374 (1980); Doby v. Lowder, 72 N.C. App. 22, 324 S.E.2d 26 (1984); Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Cited in McLeod v. McLeod, 266 N.C. 144, 146 S.E.2d 65 (1966); G.L. Wilson Bldg. Co. v. Leatherwood, 268 F. Supp. 609 (W.D.N.C. 1967); Hughes v. North Carolina State Hwy. Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968); Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984); Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985); United States v. Life Ins. Co. of Va. Single Premium Whole Life Policy, 647 F. Supp. 732 (W.D.N.C. 1986); Carter v. HCL Leasing Corp. (In re Martin), 87 Bankr. 394 (Bankr. E.D.N.C. 1988); K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

§ 1-116.1. Service of notice.

In all actions as defined in G.S. 1-116 in which notice of pendency of the action is filed, a copy of such notice shall be served on the other party or parties as follows:

(1) If filed by the plaintiff at or after service of summons but before the filing of the complaint, service shall be in the manner provided in Rule 4 of the Rules of Civil Procedure for service of summons.

(2) If filed by the plaintiff at or after the filing of the complaint, service shall be in the same manner as the complaint.

(3) All other such notices shall be served in the manner provided in Rule 5 of the Rules of Civil Procedure. (1949, c. 260; 1967, c. 954, s. 3.)

Editor's Note. — For provisions similar to those of the former last four sentences of this section, see now subsection (b) of G.S. 1-119.

The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

CASE NOTES

Cited in North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979).

§ 1-117. Cross-index of lis pendens.

Every notice of pending litigation filed under this Article shall be cross-indexed by the clerk of the superior court in a record, called the "Record of Lis Pendens," to be kept by him pursuant to G.S. 2-42(6). (1903, c. 472; Rev., s. 464; 1919, c. 31; C.S., s. 501; 1959, c. 1163, s. 2.)

Editor's Note. — Section 2-42, referred to in this section, was revised and transferred to G.S. 7A-109 by Session Laws 1971, c. 363, s. 6.

CASE NOTES

This Section Must Be Construed with § 47-18. — Lis pendens and registration each have the purpose of giving constructive notice by record, and this section and G.S. 47-18 must be construed in pari materia, while the lis pendens statutes do not affect the registration laws, the converse is not true. Massachusetts Bonding & Ins. Co. v. Knox, 220 N.C. 725, 18 S.E.2d 436, 138 A.L.R. 1438 (1942).

Operation of Lis Pendens Statutes. — The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

Plaintiff's notice of lis pendens against defendant's land was canceled because the facts alleged in plaintiffs' complaint did not state a cause of action affecting the title of defendant's land; instead, plaintiffs asserted tort and contract claims against defendant, and while plaintiffs could ultimately secure a lien against lands owned by defendant to secure payment of a judgment, that possibility alone did not warrant a notice of lis pendens on defendant's land. Gilley v. Shoffner, 345 F. Supp. 2d 563, 2004 U.S. Dist. LEXIS 23835 (M.D.N.C. 2004).

Duty of the County Clerk. — The defendant county clerk was not required by this section to cross-index the plaintiff's notice of lis pendens, filed in connection with her claim against her ex-husband, where it did not directly affect title to the real property because her primary purpose was to secure a personal money judgment. George v. Administrative Office of Courts, 142 N.C. App. 479, 542 S.E.2d 699, 2001 N.C. App. LEXIS 139 (2001).

Who Are Affected by Lis Pendens. — The doctrine of lis pendens only affects third persons who may take title after complaint is filed and notice of lis pendens is filed and cross-indexed in the Record of Lis Pendens. Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

This section deals only with constructive notice. Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

Effect of Purchaser's Actual Notice. — Where a third party buys from defendant with actual notice or knowledge of the suit and its nature and purpose, and the specific property to be affected, he takes title burdened with the same obligations as his grantors. Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

Applied in Whyburn v. Norwood, 47 N.C. App. 310, 267 S.E.2d 374 (1980).

Cited in Pierce v. Mallard, 197 N.C. 679, 150 S.E. 342 (1929); Massachusetts Bonding & Ins. Co. v. Knox, 220 N.C. 725, 18 S.E.2d 436, 138 A.L.R. 1438 (1942); Haw River Land & Timber v. Lawyers Title Ins., 152 F.3d 275 (4th Cir. 1998).

§ 1-118. Effect on subsequent purchasers.

From the cross-indexing of the notice of lis pendens only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time of cross-indexing the notice. (C.C.P., s. 90; Code, s. 229; Rev., s. 462; 1919, c. 31; C.S., s. 502.)

CASE NOTES

The purpose of this section is to supplement the registration statute by providing a simple and readily available means of ascertaining the existence of adverse claims to property not otherwise disclosed by the public registry. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Effect of Lis Pendens Statutes. — The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974); Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Under G.S. 1-118, notices of lis pendens filed by the creditors gave notice that they were claiming a lien, but did not themselves create a lien. Instead, the efficacy of the notices of lis pendens depended on the creditors obtaining a judgment that granted them a lien and the creditors never obtained a judgment establishing a lien in the underlying proceeding. Northen v. Rezvani (In re McCormick), 400 B.R. 193, 2008 Bankr. LEXIS 3741 (Bankr. M.D.N.C. 2008).

This section only purports to deal with constructive notice and its effect on subsequent purchasers. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

Purchaser Is Entitled to Rely on Absence of Notice. — This section and G.S. 1-116 and 47-18 serve to provide record notice upon the absence of which a prospective innocent purchaser may rely. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Who Are Affected by Lis Pendens. — The doctrine of lis pendens in this State only affects third persons who may take title after complaint is filed and notice of lis pendens is filed and cross-indexed in the Record of Lis Pendens. Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

Pursuant to G.S. 1-116, 1-118, and 47-18, the fact that a pre-petition lis pendens had been filed against property purportedly owned by a Chapter 7 debtor was sufficient to give the Chapter 7 trustee constructive notice that there was a possible cloud on the title to the property and to preserve the superior lien of a mortgagee's nominee, once the nominee perfected its lien by judgment and levy. In re Suggs, 355 B.R. 525, 2006 Bankr. LEXIS 2840 (Bankr. M.D.N.C. 2006).

Effect of Actual Notice. — The doctrine of lis pendens, as it ordinarily prevails, only affects third persons who may take title to lands after the nature of the claim and the property affected are pointed out with reasonable precision by complaint filed or by notice given pursuant to this section, but the principle is not operative where one buys from a litigant with full notice or knowledge of the suit, its nature and purpose and the specific property to be affected. Morris v. Basnight, 179 N.C. 298, 102 S.E. 389 (1920).

Where a third party buys from defendant with actual notice or knowledge of the suit and its nature and purpose, and the specific property to be affected, he takes title burdened with the same obligations as his grantors. Lawing v. Jaynes, 20 N.C. App. 528, 202 S.E.2d 334, modified on other grounds, 285 N.C. 418, 206 S.E.2d 162 (1974).

Fraudulent Purchase of Lands. — Where the president of a corporation, a substantial owner of its shares of stock, personally bought in the lands which the company was under a binding contract to convey before suit was brought to enforce the contract, and with full knowledge of the plaintiff's right, took a deed for same from his company before the complaint was filed, he and his corporation were precluded from setting up the doctrine of lis pendens as a defense, and his purchase would be held ineffective and fraudulent as to the decree rendered and the rights established in the plaintiff's favor for specific performance. Morris v. Basnight, 179 N.C. 298, 102 S.E. 389 (1920).

Purchase After Suit but Before Appeal. — One who, relying upon the judgment of the superior court, takes a conveyance from the successful party before the expiration of 10 days, takes it subject to the right of appeal and of the judgment which may be entered therein, and he is conclusively fixed with notice of the litigation. Rollins v. Henry, 78 N.C. 342 (1878); Dancy v. Duncan, 96 N.C. 111, 1 S.E. 455 (1887); Bird v. Gilliam, 125 N.C. 76, 34 S.E. 196 (1899).

Prior Law. — Previous to the adoption of G.S. 1-117, regarding a cross-index, the filing of notice as provided in G.S. 1-116 was all that was necessary to affect all purchasers with notice. See Toms v. Warson, 66 N.C. 417 (1872).

For cases in which judgment was held to relate back to beginning of suit, see Briley v. Cherry, 13 N.C. 2 (1828); Cates v. Whitfield, 53 N.C. 266 (1860); Dancy v. Duncan, 96 N.C. 111, 1 S.E. 455 (1887).

Applied in Cutter v. Cutter Realty Co., 265 N.C. 664, 114 S.E.2d 882 (1965); Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984).

Cited in Morgan v. Bostic, 132 N.C. 743, 44 S.E. 639 (1903); Brinson v. Lacy, 195 N.C. 394, 142 S.E. 317 (1928); Pierce v. Mallard, 197 N.C. 679, 150 S.E. 342 (1929); Huff v. Trent Academy of Basic Educ., Inc., 53 N.C. App. 113, 280 S.E.2d 17 (1981).

§ 1-119. Notice void unless action prosecuted.

(a) The notice of lis pendens is of no avail unless it is followed by the first publication of notice of the summons or by an affidavit therefor pursuant to Rule 4 (j)(1)c of the Rules of Civil Procedure or by personal service on the defendant within 60 days after the cross-indexing.

(b) When an action is commenced by the issuance of summons and permission is granted to file the complaint within 20 days, pursuant to Rule 3 of the Rules of Civil Procedure, if the complaint is not filed within the time fixed by the order of the clerk, the notice of lis pendens shall become inoperative and of no effect. The clerk may on his own motion and shall on the ex parte application of any interested party cancel such notice of lis pendens by appropriate entry on the records, which entry shall recite the failure of the plaintiff to file his complaint within the time allowed. Such applications for cancellation, when made in a county other than that in which the action was instituted, shall include a certificate over the hand and seal of the clerk of the county in which the action was instituted that the plaintiff did not file his complaint within the time allowed. The fees of the clerk may be recovered against the plaintiff and his surety. (C.C.P., s. 90; Code, s. 229; Rev., s. 461; 1919, c. 31; C.S., s. 503; 1967, c. 954, s. 3.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

CASE NOTES

Effect of Lis Pendens Statutes. — The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

Service Within 60 Days Required. — Where a party lives in a different county of the State, and claims as a bona fide purchaser, to affect him with notice of lis pendens the requirements of the statute must be strictly followed; among other things, it must be served within 60 days after its filing. Powell v. Dail, 172 N.C. 261, 90 S.E. 194 (1916).

Cited in Pierce v. Mallard, 197 N.C. 679, 150 S.E. 342 (1929).

§ 1-120. Cancellation of notice.

The court in which the said action was commenced may, at any time after it is settled, discontinued or abated, on application of any person aggrieved, on good cause shown, and on such notice as is directed or approved by the court, order the notice authorized by this Article to be cancelled of record, by the clerk of any county in whose office the same has been filed or recorded; and this cancellation must be made by an endorsement to that effect on the margin of the record, which shall refer to the order. (C.C.P., s. 90; Code, s. 229; Rev., s. 463; C.S., s. 504.)

CASE NOTES

Effect of Lis Pendens Statutes. — The lis pendens statutes enable a purchaser for a valuable consideration who has no actual notice of the pendency of litigation affecting the title to the land to proceed with assurance when the lis pendens docket does not disclose a cross-indexed notice disclosing the pendency of such an action. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

This Section Applies to Cancellation of Valid Notice. — The provisions of this section with reference to cancellation of a notice of lis pendens are applicable to the cancellation of a valid notice. Cutter v. Cutter Realty Co., 265

N.C. 664, 144 S.E.2d 882 (1965).

When Invalid Notice May Be Cancelled. — If a notice of lis pendens filed in the office of the clerk is not authorized by statute, a court has jurisdiction to cancel it upon the motion of the owner of the record title to the land, without waiting for termination of the action. Cutter v. Cutter Realty Co., 265 N.C. 664, 144 S.E.2d 882 (1965).

Cancellation by Bankruptcy Court. — Where although the action in which a lis pendens was filed was commenced in the Superior Court Division of the General Court of Justice for Wake County, where the civil suit was subsequently removed to the bankruptcy court, the bankruptcy court was the appropriate court to enter an order pursuant to this section for cancellation of the lis pendens of record. Huang v. Pioneer Sav. Bank, Inc. (In re Tara), 84 Bankr. 416 (Bankr. E.D.N.C. 1988).

Notice Continues Until Cancelled. — Where the suit has been prosecuted with proper diligence, the lis pendens continues until the final judgment, or until it has been cancelled under the direction of the court. Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894).

Loss or Destruction of Notice. — The mere loss or destruction of the notice will not affect its efficacy, if the statute has been fully complied with. Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894).

Removal of Notice by Act of Party. — If the party, by any act of his own, has, contrary to the usual course of the court, consented to or been instrumental in the removal from its files of the notice of lis pendens, leaving nothing whatever upon the record which could inform a purchaser of the nature of the action and the property sought to be subjected, it must follow, according to every principle of equity and fair dealing, that the purchaser will be protected. Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894).

Plaintiff's notice of lis pendens against defendant's land was canceled because the facts alleged in plaintiffs' complaint did not state a cause of action affecting the title of defendant's land; instead, plaintiffs asserted tort and contract claims against defendant, and while plaintiffs could ultimately secure a lien against lands owned by defendant to secure payment of a judgment, that possibility alone did not warrant a notice of lis pendens on defendant's land. Gilley v. Shoffner, 345 F. Supp. 2d 563, 2004 U.S. Dist. LEXIS 23835 (M.D.N.C. 2004).

Applied in Cowart v. Whitley, 39 N.C. App. 662, 251 S.E.2d 627 (1979).

Cited in Threlkeld v. Malcragson Land Co., 198 N.C. 186, 151 S.E. 99 (1930); Parker v. White, 235 N.C. 680, 71 S.E.2d 122 (1952).

§ 1-120.1. Article applicable to suits in federal courts.

The provisions of this Article shall apply to suits affecting the title to real property in the federal courts. (1945, c. 857.)

Legal Periodicals. — As to lis pendens in federal courts, see 23 N.C.L. Rev. 330 (1945).

CASE NOTES

Cancellation by Bankruptcy Court. — Where although the action in which a lis pendens was filed was commenced in the Superior Court Division of the General Court of Justice for Wake County, where the civil suit was subsequently removed to the bankruptcy court, the bankruptcy court was the appropriate court to enter an order pursuant to G.S. 1-120 for cancellation of the lis pendens of record. Huang v. Pioneer Sav. Bank, Inc. (In re Tara), 84 Bankr. 416 (Bankr. E.D.N.C. 1988).

§ 1-120.2. Filing of notice by cities and counties in certain cases.

The governing body of a city or county may, by ordinance under Part 5 of Article 19 of Chapter 160A of the General Statutes relating to building inspection, or Part 6 of Article 19 of Chapter 160A relating to minimum housing standards, or Part 4 of Article 18 of Chapter 153A relating to building inspection, provide that upon the issuance of a complaint and notice of hearing or order pursuant thereto, a notice of lis pendens, with a copy of the complaint and notice of hearing or order attached thereto, may be filed in the office of the clerk of superior court of the county where the property is located. When a notice of lis pendens and a copy of the complaint and notice of hearing or order is filed with the clerk of superior court, it shall be indexed and cross-indexed in accordance with the indexing procedures of G.S. 1-117. From the date and time of indexing, the complaint and notice of hearing or order shall be binding upon the successors and assigns of the owners of and parties in interest in the building or dwelling. A copy of the notice of lis pendens shall be served upon the owners and parties in interest in the building or dwelling at the time of filing in accordance with G.S. 160A-428, 160A-445, or 153A-368 as applicable. The notice of lis pendens shall remain in full force and effect until cancelled. The ordinance may authorize the cancellation of the notice of lis pendens under certain circumstances. Upon receipt of notice from the city, the clerk of superior court shall cancel the notice of lis pendens. (1995, c. 158, s. 1.)

CASE NOTES

Cited in George v. Administrative Office of Courts, 142 N.C. App. 479, 542 S.E.2d 699, 2001 N.C. App. LEXIS 139 (2001).

SUBCHAPTER VI. PLEADINGS.

ARTICLE 12.

Complaint.

§§ 1-121 through 1-123: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions as to commencement of action by issuance of summons on application for permission to delay filing of complaint, see G.S. 1A-1, Rule 3. For present provisions as to joinder of claims and remedies, see G.S. 1A-1, Rule 18.

ARTICLE 13.

Defendant's Pleadings.

§§ 1-124 through 1-126: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions as to pleadings, see G.S. 1A-1, Rule 7. For present provisions as to when and how defenses and objections may be presented, see G.S. 1A-1, Rule 12. For present provisions as to striking from pleadings any insufficient defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter, see subsection (f) of G.S. 1A-1, Rule 12.

ARTICLE 14.

Demurrer.

§§ 1-127 through 1-134: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provision abolishing demurrers, pleas, etc., see G.S. 1A-1, Rule 7. As to raising and waiving defenses and objections, see G.S. 1A-1, Rule 12. As to procedure upon misjoinder, see G.S. 1A-1, Rule 21.

ARTICLE 15.

Answer.

§§ 1-134.1 through 1-138: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to content of pleadings, see now G.S. 1A-1, Rule 8. As to defenses and objections, see now G.S. 1A-1, Rule 12. As to counterclaims and cross-claims, see G.S. 1A-1, Rule 13.

§ 1-139. Burden of proof of contributory negligence.

A party asserting the defense of contributory negligence has the burden of proof of such defense. (1887, c. 33; Rev., s. 483; C.S., s. 523; 1967, c. 954, s. 3.)

Cross References. — As to pleading affirmative defense of contributory negligence, see G.S. 1A-1, Rule 8.

Legal Periodicals. — For article, "Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina," see 18 Campbell L. Rev. 1 (1996).

CASE NOTES

What Constitutes Contributory Negligence. — A plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge, either actual or constructive, of the danger of injury which his conduct involves. Harris v. Bridges, 46 N.C. App. 207, 264 S.E.2d 804, cert. denied, 300 N.C. 556, 270 S.E.2d 107 (1980).

Negligence is not presumed from the mere fact that one is killed. Goodson v. Williams, 237 N.C. 291, 74 S.E.2d 762 (1953).

Presumption Against Contributory Negligence. — Where there is no evidence of the fact, the presumption is against contributory negligence, even in the absence of a statute making it a matter of affirmative defense. Norton v. North Carolina R.R., 122 N.C. 910, 29 S.E. 886 (1898).

The law presumes that a person found dead and killed by the alleged negligence of another has exercised due care himself. Cogdell v. Wilmington & Weldon R.R., 132 N.C. 852, 44 S.E. 618 (1903).

A four-year-old child is incapable of negligence, primary or contributory. Bevan v. Carter, 210 N.C. 291, 186 S.E. 321 (1936).

Rebuttable Presumption Against Contributory Negligence of Minor Between Seven and 14. — Minor between ages of seven and 14 is presumed to be incapable of contributory negligence. But this presumption may be overcome by evidence that the child did not use the care which a child of its age, capacity, discretion, knowledge and experience would ordinarily have exercised under the same or similar circumstances. Weeks v. Barnard, 265 N.C. 339, 143 S.E.2d 809 (1965).

Contributory Negligence Must Be Set Up in Answer and Proved. — In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and defendant must assume the burden of proving his allegation of contributory negligence. Stith v. Perdue, 7 N.C. App. 314, 172 S.E.2d 246 (1970).

One relying on contributory negligence must prove facts from which the inference of contributory negligence may be drawn by men of ordinary reason. Tharpe v. Brewer, 7 N.C. App. 432, 172 S.E.2d 919 (1970).

Defendant must plead contributory negligence in order to be entitled to submission of the issue to the jury. Bevan v. Carter, 210 N.C. 291, 186 S.E. 321 (1936).

Sufficiency of Plea. — To be sufficient, a plea of contributory negligence must aver a state of facts to which the law attaches negligence as a conclusion. Tharpe v. Brewer, 7 N.C. App. 432, 172 S.E.2d 919 (1970).

Contributory Negligence Is a Jury Question. — The question of whether the plaintiff was guilty of contributory negligence is to be determined by the jury upon proof offered at the trial pursuant to this section. Miller v. Scott, 185 N.C. 93, 116 S.E. 86 (1923).

Whether plaintiff was contributorily negligent in voluntarily riding in a car driven by defendant when plaintiff knew or should have known that defendant was under the influence of intoxicating beverages was a question for the jury; therefore, judge's refusal to submit contributory negligence to the jury entitled defendant to a new trial. Jansen v. Collins, 92 N.C.

App. 516, 374 S.E.2d 641 (1988).

Burden of Proving Assumption of Risk. — While there is a marked distinction between the doctrines of assumption of risk and contributory negligence, it is proper, in pertinent cases, to consider the application of the law relating to assumption of risk under the issue of contributory negligence, with the burden of proof on the defendant pleading it. Pigford v. Norfolk S.R.R., 160 N.C. 93, 75 S.E. 860 (1912).

Expert Testimony. — In a medical malpractice case, medical expert testimony, although useful, is not required to show the causal connection between plaintiff's alleged contributory negligence and his injuries. McGill v. French, 333 N.C. 209, 424 S.E.2d 108 (1993).

Evidence Held Sufficient. — In a medical malpractice case, the testimony of experts, as well as plaintiff's physician's testimony and other evidence indicating the condition of plaintiff's health, was sufficient evidence for a jury to find a causal connection between plaintiff's missing appointments and the spread or increased rate of the spread of his cancer so as to support its finding of contributory negligence. McGill v. French, 333 N.C. 209, 424 S.E.2d 108 (1993).

Permitting Jury to Consider Contributory Negligence Held Error. — Trial court erred by permitting the jury to consider whether plaintiffs were barred from recovery by reason of the contributory negligence of senile nursing home resident's "sitter", and such error necessitated a new trial on the issue of contributory negligence. Stacy v. Jedco Constr., Inc., 119 N.C. App. 115, 457 S.E.2d 875 (1995).

Trial court erred in denying driver's motion for judgment notwithstanding the verdict in her negligence action against a motorist, arising from a collision when the motorist went through a stop sign at an intersection; the fact that the motorist estimated that the driver was speeding, without more, was insufficient to allow the issue of contributory negligence to be considered by the jury pursuant to G.S. 1-139 because there was no causal connection established between the speeding and the accident. Ellis v. Whitaker, 156 N.C. App. 192, 576 S.E.2d 138, 2003 N.C. App. LEXIS 77 (2003).

Applied in Butner v. Atlantic & Y. Ry., 199 N.C. 695, 155 S.E. 601 (1930); Farrell v. Thomas & Howard Co., 204 N.C. 631, 169 S.E. 224 (1933); Stovall v. Ragland, 211 N.C. 536, 190 S.E. 899 (1937).

Cited in McAdoo v. Richmond & Danville R.R., 105 N.C. 140, 11 S.E. 316 (1890); Ruffin v. Atlantic & N.C.R.R., 142 N.C. 120, 55 S.E. 86 (1906); United States Leather Co. v. Howell, 151 F. 444 (4th Cir. 1907); Ramsey v. Nash Furn. Co., 209 N.C. 165, 183 S.E. 536 (1936); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

ARTICLE 16.

Reply.

§§ 1-140 through 1-142: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to service of pleadings, see G.S. 1A-1, Rule 5. As to pleadings allowed, see G.S. 1A-1, Rule 7.

ARTICLE 17.

Pleadings, General Provisions.

§§ 1-143 through 1-147: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to signing and verification of pleadings, see G.S. 1A-1, Rule 11.

§ 1-148. Verification before what officer.

Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes. (C.C.P., s. 117;

1868-9, c. 159, s. 7; Code, s. 258; 1891, c. 140; Rev., s. 492; C.S., s. 532; 1971, c. 268, s. 5.)

CASE NOTES

Verification by Out-of-State Notary. — While formerly the notaries public authorized to take affidavits for the verification of the pleadings were those of this State and not of some other state, this has now been changed by the express terms of this section, which permit verification to be taken by notaries in as well as out of the State. See Hinton v. Life Ins. Co., 116 N.C. 22, 21 S.E. 201 (1895).

Verification made before the clerk of the Hustings Court of Richmond, Virginia, was valid, as courts take judicial notice of the seal of the courts of other states just as they do of the seals of foreign courts of admiralty and notaries public. Hinton v. Life Ins. Co., 116 N.C. 22, 21 S.E. 201 (1895).

For case in which court found an insufficient basis to impeach verification, see Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976).

Cited in State ex rel. Johnson v. Eason, — N.C. App. —, 679 S.E.2d 151, 2009 N.C. App. LEXIS 1093 (July 7, 2009).

§ 1-149. When verification omitted; use in criminal prosecutions.

The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it. (C.C.P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; Rev., s. 493; C.S., s. 533.)

CASE NOTES

Admission in Criminal Prosecutions of Evidence of Civil Pleadings — Held Error. — It was error to permit the solicitor, while cross-examining defendant in a criminal prosecution, to read certain allegations of fact in a complaint in a civil action relating to the same subject matter and to ask defendant if he had failed to deny them by answer. State v. Wilson, 217 N.C. 123, 7 S.E.2d 11 (1940).

Defendant's motion to set aside verdict on the ground that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted in evidence without objection, along with typed notes of the argument of counsel for the prosecution containing reference to defendant's failure to testify, should have been allowed. State v. Stephenson, 218 N.C. 258, 10 S.E.2d 819 (1940).

In a prosecution for embezzlement the admission in evidence over defendant's objection of pleadings in civil actions against defendant, involving the funds he was alleged to have embezzled, was erroneous in view of this section. State v. Ray, 206 N.C. 736, 175 S.E. 109 (1934).

Same — Held Proper. — In a prosecution for larceny of an automobile, permitting solicitor to cross-examine defendant in regard to allegation made by defendant in his complaint in a prior civil action for the purpose of impeaching defendant's testimony, by showing defendant had made two contradictory statements about the matter, both of which the solicitor contended were incorrect, was not an impingement upon this section, since the purpose and effect was not to prove the fact alleged in the pleading, but to the contrary. State v. McNair, 226 N.C. 462, 38 S.E.2d 514 (1946).

Where testimony of a witness as to her bigamous marriage with defendant was competent, the complaint filed by her in an action to annul the marriage was competent for the purpose of corroborating her testimony. State v. Phillips, 227 N.C. 277, 41 S.E.2d 766 (1947).

Applied in State v. Dula, 204 N.C. 535, 168 S.E. 836 (1933).

§§ 1-150 through 1-160: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to computation, enlargement, etc., of time, see G.S. 1A-1, Rule 6. For general rules of pleading, see G.S. 1A-1, Rule 8. As to pleading special matters, see G.S. 1A-1, Rule 9. As to defenses and objections, see G.S. 1A-1, Rule 12.

Article 18.

Amendments.

§§ 1-161 through 1-163: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to amendments, see G.S. 1A-1, Rule 15.

§ 1-164. Amendment changing nature of action or relief; effect.

When the complaint is so amended as to change the nature of the action and the character of the relief demanded, the judgment rendered does not operate as an estoppel upon any person acquiring an interest in the property in controversy prior to the allowance of the amendment. (1901, c. 486; Rev., s. 508; C.S., s. 548.)

CASE NOTES

Cited in Pierce v. Mallard, 197 N.C. 679, 150 S.E. 342 (1929); Perkins v. Langdon, 233 N.C. 240, 63 S.E.2d 565 (1951).

§ 1-165: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-166. Defendant sued in fictitious name; amendment.

When the plaintiff is ignorant of the name of a defendant the latter may be designated in a pleading or proceeding by any name; and when his true name is discovered, the pleading or proceeding may be amended accordingly. (C.C.P., s. 134; Code, s. 275; Rev., s. 510; C.S., s. 550.)

CASE NOTES

Purpose of Section. — The obvious purpose of this section is to provide a plaintiff a means to toll the statute of limitations when he does not yet know the proper designation of the defendant. No comparable necessity existed when a defendant desired to pursue a cross action for contribution against an unknown joint tort-feasor under former G.S. 1-240, since the statute did not begin to run on the claim for contribution until judgment had been recovered against the first tort-feasor. Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

Effect of Section. — This section provides that when the plaintiff is ignorant of the name of a defendant, he may designate such defendant by any name and later amend his pleadings to insert the true name when it is discovered. Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

This section is not a tolling statute; if it were the effect would be to preserve claims against "John Doe" defendants for some unlimited period of time or perhaps until some period after a plaintiff determines their true identity. This effect cannot have been intended by the legislature. Huggard v. Wake County Hosp. Sys., 102 N.C. App. 772, 403 S.E.2d 568 (1991), aff'd, 330 N.C. 610, 411 S.E.2d 610 (1992).

Discretion of Court as to Correction of Misnomer. — Where a mistake has been made in designating the parties defendant to the action, it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, both in the process and pleadings. Rosenbacher & Bro. v. Martin, 170 N.C. 236, 86 S.E. 785 (1915).

Middle Name or Initial. — When the identity of a party is established, a variation in name, and especially a difference in the middle initial, such as H. instead of J., is immaterial. Evans v. Brendle, 173 N.C. 149, 91 S.E. 723 (1917).

Section Does Not Authorize Defendant

to Cross Plead Against Unknown Additional Defendant. — This section does not, at least by express language, apply to authorize a defendant to cross plead against an unknown additional defendant, and former G.S. 1-240 contained no provision permitting a cross action for contribution against an additional defendant designated only by a fictitious name. Wall Funeral Home v. Stafford, 3 N.C. App. 578, 165 S.E.2d 532 (1969).

Amendment After Limitations Had Run. — Federal magistrate's order denying plaintiff's motion to amend complaint and substitute specific identifiable defendants for previously named "John Does," on grounds that the limitations period had run as to the newly identified defendants and had not been tolled under this section by the filing of a "John Doe" complaint, and that the relation back provisions of Rule 15(c), Fed. R. Civ. P., were not available, would be affirmed, as the federal district court believed that the North Carolina Supreme Court would most likely find that this section was not a tolling statute. Denny v. Hinton, 110 F.R.D. 434 (M.D.N.C. 1986), aff'd, 900 F.2d 251 (4th Cir. 1990).

§§ 1-167 through 1-169: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to supplemental pleadings and amendments to conform pleadings to the evidence, see G.S. 1A-1, Rule 15.

SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 18A.

Pretrial Hearings.

§§ 1-169.1 through 1-169.6: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to pretrial procedure, see G.S. 1A-1, Rule 16.

ARTICLE 19.

Trial.

§§ 1-170 through 1-173: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-174: Repealed by Session Laws 1999-216, s. 2, effective January 1, 2000.

Cross References. — As to appeals and transfers from the clerk of superior court to the trial courts, see G.S. 1-301.1.

CASE NOTES

Cited in Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952); In re Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966); In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967); Hill v. Smith, 51 N.C. App. 670, 277 S.E.2d 542 (1981).

§§ 1-175 through 1-179: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to separate trials, see G.S. 1A-1, Rule 42.

§ 1-180: Repealed by Session Laws 1977, c. 711, s. 33.

Cross References. — For statute prohibiting expression of opinion by judge, see G.S. 15A-1222. For statute as to jury instructions, and explanation of law by judge, prohibiting judge's expression of opinion whether fact has been proved, see G.S. 15A-1232.

§ 1-180.1. Judge not to comment on verdict.

In criminal actions the presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any session of court, upon any verdict rendered at such session of court, and if any presiding judge shall make any comment as herein prohibited, or shall praise or criticize any jury on account of its verdict, whether such comment, praise or criticism be made inadvertently or intentionally, such praise, criticism or comment by the judge shall constitute valid grounds as a matter of right, for the continuance for the session of any action remaining to be tried during that week at such session of court, upon motion of a defendant or upon motion of the State. The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment. (1955, c. 200; 1967, c. 954, s. 3; 1971, c. 381, s. 12.)

Cross References. — For similar provisions regarding civil actions, see G.S. 1A-1, Rule 51.

Legal Periodicals. — For survey of 1983 law on criminal procedure, see 62 N.C.L. Rev. 1204 (1984).

CASE NOTES

This section and § 15A-1239 prohibit the trial judge from commenting on the verdict in criminal actions. State v. Neal, 60 N.C. App. 350, 299 S.E.2d 654, appeal dismissed and cert. denied, 308 N.C. 389, 302 S.E.2d 256 (1983).

This section contains the exclusive remedy for judicial praise, criticism or comment on the verdict. State v. Neal, 60 N.C. App. 350, 299 S.E.2d 654, appeal dismissed and cert. denied, 308 N.C. 389, 302 S.E.2d 256 (1983).

Applicability of Section. — The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment. State v. Neal, 60 N.C. App. 350, 299 S.E.2d 654, appeal dismissed and cert. denied, 308 N.C. 389, 302 S.E.2d 256 (1983).

Commenting on Drug Cases Prior to Calling Defendant's Case. — Comments made by a trial judge concerning cases involving drugs and a guilty plea involving hallucinogenic substances, coming immediately before defendant's LSD case was called, entitled defendant to a continuance, and it was error for the trial judge to overrule defendant's motion. State v. Brown, 29 N.C. App. 391, 224 S.E.2d 206 (1976).

Comments made by a trial judge concerning cases involving marijuana, coming shortly before the defendant's marijuana case was called, entitled defendant to a continuance, and it was error for the trial judge to overrule defendant's motion. State v. Carriker, 287 N.C. 530, 215 S.E.2d 134 (1975).

Discharge of Jury. — A trial judge in his discretion has the power to discharge a jury from service, and this section does not require the trial judge to exercise his prerogative of discharging a jury from further service in the absence of other jurors summoned for the session. State v. Hiatt, 3 N.C. App. 584, 165 S.E.2d 349 (1969).

Defendant Must Move for Continuance. — In order to obtain the benefit of this section, a defendant must move for a continuance. State v. Carriker, 287 N.C. 530, 215 S.E.2d 134 (1975).

§ 1-181. Requests for special instructions.

(a) Requests for special instructions to the jury must be —

(1) In writing,

(2) Entitled in the cause, and

(3) Signed by counsel submitting them.

(b) Such requests for special instructions must be submitted to the trial judge before the judge's charge to the jury is begun. However, the judge may, in his discretion, consider such requests regardless of the time they are made.

(c) Written requests for special instructions shall, after their submission to the judge, be filed as a part of the record of the same. (C.C.P., s. 239; Code, s. 415; Rev., s. 538; C.S., s. 565; 1951, c. 837, s. 6.)

Cross References. — For similar provisions, see G.S. 1A-1, Rule 51.

Legal Periodicals. — For article discussing North Carolina jury instructions practice, see 52 N.C.L. Rev. 719 (1974).

CASE NOTES

Requests for special instructions must be in writing and must be submitted to the trial judge before the judge's charge to the jury is begun. State v. Long, 20 N.C. App. 91, 200 S.E.2d 825 (1973).

A request for a special instruction is aptly made if in writing and submitted to the trial court before the charge to the jury is begun. State v. Sealey, 41 N.C. App. 175, 254 S.E.2d 238 (1979).

A party must aptly tender a written request for special instructions desired by him in order for an exception to the charge for its failure to contain such instructions to be considered on appeal. State v. Spillman, 210 N.C. 271, 186 S.E. 322 (1936).

If a litigant desires a fuller or more detailed charge by the court to the jury, it is incumbent upon him to ask therefor by presenting prayers for special instructions. Woods v. Roadway Express, Inc., 223 N.C. 269, 25 S.E.2d 856 (1943).

Trial court properly refused to give defendant's requested special instruction on the defense of justification of possession of a firearm by a felon because the request was not in writing. State v. Craig, 167 N.C. App. 793, 606 S.E.2d 387, 2005 N.C. App. LEXIS 6 (2005).

A party desiring more particular instructions on a subordinate feature must aptly tender request therefor. McKay v. Bullard, 219 N.C. 589, 14 S.E.2d 657 (1941).

As to "apt time" for tendering written requests, see Merrill v. Whitmire, 110 N.C. 367, 15 S.E. 3 (1892); Ward v. Albemarle & R.R.R., 112 N.C. 168, 16 S.E. 921 (1893).

Request Made After Jury Retired Not Timely. — Where it was only after the jury retired to consider their verdict that defendant's counsel asked the judge if he could have instructions as to any previous record, the request was not timely. State v. Long, 20 N.C. App. 91, 200 S.E.2d 825 (1973).

Judge Has Discretion to Give or Refuse Instruction Not Signed or in Writing. — Where an instruction is not in writing and signed pursuant to this section, it is within the discretion of the trial judge to give or refuse such instruction. State v. Spencer, 225 N.C. 608, 35 S.E.2d 887 (1945); State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821, remanded on other grounds, 301 N.C. 508, 272 S.E.2d 123 (1980). See also, State v. Broome, 268 N.C. 298, 150 S.E.2d 416 (1966).

The trial judge may disregard oral requests. State v. Horton, 100 N.C. 443, 6 S.E. 238 (1888); Justice v. Gallert, 131 N.C. 393, 42 S.E. 850 (1902); Hicks v. Nivens, 210 N.C. 44, 185 S.E. 469 (1936).

It is within the sound discretion of the trial judge to give or refuse a prayer for special instruction not signed by the attorneys tendering it as required by this section. Avery County Bank v. Smith, 186 N.C. 635, 120 S.E. 215 (1923); State v. Hardee, 6 N.C. App. 147, 169 S.E.2d 533 (1969).

Where a requested instruction is not submitted in writing and signed pursuant to this section it is within the discretion of the court to give or refuse such instruction. State v. Harris, 67 N.C. App. 97, 312 S.E.2d 541, appeal dismissed and cert. denied, 311 N.C. 307, 317 S.E.2d 905 (1984).

In a medical malpractice action, the trial court did not abuse its discretion by failing to instruct the jury on certain proposed jury instructions as the defending doctor and medical center did not submit a written proposed instruction. Swink v. Weintraub, — N.C. App. —, 672 S.E.2d 53, 2009 N.C. App. LEXIS 111 (2009).

Where Requested Instructions Do Not Relate to Essential Elements of Case. — The court is at liberty to disregard oral requests for instructions which do not relate to a substantial and essential feature of the case. State v. Hicks, 229 N.C. 345, 49 S.E.2d 639 (1948).

And failure to grant an instruction not asked for in writing is not ground for exception. Marshall v. Stine, 112 N.C. 697, 17 S.E. 495 (1893).

The fact that a limiting instruction was not repeated in the charge was not error in the absence of a request for a special instruction. State v. Spinks, 24 N.C. App. 548, 211 S.E.2d 476 (1975).

But Judge Must Give a Properly Requested Relevant Instruction. — A request for special instructions, aptly made, tendered in writing before argument and signed by counsel, has been held to impose a duty on the court to give the instructions in substance where relevant to the case. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

A request for special instructions, properly made, imposes a duty on the court to give the instructions, at least in substance, where relevant to the case. In the absence of such a request, no duty arises on the part of the trial court. State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821, remanded on other grounds, 301 N.C. 508, 272 S.E.2d 123 (1980).

It is the rule in this jurisdiction that if a specifically requested jury instruction is proper and supported by evidence, the trial court must give the instruction, at least in substance. State v. Lynch, 46 N.C. App. 608, 265 S.E.2d 491, rev'd on other grounds, 301 N.C. 479, 272 S.E.2d 349 (1980).

Trial court committed error in refusing to give defendant's jury instruction that stated that defendant had to know the age of the victims in order to be convicted of aiding and abetting statutory rape. Since that offense involved an element of knowledge, the instruction should have been given because it was both a correct statement of the law and supported by the evidence, which meant defendant was entitled to give the instruction pursuant to G.S. 1A-1-51, N.C. R. Civ. P. 51(b) and G.S. 1-181. State v. Bowman, 188 N.C. App. 635, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

The plaintiff was entitled to a new trial where the court failed to give a special jury instruction regarding proximate concurrent causation in a homeowner's insurance coverage determination suit; without it, the jury was not fully instructed in the law as they were not allowed to consider whether multiple factors combined to cause the damage to plaintiff's floor. Erie Ins. Exch. v. Bledsoe, 141 N.C. App. 331, 540 S.E.2d 57, 2000 N.C. App. LEXIS 1304 (2000), cert denied, 353 N.C. 371, 547 S.E.2d 442 (2001).

Requested Instructions Need Not Be Given Verbatim. — A defendant is not entitled to have his requested instructions given verbatim, so long as they are given in substance. State v. Agnew, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

But Failure to Give a Proper Instruction in Substance Is Reversible Error. — When a party tenders a request for a specific instruction, correct in itself and supported by the evidence, failure of the trial court to give such instruction, in substance at least, either in response to the prayer or in some portion of the charge, is reversible error. Calhoun v. State Hwy. & Pub. Works Comm'n, 208 N.C. 424, 181 S.E. 271 (1935).

The trial court is not required to give a requested instruction in the exact language of the request; however, when the request is correct in law and supported by the evidence in the case, the court must give the instructions in substance, and it is error for the court to change the sense or to so qualify the requested instruction as to weaken its force. State v. Puckett, 54 N.C. App. 576, 284 S.E.2d 326 (1981). See also, Brink v. Black, 77 N.C. 59 (1877); Lloyd v. Bowen, 170 N.C. 216, 86 S.E. 797 (1915); Coral Gables, Inc. v. Ayres, 208 N.C. 426, 181 S.E. 263 (1935).

The trial judge commits reversible error in failing to give substantially a material instruction which is duly requested under this section and embodies a correct principle of law supported by the evidence in the case, even though the evidence may be conflicting. Parks v. Security Life & Trust Co., 195 N.C. 453, 142 S.E. 473 (1928).

It is not error for the court to fail to define and explain words of common usage and meaning to the general public. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

Absent a Request for Special Instructions. — It is not error for the court to fail to define and explain words of common usage in the absence of a request for special instructions. State v. Jones, 300 N.C. 363, 266 S.E.2d 586 (1980).

An instruction to scrutinize the testimony of a witness on the grounds of interest or bias relates to a subordinate feature of a criminal case, and the trial court is not required to charge as to such matters in the absence of request for special instructions aptly made. State v. Sealey, 41 N.C. App. 175, 254 S.E.2d 238 (1979).

Court May Refuse Erroneous or Irrelevant Instructions. — The court may totally refuse instructions based on an erroneous statement of the law, or which concern issues irrelevant to the case. State v. Agnew, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

When defendant was prosecuted under G.S.

14-269.2, the trial court was not required, under G.S. 1-181 and G.S. 1A-1, Rule 51(b) to give defendant's proffered special instruction on the defense of necessity, and did not err in instructing the jury that necessity was not a defense, as several alternatives were available to defendant, who was pursuing an armed fugitive into an elementary school. State v. Haskins, 160 N.C. App. 349, 585 S.E.2d 766, 2003 N.C. App. LEXIS 1792 (2003), appeal dismissed sub nom. State v. Haskins, 357 N.C. 580, 589 S.E.2d 356 (2003).

This section applies equally to essential elements of the crime charged as well as to other legal terms contained in the charge. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

Party Cannot Complain of Favorable Instructions. — The defendants cannot, on appeal from a conviction, complain of an erroneous instruction which was not prejudicial to them but was in their favor. State v. Freeman, 122 N.C. 1012, 29 S.E. 94 (1898).

Instruction on Matters Arising Only upon Verdict. — It is not error in the judge to omit to charge the jury upon matters of law which can only arise upon the verdict, and have no bearing on the questions to be considered by the jury. Dupree v. Virginia Home Ins. Co., 92 N.C. 417 (1885).

The Supreme Court cannot indulge in speculation as to the form of an instruction, where no prayer for the instruction as required by this section appears in the record. Kearney v. Thomas, 225 N.C. 156, 33 S.E.2d 871 (1945).

Judge's Statement of Oral Instructions Binding on Appeal. — A statement of the trial judge as to what the instructions to the jury were, where orally given, and in the absence of a request that they be put in writing, is binding on appeal. Justice v. Gallert, 131 N.C. 393, 42 S.E. 850 (1902).

Applied in Taylor v. Rierson, 210 N.C. 185, 185 S.E. 627 (1936); Appliance Buyers Credit Corp. v. Mason, 271 N.C. 427, 156 S.E.2d 689 (1967); Wood v. Nelson, 5 N.C. App. 407, 168 S.E.2d 712 (1969); State v. Ervin, 26 N.C. App. 328, 215 S.E.2d 845 (1975); State v. Scales, 28 N.C. App. 509, 221 S.E.2d 898 (1976); State v. Jackson, 30 N.C. App. 187, 226 S.E.2d 543 (1976); State v. Rogers, 32 N.C. App. 274, 231 S.E.2d 919 (1977); State v. Pharr, 32 N.C. App. 775, 233 S.E.2d 684 (1977); State v. Coward, 296 N.C. 719, 252 S.E.2d 712 (1979); State v. Lamb, 39 N.C. App. 334, 249 S.E.2d 887 (1979); State v. McLawhorn, 43 N.C. App. 695, 260 S.E.2d 138 (1979); Thomas v. Deloatch, 45 N.C. App. 322, 263 S.E.2d 615 (1980); State v. Jones, 50 N.C. App. 560, 274 S.E.2d 401 (1981); Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991).

Cited in Pleasants v. Raleigh & A. Airline R.R., 95 N.C. 195 (1886); Taylor v. Plummer, 105 N.C. 56, 11 S.E. 266 (1890); Lowe v. Elliott, 107 N.C. 718, 12 S.E. 383 (1890); Lee v. Williams, 111 N.C. 200, 16 S.E. 175 (1892); Lee v. Williams, 112 N.C. 510, 17 S.E. 165 (1893); Marshall v. Stine, 112 N.C. 697, 17 S.E. 495 (1893); State v. Macon, 198 N.C. 483, 152 S.E. 407 (1930); Penland v. French Broad Hosp., 199 N.C. 314, 154 S.E. 406 (1930); Lane v. Paschall, 199 N.C. 364, 154 S.E. 626 (1930); Pyatt v. Southern Ry., 199 N.C. 397, 154 S.E. 847 (1930); State v. Sims, 213 N.C. 590, 197 S.E. 176 (1938); Clarke v. Martin, 217 N.C. 440, 8 S.E.2d 230 (1940); Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962); Waden v. McGhee, 274 N.C. 174, 161 S.E.2d 542 (1968); Jackson v. Jones, 2 N.C. App. 441, 163 S.E.2d 31 (1968); State Hwy. Comm'n v. Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969); State v. Guy, 54 N.C. App. 208, 282 S.E.2d 560 (1981); State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986); State v. Watson, 80 N.C. App. 103, 341 S.E.2d 366 (1986); Lusk v. Case, 94 N.C. App. 215, 379 S.E.2d 651 (1989); Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997); State v. Mewborn, 178 N.C. App. 281, 631 S.E.2d 224, 2006 N.C. App. LEXIS 1411 (2006).

§ 1-181.1. View by jury.

The judge presiding at the trial of any action or proceeding involving the exercise of the right of eminent domain, or the condemnation of real property may, in his discretion, permit the jury to view the property which is the subject of condemnation. (1965, c. 138.)

CASE NOTES

Cited in State Hwy. Comm'n v. Rose, 31 N.C. App. 28, 228 S.E.2d 664 (1976).

§ 1-181.2. Use of evidence by the jury.

(a) If the jury in a civil action after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The court in its discretion, after notice to the parties and giving the parties an opportunity to be heard, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. The court in its discretion may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

(b) Upon request by the jury, the court may in its discretion and after permitting the parties an opportunity to be heard permit the jury to take into the jury room admitted exhibits which have been passed to the jury, photographs admitted into evidence and shown to the jury and used by any witnesses in their testimony before the jury, and any illustrative exhibits admitted into evidence and used by any witnesses in their testimony before the jury. Summaries of testimony prepared in the courtroom by any party, lists made by any party in the courtroom and such similar documents shall not be sent to the jury room with the jury, even if admitted into evidence and requested by the jury. Depositions may be taken into the jury room upon request of the jury only with consent of the parties.

(c) Upon request by the jury, the court may permit the jury to take into the jury room any exhibit that all parties stipulate and agree may be taken into the jury room.

(d) In sending any exhibits to the jury, the court should ensure that the evidentiary integrity of the exhibit is preserved. (2007-407, s. 1.)

Editor's Note. — Session Laws 2007-407, s. 2, made this section effective for trials commencing on or after October 1, 2007.

§ 1-182: Repealed by Session Laws 1977, c. 776.

§ 1-183: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to dismissal of actions, see G.S. 1A-1, Rule 41. As to motion for directed verdict, see G.S. 1A-1, Rule 50.

§ 1-183.1. Effect on counterclaim of dismissal as to plaintiff's claim.

The granting of a motion by the defendant for judgment of dismissal as to the plaintiff's cause of action shall not amount to the taking of a voluntary dismissal on any counterclaim which the defendant was required or permitted to plead pursuant to G.S. 1A-1, Rule 13. (1959, c. 77; 1971, c. 1093, s. 3.)

CASE NOTES

Applied in Williamson v. Varner, 252 N.C. 446, 114 S.E.2d 92 (1960).

§§ 1-184, 1-185: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions regarding trials by jury and by the court, see G.S. 1A-1, Rule 39. As to findings of fact and conclusions of law by the court, see G.S. 1A-1, Rule 52.

§ 1-186. Exceptions to decision of court.

(a) For the purposes of an appeal, either party may except to a decision on a matter of law arising upon a trial by the court within 10 days after the judgment, in the same manner and with the same effect as upon a trial by jury. Where the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may except thereto, and make a case or exception as above provided in case of an appeal.

(b) Either party desiring a review, upon the evidence appearing on the trial of the questions of law, may at any time within 10 days after the judgment, or within such time as is prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge in settling the case must briefly specify the facts found by him, and his conclusions of law. (C.C.P., s. 242; Code, s. 418; Rev., s. 542; C.S., s. 570.)

Cross References. — As to the taking of appeals in civil cases, see N.C.R.A.P., Rule 3. As to exceptions and assignments of error in the record on appeal, see N.C.R.A.P., Rule 10.

Legal Periodicals. — For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

CASE NOTES

Purpose of Section. — The main object of this section is to declare that the trial by the court shall not be conclusive; but that just as an appeal lies when the trial is by jury, so an appeal lies when the trial is by the court. Green v. Castlebury, 70 N.C. 20 (1874).

Section Deals with Right of Appeal. — The right of appeal, and not the mere matter of making up the case, is the subject of this section. Green v. Castlebury, 70 N.C. 20 (1874).

Necessity for Exceptions. — Where the decision of all questions both of law and fact is left to the judge, his findings and conclusions will not be reviewed by the Supreme Court unless exceptions appear to have been aptly taken or error is distinctly pointed out. Chastain v. Coward, 79 N.C. 543 (1878).

When a trial by jury is waived, in order to preserve for review on appeal an adverse ruling on a motion for judgment as of nonsuit, it is necessary to except to the findings of fact in apt time on the ground that such findings are not supported by the evidence. Exceptions to such findings must be taken within the time allowed by this section. City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

If an individual wishes to have the Supreme Court review an affirmance by the superior court of findings by a referee or administrative agency, it is necessary to specifically except to the court's ruling with respect to the fact he wishes to challenge, in the time and manner prescribed by this section. Clark Equip. Co. v. Johnson, 261 N.C. 269, 134 S.E.2d 327 (1964).

In a trial by the court under agreement of the parties, mere entry of appeal without the filing of exception to the judgment or to the refusal of the court to find facts as requested until the service of statement on appeal did not meet the requirements of this section. Nationwide Homes of Raleigh N.C., Inc., v. First-Citizens Bank & Trust Co., 267 N.C. 528, 148 S.E.2d 693 (1966).

Exception to the signing of a judgment presents these questions: (1) Do the facts found support the judgments; and (2) Does any error of law appear upon the face of the record? City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

Broadside Exception. — An exception "to each conclusion of law embodied in the judgment" was a broadside exception and did not comply with this section. Jamison v. City of Charlotte, 239 N.C. 682, 80 S.E.2d 904 (1954).

Presumption Where Exceptions Not Taken. — Where no exceptions are taken to the admission of evidence or to the findings of fact, such findings are presumed to be supported by competent evidence and are binding upon appeal. City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

§ 1-187: Repealed by Session Laws 1967, c. 954, s. 4.

Article 20.

Reference.

§§ 1-188 through 1-195: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provision relating to referees, see G.S. 1A-1, Rule 53.

Article 21.

Issues.

§§ 1-196 through 1-200: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to verdicts, see G.S. 1A-1, Rule 49.

Article 22.

Verdict and Exceptions.

§ 1-201: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provision relating to general and special verdicts, see G.S. 1A-1, Rule 49.

§ 1-202. Special controls general.

Where a special finding of facts is inconsistent with the general verdict, the former controls, and the court shall give judgment accordingly. (C.C.P., s. 234; Code, s. 410; Rev., s. 552; C.S., s. 586.)

Cross References. — For similar provisions, see G.S. 1A-1, Rule 49.

§§ 1-203 through 1-207: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to objections and exceptions, see G.S. 1A-1, Rule 46. For present provisions as to general and special verdicts, see G.S. 1A-1, Rule 49. As to entry of judgment, see G.S. 1A-1, Rule 58. As to new trials, see G.S. 1A-1, Rule 59.

SUBCHAPTER VIII. JUDGMENT.

Article 23.

Judgment.

§ 1-208: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provision relating to definition of judgment, see G.S. 1A-1, Rule 54.

§ 1-208.1. Judgment docket, judgment and docket book defined.

As used in this Chapter, unless the context clearly requires otherwise, the phrases "judgment docket", "judgment book", "docket book", and "judgment and docket book" include, without limitation, all records created or maintained by the clerk of superior court, pursuant to rules prescribed by the Director of the Administrative Office of the Courts pursuant to G.S. 7A-109, by the use of an electronic data entry system established by the Director pursuant to G.S. 7A-343. (1991, c. 167, s. 1.)

CASE NOTES

Cited in Haw River Land & Timber v. Lawyers Title Ins., 152 F.3d 275 (4th Cir. 1998).

§ 1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.

The clerks of the superior courts are authorized to enter the following judgments:

(1) All judgments of voluntary nonsuit.

(2) All consent judgments.

(3) In all actions upon notes, bills, bonds, stated accounts, balances struck, and other evidences of indebtedness within the jurisdiction of the superior court.

(4) All judgments by default final and default and inquiry as are authorized by Rule 55 of the Rules of Civil Procedure, and in this section provided.

(5) In all cases where the clerks of the superior court enter judgment by default final upon any debt secured by mortgage, deed of trust, conditional sale contract or other conveyance of any kind, either real or personal property, or by a pledge of property, the said clerks of the superior court are authorized and empowered to order a foreclosure of such mortgage, deed of trust, conditional sale contract, or other conveyance, and order a sale of the property so conveyed or pledged upon such terms as appear to be just; and the said clerks of the superior court shall have all the power and authority now exercised by the judges of the superior court to appoint commissioners to make such sales, to receive the reports thereof, and to confirm the report of sale or to order a resale, and to that end they are authorized to continue such causes from time to time as may be required to complete the sale, and in the final judgment in said causes they shall order the execution and delivery of all necessary deeds and make all necessary orders disbursing the funds arising from the sale, and may issue writs of assistance and possession upon ten days' notice to parties in possession. The commissioners appointed to make foreclosure sales, as herein authorized, may proceed to advertise such sales immediately after the date of entering judgment and order of foreclosure, unless otherwise provided in said judgment and order.

(6) All judgments on awards, or on Certificates of Accrued Arrearages, of the Industrial Commission in workers' compensation cases, as defined and provided for in G.S. 97-87.

In any tax foreclosure action pending on March 15, 1939 or thereafter brought under the provisions of G.S. 105-414 in which there is filed no answer which seeks to prevent entry of judgment of sale, the clerk of the superior court may render judgment of sale and make all necessary subsequent orders and judgments to the same extent as permitted by this section in actions brought to foreclose a mortgage. All such judgments and orders heretofore rendered or made by a clerk of the superior court in such tax foreclosure actions are hereby, as to the authority of the said clerk, ratified and confirmed. (1919, c. 156; C.S., s. 593; Ex. Sess., 1921, c. 92, s. 12; 1929, cc. 35, 49; 1939, c. 107; 1943, c. 301, s. 1; 1967, c. 954, s. 3; 2001-477, s. 2.)

Local Modification. — Vance: 1941, c. 139, s. 1.

Cross References. — As to voluntary dismissal, see G.S. 1A-1, Rule 41. As to entry of judgment by default by the clerk, see G.S. 1A-1, Rule 55(b)(1). As to enforcement of judgments, and exemptions, see G.S. 1C-1601 et seq. For section providing for agreements, orders and final awards under the Workers' Compensation Act to be entered as judgements by the clerk of the superior court, see G.S. 97-87.

Editor's Note. — The Rules of Civil Procedure, referred to in subdivision (4) above, are found in G.S. 1A-1.

Section 105-414, referred to in the last paragraph, was repealed by Session Laws 1971, c. 806, s. 3.

CASE NOTES

I. In General.
II. Consent Judgments.
III. Default Judgments.

I. IN GENERAL.

Constitutionality. — This section is not an unconstitutional interference with the jurisdiction of the judge of the court, as the clerk is a component part of the superior court, and the exercise of the power of the judge is recognized and preserved by the right of appeal. Thompson v. Dillingham, 183 N.C. 566, 112 S.E. 321 (1922).

Purpose of Provision on Tax Foreclosure Proceedings. — To put at rest any question as to the power of the clerk in tax foreclosure proceedings, the 1929 legislature gave clerks of the superior court express authority, except where answer was filed raising issues of fact, to make all orders necessary to consummate the foreclosure. The substance of this statute now appears as the last paragraph of this section. Travis v. Johnston, 244 N.C. 713, 95 S.E.2d 94 (1956).

This statute is an enabling act and does not deprive the superior court in term of its jurisdiction to render judgments; hence, the jurisdiction of a judge in term to render judgments upon voluntary nonsuits, by consent of the parties to the action, upon notes, bills, bonds, stated accounts, balances struck, or other evidences of debt within the jurisdiction of the superior court, is not affected by this section. The authority of the clerk is concurrent with and additional to that of the judge in term. Young v. Davis, 182 N.C. 200, 108 S.E. 630 (1921); Hill v. Huffines Hotel Co., 188 N.C. 586, 125 S.E. 266 (1924); Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925); Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

Effect of Judgments Entered by Clerk. — Judgments entered by the clerk, as authorized by this section, are judgments of the superior court, and are of the same force and effect, in all respects, as if entered in term and before a judge of the superior court. Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925).

Clerk Without Authority to Direct Disbursement of Restitution Funds. — The clerk of the superior court had no jurisdiction to enter an order directing disbursement of restitution funds which the defendant in a criminal proceeding had paid into court as result of a plea bargain. State v. McIntyre, 33 N.C. App. 557, 235 S.E.2d 920 (1977).

As to entry of judgments of voluntary nonsuit by the clerk, see McFetters v. McFetters, 219 N.C. 731, 14 S.E.2d 833 (1941); Moore v. Moore, 224 N.C. 552, 31 S.E.2d 690 (1944); In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962), all decided prior to enactment of the Rules of Civil Procedure (§ 1A-1).

Appeals from Clerk to Judge. — There is no provision in the statute regulating an appeal from a judgment entered by the clerk upon the authority of the statute upon the ground that such judgment is erroneous. It would seem that the appeal from such judgment, upon this ground, may be taken from the clerk to the judge, as provided by the statute for appeals from orders and judgments upon other grounds. The proper practice is for the complaining party to except to the judgment, as entered by the clerk, and to appeal therefrom to the judge, as in other cases provided for in the statute. An appeal will then lie from the judge of the superior court to the appellate court. Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925).

In the absence of statutory provision to that effect, the resident judge of a judicial district has no jurisdiction to hear and determine an appeal from a judgment of the clerk of the superior court of any county in his district rendered pursuant to the provisions of this section, except when such judge is holding the courts of the district by assignment under the statute, or is holding a term of court by exchange, or under a special commission from the Governor. Ward v. Agrillo, 194 N.C. 321, 139 S.E. 451 (1927); Howard v. Queen City Coach Co., 211 N.C. 329, 190 S.E. 478 (1937).

Applied in Schlagel v. Schlagel, 253 N.C. 787, 117 S.E.2d 790 (1961).

Cited in Ward v. Agrillo, 194 N.C. 321, 139 S.E. 451 (1927); Baker v. Corey, 195 N.C. 299, 141 S.E. 892 (1928); State ex rel. Standard Supply Co. v. Vance Plumbing & Elec. Co., 195 N.C. 629, 143 S.E. 248 (1928); County of Buncombe v. Penland, 206 N.C. 299, 173 S.E. 609 (1934); Beaufort County v. Bishop, 216 N.C. 211, 4 S.E.2d 525 (1939); Keen v. Parker, 217 N.C. 378, 8 S.E.2d 209 (1940); Johnson v. Sidbury, 225 N.C. 208, 34 S.E.2d 67 (1945); Pate v. R.L. Pittman Hosp., 234 N.C. 637, 68 S.E.2d 288 (1951); Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952); Morris v. Wilkins, 241 N.C. 507, 85 S.E.2d 892 (1955); Keith Tractor & Implement Co. v. McLamb, 252 N.C. 760, 114 S.E.2d 668 (1960); Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963); Price v. Horn, 30 N.C. App. 10, 226 S.E.2d 165 (1976); Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977); Peebles v. Moore, 302 N.C. 351, 275 S.E.2d 833 (1981).

II. CONSENT JUDGMENTS.

A consent judgment is the contract between the parties entered upon records with approval and sanction of the court, and is construed as is any other contract. Redevelopment Comm'n v. Hannaford, 29 N.C. App. 1, 222 S.E.2d 752 (1976).

Entry of Consent Judgment While Action Pending Before Referee. — The clerk of the superior court has jurisdiction under this section to sign a consent judgment in an action even while the action is pending before a referee. Weaver v. Hampton, 204 N.C. 42, 167 S.E. 484 (1933).

Ordinarily Consent Is Required to Set Aside a Consent Judgment. — A consent judgment cannot be modified or set aside, absent fraud or mutual mistake, without the consent of the parties. State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc., 52 N.C. App. 344, 278 S.E.2d 564 (1981).

When Consent Judgment Will Be Set Aside Without Consent of Parties. — Where parties solemnly consent that a certain judgment shall be entered on the record, it cannot be changed, altered or set aside without the consent of the parties unless it appears, upon proper allegation and proof and a finding of the court, that it was obtained by fraud or mutual mistake or that consent was not in fact given. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

A consent judgment set aside for cause must be set aside in its entirety. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

A consent judgment may be set aside for lack of consent with respect to but one of the parties. Brundage v. Foye, 118 N.C. App. 138, 454 S.E.2d 669 (1995).

Lack of Consent Renders Judgment Void. — The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement of the parties and promulgates it as a judgment. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

And Such Judgment Will Be Vacated Without Showing of Meritorious Defense. — When a purported consent judgment is void for want of consent of one of the parties, such party is not required to show a meritorious defense in order to vacate the void judgment. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

Findings on Consent Supported by Evidence Are Binding. — The findings of fact made by the trial judge in making a determination as to whether a party gave his consent, where there is some supporting evidence, are final and binding on the appellate court. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963).

Change in or Misconstruction of Law Not Grounds to Set Aside Consent Judgment. — A consent order is a final and binding decree. Neither a subsequent change in the law, nor counsel's misconstruction of the law at the time the consent order was entered, is a ground for setting aside the order. State ex rel. North

Carolina State Bd. of Registration v. Testing Labs., Inc., 52 N.C. App. 344, 278 S.E.2d 564 (1981).

A consent judgment will not be set aside even where a statute upon which it was predicated was later declared unconstitutional. State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc., 52 N.C. App. 344, 278 S.E.2d 564 (1981).

Proper Procedure to Set Aside Consent Judgment Must Be Followed. — Even with the consent of the parties, a consent judgment may not be later opened, changed or set aside unless the appropriate legal proceeding is instituted. State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc., 52 N.C. App. 344, 278 S.E.2d 564 (1981).

Proper procedure to set aside judgment for want of consent is by a motion in the cause. Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963); State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc., 52 N.C. App. 344, 278 S.E.2d 564 (1981).

Proper procedure to vacate a consent judgment for fraud or mutual mistake is by an independent action. State ex rel. North Carolina State Bd. of Registration v. Testing Labs., Inc., 52 N.C. App. 344, 278 S.E.2d 564 (1981).

III. DEFAULT JUDGMENTS.

Default judgment by the clerk is provided for by § 1A-1, Rule 55(b)(1), is subject to the jurisdictional proof required by G.S. 1-75.11 and is still controlled by subdivision (4) of this section, which empowers the clerk to enter all judgments by default and default and inquiry as are authorized by G.S. 1A-1, Rule 55. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

Judgment by default may be entered only when defendant has not answered; hence, when an answer has been filed, even though it was filed after time for answering had expired, the clerk is without authority, so long as the answer remains filed of record, to enter judgment by default. Bailey v. Davis, 231 N.C. 86, 55 S.E.2d 919 (1949).

Judgment by Default when Plaintiff Fails to Reply to Answer Seeking Affirmative Relief. — Where the parties are properly before the court and the subject matter of the action is also jurisdictional in the superior court, the clerk, having authority under this section, may render a judgment against the plaintiff by default for want of a reply to an answer setting up affirmative relief. Finger v. Smith, 191 N.C. 818, 133 S.E. 186 (1926).

A Default Judgment May Be Entered in an Action for Breach of Contract to Pay a Certain Sum. Freeman v. Hardee's Food Sys., 267 N.C. 56, 147 S.E.2d 590 (1966).

Action to Cancel Deed of Trust and Surrender Secured Notes. — The clerk of the superior court is given no authority to render a judgment by default final for want of an answer in an action for the cancellation of a deed of trust and for surrender of notes secured thereby upon payment by plaintiffs to defendant of the balance claimed by plaintiffs to be due upon the notes. Cook v. Bradsher, 219 N.C. 10, 12 S.E.2d 690 (1941).

Judgment Entered Without Authority May Be Set Aside on Motion. — A judgment by default final entered by the clerk in an instance in which he is without authority to enter such judgment is subject to attack, and may be set aside and vacated upon motion in the cause. Cook v. Bradsher, 219 N.C. 10, 12 S.E.2d 690 (1941).

When a clerk of the superior court, without statutory authority, enters a judgment by default final, it is subject to attack by motion in the cause and will be vacated. Freeman v. Hardee's Food Sys., 267 N.C. 56, 147 S.E.2d 590 (1966).

As Where Complaint Does Not Allege Sufficient Facts. — Clerk's judgment by default final should be vacated if the complaint does not allege facts sufficient to constitute a basis therefor. Freeman v. Hardee's Food Sys., 267 N.C. 56, 147 S.E.2d 590 (1966).

The entry of default by the clerk is not a final judgment and it is not appealable; rather, it is an interlocutory act looking toward the subsequent entry of a final judgment by default. However, an exception to such an interlocutory order, properly preserved, may be reviewed on an appeal from the final judgment. Looper v. Looper, 51 N.C. App. 569, 277 S.E.2d 78 (1981).

§ 1-209.1. Petitioner who abandons condemnation proceeding taxed with fee for respondent's attorney.

In all condemnation proceedings authorized by G.S. 40A-3 or by any other statute, the clerks of the superior courts are authorized to fix and tax the petitioner with a reasonable fee for respondent's attorney in cases in which the petitioner takes or submits to a voluntary nonsuit or otherwise abandons the proceeding. (1957, c. 400, s. 1; 2001-487, s. 38(a).)

CASE NOTES

Attorney's Fees Approved. — Town of N. Topsail Beach v. Forster-Pereira, — N.C. App. —, 670 S.E.2d 590, 2009 N.C. App. LEXIS 50 (2009). As the property owners' billing documents were competent evidence to support awarding attorney's fees in the amounts listed in the affidavits, and the town's contention that it had no opportunity to object to the admission of the billing documents was unfounded, the award of attorney's fees under G.S. 40A-8(b), G.S. 1.209.1, and G.S. 7A-305(d) were affirmed.

Authority to Tax Counsel Fees Generally. — With one exception, contained in this section, in eminent domain proceedings the court is authorized to tax counsel fees as a part of the costs only for an attorney appointed by the court to appeal for and protect the rights of any party in interest who is unknown or whose residence is unknown. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Cited in North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964); Housing Auth. v. Clinard, 67 N.C. App. 192, 312 S.E.2d 524 (1984).

§ 1-209.2. Voluntary nonsuit by petitioner in condemnation proceeding.

The petitioner in all condemnation proceedings authorized by G.S. 40A-3 or by any other statute is authorized and allowed to take a voluntary nonsuit. (1957, c. 400, s. 2; 2001-487, s. 38(b).)

Cross References. — As to voluntary dismissal, see G.S. 1A-1, Rule 41.

CASE NOTES

Right to Take Nonsuit Recognized Prior to Enactment of Section. — The right of a petitioner in a condemnation proceeding to submit to a voluntary nonsuit at any time prior to the vesting of title in condemnor was judicially recognized prior to the enactment of this section. North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

This section does not permit condemnor to avoid payment of compensation by taking a nonsuit after title to the property has vested in condemnor. North Carolina Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

§ 1-210. Return of execution; order for disbursement of proceeds.

In all executions issued by the clerk of the superior court upon judgment before the clerk of the superior court, under G.S. 1-209, and execution issued thereon, the sheriff shall make his return to the clerk of the superior court, who shall make the final order directing the sheriff to disburse the proceeds received by him under said execution: Provided, that any interested party may appeal to the superior court, where the matter shall be heard de novo. (1925, c. 222, s. 1.)

§§ 1-211 through 1-215: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to judgments by default, see G.S. 1A-1, Rule 55.

§ 1-215.1. Judgments or orders not rendered on Mondays validated.

In any case where, prior to the ratification of this section, any judgment or order, required to be rendered or signed on Monday, has been rendered or signed by any clerk of the superior court on any day other than Monday, such judgment or order is hereby declared to be valid and of the same force and effect as if the day on which it was signed or rendered had been a Monday; and any conveyance executed by any commissioner or other person authorized to make a conveyance in any action or special proceeding where the appointment of the commissioner or other person, the order of sale, the order of resale, or the confirmation of sale was made on a day other than Monday, is hereby declared to be valid and to have the same force and effect as if the day on which such judgment or order was rendered had been a Monday. (1943, c. 301, s. 4.)

CASE NOTES

Legislature Cannot Validate Void Judgment. — This section was directly intended to validate judgments not rendered on Monday as required by the former statute. However, it is well understood that the legislature has no power to validate a void judgment. Ange v. Owens, 224 N.C. 514, 31 S.E.2d 521 (1944).

§ 1-215.2. Time within which judgments or orders signed on days other than Mondays may be attacked.

From and after the 30th day of September, 1951, no action shall be brought or no motion in the cause shall be made to attack any judgment or order of any clerk of the superior court by reason of such judgment or order having been signed by such clerk of the superior court on any day other than Monday. (1951, c. 895, s. 1.)

§ 1-215.3. Validation of conveyances pursuant to orders made on days other than Mondays.

From and after the 30th day of September, 1951, any conveyance executed by any commissioner or other person authorized to make a conveyance in any action or special proceeding where the appointment of the commissioner or other person, the order of sale, the order of resale, or the order or confirmation of sale was made on a day other than Monday is hereby declared to be valid and to have the same force and effect as if the day on which such judgment or order was rendered had been a Monday. (1951, c. 895, s. 2.)

§ 1-216: Repealed by Session Laws 1943, c. 301, s. 3.

§ 1-217. Certain default judgments validated.

In every case where, prior to the first day of January, one thousand nine hundred and twenty-seven, a judgment by default final has been entered by the clerk of the superior court of any county in this State on a day other than Monday, contrary to G.S. 1-215 and 1-216, such judgment shall be deemed to have been entered as of the first Monday immediately following the default and is hereby to all intents and purposes validated; provided, however, nothing in this section shall be construed to affect the rights of any interested party, as provided in G.S. 1-220 other than for irregularity as to date of entry of the judgment by the clerk of the court. (1927, c. 187.)

Editor's Note. — Sections 1-215 and 1-220, referred to in this section, were repealed by Session Laws 1967, c. 954, s. 4. Section 1-216, also referred to in this section, was repealed by Session Laws 1943, c. 301, s. 3.

§ 1-217.1. Judgments based on summons erroneously designated alias or pluries validated.

In all civil actions and special proceedings where the defendants were served with summons and judgment thereafter entered, or any final decree made, and said judgments or decrees shall not be invalidated by reason of the fact that the summons, although designated an alias or pluries summons, was not actually such: Provided, that this section shall not apply where the first summons was issued more than five years preceding March 6, 1943. (1943, c. 532.)

§ 1-217.2. Judgments by default to remove cloud from title to real estate validated.

In every case where prior to the tenth day of October, 1969, a judgment by default final has been entered by the clerk of superior court of any county in this State in an action to remove cloud from title to real estate, the said judgment is hereby to all intents and purposes validated, and said judgment is hereby declared to be regular, proper and a lawful judgment in all respects according to the provisions of same. (1961, c. 628; 1971, c. 59; 1973, c. 1348, s. 1.)

§§ 1-218 through 1-222: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to relief from judgments or orders, see G.S. 1A-1, Rule 60.

§ 1-223. Against married persons.

In an action brought by or against a married person, judgment may be given against such married person for costs or damages or both, to be levied and collected solely out of such married person's separate estate or property. (Rev., s. 563; C.S., s. 603; 1977, c. 545.)

Cross References. — As to statutes concerning married persons generally, see G.S. 52-1 et seq.

CASE NOTES

Cited in McLeod v. Williams, 122 N.C. 451, 30 S.E. 129 (1898); Craddock v. Brinkley, 177 N.C. 125, 98 S.E. 280 (1919).

§§ 1-224 through 1-227: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to judgment divesting title of one party and vesting it in others, see G.S. 1A-1, Rule 70.

§ 1-228. Regarded as a deed and registered.

Every judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the rules and regulations prescribed for conveyances of similar property executed by the party. The party desiring registration of such judgment must produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate. All laws which are passed for extending the time for registration of deeds include such judgments, provided the conveyance, if actually executed, would be so included. (1850, c. 107, ss. 2, 4; R.C., c. 32, ss. 25, 27; 1874-5, c. 17, ss. 2, 4; Code, ss. 427, 429; Rev., ss. 567, 568; C.S., s. 608.)

Cross References. — As to distribution by court of marital property upon divorce, see G.S. 50-20.

CASE NOTES

Section Is Partially Superseded by § 47-27. — The provision of this section that judgments in which transfers of title are declared shall be registered under the same rules prescribed for deeds is superseded as to judgments in eminent domain proceedings by the later enactment of c. 148, Public Laws of 1917 (G.S. 47-27), exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration. Carolina Power & Light Co. v. Bowman, 228 N.C. 319, 45 S.E.2d 531 (1947).

Effect of Consent Decree. — A consent decree for the recovery of the lands in fee has the effect of conveying the legal estate in fee as between the parties, and is good as against third persons in the absence of fraud or collusion. Morris v. Patterson, 180 N.C. 484, 105 S.E. 25 (1920).

Agreement in Divorce Proceedings. — In an action brought by wife for a divorce a mensa, an agreement that the wife have a life estate in certain of her husband's lands, was binding as a consent judgment, even though a divorce had not been decreed therein; and it was not affected by the fact that an award of the children had therein been made with the sanction of the court. Morris v. Patterson, 180 N.C. 484, 105 S.E. 25 (1920).

Dismissal of assignee's motion to subject real estate to execution sale was reversed as the assignee's judgment lien attached to a husband's undivided interest in property formerly held as a tenancy by the entirety upon the date of his divorce, when the property was converted by law to a tenancy in common, and when he conveyed his interest to his former wife, she took title subject to the judgment lien; a consent order providing for a future transfer of the property was not a conveyance as it provided for a future transfer of the property, did not provide a legal description or state the location of the property, and was not filed with the register of deeds. Martin v. Roberts, 177 N.C. App. 415, 628 S.E.2d 812, 2006 N.C. App. LEXIS 964 (2006).

Marginal Cancellation Not Essential But Advisable. — When a decree of court adjudges a deed to be void, no marginal cancellation of record, as in the case of mortgages and deeds of trust, is required, but such cancellation is a commendable and convenient practice. Smith v. King, 107 N.C. 273, 12 S.E. 57 (1890).

Cited in Town of Ayden v. Lancaster, 197 N.C. 556, 150 S.E. 40 (1929); Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

§ 1-229. Certified registered copy evidence.

In all legal proceedings, touching the right of parties derived under such judgment, a certified copy from the register's books is evidence of its existence and of the matters therein contained, as fully as if proved by a perfect transcript of the whole case. (1850, c. 107, s. 3; R.C., c. 32, s. 26; 1874-5, c. 17, s. 3; Code, s. 428; Rev., s. 569; C.S., s. 609.)

CASE NOTES

A valid, properly authenticated judgment is admissible under North Carolina law. State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984), aff'd, 943 F.2d 407 (4th Cir. 1991), cert. denied, 502 U.S. 1110, 112 S. Ct. 1211, 117 L. Ed. 2d 450 (1992).

§ 1-230. In action for recovery of personal property.

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the value thereof in case a return cannot be had, and damages for taking and withholding the same. (C.C.P., s. 251; Code, s. 431; Rev., s. 570; C.S., s. 610.)

Cross References. — As to the provisional remedy of claim and delivery for personal property, see G.S. 1-472 et seq.

Legal Periodicals. — For note, "Stolen Artwork: Deciding Ownership Is No Pretty Picture," see 1993 Duke L.J. 337.

CASE NOTES

Where defendant in claim and delivery replevies the property, the form of the judgment against him should be for the possession of the property with damages for its detention and costs, or for the value thereof if delivery cannot be had and damages for its detention. Boyd v. Walters, 201 N.C. 378, 160 S.E. 451 (1931).

Judgment in the Alternative. — In claim and delivery, the judgment should be for the delivery of the property or its value. Oil Co. v. Grocery Co., 136 N.C. 354, 48 S.E. 781 (1904); Hendricks v. Ireland, 162 N.C. 523, 77 S.E. 1011 (1913). See also, Grubbs v. Stephenson, 117 N.C. 66, 23 S.E. 97 (1895).

Plaintiff May Recover Both Possession of Property and Damages for Its Detention. — In a proceeding for claim and delivery of personal property, a plaintiff is entitled in a single action to recover both possession of the property and damages for its detention. Bowen v. King, 146 N.C. 385, 59 S.E. 1044 (1907); Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Right to Recover Damages in Another Action After Regaining Possession. — While plaintiff could have had his damages assessed in a former action of claim and delivery brought by him for the wrongful seizure and detention of his property under an attachment in a suit brought by defendant against another, by virtue of this section, he was not required to take this course, but, after regaining possession could, in another action, recover damages for the injury done thereby. Bowen v. King, 146 N.C. 385, 59 S.E. 1044 (1907).

Where judgment is rendered against defendant and surety on his bond in claim and delivery, and no issue is submitted to the jury on the question of damages for the wrongful detention of the property, plaintiff is not estopped from bringing an independent action to recover such damages. Woody v. Jordan, 69 N.C. 189 (1873); Moore v. Edwards, 192 N.C. 446, 135 S.E. 302 (1926).

Where the defendant in claim and delivery proceedings had recovered of the plaintiff therein such damages for his wrongful seizure of defendant's property as were allowed by this section, and he had claimed no more, he could by an independent action, sue for such damages to his business as were caused by the malicious prosecution of the plaintiff's action, for such was not the subject of recovery in the claim and delivery proceedings. Ludwick v. Penny, 158 N.C. 104, 73 S.E. 228 (1911).

Measure of Damages When Property Cannot Be Returned. — The measure of damages for the wrongful taking of a tractor-trailer which cannot be returned was its value at the time of taking by the sheriff, with interest. Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959).

Measure of Damages When Property Is Beyond Control of Court. — In an action of claim and delivery, where it appeared that defendant was in possession under a contract of purchase, and the property had been placed beyond the control of the court, the equities would be adjusted and judgment rendered against defendant for the balance of the purchase money, with interest from the date of purchase. Hall v. Tillman, 115 N.C. 500, 20 S.E. 726 (1894).

Additional Cost Allowed by Consent. — Where defendant in claim and delivery of crops had replevied the property, and plaintiff had recovered final judgment, an additional item of expense or cost allowed by consent to plaintiff would be held as binding upon the parties on appeal. Hendricks v. Ireland, 162 N.C. 523, 77 S.E. 1011 (1913).

Running of Interest from Date of Judgment. — When the verdict of the jury only established that the plaintiff had wrongfully converted to his own use an excess of property in a certain sum over that required to pay off defendant's mortgage to him, the judgment thereon would not include interest from the time of the alleged conversion, but only from the date of the judgment, the conversion being a tort and the damages unliquidated; and when on appeal the judgment of the court was erroneous in this respect only, it would be ordered to be amended and affirmed. Penny v. Ludwick, 152 N.C. 375, 67 S.E. 919 (1910).

Issues and Judgment Should Cover Whole Case. — Where an action is brought to recover property conveyed to secure a debt, in order to avoid circuity of action, when the debt is denied the issues and judgment should cover the whole case, including the balance due upon the debt, and for the benefit of the sureties upon the undertaking the value of the property at the time of the seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. Griffith v. Richmond, 126 N.C. 377, 35 S.E. 620 (1900).

Liability of Surety on Replevin Bond. — Where plaintiff is successful in his action wherein claim and delivery have been issued, the surety on the defendant's replevin bond, given in accordance with this section, is liable for the full amount thereof to be discharged upon the return of the property and the payment of damages and cost recovered by plaintiff; or, if the return cannot be had, the judgment should order that the surety be discharged upon the payment to plaintiff of the amount of his recovery, within the amount limited in the bond, for the value of the property at the time of its wrongful taking and detention, with interest thereon, together with the cost of the action. Orange Trust Co. v. Hayes, 191 N.C. 542, 132 S.E. 466 (1926).

Cited in Asher v. Reizenstein, 105 N.C. 213, 10 S.E. 889 (1890); Penny v. Ludwick, 152 N.C. 375, 67 S.E. 919 (1910); Harrell v. Tripp, 197 N.C. 426, 149 S.E. 548 (1929); Green v. Carroll, 205 N.C. 459, 171 S.E. 627 (1933); Moore v. Humphrey, 247 N.C. 423, 101 S.E.2d 460 (1958); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960); McKissick v. McKissick, 129 N.C. App. 252, 497 S.E.2d 711 (1998).

§ 1-231. What judge approves judgments.

In all cases where a judgment, decree or order of the superior court is required to be approved by a judge, it shall be approved by the judge having jurisdiction of receivers and injunctions. (1876-7, c. 223, s. 3; 1879, c. 63; 1881, c. 51; Code, s. 432; Rev., s. 571; C.S., s. 611.)

CASE NOTES

Restraining orders must be made returnable before the judge in the district in which the action is pending. Galbreath v. Everett, 84 N.C. 546 (1881).

Motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district, or one holding the courts thereof by exchange, at the option of the mover. Corbin v. Berry, 83 N.C. 27 (1880).

§ 1-232. Judgment roll.

Unless the party or his attorney furnishes a judgment roll or the documents referred to in this section are already on file, the clerk, immediately after entering the judgment, shall attach together and file the following papers which constitute the judgment roll:

(1) In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

(2) In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way

involving the merits and necessarily affecting the judgment. (C.C.P., s. 253; Code, s. 434; Rev., s. 572; C.S., s. 612; 2003-59, s. 1.)

CASE NOTES

Section Directory. — The provisions of this section as to the judgment roll should be complied with, but they are directory, and the clerk's failure to "attach together" the papers did not vitiate the judgment which was entered of record and regular in form. Brown v. Harding, 171 N.C. 686, 89 S.E. 222 (1916). But see, Dewey v. Sugg, 109 N.C. 328, 13 S.E. 923 (1891), to the effect that a judgment to constitute a lien must be docketed in the "prescribed manner."

Where a party is seeking to establish his chain of title and introduces into evidence a deed executed by a commissioner, but fails to offer in evidence the judgment roll to establish that the person named was in fact a commissioner, and had authority to convey, there is a break in the chain of title. Keller v. Hennessee, 11 N.C. App. 43, 180 S.E.2d 452 (1971).

Cited in Williams v. Trammell, 230 N.C. 575, 55 S.E.2d 81 (1949).

§ 1-233. Docketed and indexed.

Every judgment of the superior or district court, affecting title to real property, or requiring in whole or in part the payment of money, shall be indexed and recorded by the clerk of said superior court on the judgment docket of the court. The docket entry must contain the file number for the case in which the judgment was entered, the names of the parties, the address, if known, of each party and against whom judgment is rendered, the relief granted, the date, hour, and minute of the entry of judgment under G.S. 1A-1, Rule 58, and the date, hour, and minute of the indexing of the judgment. The clerk shall keep a cross-index of the whole, with the dates and file numbers thereof; however, error or omission in the entry of the address or addresses shall in no way affect the validity, finality or priority of the judgment docketed. (Sup. Ct. Rule VIII; C.C.P., s. 252; Code, s. 433; Rev., s. 573; 1909, c. 709; C.S., s. 613; 1929, c. 183; 1943, c. 301, s. 41/2; 1971, c. 268, s. 6; 1981, c. 745, s. 1; 2003-59, s. 2.)

Local Modification. — Durham: 1929, c. 88.

Legal Periodicals. — For article on change of names by legal process, see 16 N.C.L. Rev. 187 (1938).

CASE NOTES

Necessity of Strict Compliance. — The observance of this law is regarded as so important to subsequent purchasers and mortgagees that, wherever the system of docketing obtains, a very strict compliance with its provisions in every respect is required. Jones v. Currie, 190 N.C. 260, 129 S.E. 605 (1925).

Liability of Clerk for Failure to Index Judgment. — An action of tort will lie against the clerk upon his failure to index a judgment where such neglect results in damage to the plaintiff. Shackelford v. Staton, 117 N.C. 73, 23 S.E. 101 (1895).

Duty of Judgment Creditor to See Judgment Properly Docketed. — It is the duty of a judgment creditor to see that his judgment is properly docketed. If the clerk neglects to docket the judgment, subsequent encumbrancers and claimants under the judgment debtor are not to be prejudiced thereby, and the remedy of the judgment creditor is against the clerk for loss suffered by reason of failure to docket the judgment. Holman v. Miller, 103 N.C. 118, 9 S.E. 429 (1889).

Docketing of Judgment in Another County. — Where the transcript of a judgment recovered in one county is sent to another for docketing, the transcript must not only be docketed, but must also be entered on the cross-index, giving the names of all the judgment debtors and the name of at least one plaintiff. Dewey v. Sugg, 109 N.C. 328, 13 S.E. 923 (1891); Jones v. Currie, 190 N.C. 260, 129 S.E. 605 (1925).

When there are several judgment debtors in the docketed judgment the index must specify the name of each one, because the index as to one would not point to all or any of the others. The purpose is so that the index shall point to a judgment against the particular person inquired about if there is a judgment on the docket against him. A judgment not thus fully docketed does not serve the purpose of the statute, and is not docketed in contemplation of law. Dewey v. Sugg, 109 N.C. 328, 13 S.E. 923 (1891); Jones v. Currie, 190 N.C. 260, 129 S.E. 605 (1925).

Initials in Index. — "J. Mizell" or "Jo. Mizell" is a sufficient cross-indexing for a judgment against "Josiah Mizell." Valentine v. Britton, 127 N.C. 57, 37 S.E. 74 (1900).

One Cross-Indexing Not Sufficient for Two Judgments. — One cross-indexing is insufficient for two judgments, even though they appear on the same page and include the same parties, and only the first judgment on the page will constitute a lien. Valentine v. Britton, 127 N.C. 57, 37 S.E. 74 (1900).

Judgment Signed Out of Session. — The provisions of this section that judgments relate to the first day of the term (now session) apply when the judgment was rendered and docketed during the term (session) or within 10 days after adjournment thereof, and not to a judgment signed out of term (session) by the consent of the parties, except where third persons are prejudiced; hence, the position could not be maintained that a sale of lands to be made by commissioners appointed to sell property, etc., was not made within the time prescribed by the order, under the theory that the date of the order was to relate back to the commencement of the term (session), when by consent the order was signed after the term (session) of court, and the sale occurred within the time prescribed from the actual date on which the judge signed it. Conestee Chem. Co. v. Long, 184 N.C. 398, 114 S.E. 465 (1922).

Consent Judgments. — For case holding that the provision that judgments rendered during a term (now session) should relate back to the first day thereof does not apply to judgments by consent, see Hood v. Wilson, 208 N.C. 120, 179 S.E. 425 (1935).

Judgment Against Corporations. — A judgment against a corporation does not relate back, by implication of law, to the beginning of the term (session), so as to create a lien on the corporate property as against the vesting of the title in a receiver who had in the meantime been appointed. Odell Hdwe. Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

Cited in Pentuff v. Park, 195 N.C. 609, 143 S.E. 139 (1928); Henry v. Sanders, 212 N.C. 239, 193 S.E. 15 (1937).

§ 1-234. Where and how docketed; lien.

Upon the entry of a judgment under G.S. 1A-1, Rule 58, affecting the title of real property, or directing in whole or in part the payment of money, the clerk of superior court shall index and record the judgment on the judgment docket of the court of the county where the judgment was entered. The judgment may be docketed on the judgment docket of the court of any other county upon the filing with the clerk thereof of a transcript of the original docket. The judgment lien is effective as against third parties from and after the indexing of the judgment as provided in G.S. 1-233. The judgment is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for 10 years from the date of the entry of the judgment under G.S. 1A-1, Rule 58, in the county where the judgment was originally entered. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the 10 years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith.

A judgment docketed pursuant to G.S. 15A-1340.38 shall constitute a lien against the property of a defendant as provided for under this section. (C.C.P., s. 254; Code, s. 435; Rev., s. 574; C.S., s. 614; 1971, c. 268, s. 7; 1998-212, s. 19.4(i); 2003-59, s. 3.)

Legal Periodicals. — For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

For article, "North Carolina's Real Estate Recording Laws: The Ghost of 1885," see 28 N.C. Cent. L.J. 199 (2006).

CASE NOTES

I. In General.
II. Creation of Lien.
III. Priorities.
IV. Enforcement and Loss of Lien.

I. IN GENERAL.

Liens on Real Estate and Personalty Distinguished. — A judgment creditor acquires a lien on the judgment debtor's real estate by docketing. But he acquires no lien on the personalty until there has been a valid levy. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

As to liens upon personal property, see also, Selby v. Dixon, 11 N.C. 424 (1826); Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894); Summers Hdwe. Co. v. Jones, 222 N.C. 530, 23 S.E.2d 883 (1943); Porter v. Citizens Bank of Warrenton, Inc., 251 N.C. 573, 111 S.E.2d 904 (1960).

Applicability of Section to Legal and Equitable Estates. — This section is sufficiently comprehensive to include equitable as well as legal estates. Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905).

Judgment Constitutes Lien on All Defendant's Interest in Realty. — A judgment, from the time it is docketed, constitutes a lien on all the interest of whatever kind the defendant had in real estate, whether it is such as may be seized under execution or not. Hoppock, Glenn & Co. v. Shober, 69 N.C. 154 (1873).

But property converted from its original nature, such as land into money, is not subject to the lien of a judgment, or to sale under execution issued thereon, although the statute gives a lien, under the judgment, on all the real property of the debtor in the county. Dixon v. Dixon, 81 N.C. 323 (1879); Clifton v. Owens, 170 N.C. 607, 87 S.E. 502 (1916).

Homestead Right Not Subject to Judgment Lien. — The mere right of homestead is not such an estate or interest in lands as is subject to a lien by judgment. Kirkwood v. Peden, 173 N.C. 460, 92 S.E. 264 (1917).

But Reversionary Interest May Be Subjected. — The only reason for keeping a judgment in full force and effect during the existence of the homestead is to subject the reversionary interest to its payment when the homestead expires, as such interest cannot be sold under execution during the life of the homestead. Kirkwood v. Peden, 173 N.C. 460, 92 S.E. 264 (1917).

A docketed judgment is a lien on all the land of the debtor in the county where docketed from the date of the docketing, and the creditor may presently enforce the same on all the debtor's land outside of the homestead boundaries, but must await the termination of the homestead estate to subject the land to which it pertains, and no act of the debtor can change or impair the creditor's rights under such lien. Vanstory v. Thornton, 112 N.C. 196, 17 S.E. 566 (1893).

A judgment for taxes is a lien on all of the property owned by the judgment debtor in the county. Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991).

A judgment upon individual debt against the holder of a mere legal title held in trust for another constitutes no lien upon the land so held. Jackson v. Thompson, 214 N.C. 539, 200 S.E. 16 (1938).

An estate created by a deed conveying standing timber, with a right to cut and remove the same within a specified time, is, while it exists, subject to the lien of a docketed judgment and to the ordinary methods of enforcing collection of the same as in other cases of realty. Fowle v. McLean, 168 N.C. 537, 84 S.E. 852 (1915).

Where title is taken in the name of some third person, a docketed judgment constitutes no lien on real property purchased by the debtor. In such case the creditor has a right to follow the fund in equity, but the institution of a suit for that purpose confers no lien, and can have no further effect than to give the creditor first bringing his suit a priority over other creditors, and to disable the holder of the property from defeating, by a conveyance, the object of the proceedings. Dixon v. Dixon, 81 N.C. 323 (1879).

Judgments Against Land Held in Remainder. — The docketing of judgments against a debtor who holds land in remainder, dependent upon a life estate in another, creates a lien upon such estate which, not being susceptible of immediate occupancy, is not protected from sale under execution by the Constitution and laws relating to homestead exemptions. Stern Bros. v. Lee, 115 N.C. 426, 20 S.E. 736 (1894).

Where a debtor executes a deed in trust to secure certain debts therein mentioned, and after the registration of the deed a creditor obtains judgment and has the same docketed, the judgment, under the provisions of this section, is a lien upon the equitable estate of the debtor. McKeithan v. Walker, 66 N.C. 95 (1872).

Only Land Situated in County of Docketing Is Affected. — A docketed judgment is a lien only upon so much of the real property of the defendant as is situated in the county where the same is docketed. King v. Portis, 77 N.C. 25 (1877); Helsabeck v. Vass, 196 N.C. 603, 146 S.E. 576 (1929); Jackson v. Thompson, 214 N.C. 539, 200 S.E. 16 (1938); Moore v. Jones, 226 N.C. 149, 36 S.E.2d 920 (1946).

A docketed judgment gives no peculiar lien upon any particular parcel of land. Bryan v. Dunn, 120 N.C. 36, 27 S.E. 37 (1897).

Nor Vest Any Estate in Land. — The lien created by docketing a judgment does not vest any estate in the property subject to it in the judgment creditor, but only secures to the creditor the right to have the property applied to the satisfaction of his judgment, and such lien extends only to such estate, legal or equitable, as may be sold or disposed of at the time it attaches. Bruce v. Nicholson, 109 N.C. 202, 13 S.E. 790 (1891).

Liability of Trustee. — A trustee who has a surplus in his hands after the sale of land under a conveyance to secure money loaned thereunder, who is affected with notice by docketing of judgments against the trustor, or the one who otherwise is entitled to receive it, under the provisions of this section may not pay the same to the trustor without incurring liability; and in an action brought for that purpose, the judgment creditors are necessary parties, and a final judgment therein entered without them is reversible error. Barrett v. Barnes, 186 N.C. 154, 119 S.E. 194 (1923).

A judge cannot validly issue an order to the clerk not to docket a judgment pending the fulfillment of a conditional order directed to the parties. Hopkins v. Bowers, 111 N.C. 175, 16 S.E. 1 (1892).

Comprehensive Bankruptcy Relief. — An action by debtors to quiet whatever liability might arise from creditors' judgments under this section which might survive their discharge and eventually impair any exemptable interests in real property they acquire in the future is not necessary, as the comprehensive relief afforded by a Chapter 7 discharge protects the debtors' interests in property they acquire after bankruptcy and assures them a "fresh start" in their financial affairs. Clowney v. North Carolina Nat'l Bank, 19 Bankr. 349 (Bankr. M.D.N.C. 1982).

Rooker-Feldman Doctrine. — Homeowner claimed that defendants violated her civil and constitutional rights by obtaining a judgment pursuant to G.S. 1-234 against her in state court; however, in order for the homeowner to prevail in the instant court, it would have to undo the state-court judgment and declare that judgment invalid, and if the homeowner wanted such relief from the state-court judgment, she was to find it in state court as the Rooker-Feldman doctrine prohibited obtaining such relief. Moore v. Idealease of Wilmington, 465 F. Supp. 2d 484, 2006 U.S. Dist. LEXIS 90507 (E.D.N.C. 2006).

Applied in Dillard v. Walker, 204 N.C. 67, 167 S.E. 632 (1933); Equitable Life Assurance Soc'y v. Russos, 210 N.C. 121, 185 S.E. 632 (1936); McCollum v. Smith, 233 N.C. 10, 62 S.E.2d 483 (1950); In re Knapp, 285 Bankr. 176, 2002 Bankr. LEXIS 1407 (Bankr. M.D.N.C. 2002).

Cited in McKeithan v. Walker, 66 N.C. 95 (1872); Rhyne v. McKee, 73 N.C. 259 (1875); Mannix v. Ihrie, 76 N.C. 299 (1877); Pasour v. Rhyne, 82 N.C. 149 (1880); Lyon v. Russ, 84 N.C. 588 (1881); Morton v. Rippy, 84 N.C. 611 (1881); Brown v. Harding, 170 N.C. 253, 86 S.E. 1010 (1915); Boyd v. Bristol Typewriter Co., 190 N.C. 794, 130 S.E. 858 (1925); Cheek v. Walden, 195 N.C. 752, 143 S.E. 465 (1928); Jones v. Rhea, 198 N.C. 190, 151 S.E. 255 (1930); Osborne v. Board of Educ., 207 N.C. 503, 177 S.E. 642 (1935); Crow v. Morgan, 210 N.C. 153, 185 S.E. 668 (1936); Scales v. Scales, 218 N.C. 553, 11 S.E.2d 569 (1940); Edmonds v. Wood, 222 N.C. 118, 22 S.E.2d 237 (1942); Dula v. Parsons, 243 N.C. 32, 89 S.E. 797 (1955); Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955); Page v. Miller, 252 N.C. 23, 113 S.E.2d 52 (1960); Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988); Andrews v. Crump, 984 F. Supp. 393 (W.D.N.C. 1996); Haw River Land & Timber v. Lawyers Title Ins., 152 F.3d 275 (4th Cir. 1998).

II. CREATION OF LIEN.

The mere rendition of a judgment will not constitute a lien. Alsop v. Mosely, 104 N.C. 60, 10 S.E. 124 (1889); Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

Nor does the execution fix the lien. Pasour v. Rhyne, 82 N.C. 149 (1880).

Docketing Fixes the Lien. — The docketed judgment fixes the lien and the debtor cannot escape it; if he sells thereafter, the purchaser takes subject to the statutory lien given by this section. Moore v. Jordan, 117 N.C. 86, 23 S.E. 259 (1895); Moore v. Jones, 226 N.C. 149, 36 S.E.2d 920 (1946). See also, Holman v. Miller, 103 N.C. 118, 9 S.E. 429 (1889).

A judgment lien in North Carolina is neither created nor perfected until it is docketed. Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

No lien is created by a judgment until the judgment is docketed. Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

And Fixes the Rights of Judgment Creditors. — The docketing of the judgment having fixed the lien, the rights of the judgment creditor become fixed thereby, and the subsequent registration of a deed or mortgage to or on the same property cannot divest those rights.

Cowen v. Withrow, 112 N.C. 736, 17 S.E. 575 (1893).

Judgment by Confession. — Even though a judgment by confession is given out of the ordinary course of procedure, when docketed it at once becomes a lien upon the judgment debtor's real property. Sharp v. Danville, M. & S.R.R., 106 N.C. 308, 11 S.E. 530 (1890); Keel v. Bailey, 214 N.C. 159, 198 S.E. 654 (1938).

No Charge Against Property Is Created Until It Is Acquired. — The language of this section which provides for a lien on real property acquired by judgment debtors within 10 years of the entry of the judgment does not create a charge against or interest in real property until the real property is acquired by the judgment debtor. Clowney v. North Carolina Nat'l Bank, 19 Bankr. 349 (Bankr. M.D.N.C. 1982).

Judgment creditors have no charge against or interest in the real property the debtors might acquire in the future, as such judgments cannot create a "judicial lien" until the creditors attach the liability arising from the judgments upon some property of the debtors. Clowney v. North Carolina Nat'l Bank, 19 Bankr. 349 (Bankr. M.D.N.C. 1982).

When Lien Attaches to After-Acquired Lands. — Under this section the lien of docketed judgments attaches to after-acquired lands in the same county at the moment that the title vests in the judgment debtor, and the proceeds of a sale under such judgments should be distributed pro rata without reference to the day when they were docketed. Moore v. Jordan, 117 N.C. 86, 23 S.E. 259 (1895).

The lien extends to and embraces only such estate as the judgment debtor has at the time of the docketing thereof, or thereafter acquires while the judgment subsists. Thompson v. Avery County, 216 N.C. 405, 5 S.E.2d 146 (1939). See also, Durham v. Pollard, 219 N.C. 750, 14 S.E.2d 818 (1941).

The lien of a judgment attaches when the land is conveyed to the judgment debtor, and is superior to any equity which his grantor could retain by a parol agreement or a subsequently recorded conveyance. Colonial Trust Co. v. Sterchie Bros., 169 N.C. 21, 85 S.E. 40 (1915).

Date of Lien on Subsequently Acquired Real Property. — Under this section, a docketed judgment constitutes a lien on the real property owned by the debtor at the time of the docketing or which the debtor subsequently acquires within ten years from the date of the judgment. However, the general rule is that, with respect to property acquired after a judgment lien is docketed, the lien is created when the property is acquired, not when the judgment is docketed. Carter v. HCL Leasing Corp. (In re Martin), 87 Bankr. 394 (Bankr. E.D.N.C. 1988).

Docketing Requirements Must Be Strictly Complied with. — To constitute a lien on real estate, the judgment must be docketed in the office of the clerk of the superior court of the county where such property is situated. And, for a lien to be obtained, the requirement as to docketing must be strictly complied with. Southern Dairies, Inc. v. Banks, 92 F.2d 282 (4th Cir. 1937), cert. denied, 302 U.S. 761, 58 S. Ct. 368, 82 L. Ed. 590 (1937); Norman Lumber Co. v. United States, 223 F.2d 868 (4th Cir. 1955), cert. denied, 350 U.S. 902, 76 S. Ct. 181, 100 L. Ed. 792 (1955).

But docketing is not a condition precedent to the enforcement of the judgment by final process. Bernhardt v. Brown, 122 N.C. 587, 29 S.E. 884 (1898). See also, Holman v. Miller, 103 N.C. 118, 9 S.E. 429 (1889).

Docketing First in County of Rendition. — A judgment rendered in one county cannot be docketed in another without having been first docketed in the county where it was rendered. McAden v. Banister, 63 N.C. 478 (1869); Essex Inv. Co. v. Pickelsimer, 210 N.C. 541, 187 S.E. 813 (1936).

Sufficiency of Transcript Sent to Foreign County. — The transcript of a judgment sent from one county to another to be docketed, which sets out the date of its rendition, the names of the parties to the suit, the amount of the judgment and the costs of the action, is a sufficient docketing to create a lien on the defendant's land. Wilson v. Patton, 87 N.C. 318 (1882); Lee v. Bishop, 89 N.C. 256 (1883).

Interlocutory Judgment. — An interlocutory judgment containing recitals made only for the purpose of directing a commissioner how to proceed in the sale of land, where the land was not sold, did not affect the rights of the parties. Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905).

III. PRIORITIES.

Record as Notice. — A plaintiff will be charged with notice of judgment entered at a regular term of court as of the time of the entry. Sluder v. Graham, 118 N.C. 835, 23 S.E. 924 (1896).

Liens Ranked in Order of Docketing. — Where several judgments have been docketed against the same debtor subsequent to his acquisition of real property, the liens of such judgments take rank or priority with reference to such property according to the dates when such judgments were respectively docketed. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Including Liens of Justice's Judgments. — If a number of justice's judgments are docketed in the superior court, they will, under this section, be a lien upon the land of the defendant from the time when they were docketed, and will have a priority over a judgment obtained in court by another person against the same defendant at a subsequent time; and even though an execution is issued on the latter and the sheriff levies it on the land and advertises it for sale, yet if before the sale executions are issued on a part of the justice's docketed judgments and placed in the hands of the sheriff, the proceeds of the sale of the land must first be applied to the payment of all the justice's judgments. Perry v. Morris, 65 N.C. 221 (1871).

And Those of Consent Judgments. — Consent judgments, under this section, have priority in accordance with the priority of docketing, since the provisions of G.S. 1-233 are not applicable to consent judgments. Hood v. Wilson, 208 N.C. 120, 179 S.E. 425 (1935).

Judgment Prevails over Later Attachment. — Where a judgment has become a lien on property of defendant before the levy of an attachment on the same property, the judgment creditor will prevail over the attaching creditor. Porter v. Citizens Bank of Warrenton, Inc., 251 N.C. 573, 111 S.E.2d 904 (1960).

Docketed Judgment Superior to Unrecorded Deed. — The lien of a regularly docketed judgment is superior to a claim under an unrecorded deed from the judgment debtor. Eaton v. Doub, 190 N.C. 14, 128 S.E. 494 (1925).

Where there was a lien by judgment under this section against the holder of an equitable title to lands, who also held a registered mortgage from his grantee under an unregistered deed to secure the balance of the purchase price, his deed, registered after the lien of the judgment had taken effect, could not render the lien under the mortgage superior to the judgment lien, and equity would remove the lien of the mortgage cloud upon the title of the purchaser at the execution sale holding the sheriff's deed. Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905); Mills v. Tabor, 182 N.C. 722, 109 S.E. 850 (1921).

A judgment is not a lien upon lands of the judgment debtor that he had previously conveyed bona fide either by registered deed or mortgage upon which foreclosure has been made. Helsabeck v. Vass, 196 N.C. 603, 146 S.E. 576 (1929).

Where a judgment is entered during the term, the lien has no application against claimants who have in the meantime acquired bona fide title; in such case, the law will take notice of fractions of a day in favor of such a purchaser. Receivers of the debtor should be classed as purchasers. Odell Hdwe. Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

A docketed judgment has priority over a subsequently recorded mortgage. Moore v. Jones, 226 N.C. 149, 36 S.E.2d 920 (1946).

Where, after the recordation of a judgment, the judgment debtor executed a mortgage on certain of his land, and the land was foreclosed under prior mortgages antedating the judgment, and the judgment debtor made no claim to his homestead, the judgment creditor had a preference in the proceeds of the sale over the subsequent mortgage. Duplin County v. Harrell, 195 N.C. 445, 142 S.E. 481 (1928).

The lien of a judgment duly docketed in the county where the land lies is superior to that of a subsequently registered mortgage on land outside of the debtor's allotted homestead, and therefore, the proceeds of the sale of such land should first be applied to the payment of the judgment debt. Gulley v. Thurston, 112 N.C. 192, 17 S.E. 13 (1893).

Subsequent Purchaser Takes Subject to Lien. — Upon the docketing of a judgment it becomes a lien on all the land to which the judgment debtor has title for a period of 10 years from the time of its docketing, and the land is not relieved of the judgment lien by a subsequent transfer of title by the judgment debtor. Moses v. Major, 201 N.C. 613, 160 S.E. 890 (1931).

A judgment creditor or his assignee has a lien on the lands of the judgment debtor, and where the judgment is duly docketed, under this section, the lien exists against a subsequent purchaser from the judgment debtor, carrying with it the right to subject the property and improvements thereto to the satisfaction of the debt, but the judgment creditor or his assignee has no title or estate in the lands. Byrd v. Pilot Fire Ins. Co., 201 N.C. 407, 160 S.E. 458 (1931).

An adverse holder of land under § 1-40, pursuant to an unrecorded deed, has title superior to the lien of a judgment based on this section, but acquired and registered after the elapse of the 20-year period against the original grantor. Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928).

A prior assignee of a judgment for a valuable consideration takes the title of his assignor unaffected by a subsequent assignment of the same judgment by the assignor to another for a valuable consideration without notice of the prior assignment, in the absence of fraud, even though the second assignee has his assignment first recorded on the judgment docket, there being no statute requiring an assignment of a judgment to be recorded. In re Wallace, 212 N.C. 490, 193 S.E. 819 (1937).

Judgment Lien Is Subject to Homestead. — A lien on the lands of the judgment debtor is subject to the homestead interest provided by the Constitution. Farris v. Hendricks, 196 N.C. 439, 146 S.E. 77 (1929).

When an heir acquires land or property to be treated as realty subsequent to the docketing of several judgments against him, the judgment creditors are not entitled to priority in accordance with the date of the docketing of their respective judgments, but are entitled only to application of the property to the judgments pro rata. Linker v. Linker, 213

N.C. 351, 196 S.E. 329 (1938).

Effect of Execution Sale Under Prior Judgment. — A judgment is not a lien upon the lands of the judgment debtor conveyed under execution sale of a prior docketed judgment. Helsabeck v. Vass, 196 N.C. 603, 146 S.E. 576 (1929).

Where judgment creditor and mortgagee under a prior registered mortgage claim land from the same person, they are ordinarily estopped to deny the title of their common source, but where the deed from this common source, upon which the mortgagor's title depends, has been registered after the judgment lien has taken effect, this element of estoppel does not apply to the purchaser at the execution sale. Mills v. Tabor, 182 N.C. 722, 109 S.E. 850 (1921).

The effect of a sale under a junior judgment is to pass the debtor's estate encumbered with the lien of an older docketed judgment; and the effect of a sale under both is to vest the title in the purchaser, and transfer the liens, in the same order of priority to the proceeds of sale. Cannon v. Parker, 81 N.C. 320 (1879).

Merger. — Where a creditor sues on his judgment constituting a lien on the homestead of the debtor and obtains a new judgment, the first judgment is not merged in the second. Springs v. Pharr, 131 N.C. 191, 42 S.E. 590 (1902).

Satisfaction of Judgment After Successive Transfers of Different Tracts. — Where there is a judgment lien on land, part of which is sold by the debtor, the remaining portion will be first sold in satisfaction of the judgment before resorting to the land first sold, and this rule extends to a purchaser of the remaining land from the judgment debtor, but this equity is never enforced against the creditor when he will in any substantial way be prejudiced by it. Brown v. Harding, 170 N.C. 253, 86 S.E. 1010 (1915), rehearing denied, 171 N.C. 686, 89 S.E. 222 (1916).

Where there was a conflict as to the priorities of the secured creditors, plaintiff, whose docketed judgment constituted a lien on the resulting trust in a deed of trust, could not enforce his lien by the ordinary process of execution, but had to resort to an action in the nature of an equitable execution where an account could be taken. Trimble v. Hunter, 104 N.C. 129, 10 S.E. 291 (1889).

IV. ENFORCEMENT AND LOSS OF LIEN.

The life of the lien of a judgment is 10 years from the date of its rendition in the superior court. Lupton v. Edmundson, 220 N.C. 188, 16 S.E.2d 840 (1941).

The lien of a judgment created upon real estate by the provisions of this section is for a period of 10 years from the date of rendition of the judgment and such lien ceases to exist at the end of that time, unless suspended in the manner set out in the statute. It is in the interest of public policy that this statute should be strictly construed. Cheshire v. Drake, 223 N.C. 577, 27 S.E.2d 627 (1943).

Where a judgment rendered in another county is docketed in the county in which the judgment debtor owns realty, the lien of the judgment expires at the end of 10 years from the date of rendition of the judgment and not the date of docketing. North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

Lien Is Lost if Sale Not Made in Ten Years. — This section and G.S. 1-306 clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. Hence, it follows that the lien upon lands of a docketed judgment is lost by the lapse of 10 years from the date of the docketing, and notwithstanding execution was begun, but not completed, before the expiration of the 10 years. McCullen v. Durham, 229 N.C. 418, 50 S.E.2d 511 (1948).

An action to enforce the lien by condemning land of the judgment debtor to be sold is barred by the statute when sale of the land cannot be made and concluded within the 10-year period, even though the action is instituted within such period, when the running of the statute is not interrupted at any time or in any manner by order restraining and proceeding on the judgment. Lupton v. Edmundson, 220 N.C. 188, 16 S.E.2d 840 (1941).

The execution adds nothing by way of prolongation to the life of the lien. McCullen v. Durham, 229 N.C. 418, 50 S.E.2d 511 (1948).

The sole office of the execution is to enforce the lien by the sale of the land upon which it has attached. Pasour v. Rhyne, 82 N.C. 149 (1880); McCullen v. Durham, 229 N.C. 418, 50 S.E.2d 511 (1948).

When Mandate to Sell Expires. — A judgment recovered in the superior court for the payment of money is a lien on land from the moment it is docketed, and executions issued to enforce collection are returnable to the next term of the court beginning not less than 40 days after they are issued. With the return day the mandate expires and the power to sell land under the particular writ is thereafter withheld. Jeffreys v. Hocutt, 193 N.C. 332, 137 S.E. 177 (1927).

Time for Issuing Execution. — Leave to issue execution upon a docketed judgment may be granted at any time within 10 years from the docketing. Adams v. Guy, 106 N.C. 275, 11 S.E. 535 (1890).

Trial court did not err in dismissing a judgment assignee's complaint to enforce a judgment entered because the assignee failed to assert his claim within the ten-year statute of limitations, G.S. 1-47(1), and nothing in the plain language of G.S. 1A-1, N.C. R. Civ. P. 62(a), indicated that the legislature intended the automatic stay from execution to add thirty days to the ten-year statute of limitations on commencing an action to enforce a judgment; because the issuance of an execution does not prolong the life of a judgment lien, the thirty-day stay on the issuance of an execution or proceedings to enforce the judgment will also not operate to toll the statute of limitations for commencement of an action to enforce a judgment. Fisher v. Anderson, — N.C. App. —, 667 S.E.2d 292, 2008 N.C. App. LEXIS 1806 (2008).

Trial court did not err in dismissing a judgment assignee's complaint to enforce a judgment entered against individuals pursuant to G.S. 1-47 because the assignee failed to assert his claim within the ten-year statute of limitations, G.S. 1-47(1), which required him to file his complaint within ten years of the judgment; the ten-year period referred to in G.S. 1-234 governs judgment liens on real property, and nothing in the plain language of G.S. 1-234 indicates that the limitations on the duration of a judgment lien should apply to the statutory period set forth in G.S. 1-47(1). Fisher v. Anderson, — N.C. App. —, 667 S.E.2d 292, 2008 N.C. App. LEXIS 1806 (2008).

Trial court did not err in dismissing a judgment assignee's complaint to enforce a judgment pursuant to G.S. 1-47 because the assignee failed to assert his claim within the ten-year statute of limitations, G.S. 1-47(1), and the ten-year limitations period on the duration of a judgment lien, G.S. 1-234, did not apply to the statutory period set forth in G.S.1-47(1); even assuming arguendo, that the legislature intended the limitation for the duration of a judgment lien outlined in G.S. 1-234 to apply to the ten-year statute of limitations in G.S. 1-47, the assignee failed to demonstrate G.S. 1-234 applied to the facts because he did not allege that enforcement of the judgment was restrained by an injunction, order, appeal, or statutory prohibition. Fisher v. Anderson, — N.C. App. —, 667 S.E.2d 292, 2008 N.C. App. LEXIS 1806 (2008).

Motion to Issue Execution Held Timely. — Motion for leave to issue execution was made in apt time, even though the 10 years expired pending appeal no undertaking was given, because the time during which judgment creditor was restrained by the operation of the appeal was not to be counted, as the appeal had the effect of preventing issuance of execution within the time prescribed. Adams v. Guy, 106 N.C. 275, 11 S.E. 535 (1890).

Where a judgment creditor delayed issuing execution until within a short time before the expiration of the lien of his judgment, and then gave notice of a motion to revive and for leave to issue execution, and the motion was heard and execution was issued after 10 years from the date of the judgment, a purchaser at the execution sale of land got no title as against one who bona fide bought the land during the 10 years. Lilly v. West, 97 N.C. 276, 1 S.E. 834 (1887); Pipkin v. Adams, 114 N.C. 201, 19 S.E. 105 (1894).

The same principle applied where the execution was levied before the expiration of the lien but the sale did not take place until after the expiration of the lien. Spicer v. Gambill, 93 N.C. 378 (1885).

Execution sale held less than 10 days before the expiration of 10 years after rendition of the judgment was held ineffective, since under former G.S. 45-28, the sale under execution could "not be deemed to be closed under 10 days," in order to afford opportunity for an increase in the bid, and thus the sale could not be consummated within the 10-year period. McCullen v. Durham, 229 N.C. 418, 50 S.E.2d 511 (1948).

Appeal Which Was Never Heard Held Not to Stop Statute. — Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, which motion was denied, and appeal was taken to the judge, and the clerk ordered that execution should not issue until adjournment of the August, 1931, term of court, and the appeal to the judge was never heard, the order of the clerk and the appeal to the judge did not have the effect of stopping the statute and the judgment was barred in 1939 by the 10-year statute of limitations. Exum v. Carolina R.R., 222 N.C. 222, 22 S.E.2d 424 (1942).

The period during which a judgment debtor is in the bankrupt court and his property in custodia legis should be deducted from the 10-year period, as provided in this section. First-Citizens Bank & Trust Co. v. Parker, 232 N.C. 512, 61 S.E.2d 441 (1950).

Life of Lien Not Prolonged by Order of Resale. — Where the bid for real estate, offered at a sale held under authority of an execution within the period of 10 years next after the date of rendition of the judgment upon which the execution issued, was raised, and resales were ordered successively under former G.S. 45-28, and the final sale so ordered took place on a date after the expiration of the 10-year period, such orders did not have the effect of prolonging the statutory life of the lien of the judgment within the meaning of this section. Cheshire v. Drake, 223 N.C. 577, 27 S.E.2d 627 (1943), commented on in 22 N.C.L. Rev. 146.

Motion to Subject Real Estate to Execution Improperly Denied. — Dismissal of assignee's motion to subject real estate to execution sale was reversed as the assignee's judgment lien attached to a husband's undivided interest in property formerly held as a tenancy by the entirety upon the date of his divorce, when the property was converted by law to a tenancy in common, and when he conveyed his interest to his former wife, she took title subject to the judgment lien; a consent order providing for a future transfer of the property was not a conveyance as it provided for a future transfer of the property, did not provide a legal description or state the location of the property, and was not filed with the register of deeds. Martin v. Roberts, 177 N.C. App. 415, 628 S.E.2d 812, 2006 N.C. App. LEXIS 964 (2006).

§ 1-235. Of appellate division docketed in superior court; lien.

It is the duty of the appropriate clerk of the appellate division, on application of the party obtaining judgment in one of the courts of that division, directing in whole or in part the payment of money, or affecting the title to real estate, or on the like application of the attorney of record of said party, to certify under his hand and the seal of said court a transcript of the judgment, setting forth the title of the court, the names of the parties thereto, the relief granted, that the judgment was so rendered by said court, the amount and date of the judgment, what part thereof bears interest and from what time; and said clerk shall send such certificate and transcript to the clerk of the superior court of such counties as he is directed; and the clerk of the superior court receiving the certificate and transcript shall docket them in like manner as judgment rolls of the superior court are docketed. And when so docketed, the lien of said judgment is the same in all respects, subject to the same restrictions and qualifications, and the time shall be reckoned as is provided and prescribed in the preceding sections for judgments of the superior court, so far as the same are applicable. The party desiring the certificate and transcript provided for in this section may obtain them at any time after such judgment has been rendered, unless the appellate court otherwise directs. (1881, c. 75, ss. 1, 4; Code, s. 436; Rev., s. 575; C.S., s. 615; 1969, c. 44, s. 2.)

CASE NOTES

Simple rendition of a judgment will not constitute a lien upon the judgment debtor's land until the judgment is docketed in the county where the land lies, as required by statute. Alsop v. Moseley, 104 N.C. 60, 10 S.E. 124 (1889).

Application of Amount of Decree of Appellate Court to Docketed Lower Court Judgment. — Where defendant, by a decree in the appellate court, had recovered from plaintiffs a sum of money, and while the execution was in the hands of the sheriff plaintiffs recovered from defendant, by judgments before a magistrate, a like amount for items in their account not allowed in the case in the appellate court, and these latter judgments were docketed and executions were taken out upon them and returned nulla bona, plaintiffs were entitled at their request to an order to have the amount of the decree in favor of defendant applied to their judgments. Hogan v. Kirkland, 64 N.C. 250 (1870).

Cited in Southern Dairies, Inc. v. Banks, 92 F.2d 282 (4th Cir. 1937).

§ 1-236: Repealed by Session Laws 1971, c. 268, s. 34.

§ 1-236.1. Transcripts of judgments certified by deputy clerks validated.

Each transcript of judgment from the original docket of the superior or district court of a county where the same was rendered and docketed, heretofore certified under the official seal of said court, by a deputy clerk thereof, in his own name as such deputy clerk, and docketed on the judgment docket of another county in the State, is hereby validated and declared of full force and effect in such county where docketed, from the date of docketing of the same, to the same extent and with the same effect as if said transcript of judgment had been certified in the name of the clerk of the superior court of said original county, and under his hand and official seal. (1943, c. 11; 1971, c. 268, s. 8.)

CASE NOTES

A valid, properly authenticated judgment is admissible under North Carolina law. State v. Maynard, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984), aff'd, 943 F.2d 407 (4th Cir. 1991), cert. denied, 502 U.S. 1110, 112 S. Ct. 1211, 117 L. Ed. 2d 450 (1992).

§ 1-237. Judgments of federal courts docketed; lien on property; recordation; conformity with federal law.

Judgments and decrees rendered in the district courts of the United States within this State may be docketed on the judgment dockets of the superior courts in the several counties of this State for the purpose of creating liens upon property in the county where docketed; and when a judgment or decree is registered, recorded, docketed and indexed in a county in like manner as is required of judgments and decrees of the courts of this State, it shall become a lien and shall have all the rights, force and effect of a judgment or decree of the superior court of said county. When a judgment roll of a district court is filed with the clerk of the superior court, the clerk shall docket it as judgments of the superior court are required to be docketed. It is the intent and purpose of this section to conform the State law to the requirements of the act of Congress entitled "An Act to Regulate the Liens on Judgments and Decrees of the Courts of the United States" being the act of August first, one thousand eight hundred and eighty-eight, Chapter seven hundred and twenty-nine. (1889, c. 439; Rev., s. 576; C.S., s. 616; 1943, c. 543.)

CASE NOTES

Date of Docketing Fixes the Lien. — Under the act of Congress as to docketing judgments of federal courts and the provisions of this section authorizing the docketing of judgments and decrees of the federal courts on the judgment dockets of the superior courts of this State for the purpose of creating liens, such judgments on a money demand are liens on real property only from the date of their docketing in the county where the land is situated. Riley v. Carter, 165 N.C. 334, 81 S.E. 414 (1914).

A condemnation judgment in favor of the United States need not be recorded in the county where the land lies and cross-indexed in order to protect the federal government's ownership in land that it has acquired. United States v. Norman Lumber Co., 127 F. Supp. 518 (M.D.N.C. 1955), aff'd, 223 F.2d 868 (4th Cir.), cert. denied, 350 U.S. 902, 76 S. Ct. 181, 100 L. Ed. 792 (1955).

Whether docketing and cross-indexing of federal judgments of condemnation with State court records should be required as a condition of validity as against subsequent purchasers from the condemnee is a matter for Congress, and, so far Congress has not seen fit to take action with regard to the matter. Norman Lumber Co. v. United States, 223 F.2d 868 (4th Cir. 1955), cert. denied, 350 U.S. 902, 76 S. Ct. 181, 100 L. Ed. 792 (1955).

Enforcement by United States of Federal Judgment Barred by Statute. — Judgment rendered by federal district and circuit courts, in order to be liens, must be docketed as required by the State laws, and since the United States may take advantage of any state or federal statute without being bound by its limitations, it may enforce the lien of the judgment in its favor though barred by the 10-year limitation contained in this statute. United States v. Minor, 235 F. 101 (4th Cir. 1916).

Cited in Southern Dairies, Inc. v. Banks, 92 F.2d 282 (4th Cir. 1937); Pineville Real Estate Operation Corp. v. Michael, 32 F.3d 88 (4th Cir. 1994).

§ 1-238: Repealed by Session Laws 1943, c. 543.

§ 1-239. Paid to clerk; docket credited; transcript to other counties; notice to attorney for judgment creditor; judgment creditor to give notice of payment; entry of payment on docket; penalty for failure to give notice of payment.

(a) Payment of money judgment to clerk's office.

(1) The party against whom a judgment for the payment of money is rendered by any court of record may pay the whole, or any part thereof, in cash or by check, to the clerk of the court in which the same was rendered, although no execution has issued on such judgment.

(2) The clerk shall give the party a receipt showing the date and amount of the payment and identifying the judgment, and shall note receipt of the payment on the judgment docket of the court. If the payment is made by check and the check is not finally paid by the drawee bank, the clerk shall cancel the notation of receipt and return the check to the party who tendered it.

(3) When a payment to the clerk is made in cash or when a check is finally paid by the drawee bank, the clerk shall give the notice provided for in subsection (b). When the full amount of a judgment has been so paid, the clerk shall include the words "JUDGMENT PAID IN FULL" in the notice.

(4) When a judgment has been paid in part, but not in full, the clerk shall furnish a certificate of partial payment to the clerk of superior court of any county to which a transcript of a judgment has been sent, but only upon the request of that clerk or of the party who made the partial payment.

(5) When a judgment has been paid in full, and the party in whose favor the judgment was rendered has collected all payments made to the clerk, or when ten days have passed since notice of payment in full was sent pursuant to subsection (b) and the party has neither collected all payments made to the clerk nor notified the clerk that the party disputes payment of the full amount of the judgment, then the clerk shall immediately:

a. Mark "PAID AND SATISFIED IN FULL" on the judgment docket, and

b. Forward a certificate of payment in full to the clerk of superior court in each county to which a transcript of the judgment has been sent.

(6) If the party in whose favor a judgment has been rendered notifies the clerk that the party disputes payment in full of the judgment, the clerk shall proceed as provided in G.S. 1-242.

(7) Entries of payment or satisfaction on the judgment dockets in the office of the clerk of the superior court by any person other than the clerk shall be made in the presence of the clerk or his deputy, who shall witness the same.

(b) Upon receipt of any payment of money upon a judgment, the clerk of superior court shall within seven days after the receipt of such payment give notice thereof to the attorney of record for the party in whose favor the judgment was rendered, or if there is no attorney of record to the party. Any other official of any court who receives payment of money upon a judgment shall give notice in the same manner; provided, further, that no such moneys shall be paid by the clerk of the superior court until at least seven days after written notice by mail or in person has been given to the attorney of record in whose favor the judgment was rendered; provided further, that the attorney of record may waive said notice, and said moneys shall be paid by the clerk of superior court, by signing the judgment docket.

(c) Upon receipt by the judgment creditor of any payment of money upon a judgment, the judgment creditor shall within 60 days after receipt of the payment give satisfactory notice thereof to the clerk of the superior court in which the judgment was rendered, and the clerk shall thereafter promptly enter the payment on the judgment docket of the court, and the clerk shall immediately forward a certificate thereof to the clerk of the superior court of each county to whom a transcript of the judgment has been sent, and the clerk of each superior court shall thereafter promptly enter the same on the judgment docket of the court and file the original with the judgment roll in the action. If the judgment creditor fails to file the notice required by this subsection within 30 days following written demand by the debtor, he may be required to pay a civil penalty of one hundred dollars ($100.00) in addition to attorneys' fees and any loss caused to the debtor by such failure. The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1823, c. 1212, P.R.; R.C., c. 31, s. 127; Code, s. 438; Rev., s. 577; 1911, c. 76; C.S., s. 617; 1967, c. 1067; 1969, c. 18; 1981, c. 745, s. 2; 1987, c. 497; 1997-456, s.27; 1998-215, s. 94.)

CASE NOTES

Clerk is Statutory Agent of Owner of Judgment. — The effect of this section is to make the clerk the statutory agent of the owner of a judgment, and it is the clerk's duty to pay money received thereunder to the party entitled thereto. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

There is no duty on the party making payment to require the clerk to make an entry on the judgment docket. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

Credit for Payments Not Entered by Clerk. — A judgment debtor under this section is entitled to credit on the judgment for amounts paid by him on the judgment to the clerk of the superior court in whose office the judgment is docketed, even though the clerk fails to enter payment on the judgment docket, the judgment debtor being under no duty to require the clerk to make entry of payment on the judgment docket and the clerk being in effect the statutory agent of the owner of the judgment in making such entries. Dalton v. Strickland, 208 N.C. 27, 179 S.E. 20 (1935).

Misappropriation of Payment by Clerk. — Where a judgment debtor has paid the judgment entered against him in the office of the clerk of the superior court, and the clerk has misappropriated the payment, so that the debtor has again paid the judgment, the equitable doctrine as to whether he is subrogated to the right of the judgment creditor does not necessarily arise, and a right of action will lie against the surety on the clerk's bond for the direct misappropriation of the money. Gilmore v. Walker, 195 N.C. 460, 142 S.E. 579 (1928).

Liability for Loss Resulting from Clerk's Failure to Perform Duty. — The clerk of the superior court and the surety on his bond are liable for loss resulting to the owner of a judgment from the clerk's failure to perform his statutory duty to enter the judgment and payments thereon on the judgment docket or his failure to account to the owner for sums paid on the judgment by the judgment debtor, as provided by this section. Dalton v. Strickland, 208 N.C. 27, 179 S.E. 20 (1935).

The clerk and his surety would be liable to the owner of the judgment for any loss which he might suffer because of the clerk's failure to perform his statutory duty. Kendrick v. Cain, 272 N.C. 719, 159 S.E.2d 33 (1968).

A trustee may properly pay money to the clerk as part payment in satisfaction of a judgment. Sugg v. Bernard, 122 N.C. 155, 29 S.E. 221 (1898).

Interest on Balance Following Partial Payment. — Where a judgment creditor rejected a judgment debtor's tender of payment because it was $49 short, under G.S. 1-239(a)(1), the partial tender was valid and post-judgment interest accrued only on the $49, not on the entire amount of the judgment. Webb v. McKeel, 144 N.C. App. 381, 551 S.E.2d 440, 2001 N.C. App. LEXIS 439 (2001).

Judgment against defendant corporation was properly declared satisfied in full because defendant's tender of a check for the total judgment less $715 plus eight percent interest constituted a partial payment under G.S. 1-239, and thus postjudgment interest did not accrue on the entire amount of the judgment when a second corrected check was issued 14 days later. WMS, Inc. v. Weaver, 183 N.C. App. 295, 644 S.E.2d 567, 2007 N.C. App. LEXIS 1038 (2007).

Payment When Execution Is in Sheriff's Hands. — A debtor has no right to pay the money to the clerk when the execution is in the hands of the sheriff. Bynum v. Barefoot, 75 N.C. 576 (1876).

Receipt of Depreciated Currency. — Whenever it is sought to establish an authority in a clerk to bind a plaintiff by the receipt of depreciated currency in payment of a judgment, it must be shown either that the receipt was expressly authorized by the plaintiff or that the plaintiff had done acts from which such an authority might fairly be implied. Purvis v. Jackson, 69 N.C. 474 (1873).

Statements Filed Properly. — Where defendant's filing of statements was in accord with the instructions given by the judge and within the time period required by law, defendant acted properly and satisfied all legal obligations owed to plaintiffs with respect to the filing of notices regarding payments made by plaintiff. Everett v. Continental Bank, 845 F. Supp. 335 (M.D.N.C.), cert. denied, 514 U.S. 1018, 115 S. Ct. 1362, 131 L. Ed. 2d 219 (1995).

Notice of Satisfaction of Judgment. — Nothing in G.S. 1-239(c) required a judgment creditor to file a notice with the clerk that a judgment had been satisfied until a written demand for such a notice had been made; therefore, absent proof that such a demand was made, it was not an unfair or deceptive trade practice for a landlord to fail to file a notice that a judgment against a delinquent tenant had been satisfied. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Applied in United States v. Atlantic Coast Line R.R., 237 F.2d 137 (4th Cir. 1956).

Cited in McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964); Pittman v. Snedeker, 264 N.C. 55, 149 S.E.2d 740 (1965).

§ 1-239.1. Records of cancellation, assignment, etc., of judgments recorded by photographic process.

In all cases where the governing authority of any county has caused the instruments or documents filed for record in the office of the clerk of the superior court of such county to be recorded by any system involving the use of microfilm or by the use of any microphotographic system or by any system of photographic recording, it shall be lawful for the clerk of the superior court to keep a record or docket book for the purpose of entering on same payment or payments, credit or satisfaction, assignments or releases in whole or in part of any judgment which has heretofore been recorded by any photographic process above mentioned. For this purpose, the form of such docket or record book shall be substantially as follows:

"____________ Superior Court Cancellation, Assignment, Transfer or Release of Judgments, etc.

I (We) ____________ do hereby certify that that certain judgment docketed in Judgment Docket ____________, at page ________, filed ________ day of ____________, ________, Case No. ________, wherein ____________ is (are) Plaintiff(s) and ____________ is (are) Defendant(s) has been fully satisfied, released and discharged together with all costs, and interest,

____

____

Signed in the presence of ____________________

____________________ ____________________

Assistant-Deputy Clerk of ____________________
the Superior Court of
____________ County"

Any entries of payment, credits or satisfaction made on such record or docket book, in substantially the form above mentioned, shall be good and valid payments, credits or satisfactions in all respects as if the same had been duly entered on the original judgment docket before the recording of same by the photographic process or system above mentioned. The clerk of the superior court shall have the authority to forward certificates to the clerk of the superior court of each county to whom a transcript of said judgment has been sent to the same extent and for all the purposes provided in G.S. 1-239, and all payments, credits or satisfactions entered in said docket book or record shall be valid to the same extent as if the same had been entered in the regular judgment docket in accordance with the provisions of G.S. 1-239. (1951, c. 774; 1999-456, s. 59.)

§ 1-240: Repealed by Session Laws 1967, c. 847, s. 2.

Cross References. — For present provisions as to contribution, see Chapter 1B. As to third-party practice, see G.S. 1A-1, Rule 14.

§ 1-241. Clerk to pay money to party entitled.

The clerk, to whom money is paid as aforesaid, shall pay it to the party entitled to receive it, under the same rules and penalties as if the money had been paid into his office by virtue of an execution. (1823, c. 1212, s. 2, P.R.; R.C., c. 31, s. 128; Code, s. 439; Rev., s. 578; C.S., s. 619.)

CASE NOTES

The duty to receive carries with it the duty to pay the sums collected to the parties entitled thereto. McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Applied in United States v. Atlantic Coast Line R.R., 135 F. Supp. 600 (E.D.N.C. 1955).

§ 1-242. Credits upon judgments.

If payment is made on a judgment docketed in the office of the clerk of the superior court and no entry is made on the judgment docket, or if a docketed judgment is reversed or modified on appeal and no entry is made on the judgment docket, any interested person may move in the cause before the clerk, upon affidavit after notice to all interested persons, to have the credit, reversal, or modification entered. A hearing on the motion before the clerk may be on affidavit, oral testimony, deposition, and any other competent evidence. The clerk shall render judgment, from which any party may appeal in the same manner as in appeals in special proceedings. On appeal, any party may demand a jury trial of any issue of fact. If a final judgment orders the credit, reversal, or modification, a transcript of the final judgment shall be sent by the clerk of the superior court to each county in which the original judgment is docketed, and the clerk of each county shall enter the transcript on the judgment docket of that county opposite the original judgment and file the transcript. No final process may issue on the original judgment after affidavit filed in the cause until there is a final disposition of the motion for credit, reversal, or modification. (1903, c. 558; Rev., s. 579; C.S., s. 620; 1999-216, s. 3.)

CASE NOTES

Parol Agreement to Convey Land Not Within Section. — Upon a motion to enter satisfaction of a judgment under this section, a defendant may not set up his parol executory agreement to convey lands to the plaintiff for that purpose; such is not in the purview of the statute, and is not enforceable under the statute of frauds. Brown v. Hobbs, 154 N.C. 544, 70 S.E. 906 (1911).

Credit for Amount Paid on Covenant Not to Sue. — Where some of defendants, sued as joint tort-feasors, paid plaintiff a sum in consideration of a covenant not to sue, and thereafter the action was prosecuted against the other defendants and judgment was recovered against them, the defendants against whom judgment was entered were entitled to have the judgment credited with the amounts paid by the other defendants for the covenant not to sue upon the motion made prior to execution, the motion coming within the spirit if not the letter of this section. Brown v. Norfolk S.R.R., 208 N.C. 423, 181 S.E. 279 (1935); Ramsey v. Camp, 254 N.C. 443, 119 S.E.2d 209 (1961).

Applied in Webb v. McKeel, 144 N.C. App. 381, 551 S.E.2d 440, 2001 N.C. App. LEXIS 439 (2001).

§ 1-243. For money due on judicial sale.

The Supreme and other courts ordering a judicial sale, or having possession of bonds taken on such sale, may, on motion, after ten days' notice thereof in writing, enter judgment as soon as the money becomes due against the debtors or any of them, unless for good cause shown the court directs some other mode of collection. (R.C., c. 31, s. 129; Code, s. 941; Rev., s. 1524; C.S., s. 621.)

CASE NOTES

Constitutionality. — This section is constitutional and does not contravene the right of trial by jury. Ex parte Cotten, 62 N.C. 79 (1867).

Waiver of Right to Jury Trial. — Although the defendant under this section is entitled to have the issue tried by a jury where the debt sued on was contracted for the purchase of land, if after being duly summoned he fails to appear and answer, he waives that right. Durham v. Wilson, 104 N.C. 595, 10 S.E. 683 (1889).

Applicability of Section to Sale by Administrator. — A sale of land for assets, made by an administrator pursuant to a judgment in a probate court in a proceeding instituted for that purpose, is a judicial sale, and the provisions of this section are applicable thereto. Mauney v. Pemberton, 75 N.C. 219 (1876); Chambers v. Penland, 78 N.C. 53 (1878).

Remedies Where Purchaser Fails to Comply with Bid. — If a purchaser at a judicial sale fails to comply with his bid, the court may decree: (1) That he specially perform his contract; (2) That the land be resold and the purchaser released; or (3) That without releasing the purchaser the land be resold; but in this case the purchaser must undertake, as a condition precedent to the order of sale, to pay all additional costs and to make good any deficiency in the price. Hudson v. Coble, 97 N.C. 260, 1 S.E. 688 (1887).

Motion Is Proper Method to Enforce Purchase Contract. — An independent action upon an obligation to secure the payment of money given on a purchase under a judicial sale will not be entertained if objection is timely made; the proper course is to enforce the contract by a motion in the cause in which the sale is decreed. Lackey v. Pearson, 101 N.C. 651, 8 S.E. 121 (1888).

But Absent Timely Objection an Independent Action May Be Allowed. — If objection is not made at the proper time the court may proceed with an independent action upon an obligation to secure the payment of money given on a purchase under a judicial sale. Such objection will not be entertained when made for the first time in the appellate court. Lackey v. Pearson, 101 N.C. 651, 8 S.E. 121 (1888).

In proper instances the court may decree a resale of the land if the purchaser does not pay within a specified time. Davis v. Pierce, 167 N.C. 135, 83 S.E. 182 (1914).

Notice Required. — Any court which orders a judicial sale has the power to make a decree for the money after 10 days' notice thereof. Ex parte Cotten, 62 N.C. 79 (1867).

Reopening of Case Where Actual Purchase Price Was Withheld from Court. — Where commissioner for the private sale of lands for division withheld from the knowledge of the court the actual price the purchaser had agreed to pay, and reported a lesser sum, which the court confirmed by final judgment, this is an imposition on the court, and would not conclude it from reopening the case on the petition of the commissioner in the cause, after notice, and affording the proper relief. Lyman v. Southern Coal Co., 183 N.C. 581, 112 S.E. 242 (1922).

§ 1-244: Repealed by Session Laws 1971, c. 268, s. 34.

§ 1-245. Cancellation of judgments discharged through bankruptcy proceedings.

When a referee in bankruptcy furnishes the clerk of the superior court of any county in this State a written statement or certificate to the effect that a bankrupt has been discharged, indicating in said certificate that the plaintiff or judgment creditor in whose favor judgments against the defendant bankrupt are docketed in the office of the clerk of the superior court have received due notice as provided by law from the said referee, and that said judgments have been discharged, it shall be the duty of the clerk of the superior court to file said certificate and enter a notation thereof on the margin of said judgments.

This section shall apply to judgments of this kind already docketed as well as to future judgments of the same kind. (1937, c. 234, ss. 1-4; 1971, c. 268, s. 8.1.)

Legal Periodicals. — For article on discharge in bankruptcy, see 58 N.C.L. Rev. 723 (1980).

CASE NOTES

Effect of Section. — This statute outlines a procedure which effectively gives notice that judgments which have been discharged in bankruptcy no longer have the power to create a lien upon property of the discharged debtor. Clowney v. North Carolina Nat'l Bank, 19 Bankr. 349 (Bankr. M.D.N.C. 1982).

§ 1-246. Assignment of judgment to be entered on judgment docket, signed and witnessed.

No assignment of judgment shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or assignor, but from the entry of such assignment on the margin of the judgment docket opposite the said judgment, signed by the owner of said judgment, or his attorney under power of attorney or his attorney of record, and witnessed by the clerk or the deputy clerk of the superior court of the county in which said judgment is docketed: Provided, that when an assignment of judgment is duly executed by the owner or owners of the judgment and recorded in the office of the clerk of the superior court of the county in which the judgment is docketed and a specific reference thereto is made on the margin of the judgment docket opposite the judgment to be assigned, it shall operate as a complete and valid transfer and assignment of the judgment. (1941, c. 61; 1945, c. 154.)

Legal Periodicals. — For comment on this section, see 19 N.C.L. Rev. 462 (1941).

CASE NOTES

This section refers solely to what an assignee is required to do in order to protect his rights as against a subsequent assignee or other subsequent creditors of or purchasers from the owner of the judgment. Houck v. Overcash, 282 N.C. 623, 193 S.E.2d 905 (1973).

Cited in Walker Mfg. Co. v. Dickerson, Inc., 510 F. Supp. 329 (W.D.N.C. 1980).

ARTICLE 24.

Confession of Judgment.

§§ 1-247 through 1-249: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to confession of judgment, see now G.S. 1A-1, Rule 68.1.

ARTICLE 25.

Submission of Controversy Without Action.

§§ 1-250 through 1-252: Repealed by Session Laws 1967, c. 954, s. 4.

ARTICLE 26.

Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (1931, c. 102, s. 1.)

Cross References. — As to declaratory judgments, see also G.S. 1A-1, Rule 57.

Legal Periodicals. — For explanation and comments regarding this section, see 9 N.C.L. Rev. 20 (1931); 9 N.C.L. Rev. 352 (1931).

For note on this section, see 12 N.C.L. Rev. 57 (1934).

For comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

For survey of developments in North Carolina law (1992), see 71 N.C.L. Rev. 1893 (1993).

CASE NOTES

- I. In General.
- II. Scope of Article.
- III. Actual Controversy Requirement.
- IV. What May Be Determined by Declaratory Judgment.
  - A. In General.
  - B. Actions in Which Declaratory Judgment Held Available.
  - C. Actions in Which Declaratory Judgment Held Unavailable.
- V. Procedure.

I. IN GENERAL.

Common Law. — It would appear that declaratory relief was unknown at common law, inasmuch as the common-law conception of courts was that they were a branch of the government created to redress private wrongs and punish the commission of crimes and misdemeanors. The courts took no official interest in the affairs of civil life until one person had wronged another; then the object was to give relief for the injury inflicted. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969).

This Article Preserves the Inherent Function of Judicial Tribunals. — While the Uniform Declaratory Judgment Act enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966); Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Hicks v. Hicks, 60 N.C. App. 517, 299 S.E.2d 275 (1983).

An actual controversy between the parties is a jurisdictional prerequisite for a proceeding under the Declaratory Judgment Act in order to preserve inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978); Kirkman v. Kirkman, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

Purpose of Article. — The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The Declaratory Judgment Act may be utilized to alleviate uncertainty and clarify litigation. Travelers Ins. Co. v. Curry, 28 N.C. App. 286, 221 S.E.2d 75, cert. denied, 289 N.C. 615, 223 S.E.2d 396 (1976); Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984), rev'd on other grounds, 314 N.C. 1, 332 S.E.2d 51 (1985).

The Declaratory Judgment Act is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments, nor a substitute or alternate method of contesting the validity of wills. Farthing v. Farthing, 235 N.C. 634, 70 S.E.2d 664 (1952); Bennett v. Attorney Gen., 245 N.C. 312, 96 S.E.2d 46 (1957); Town of Nags Head v. Tillett, 68 N.C. App. 554, 315 S.E.2d 740 (1984), aff'd in part and rev'd in part on other grounds, Jones v. Clark, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

The Declaratory Judgment Act affords an appropriate procedure for alleviating uncertainty in the interpretation of written instruments and for clarifying litigation. Bellefonte Underwriters Ins. Co. v. Alfa Aviation, Inc., 61 N.C. App. 544, 300 S.E.2d 877 (1983), aff'd, 310 N.C. 471, 312 S.E.2d 426 (1984).

A declaratory judgment action is designed to provide an expeditious method of procuring a judicial interpretation of written instruments, such as wills, contracts, statutes, and insurance policies. Penley v. Penley, 65 N.C. App. 711, 310 S.E.2d 360 (1984), rev'd on other grounds, 314 N.C. 1, 332 S.E.2d 51 (1985).

Trial court did not err in granting summary judgment to the governor, state public safety agency, state highway patrol, and certain unidentified persons, and denying the wrecker service owner's motion for summary judgment on the wrecker service owner's declaratory judgment action seeking a determination that regulations used to remove his wrecker service business from the state's Wrecker Rotation Services List were illegal and that the regulations were preempted by federal law; the trial court had the authority to declare that the regulations were not illegal because the General Assembly granted to the state public safety agency the power to direct the state highway patrol to establish regulations for private wrecker services. Ramey v. Easley, 178 N.C. App. 197, 632 S.E.2d 178, 2006 N.C. App. LEXIS 1308 (2006).

The Declaratory Judgment Act is to be liberally construed and administered. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The act requires liberal construction in favor of resolving uncertainties. Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985), rev'd on other grounds, 317 N.C. 579, 347 S.E.2d 25 (1986).

The essential distinction between an action for declaratory judgment and the usual action is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action, but there must be no uncertainty that the loss will occur or that the asserted right will be invaded. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969).

The essential distinction between a declaratory judgment action and any other action for relief is that a declaratory judgment action may be maintained without actual wrong or loss as its basis. McCabe v. Dawkins, 97 N.C. App. 447, 388 S.E.2d 571, cert. denied, 326 N.C. 597, 393 S.E.2d 880 (1990).

Settlement of a declaratory judgment action to construe a will is not an election of remedies which would preclude one from suing attorney for negligent will drafting. McCabe v. Dawkins, 97 N.C. App. 447, 388 S.E.2d 571, cert. denied, 326 N.C. 597, 393 S.E.2d 880 (1990).

Applied in Edgerton v. Hood, 205 N.C. 816, 172 S.E. 481 (1934); Farnell v. Dongan, 207 N.C. 611, 178 S.E. 77 (1935); Carr v. Jimmerson, 210 N.C. 570, 187 S.E. 800 (1936); E.B. Ficklen Tobacco Co. v. Maxwell, 214 N.C. 367, 199 S.E. 405 (1938); Branch Banking & Trust Co. v. Toney, 215 N.C. 206, 1 S.E.2d 538

(1939); Hilton Lumber Co. v. Estate Corp., 215 N.C. 649, 2 S.E.2d 869 (1939); Burcham v. Burcham, 219 N.C. 357, 13 S.E.2d 615 (1941); Moore v. Sampson County, 220 N.C. 232, 17 S.E.2d 22 (1941); Oxford Orphanage v. Kittrell, 223 N.C. 427, 27 S.E.2d 133 (1943); Williams v. Rand, 223 N.C. 734, 28 S.E.2d 247 (1943); Patterson v. Brandon, 226 N.C. 89, 36 S.E.2d 717, 163 A.L.R. 1150 (1946); Buffaloe v. Barnes, 226 N.C. 313, 38 S.E.2d 222 (1946); First Sec. Trust Co. v. Henderson, 226 N.C. 649, 39 S.E.2d 804 (1946); In re Battle, 227 N.C. 672, 44 S.E.2d 212 (1947); Williams v. Johnson, 228 N.C. 732, 47 S.E.2d 24 (1948); Ward v. Black, 229 N.C. 221, 49 S.E.2d 413 (1948); First Nat'l Bank v. Brawley, 231 N.C. 687, 58 S.E.2d 706 (1950); Elmore v. Austin, 232 N.C. 13, 59 S.E.2d 205 (1950); Williamson v. Williamson, 232 N.C. 54, 59 S.E.2d 214 (1950); Blue Ridge Mem. Park v. Union Nat'l Bank, Inc., 237 N.C. 547, 75 S.E.2d 617 (1953); Bradford v. Johnson, 237 N.C. 572, 75 S.E.2d 632 (1953); City of Greensboro v. Smith, 239 N.C. 138, 79 S.E.2d 486 (1954); Fuller v. Hedgpeth, 239 N.C. 370, 80 S.E.2d 18 (1954); Hubbard v. Wiggins, 240 N.C. 197, 81 S.E.2d 630 (1954); Julian v. Lawton, 240 N.C. 436, 82 S.E.2d 210 (1954); Mesimore v. Palmer, 245 N.C. 488, 96 S.E.2d 356 (1957); Finch v. Honeycutt, 246 N.C. 91, 97 S.E.2d 478 (1957); Wachovia Bank & Trust Co. v. Taliaferro, 246 N.C. 121, 97 S.E.2d 776 (1957); Carter v. Davis, 246 N.C. 191, 97 S.E.2d 838 (1957); Walker v. Moss, 246 N.C. 196, 97 S.E.2d 836 (1957); Reed v. Elmore, 246 N.C. 221, 98 S.E.2d 360 (1957); Competitor Liaison Bureau of Nascar, Inc. v. Midkiff, 246 N.C. 409, 98 S.E.2d 468 (1957); Edmondson v. Henderson, 246 N.C. 634, 99 S.E.2d 869 (1957); Bullock v. Bullock, 251 N.C. 559, 111 S.E.2d 837 (1960); Parker v. Parker, 252 N.C. 399, 113 S.E.2d 899 (1960); Lanier v. Dawes, 255 N.C. 458, 121 S.E.2d 857 (1961); Eastern Carolina Tastee-Freez, Inc. v. City of Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962); Cline v. Olson, 257 N.C. 110, 125 S.E.2d 320 (1962); Poindexter v. Wachovia Bank & Trust Co., 258 N.C. 371, 128 S.E.2d 867 (1963); Thomas v. Thomas, 258 N.C. 590, 129 S.E.2d 239 (1963); Worsley v. Worsley, 260 N.C. 259, 132 S.E.2d 579 (1963); Tolson v. Young, 260 N.C. 506, 133 S.E.2d 135 (1963); Joyce v. Joyce, 260 N.C. 757, 133 S.E.2d 675 (1963); Clark v. Meyland, 261 N.C. 140, 134 S.E.2d 168 (1964); Adams v. Adams, 261 N.C. 342, 134 S.E.2d 633 (1964); Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 262 N.C. 691, 138 S.E.2d 512 (1964); Walker v. City of Charlotte, 262 N.C. 697, 138 S.E.2d 501 (1964); First Union Nat'l Bank v. Broyhill, 263 N.C. 189, 139 S.E.2d 214 (1964); Central Carolina Bank & Trust Co. v. Bass, 265 N.C. 218, 143 S.E.2d 689 (1965); Gardner v. City of Reidsville, 269 N.C. 581, 153 S.E.2d 139 (1967); Grant v. Banks, 270 N.C. 473, 155 S.E.2d 87 (1967); Breece v. Breece, 270 N.C. 605, 155 S.E.2d 65 (1967); Gaskill v. Costlow, 270 N.C. 686, 155 S.E.2d 148 (1967); Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967); Harrelson v. City of Fayetteville, 271 N.C. 87, 155 S.E.2d 749 (1967); Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737 (1967); Sigmund Sternberger Found. v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968); City of Raleigh v. Norfolk S. Ry., 4 N.C. App. 1, 165 S.E.2d 745 (1969); Dillon v. North Carolina Nat'l Bank, 6 N.C. App. 584, 170 S.E.2d 571 (1969); Godfrey v. Patrick, 8 N.C. App. 510, 174 S.E.2d 674 (1970); Kale v. Forrest, 9 N.C. App. 82, 175 S.E.2d 752 (1970); Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co., 9 N.C. App. 193, 175 S.E.2d 741 (1970); Price v. Price, 11 N.C. App. 657, 182 S.E.2d 217 (1971); North Carolina Nat'l Bank v. Carpenter, 12 N.C. App. 19, 182 S.E.2d 3 (1971); Stephens v. North Carolina Nat'l Bank, 12 N.C. App. 323, 183 S.E.2d 287 (1971); Duplin County Bd. of Educ. v. Carr, 15 N.C. App. 690, 190 S.E.2d 653 (1972); Reeves Bros. v. Town of Rutherfordton, 282 N.C. 559, 194 S.E.2d 129 (1973); Szabo Food Serv., Inc. v. Balentine's, Inc., 285 N.C. 452, 206 S.E.2d 242 (1974); Sterling Cotton Mills, Inc. v. Vaughan, 24 N.C. App. 696, 212 S.E.2d 199 (1975); Gaddy v. North Carolina Nat'l Bank, 25 N.C. App. 169, 212 S.E.2d 561 (1975); White v. Alexander, 290 N.C. 75, 224 S.E.2d 617 (1976); Cedar Creek Enter., Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976); Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976); Suitt Constr. Co. v. Seaman's Bank for Sav., 30 N.C. App. 155, 226 S.E.2d 408 (1976); Nationwide Mut. Ins. Co. v. Allison, 51 N.C. App. 654, 277 S.E.2d 473 (1981); White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983); Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984); Unigard Mut. Ins. Co. v. Ingram, 71 N.C. App. 725, 323 S.E.2d 442 (1984); Newton v. Ohio Cas. Ins. Co., 91 N.C. App. 421, 371 S.E.2d 782 (1988); Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991); Majebe v. North Carolina Bd. of Medical Exmrs., 106 N.C. App. 253, 416 S.E.2d 404 (1992); Wendell v. Long, 107 N.C. App. 80, 418 S.E.2d 825 (1992); Carpenter v. Brewer Hendley Oil Co., 145 N.C. App. 493, 549 S.E.2d 886, 2001 N.C. App. LEXIS 653 (2001); Nat'l Travel Servs., Inc. v. State ex rel. Cooper, 153 N.C. App. 289, 569 S.E.2d 667, 2002 N.C. App. LEXIS 1136 (2002); Harleysville Mut. Ins. Co. v. Narron, 155 N.C. App. 362, 574 S.E.2d 490, 2002 N.C. App. LEXIS 1615 (2002); Trent v. River Place, LLC, 179 N.C. App. 72, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006); Hejl v. Hood, Hargett & Assocs., — N.C. App. —, 674 S.E.2d 425, 2009 N.C. App. LEXIS 377 (2009).

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Godfrey, 254 N.C. 215, 118 S.E.2d 538 (1961); Seaford v. Nationwide Mut. Ins. Co., 253 N.C. 719, 117 S.E.2d 733 (1961); Employers' Fire Ins. Co. v. British Am. Assurance Co., 259 N.C. 485, 131 S.E.2d 36 (1963); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966); Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966); Tilley v. Tilley, 268 N.C. 630, 151 S.E.2d 592 (1966); Atlantic Disct. Corp. v. Mangel's of N.C., Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968); Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969); State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970); Howell v. Gentry, 8 N.C. App. 145, 174 S.E.2d 61 (1970); Latham v. Taylor, 10 N.C. App. 268, 178 S.E.2d 122 (1970); Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971); North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971); Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971); Reading v. Dixon, 10 N.C. App. 319, 178 S.E.2d 322 (1971); Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Revco S.E. Drug Centers, Inc. v. North Carolina Bd. of Pharmacy, 21 N.C. App. 156, 204 S.E.2d 38 (1974); Myers v. Southern Nat'l Bank, 21 N.C. App. 202, 204 S.E.2d 30 (1974); North Carolina Consumers Power, Inc. v. Duke Power Co., 21 N.C. App. 237, 204 S.E.2d 399 (1974); Houck v. Stephens, 26 N.C. App. 608, 216 S.E.2d 490 (1975); Moore v. Smith, 33 N.C. App. 275, 235 S.E.2d 102 (1977); In re Grady, 33 N.C. App. 477, 235 S.E.2d 425 (1977); Phillips v. Phillips, 296 N.C. 590, 252 S.E.2d 761 (1979); Wing v. Wachovia Bank & Trust Co., 301 N.C. 456, 272 S.E.2d 90 (1980); Beveridge v. Howland, 301 N.C. 498, 271 S.E.2d 910 (1980); State ex rel. Hunt v. North Carolina Reinsurance Facility, 49 N.C. App. 206, 271 S.E.2d 302 (1980); Ward Lumber Co. v. Brooks, 50 N.C. App. 294, 273 S.E.2d 331 (1981); Nationwide Mut. Ins. Co. v. Taylor, 55 N.C. App. 76, 284 S.E.2d 532 (1981); Bowlin v. Bowlin, 55 N.C. App. 100, 285 S.E.2d 273 (1981); Bowens v. Board of Law Exmrs., 57 N.C. App. 78, 291 S.E.2d 170 (1982); Pittman v. Thomas, 307 N.C. 485, 299 S.E.2d 207 (1983); Chem-Security Systems v. Morrow, 61 N.C. App. 147, 300 S.E.2d 393 (1983); City of Greensboro v. Reserve Ins. Co., 70 N.C. App. 651, 321 S.E.2d 232 (1984); Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984); Southeast Airmotive Corp. v. United States Fire Ins. Co., 78 N.C. App. 418, 337 S.E.2d 167 (1985); Welsh v. Northern Telecom, Inc., 85 N.C. App. 281, 354 S.E.2d 746 (1987); Leonard v. Dillard, 87 N.C. App. 79, 359 S.E.2d 497 (1987); Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988); Knotville Fire Dep't, Inc. v. Wilkes County, 94 N.C. App. 377, 380 S.E.2d 422 (1989); Thornhill v. Riegg, 95 N.C. App. 532, 383 S.E.2d 447 (1989); Price v. Walker, 95 N.C. App. 712, 383 S.E.2d 686 (1989); FDIC v. British-American Corp., 726 F. Supp. 622 (E.D.N.C. 1989); Clark v. Craven Regional Medical Auth., 326 N.C. 15, 387 S.E.2d 168 (1990); American Motorists Ins. Co. v. Avnet, Inc., 98 N.C. App. 385, 391 S.E.2d 50 (1990); Total Care, Inc. v. Department of Human Resources, 99 N.C. App. 517, 393 S.E.2d 338 (1990); Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); Hales v. North Carolina Ins. Guar. Ass'n, 111 N.C. App. 892, 433 S.E.2d 468 (1993); Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 108 N.C. App. 378, 424 S.E.2d 431 (1993); Mitchell v. Nationwide Ins. Co., 110 N.C. App. 16, 429 S.E.2d 351 (1993); Mitchell v. Nationwide Mut. Ins. Co., 335 N.C. 433, 439 S.E.2d 110 (1994); Homebuilders Ass'n v. City of Charlotte, 336 N.C. 37, 442 S.E.2d 45 (1994); Nationwide Mut. Ins. Co. v. Lankford, 118 N.C. App. 368, 455 S.E.2d 484 (1995); North Carolina Bd. of Exmrs. for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996); Carter v. Stanly County, 125 N.C. App. 628, 482 S.E.2d 9 (1997); Norman v. Cameron, 127 N.C. App. 44, 488 S.E.2d 297 (1997); News & Observer Publishing Co. v. Coble, 128 N.C. App. 307, 494 S.E.2d 784 (1998); Ferguson v. Killens, 129 N.C. App. 131, 497 S.E.2d 722 (1998); Town of Spencer v. Town of E. Spencer, 129 N.C. App. 751, 501 S.E.2d 367 (1998); Sale Chevrolet, Buick, BMW, Inc. v. Peterbilt of Florence, Inc., 133 N.C. App. 177, 514 S.E.2d 747 (1999); Republic Mtg. Ins. Co. v. Brightware, Inc., 35 F. Supp. 2d 482 (M.D.N.C. 1999); Southern Furniture Co. of Conover, Inc. v. DOT, 133 N.C. App. 400, 516 S.E.2d 383 (1999); Town of Spencer v. Town of E. Spencer, 351 N.C. 124, 522 S.E.2d 297 (1999); Onuska v. Barnwell, 140 N.C. App. 590, 537 S.E.2d 840, 2000 N.C. App.

LEXIS 1244 (2000); Howell v. Sykes, 136 N.C. App. 407, 526 S.E.2d 183, 2000 N.C. App. LEXIS 6 (2000); Groves v. Community Hous. Corp. of Haywood County, 144 N.C. App. 79, 548 S.E.2d 535, 2001 N.C. App. LEXIS 345 (2001); Malloy v. Cooper, 356 N.C. 113, 565 S.E.2d 76, 2002 N.C. LEXIS 543 (2002); Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002); Augur v. Augur, 356 N.C. 582, 573 S.E.2d 125, 2002 N.C. LEXIS 1262 (2002); Farm Bureau Ins. Co. of N.C., Inc. v. Blong, 159 N.C. App. 365, 583 S.E.2d 307, 2003 N.C. App. LEXIS 1497 (2003); Malloy v. Cooper, 162 N.C. App. 504, 592 S.E.2d 17, 2004 N.C. App. LEXIS 189 (2004); Calhoun v. WHA Med. Clinic, PLLC, 178 N.C. App. 585, 632 S.E.2d 563, 2006 N.C. App. LEXIS 1654 (2006); Wake Cares, Inc. v. Wake County Bd. of Educ., 190 N.C. App. 1, 660 S.E.2d 217, 2008 N.C. App. LEXIS 872 (2008).

II. SCOPE OF ARTICLE.

Scope of Article, Generally. — For a discussion of principles concerning the scope of the Declaratory Judgment Act, see Kirkman v. Kirkman, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

When employers and insurers objected to paying hospitals certain amounts which had been approved by the Industrial Commission, in workers' compensation claims, and the employers and insurers challenged the constitutionality of the statute under which these amounts were approved, the employers and insurers could have brought an action under the Uniform Declaratory Judgment Act, G.S. 1-253 seeking relief. Carolinas Med. Ctr. v. Emplrs & Carriers Listed in Exhibit A, 172 N.C. App. 549, 616 S.E.2d 588, 2005 N.C. App. LEXIS 1773 (2005).

Any Person Interested. — The provision "any person interested under a deed, will, written contract or other writings constituting a contract" has been interpreted by the court to allow a party to a contract or a direct beneficiary to have standing under G.S. 1-254 to file a declaratory judgment action under G.S. 1-253. Whittaker v. Furniture Factory Outlet Shops, 145 N.C. App. 169, 550 S.E.2d 822, 2001 N.C. App. LEXIS 552 (2001).

While proceedings under this Article have been given a wide latitude, they are not without limitations, and it can hardly be said the court is expected to lend its general equity jurisdiction to such proceedings. Brandis v. Trustees of Davidson College, 227 N.C. 329, 41 S.E.2d 833 (1947); Kirkman v. Kirkman, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979). See also, Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

This Article does not license litigants to fish in judicial ponds for legal advice. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966); City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969); Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

The courts of this State do not issue anticipatory judgments resolving controversies that have not arisen. Bland v. City of Wilmington, 10 N.C. App. 163, 178 S.E.2d 25 (1970), rev'd on other grounds, 278 N.C. 657, 180 S.E.2d 813 (1971).

This Article does not authorize the adjudication of mere abstract or theoretical questions. Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966); Bland v. City of Wilmington, 10 N.C. App. 163, 178 S.E.2d 25 (1970), rev'd on other grounds, 278 N.C. 657, 180 S.E.2d 813 (1971).

This Article does not extend to the submission of the theoretical problem or a mere abstraction, and it is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter. Poore v. Poore, 201 N.C. 791, 161 S.E. 532 (1931); Carolina Power & Light Co. v. Iseley, 203 N.C. 811, 167 S.E. 56 (1933); Allison v. Sharp, 209 N.C. 477, 184 S.E. 27 (1936); Branch Banking & Trust Co. v. Whitfield, 238 N.C. 69, 76 S.E.2d 334 (1953); Competitor Liaison Bureau of Nascar, Inc. v. Blevins, 242 N.C. 282, 87 S.E.2d 490 (1955).

The sound principle that judicial resources should be focused on problems which are real and present rather than dissipated on abstract, hypothetical or remote questions is fully applicable to the Declaratory Judgment Act. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Nor the Giving of Advisory Opinions. — The Uniform Declaratory Judgment Act does not undertake to convert judicial tribunals into counselors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966); City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969); Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Hicks

v. Hicks, 60 N.C. App. 517, 299 S.E.2d 275 (1983).

The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise or give abstract opinions. Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

This Article was not intended to require the court to give advisory opinions when no genuine controversy presently exists between the parties. Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966); Bland v. City of Wilmington, 10 N.C. App. 163, 178 S.E.2d 25 (1970), rev'd on other grounds, 278 N.C. 657, 180 S.E.2d 813 (1971).

The Declaratory Judgment Act does not require the court to give a purely advisory opinion which the parties might put on ice to be used if and when occasion might arise. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978); Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

No Justiciable Controversy Where Action Is Barred. — Where the facts alleged disclose that either the statute of limitations or the doctrine of laches is applicable thereto, there is no justiciable controversy as contemplated by the Declaratory Judgment Act. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969).

A moot question is not within the scope of the Declaratory Judgment Act. Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

It is not required for purposes of jurisdiction under the Uniform Declaratory Judgment Act that the plaintiff allege that his rights have been invaded by the defendant prior to commencement of the action. Nevertheless, the courts have construed the law in such a manner that the jurisdiction may be protected against mere academic inquiry when the questions presented are altogether moot, arising out of no necessity for the protection of any rights or avoidance of any liability, and where the parties have only a hypothetical interest in the decision of the court. Hicks v. Hicks, 60 N.C. App. 517, 299 S.E.2d 275 (1983).

Unavailability of Adequate Remedy at Law Not Necessary. — For a court to have jurisdiction under the Declaratory Judgment Act, it is not necessary for a plaintiff to show that an adequate remedy at law is unavailable. Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

The Declaratory Judgment Act is restricted to declaring the rights and liabilities of parties regarding property; for the trial court to find that conveyances are void as a matter of law is beyond the scope of the act. Town of Nags Head v. Tillett, 314 N.C. 627, 336 S.E.2d 394 (1985).

No Waiver of Sovereign Immunity. — Trial court erred in denying state agencies' motion to dismiss a corporation's complaint, seeking a declaratory judgment that an E-Procurement fee was a tax not enacted by the legislature in violation of N.C. Const., Art. II, § 23 and a refund of the taxes under G.S. 105-267 because the corporation's claims were barred by the defense of sovereign immunity; sovereign immunity is not waived by either the Declaratory Judgment Act, G.S. 1-253 et seq., or G.S. 105-267. Petroleum Traders Corp. v. State, 190 N.C. App. 542, 660 S.E.2d 662, 2008 N.C. App. LEXIS 1003 (2008).

III. ACTUAL CONTROVERSY REQUIREMENT.

The touchstone of the Declaratory Judgment Act is the presence of a justiciable controversy, where the pleadings demonstrate a real controversy and the need for a declaration of rights. State ex rel. Hunt v. North Carolina Reinsurance Facility, 49 N.C. App. 206, 271 S.E.2d 302 (1980), rev'd on other grounds, 302 N.C. 274, 275 S.E.2d 399 (1981).

And the existence of a genuine controversy is a jurisdictional necessity. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969); Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978); Griffin v. Fraser, 39 N.C. App. 582, 251 S.E.2d 650 (1979); State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

The charter and bylaws of an association may constitute a contract between the organization and its members wherein members are deemed to have consented to all reasonable regulations and rules of the organization, but such a contract cannot form the basis for jurisdiction in an action for a declaratory judgment absent an actual controversy about legal rights and liabilities arising under the contract. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Actual Controversy Required by Case Law. — Although the Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional prerequisite to an action, the case law imposes such a requirement. Town of Pine Knoll Shores v. Carolina Water Serv., Inc., 128 N.C. App. 321, 494 S.E.2d 618 (1998).

Before a declaratory judgment action is cognizable, North Carolina case law requires that an actual controversy between the parties exist as a jurisdictional prerequisite to an action. Additionally, parties cannot by agreement or stipulation, confer subject matter jurisdiction upon a court by consent. Whittaker v. Furniture Factory Outlet Shops, 145 N.C. App. 169, 550 S.E.2d 822, 2001 N.C. App. LEXIS 552 (2001).

Challenge to Constitutionality of Cruelty to Animals Statute. — A declaratory judgment action seeking to have a statute prohibiting cruelty to animals declared unconstitutional and enjoining its enforcement should have been dismissed because it did not involve only pure questions of law, and even though a criminal prosecution had been threatened, the plaintiff did not show he stood to suffer the loss of either fundamental human rights or property interests if the statute was enforced. Malloy v. Easley, 146 N.C. App. 66, 551 S.E.2d 911, 2001 N.C. App. LEXIS 787 (2001), cert. granted, 354 N.C. 364, 556 S.E.2d 571 (2001).

Parties cannot confer jurisdiction upon a court by consent, stipulation or agreement in declaratory judgment proceedings. City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969); McLaughlin v. Martin, 92 N.C. App. 368, 374 S.E.2d 455 (1988).

Action for a declaratory judgment will lie only where there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Branch Banking & Trust Co. v. Whitfield, 238 N.C. 69, 76 S.E.2d 334 (1953); City of Greensboro v. Wall, 247 N.C. 516, 101 S.E.2d 413 (1958); Haley v. Pickelsimer, 261 N.C. 293, 134 S.E.2d 697 (1964); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966); Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978); Griffin v. Fraser, 39 N.C. App. 582, 251 S.E.2d 650 (1979); Hicks v. Hicks, 60 N.C. App. 517, 299 S.E.2d 275 (1983); Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984); State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

Actions for declaratory judgment will lie for an adjudication of rights, status, or other legal relations only when there is an actual existing controversy between the parties. Wright v. McGee, 206 N.C. 52, 173 S.E. 31 (1934); Bland v. City of Wilmington, 10 N.C. App. 163, 178 S.E.2d 25 (1970), rev'd on other grounds, 278 N.C. 657, 180 S.E.2d 813 (1971).

The broad terms of this Article do not confer upon the court an unlimited jurisdiction; and the court will not entertain an ex parte proceeding of a proceeding which, while adversary in form, yet lacks the essentials of genuine controversy. Town of Tryon v. Duke Power Co., 222 N.C. 200, 22 S.E.2d 450 (1942).

Although the North Carolina Declaratory Judgment Act does not state specifically that an actual controversy between the parties is a jurisdictional prerequisite to an action thereunder, our case law does impose such a requirement. Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

Arising Out of Conflicting Contentions as to Rights and Liabilities. — The superior court has jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance or franchise. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968); Griffin v. Fraser, 39 N.C. App. 582, 251 S.E.2d 650 (1979).

For a court to have jurisdiction under the Declaratory Judgment Act it is required only that plaintiff allege in his complaint and show at trial that a real controversy arising out of the parties' opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing, or under a statute, municipal ordinance, contract or franchise exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure. Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

To constitute an actual controversy there need not exist an actual right of action in one party against the other in which consequential relief might be granted. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969).

It need not be shown by plaintiff that the question is one which might be the subject of a civil action at the time, or that plaintiff's rights have been invaded or violated, or that defendant has incurred liability to plaintiff prior to the action. Town of Tryon v. Duke Power Co., 222 N.C. 200, 22 S.E.2d 450 (1942).

A mere threat to sue is not enough to establish an actual controversy. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

But Mere Apprehension of a Future Action Is Not Sufficient. — A mere fear or apprehension that a claim may be asserted in the future is not ground for issuing a declaratory judgment; before granting such relief, the court must be convinced that litigation sooner or later appears to be unavoidable. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969); Pilot Title Ins.

Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

The mere threat of an action to rescind a sale of personal property or to sue for damages is not sufficient to constitute such an actual controversy as is cognizable under the Uniform Declaratory Judgment Act. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969).

Mere apprehension or the mere threat of an action or a suit is not enough. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984); State v. McNeill, 78 N.C. App. 514, 337 S.E.2d 172 (1985), cert. denied, 316 N.C. 383, 342 S.E.2d 904 (1986).

Mere threat of a suit is not enough to create jurisdiction for a declaratory judgment action. North Carolina Farm Bureau Mut. Ins. Co. v. Warren, 89 N.C. App. 148, 365 S.E.2d 216, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

Litigation Must Appear Unavoidable. — It is not necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief. However, it is necessary that the courts be convinced that the litigation appears to be unavoidable. North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984); Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

Jurisdiction lies where the court is convinced that litigation, sooner or later, appears to be unavoidable. Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

An actual controversy exists for purposes of the act when litigation appears unavoidable. Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985), rev'd on other grounds, 317 N.C. 579, 347 S.E.2d 25 (1986).

It is not necessary that one party have an actual right of action against another, but there must be more than a mere disagreement. This means that it must be shown in the complaint that litigation appears unavoidable. North Carolina Farm Bureau Mut. Ins. Co. v. Warren, 89 N.C. App. 148, 365 S.E.2d 216, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

Practical Certainty of Litigation. — Where plaintiff hospitals sufficiently demonstrated a "practical certainty" that litigation would ensue, they presented an actual controversy justiciable under the Declaratory Judgment Act. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Litigation over the price at which the Department of Transportation must convey property to plaintiffs was unavoidable and, therefore, amounted to a justiciable controversy. Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

A Mere Difference of Opinion Is Not Enough. — A mere difference of opinion between the parties as to whether one has the right to purchase or condemn the property of another, without any practical bearing on any contemplated action, does not constitute a genuine controversy. Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978). See also, Town of Tryon v. Duke Power Co., 222 N.C. 200, 22 S.E.2d 450 (1942).

A mere difference of opinion between the parties does not constitute a controversy within the meaning of the Declaratory Judgment Act. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

But where there is no doubt that litigation is forthcoming, plaintiff should not be required to await suit, perhaps indefinitely, thereby running the risk that evidence relating to the facts will be lost. This is especially true where in the meantime plaintiff would have to maintain sufficient reserves to cover the claim. Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

It is not necessary that the parties wait until lawsuit is immediately imminent or risk forfeiture to have a justiciable controversy. Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985), rev'd on other grounds, 317 N.C. 579, 347 S.E.2d 25 (1986).

An actual controversy is required to exist both at the time of the filing of the pleading and at the time of hearing. The jurisdiction of a court depends upon the state of affairs existing at the time it is invoked. Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

Genuine controversy must appear from the complaint and the record. Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985), rev'd on other grounds, 317 N.C. 579, 347 S.E.2d 25 (1986).

"Bootstrapping" Not Allowed. — Where plaintiffs sought by their complaint a ruling creating a new interpretation of Internal Revenue Code sections, and then sought to use such ruling to create a controversy between the parties justifying the grant of relief, such "bootstrapping" would not suffice for the jurisdictional prerequisites of a declaratory judgment action. Griffin v. Fraser, 39 N.C. App. 582, 251 S.E.2d 650 (1979).

The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff is entitled to the declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all, so that even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory judgment. Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966); Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966).

Where the trial court concluded a case or controversy by finding respondent not mentally ill pursuant to this section, the trial court lacked jurisdiction to subsequently (six months later) declare nunc pro tunc that G.S. 122C-3(21)(ii) was unconstitutional. In re Lynette H., 323 N.C. 598, 374 S.E.2d 272 (1988).

In an action to contest the constitutionality of § 14-225.1 under the Declaratory Judgment Act when his license to picket was voided, plaintiff was granted a temporary restraining order which allowed the picket to proceed; therefore, where it was over a year later when the lower court granted plaintiff's motion for summary judgment and over two years before the case was heard on appeal, the case was moot, both at the time it was before the lower court and on appeal; plaintiff had yet to be arrested or refused a permit for a similar demonstration, and the case did not fall under the exception "capable of repetition, yet evading review." Crumpler v. Thornburg, 92 N.C. App. 719, 375 S.E.2d 708, cert. denied, 324 N.C. 543, 380 S.E.2d 770 (1989).

A prospective defendant in an anticipated enforcement action by the State may not prelitigate its defenses and seek to determine the scope of prosecutorial discretion in a declaratory judgment action and request for injunction. Central Carolina Nissan, Inc. v. Sturgis, 98 N.C. App. 253, 390 S.E.2d 730, cert. denied, 327 N.C. 137, 394 S.E.2d 169 (1990).

Interpretation in Light of Past and Present Action. — Where parties were not asking the court to interpret a document in anticipation of future acts, but in light of past and present action, an actual controversy existed and the trial court did not err in exercising jurisdiction under the Declaratory Judgment Act. Bueltel v. Lumber Mut. Ins. Co., 134 N.C. App. 626, 518 S.E.2d 205, 1999 N.C. App. LEXIS 865 (1999), cert. denied, 351 N.C. 186, 541 S.E.2d 709 (1999).

Abuse of the Declaratory Judgment Act by prospective defendant in an anticipated enforcement action by the State under Chapter 75 in attempting to prelitigate its defenses and determine the scope of prosecutorial discretion constituted grounds for trial court's holding that the attorney violated G.S. 1A-1, Rule 11 in signing and filing pleadings which were not warranted by existing law or a good faith argument for modification or reversal of existing law. Central Carolina Nissan, Inc. v. Sturgis, 98 N.C. App. 253, 390 S.E.2d 730, cert. denied, 327 N.C. 137, 394 S.E.2d 169 (1990).

IV. WHAT MAY BE DETERMINED BY DECLARATORY JUDGMENT.

A. In General.

Editor's Note. — *As to what matters may be determined by declaratory judgment, see also G.S. 1-254 and the case notes thereunder.*

A declaratory judgment is a civil remedy which may not be resorted to to try ordinary matters of guilt or innocence. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

Under Which Only Civil Matters May Be Determined. — Only civil rights, status and relations may be determined under the Declaratory Judgment Act, and when an action instituted thereunder involves both civil and criminal matters, the courts have jurisdiction to determine only the civil matters. Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938).

An action is maintainable under the Declaratory Judgment Act only insofar as it affects the civil rights, status and other relations in the present actual controversy between parties. Chadwick v. Salter, 254 N.C. 389, 119 S.E.2d 158 (1961).

And Declaratory Judgment Will Not Be Granted to Determine Criminal Issues. — A declaratory judgment will not be granted when its only effect is to determine questions which properly should be decided in a criminal action. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

But the courts do not lack power to grant a declaratory judgment merely because a questioned statute relates to penal matters. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971); Commodities Int'l, Inc. v. Eure, 22 N.C. App. 723, 207 S.E.2d 777 (1974).

In General Only Questions of Law May Be Determined. — Absent waiver of jury trial, the trial court under this Article may only determine questions of law. Hall v. Hall, 35 N.C. App. 664, 242 S.E.2d 170, cert. denied, 295 N.C. 260, 245 S.E.2d 777 (1978).

The purpose of this Article is to provide a speedy remedy for the determination of questions of law, and although questions of fact necessary to the adjudication of the legal questions involved may be determined, the remedy is not available to present for determination issues of fact alone. Prudential Ins. Co. of Am. v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

Declaratory Judgment May Be Used to Determine Construction and Validity of a Statute. — This section furnishes a proper method for determining all controversies relative to the construction and validity of a statute. City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969).

And to Determine a Statute's Constitutionality. — It is the rule in this jurisdiction that a statute will be declared unconstitutional and its enforcement will be enjoined when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees. This may be done in a properly constituted action under the Declaratory Judgment Act when a specific provision of a statute is challenged by a person directly and adversely affected thereby. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

A party seeking to challenge the constitutionality of a section requiring a certificate of need to construct a hospital must bring an action pursuant to the Declaratory Judgment Act. Hospital Group v. North Carolina Dep't of Human Resources, 76 N.C. App. 265, 332 S.E.2d 748 (1985).

A declaratory judgment action is a proper means of challenging the constitutionality of a statute which adversely affects the plaintiff. Poor Richard's, Inc. v. Stone, 86 N.C. App. 137, 356 S.E.2d 828 (1987), rev'd on other grounds, 322 N.C. 61, 366 S.E.2d 697 (1988).

But Declaratory Judgment Will Not Lie Prior to Statute's Enactment. — It is unnecessary for an assailed statute to have taken effect in order to entitle one whose rights it affects to contest it by declaratory action. However, the court will not entertain a declaratory action with respect to the effect and validity of a statute in advance of its enactment. City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969).

And Statute Must Be Challenged by One Who Is Directly Affected. — The validity of a statute, when directly and necessarily involved, may be determined in a properly constituted action under this Article, but only when some specific provision thereof is challenged by a person who is directly and adversely affected thereby. City of Greensboro v. Wall, 247 N.C. 516, 101 S.E.2d 413 (1958); Angell v. City of Raleigh, 267 N.C. 387, 148 S.E.2d 233 (1966); Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978).

This Article does not authorize an action to determine the validity of a taxing statute in lieu of, or in substitution for, the specific statutory procedure provided for that purpose. Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961).

Adjudication of Sales Tax Liability Not Available. — The State has not waived its immunity against suit by one of its citizens under the Declaratory Judgment Act for adjudication of his tax liability under the sales tax statute, and hence the Commissioner of Revenue cannot be sued pursuant to the provisions of the Declaratory Judgment Act. Housing Auth. v. Johnson, 261 N.C. 76, 134 S.E.2d 121 (1964).

As State Cannot Be Delayed in Collection of Revenue. — As broad and comprehensive as it is, this Article does not supersede the rule that the sovereign may not be denied or delayed in the enforcement of its right to collect the revenue upon which its existence depends. Bragg Dev. Co. v. Braxton, 239 N.C. 427, 79 S.E.2d 918 (1954).

An action to obtain a judicial declaration of plaintiff's right to an easement is authorized by the Declaratory Judgment Act. Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

An action to obtain a judicial declaration of plaintiffs' right to an easement appurtenant and by necessity over the lands of defendants is authorized by this Article, and the superior court has jurisdiction, it not being a special proceeding to establish a cartway which must be instituted before the clerk. Carver v. Leatherwood, 230 N.C. 96, 52 S.E.2d 1 (1949).

A controversy as to the extent of an easement granted by the State may be the basis of a suit against the State in the superior court under this section, since such suit involves title to realty within the purview of G.S. 41-10.1. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

But State May Not Be Enjoined from Interfering with Easement. — In an action under this section to construe an easement granted by the State, judgment may not be entered enjoining the State and its employees from interfering with an easement as defined by the court, since no action, except as provided in G.S. 143-291, may be maintained against the State or any agency thereof in tort or to restrain the commission of a tort. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963).

Article Does Not Vest in Superior Court Power to Supervise Officials of Inferior Courts. — While the Declaratory Judgment Act is comprehensive in scope and purpose, the legislature, in enacting it, did not intend to vest in the superior courts of the State the general power to oversee, supervise, direct or instruct officials of inferior courts in the discharge of their official duties. Town of Fuquay Springs v. Rowland, 239 N.C. 299, 79 S.E.2d 774 (1954); City of Henderson v. County of Vance, 260 N.C. 529, 133 S.E.2d 201 (1963).

This Article does not confer upon one judge authority to advise a litigant upon a matter of procedure in another trial before another judge. Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940).

No Jurisdiction over Workers' Compensation Cases. — In an action instituted in the superior court under the Declaratory Judgment Act or otherwise, when the pleadings disclose that an employee-employer relationship exists so that the parties are subject to the provisions of the Workers' Compensation Act, dismissal is proper, for the Industrial Commission has exclusive jurisdiction in such cases. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963).

The Declaratory Judgment Act may not be used to determine whether or not an employer's insurance carrier is entitled to the right of subrogation against funds received from third party tort-feasor under the provisions of G.S. 97-10.2, since the Industrial Commission has exclusive original jurisdiction to determine such question. Cox v. Pitt County Transp. Co., 259 N.C. 38, 129 S.E.2d 589 (1963).

Action to Quiet Title. — A declaratory action is an appropriate remedy to perform the function of the customary action to quiet title. York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Interpretation of Restrictive Covenant. — Trial court properly entered a declaration that two house plans submitted by a builder to a homeowner's association satisfied a restrictive covenant; the trial court was not required to make additional findings of fact pursuant to G.S. 1A-1, Rule 52(a)(1), and the covenant language allowed a minimum area requirement to be satisfied by rooms on multiple floors of the home. Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n, 158 N.C. App. 518, 581 S.E.2d 94, 2003 N.C. App. LEXIS 1190 (2003).

Marketability of Land. — The Declaratory Judgment Act does not empower courts to give advisory opinions as to the marketability of land merely to enable owners to allay the fears of prospective purchasers. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949).

Construction and Coverage of Insurance Contracts. — The Declaratory Judgment Act, while not applicable to claims under the Workers' Compensation Act, is applicable to the construction of insurance contracts and in determining the extent of coverage when there is a controversy as to whether workers' compensation or insurance covers. Travelers Ins. Co. v. Curry, 28 N.C. App. 286, 221 S.E.2d 75, cert. denied, 289 N.C. 615, 223 S.E.2d 396 (1976).

Generally questions involving the liability of insurance companies under their policies are proper subjects for declaratory relief. Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 258 N.C. 69, 128 S.E.2d 19 (1962); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

A declaratory judgment action which served the dual purpose of determining with finality an insurance company's obligation to defend insured in a pending tort action and the company's ultimate liability for any judgment rendered against the insured was a perfect case for declaratory judgment. Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962).

The Declaratory Judgment Act is applicable to construction of insurance contracts and in determining the extent of coverage under a policy. Bellefonte Underwriters Ins. Co. v. Alfa Aviation, Inc., 61 N.C. App. 544, 300 S.E.2d 877 (1983), aff'd, 310 N.C. 471, 312 S.E.2d 426 (1984).

A question concerning the liability of an insurance company under its policy is generally a proper subject for a declaratory judgment, provided a genuine controversy exists between the parties. However, the cases in which a declaratory judgment has been found appropriate for determining the existence or extent of insurance coverage have involved situations in which legal action was pending, or judgment had been entered, against the insured. Ramsey v. Interstate Insurors, Inc., 89 N.C. App. 98, 365 S.E.2d 172, cert. denied, 322 N.C. 607, 370 S.E.2d 248 (1988).

Insurance companies' motion for declaratory judgment on issue of a default judgment on the insurance companies' duty to defend insured under G.S. 1-253 was denied because the pleadings in the underlying lawsuit sufficiently alleged that property damage was caused by an accident and was thus an "occurrence" covered under the insured's commercial general liability and umbrella policies at issue. Wayne Bros., Inc. v. N. River Ins. Co., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 16838 (M.D.N.C. Aug. 20, 2003).

Trial court properly declared, pursuant to G.S. 1-253 that insurance companies were not obligated to defend or indemnify a business owner in an underlying tort action; injuries caused when the owner shot a thief were expected or intended, and were therefore excluded under the policies in question. Auto Owners Ins. Co. v. Grier, 163 N.C. App. 560, 593 S.E.2d 804, 2004 N.C. App. LEXIS 411 (2004).

B. Actions in Which Declaratory Judgment Held Available.

Challenge to Constitutionality of County Ordinance And Its Enabling Statute. — Trial court did not err in concluding that a county ordinance, Orange County, N.C., Civil Rights Ordinance art. II, § 2.1(a), that pertained to employment discrimination and its enabling statute, G.S. 160A-492, were unconstitutional acts because they had the practical effect of regulating labor, which was forbidden by N.C. Const. art. II, § 24(1)(j). Williams v. Blue Cross Blue Shield, 357 N.C. 170, 581 S.E.2d 415, 2003 N.C. LEXIS 595 (2003).

Challenge to Laws Giving County Power to Administer City Code. — The superior court had jurisdiction under the Declaratory Judgment Act to determine the validity of laws adopted by the General Assembly to provide that Craven County would administer building and safety codes inside the city limits of New Bern. City of New Bern v. New Bern-Craven County Bd. of Educ., 328 N.C. 557, 402 S.E.2d 623 (1991), aff'd, 338 N.C. 430, 450 S.E.2d 735 (1994).

Action to Determine Applicability of Administrative Procedure Act to Governor's Action. — A declaratory judgment action was appropriate to obtain a determination as to whether the Governor had to follow the procedure set out in the Administrative Procedure Act in removing for cause a member of the North Carolina Cemetery Commission and whether the Governor had authority to suspend a member of the commission pending final determination on the merits. James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979), cert. denied, 299 N.C. 121, 262 S.E.2d 6 (1980).

Challenge by Governor to Reinsurance Facility's Collection of Recoupment Surcharges. — The Governor's constitutional powers, duties and obligations to the people of North Carolina generally, including that significant class of citizens who are compelled to obtain automobile liability insurance in order to use the public roads and highways of the State, constituted significant interest in controversy generated by the action of the Board of Governors of the North Carolina Reinsurance Facility in charging and collecting recoupment surcharges from motor vehicle insurance policyholders without filing the surcharge and supplemental information with the Commissioner of Insurance, which interest was sufficient to give the Governor standing to seek a declaration as to the legality of their action. State ex rel. Hunt v. North Carolina Reinsurance Facility, 49 N.C. App. 206, 271 S.E.2d 302 (1980), rev'd on other grounds, 302 N.C. 274, 275 S.E.2d 399 (1981).

Declaratory judgment is appropriate for construction of insurance contracts and in determining the extent of coverage under an insurance policy. Hobson Constr. Co. v. Great Am. Ins. Co., 71 N.C. App. 586, 322 S.E.2d 632 (1984), cert. denied, 313 N.C. 329, 327 S.E.2d 890 (1985).

Insurance Coverage. — A declaratory judgment action may be brought to determine whether coverage exists under an insurance policy. Western World Ins. Co. v. Carrington, 90 N.C. App. 520, 369 S.E.2d 128 (1988).

Where exhaustion of the limits of tortfeasor's liability policy by payment of the limits of the policy by tortfeasor's insurer into deceased's estate triggered the applicability of plaintiff's underinsured motorist (UIM) coverage, refusal of decedent's insurer to state the extent of the UIM coverage under the two policies at issue sparked an actual controversy between plaintiff and insurer which provided the basis for a declaratory judgment suit. Smith v. Nationwide Mut. Ins. Co., 97 N.C. App. 363, 388 S.E.2d 624 (1990), rev'd on other grounds, 328 N.C. 139, 400 S.E.2d 44, rehearing denied, 328 N.C. 577, 403 S.E.2d 514 (1991).

Question of Insurer's Liability. — An insurer who issued a liability policy insuring defendant's truck for "business-pleasure" use could invoke the provisions of the Uniform Declaratory Judgment Act to determine whether the truck was being used at the time of an accident within the exception clause of the policy. Lumber Mut. Cas. Ins. Co. v. Wells, 225 N.C. 547, 35 S.E.2d 631 (1945).

Where plaintiff's insured was being sued on a claim for which it denied coverage and for which, if coverage existed, it had a duty to defend, a declaratory judgment action was proper. Western World Ins. Co. v. Carrington, 90 N.C. App. 520, 369 S.E.2d 128 (1988).

Declaratory judgment actions are appropriate to interpret written instruments. LDDC, Inc. v. Pressley, 71 N.C. App. 431, 322 S.E.2d 416 (1984).

Construction of a Will. — Where plaintiff was not attacking the validity of a will but was asking the court to construe the will to determine who could take under the will, a civil action for construction of a will could be brought under this section. Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

Interpretation of Testamentary Trust. — A bona fide controversy justiciable under the Declaratory Judgment Act was presented by the pleadings and stipulations in a trustee's action seeking an interpretation of a testamentary trust as to the manner of distribution of land constituting the trust corpus to testator's widow and daughter upon termination of the trust. First-Citizens Bank & Trust Co. v. Carr, 279 N.C. 539, 184 S.E.2d 268 (1971).

An action to determine the rights of the parties under a charitable trust created by will, in which the trustees and all of the agencies who were beneficiaries of the trust were made parties, was justiciable under this Article. Johnson v. Wagner, 219 N.C. 235, 13 S.E.2d 419 (1941).

Question as to Right of Adopted Children to Share in Corpus of Trust. — Where, in an action to construe a will, the parties sought an adjudication as to whether three adopted children of testator's nephew would be entitled to share in the corpus of a trust after the death of the life beneficiaries, it was held that since the question was one of law and was presently determinable, and since it would not be moot unless all three adopted children were to die prior to the death of the survivor of the life beneficiaries, the parties were entitled to a determination of the question. Wachovia Bank

& Trust Co. v. Green, 238 N.C. 339, 78 S.E.2d 174 (1953).

Question by Executor of Estate as to Source of Payment of Taxes. — An executor of an estate may properly maintain an action under the Declaratory Judgment Act to obtain the advice of the court as to the source of payment of inheritance taxes. Branch Banking & Trust Co. v. Staples, 120 N.C. App. 227, 461 S.E.2d 921 (1995).

Challenge to Order of Board of Paroles. — The Declaratory Judgment Act is an appropriate means whereby a prisoner who is currently serving a valid sentence for a crime committed during his parole may challenge an order of the Board of Paroles providing that the remainder of the sentence upon which the parole was revoked would be served upon completion of the sentence for the crime committed during the parole. Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971).

Challenge to Firemen's Pension Fund Act. — Under the broad terms of the Declaratory Judgment Act there was held to be a right to challenge the Firemen's Pension Fund Act, former G.S. 118-18 et seq. (see now G.S. 58-86-1 et seq.), in the superior court. It did not appear that the case was an action against the State and the allegations were sufficient to show the court had jurisdiction of the cause. American Equitable Assurance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958).

Right to Close Alleyway. — Where an alleyway ending in a cul-de-sac was referred to in the respective deeds to contiguous lots, the right to close a part of the alley at the cul-de-sac end could be determined under the Declaratory Judgment Act. Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

A controversy as to whether deeds created a fee upon special limitation and as to whether title would revert to grantors upon threatened happening of contingency could be maintained under the Declaratory Judgment Act. Charlotte Park & Recreation Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114, cert. denied, 350 U.S. 983, 76 S. Ct. 469, 100 L. Ed. 851 (1955); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

Determination of Rights Under Zoning Ordinance. — It is fundamental under the Declaratory Judgment Act that a party who considers his rights to be affected by a zoning ordinance, in a situation where there can be no doubt that litigation involving him is imminent, does not have to wait to be sued, but that he may go to court, obtain a declaration of his rights under the ordinance and seek relief from uncertainty and insecurity with respect to rights, status, and other legal relations. Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

A conditional use rezoning ordinance may be properly challenged by an action for declaratory judgment. Village Creek Property Owners Ass'n v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793, 1999 N.C. App. LEXIS 1159 (1999).

Action to Declare Ownership Interest in Franchise. — A declaratory judgment was held appropriate in an action by a former husband against his former wife and her incorporated fast food restaurant franchise seeking a declaration of his entitlement to an ownership interest based on an oral agreement. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Validity of Covenant Not to Compete. — Where record showed an actual controversy between the parties as to validity of a covenant not to compete, and that litigation was not only unavoidable but had actually begun, court had jurisdiction to hear declaratory judgment action on the issue. Stevenson v. Parsons, 96 N.C. App. 93, 384 S.E.2d 291 (1989), cert. denied, 326 N.C. 366, 389 S.E.2d 819 (1990).

Action Against the Industrial Commission. — Plaintiff hospitals were entitled to seek declaratory and injunctive relief under the Declaratory Judgment Act in action against the Industrial Commission regarding payment of fees. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Rights of Employees. — State government employees, who were left in temporary positions, found themselves in legal limbo in which rules governing appointment terms were broken, but in which the legal result was uncertain. Thus, the employees were entitled to have their rights declared. Sanders v. State Personnel Comm'n, — N.C. App. —, 677 S.E.2d 182, 2009 N.C. App. LEXIS 687 (2009).

C. Actions in Which Declaratory Judgment Held Unavailable.

Challenge to Statutes Authorizing Land Acquisition for Park Purposes. — Where none of the plaintiffs seeking a declaratory judgment that Article 2 of Chapter 113, and Article 3 of Chapter 113A, were unconstitutional and praying that defendants be permanently enjoined from adopting a "Master Plan" for the Eno River State Park had as yet been directly and adversely affected by the statutes they sought to challenge, and where no condemnation proceeding affecting any lands of the plaintiffs had as yet been instituted, and all that had occurred was that employees of the Division of Parks and Recreation had made initial alternative planning proposals for a State park which contemplated ultimate acquisition of certain lands of the plaintiffs for park purposes, the plaintiffs failed to show the existence of a genuine controversy cognizable under the Declaratory Judgment Act. Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978).

Challenge to Insurance Regulation Without Exhausting Administrative Remedies. — Plaintiff collection agency was not entitled to seek a declaratory judgment in the superior court as to the validity and applicability of a regulation of the Department of Insurance prohibiting collection agencies from instituting judicial proceedings on behalf of other persons where plaintiff failed to exhaust available administrative remedies. Porter v. North Carolina Dep't of Ins., 40 N.C. App. 376, 253 S.E.2d 44, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979).

Insurance Coverage. — Neither the allegation that third party might file a civil action against plaintiff insureds, nor the bare allegation, based upon information and belief, that third party had made claims for damages upon insurer established a genuine existing controversy. Unless and until an actual claim arising out of the accident in question was filed against plaintiffs or appeared unavoidable, their interest in the existence of insurance coverage for any such claim would be purely academic and the issue would not be ripe for determination by declaratory judgment. Ramsey v. Interstate Insurors, Inc., 89 N.C. App. 98, 365 S.E.2d 172, cert. denied, 322 N.C. 607, 370 S.E.2d 248 (1988).

Where complaint alleged nothing more than the possibility that plaintiff insurer might be responsible for excess coverage, and it was not evident from the complaint how much injury was sustained by the injured party, and where plaintiff did not even allege that it had been called upon to defend the action or participate in any way, plaintiff failed to allege sufficient facts to show the existence of an actual or justiciable controversy with regard to its insurance policy. North Carolina Farm Bureau Mut. Ins. Co. v. Warren, 89 N.C. App. 148, 365 S.E.2d 216, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

Under the uninsured motorist coverages of defendant insurers, liability did not attach until a valid judgment was obtained against the uninsured motorist; therefore, where plaintiffs had not obtained any such judgment and there was no assurance that they ever would, there was no case in controversy to meet the jurisdictional requirements for declaratory judgment under G.S. 1-253. McLaughlin v. Martin, 92 N.C. App. 368, 374 S.E.2d 455 (1988).

The plaintiff, who was injured in an automobile collision with the defendant's insured, lacked standing to seek a declaratory judgment construing the defendant insurer's policy provisions because the plaintiff was a stranger to the insurance contract; standing to seek a declaration as to the extent of coverage under an insurance policy requires that the party seeking relief have an enforceable contractual right under the insurance agreement. DeMent v. Nationwide Mut. Ins. Co., 142 N.C. App. 598, 544 S.E.2d 797, 2001 N.C. App. LEXIS 189 (2001).

A proceeding for a declaration as to how the estate of deceased passed by purported will would be dismissed where the record of probate of the instrument disclosed on its face that the paper-writing had not been proven as required by statute, since in such instance the question of title to property under the paper-writing was moot. Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

Rights of Contingent Beneficiaries of Trust. — Contingent beneficiaries of an inter vivos trust could not seek a declaratory judgment of their rights in the trust because their rights were a mere expectancy. Taylor v. Taylor, 143 N.C. App. 664, 547 S.E.2d 161, 2001 N.C. App. LEXIS 323 (2001).

Action to determine whether salaries paid certain employees should be included in computing contributions to be paid by an employer under the Employment Security Law involved solely an issue of fact and did not involve any right, status or legal relation, and the employer could not maintain proceedings under this Article to determine the question. Prudential Ins. Co. of Am. v. Powell, 217 N.C. 495, 8 S.E.2d 619 (1940).

Refusal to Amend Semiannual Dialysis Report. — Dialysis firm challenging the refusal of the N.C. Department of Health and Human Services (DHHS), Division of Facility Services [now the Division of Health Service Regulation], Medical Facilities Planning Section, to amend a Semiannual Dialysis Report (SDR) did not have a remedy under the North Carolina Administrative Procedures Act or the North Carolina Declaratory Judgment Act since, inter alia: the enabling statute suggested that the North Carolina State Medical Facilities Plan (SMFP), which contained the SDR, was a snapshot in time intended to enable the DHHS to develop policy, criteria, and standards for health service facilities planning; and it was the role of the DHHS and the N.C. State Health Coordinating Council to develop the SMFP. Bio-Medical Applications of N.C., Inc. v. N.C. HHS, 179 N.C. App. 483, 634 S.E.2d 572, 2006 N.C. App. LEXIS 1979 (2006).

Failure of a clerk of a local court to collect and account for moneys rightfully belonging to a municipality because of alleged error in the taxing of costs in criminal prosecutions in his court could not be made the subject of an action instituted under the Declaratory Judgment Act. Town of Fuquay Springs v. Rowland, 239 N.C. 299, 79 S.E.2d 774 (1954).

In an action to contest the constitutionality of § 14-225.1 under the Declaratory Judgment Act when his license to picket was voided, plaintiff was granted a temporary restraining order which allowed the picket to proceed; therefore, where it was over a year later when the lower court granted plaintiff's motion for summary judgment and over two years before the case was heard on appeal, the case was moot, both at the time it was before the lower court and on appeal; plaintiff had yet to be arrested or refused a permit for a similar demonstration, and the case did not fall under the exception "capable of repetition, yet evading review." Crumpler v. Thornburg, 92 N.C. App. 719, 375 S.E.2d 708, appeal of right allowed pursuant to N.C.R.A.P., Rule 16(b) and petition denied as to additional issues, 324 N.C. 543, 380 S.E.2d 770 (1989).

Challenge to Constitutionality of Cruelty to Animals Statute. — A declaratory judgment action seeking to have a statute prohibiting cruelty to animals declared unconstitutional and enjoining its enforcement should have been dismissed because it did not involve only pure questions of law and even though a criminal prosecution had been threatened, the plaintiff did not show he stood to suffer the loss of either fundamental human rights or property interests if the statute was enforced. Malloy v. Easley, 146 N.C. App. 66, 551 S.E.2d 911, 2001 N.C. App. LEXIS 787 (2001), cert. granted, 354 N.C. 364, 556 S.E.2d 571 (2001).

Challenge to Zoning Ordinance Where Benefit Accepted. — Where plaintiff had clearly requested, obtained and accepted the benefits of a variance from a city ordinance, plaintiff was precluded from attacking the validity of the zoning ordinance in an action for declaratory judgment. Franklin Rd. Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989).

Land Owners Not Entitled to Declaratory Judgment Overturning Zoning Decision. — Trial court properly granted summary judgment to a city in property owners' declaratory judgment action pursuant to G.S. 1-253, challenging a denial of an application to rezone property; a city council's finding that the rezoning would lead to further traffic congestion in the area had a plausible basis, and the decision had a basis in reason and bore a substantial relation to public safety. Ashby v. Town of Cary, 161 N.C. App. 499, 588 S.E.2d 572, 2003 N.C. App. LEXIS 2199 (2003).

Fact that plaintiff remained subject to criminal contempt should he again fail to pay child support as required by an outstanding court order did not present a situation where litigation appeared unavoidable, but only presented the "mere threat of an action," and as such it was insufficient to create an actual controversy. Hammock v. Bencini, 98 N.C. App. 510, 391 S.E.2d 210 (1990).

Negligence Action. — Generally only questions of law are appropriate to be determined under the Declaratory Judgment Act; thus, a negligence action, with unresolved issues of fact, cannot be properly decided under the Act. Strickland v. Town of Aberdeen, 124 N.C. App. 430, 477 S.E.2d 218 (1996).

Proposed Construction of Water System. — Where town merely proposed to construct a water system for the purposes of providing potable water to its residents, the court was without jurisdiction to hear the declaratory judgment action filed by the town and landowners (which sought a declaration that an agreement with water company was no longer enforceable). Town of Pine Knoll Shores v. Carolina Water Serv., Inc., 128 N.C. App. 321, 494 S.E.2d 618 (1998).

Action to determine whether plaintiff, county board of realtors, conducted lawful disciplinary proceedings against one of its members, the defendant, involved no actual controversy between the parties sufficient to invoke a court's jurisdiction under the Declaratory Judgment Act, as litigation between the parties did not appear unavoidable. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Interpetation of Property Settlement Agreement Incorporated Within a Consent Judgment of Divorce. — District court erred by interpreting a property settlement agreement via a declaratory judgment action brought by an ex-husband against his ex-wife because the proper remedy with regard to interpreting the agreement, which had been incorporated into a consent judgment of divorce, was a contempt proceeding and not an independent declaratory judgment action; as a result, the district court lacked subject matter jurisdiction of the matter and the order interpreting the agreement, which was in favor of the ex-husband, was vacated on appeal. Fucito v. Francis, 175 N.C. App. 144, 622 S.E.2d 660, 2005 N.C. App. LEXIS 2715 (2005).

Actions to Quiet Title. — Dismissal of a suit brought by a group of beachfront landowners against the State of North Carolina, the State of North Carolina Department of Environment and Natural Resources, the Coastal Resources Commission, the Division of Coastal Management, and its director, was upheld on appeal because the landowners failed to allege in their complaint sufficient allegations to establish that the State of North Carolina asserted any claim of title to their land under G.S. 41-10.1 to have constituted a waiver of the state's sovereign immunity with regard to the landowners' suit to prevent the general public from interfering with their use of certain beach property, which the landowners claimed was deeded to them. Fabrikant v. Currituck County, 174 N.C. App. 30, 621 S.E.2d 19, 2005 N.C. App. LEXIS 2219 (2005).

Request to Purge Easement From

County Registry. — Trial court did not err in dismissing a landowner's declaratory judgment complaint against an adjacent landowner because the trial court had no jurisdiction pursuant to the Declaratory Judgment Act, G.S. 1-253 et seq., to consider the landowner's request that it purge the adjacent's landowner's easement from the county registry; the relief sought was the same as a request to void a conveyance or to nullify a written instrument and was beyond the scope of the Act. A. Perin Dev. Co., LLC v. Ty-Par Realty, Inc., — N.C. App. —, 667 S.E.2d 324, 2008 N.C. App. LEXIS 1807 (2008).

Citizens' Action to Block Construction on Leased Property Mooted. — Declaratory judgment declaring a modular school building unlawful would have had no practical effect on the controversy where citizens claimed that a board of education improperly constructed the building on leased property, under G.S.115C-521(d), because the disputed school was already operating, and the citizens did not seek the closure of the facility; therefore, the issue presented only an abstract proposition of law for determination, and was therefore also moot. Citizens Addressing Reassignment & Educ., Inc. v. Wake County Bd. of Educ., 182 N.C. App. 241, 641 S.E.2d 824, 2007 N.C. App. LEXIS 593 (2007).

V. PROCEDURE.

The existence of an actual controversy must be shown in the complaint. North Carolina Farm Bureau Mut. Ins. Co. v. Warren, 89 N.C. App. 148, 365 S.E.2d 216, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

A declaratory judgment action cannot be commenced by a motion in the cause, any more than can an action to modify or reform a consent judgment. Home Health & Hospice Care, Inc. v. Meyer, 88 N.C. App. 257, 362 S.E.2d 870 (1987).

Plaintiff must show the existence of the conditions upon which the court's jurisdiction may be invoked. Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

But Specific Reference to This Article Is Not Required. — It is not error if an action instituted under this section fails to make specific reference to the statute in the complaint. It is the facts alleged that determine the nature of the relief to be granted. Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960); Langdon v. Hurdle, 15 N.C. App. 158, 189 S.E.2d 517 (1972).

When Motion to Dismiss Under § 1A-1, Rule 12(b)(6) Is Proper. — When the record shows that there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine existing controversy, this may be taken advantage of by a motion to dismiss under G.S. 1A-1, Rule 12(b)(6). Kirkman v. Kirkman, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

When the record shows that there is no basis for declaratory relief, or the complaint does not allege an actual, genuine existing controversy, a motion for dismissal under G.S. 1A-1, Rule 12(b)(6) will be granted. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

When Summary Judgment Is Appropriate. — Summary judgment is appropriate in a declaratory judgment action where there is no genuine issue as to any material fact and either party is entitled to a judgment as a matter of law. Threatte v. Threatte, 59 N.C. App. 292, 296 S.E.2d 521 (1982); Smith v. HBE Corp., 655 F. Supp. 59 (E.D.N.C. 1986), aff'd, 811 F.2d 1505 (4th Cir. 1987).

The propriety of summary judgment in a declaratory judgment action is governed by the same considerations applicable to any other action and therefore summary judgment may be entered when there is no issue of material fact and a party is entitled to prevail as a matter of law. Smith v. HBE Corp., 655 F. Supp. 59 (E.D.N.C. 1986), aff'd, 811 F.2d 1505 (4th Cir. 1987).

Summary judgment may be entered, when otherwise proper, upon the motion of either plaintiff or defendant in an action for a declaratory judgment. Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972).

As to the use of demurrers in declaratory judgment actions, see Walker v. City of Charlotte, 268 N.C. 345, 150 S.E.2d 493 (1966); Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967); Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

A declaratory judgment may be entered only after answer and on such evidence as the parties may introduce upon the trial or hearing, in the absence of a stipulation. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964); Hubbard v. Josey, 267 N.C. 651, 148 S.E.2d 638 (1966).

Effect of Failure to Appear and Answer. — The failure of a defendant who has been duly served to appear and answer a complaint seeking a declaratory judgment constitutes admission of every material fact pleaded which is essential to the judgment sought, but the court must, nevertheless, proceed to construe such facts or instruments set out in the complaint and enter judgment thereon; the default caused by the defendant's failure to appear and answer does not entitle the plaintiff to a judgment based on the pleader's conclusions. Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622, cert. denied, 281 N.C. 621, 190 S.E.2d 465 (1972).

Venue. — Since the Declaratory Judgment Act contains no provisions regarding venue, the venue statutes and principles generally applicable to civil actions should govern venue of an action for declaratory relief. McCrary Stone Serv., Inc. v. Lyalls, 77 N.C. App. 796, 336 S.E.2d 103 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 26 (1986).

Pleading Special Damages. — The plaintiffs' complaint was improperly dismissed for lack of standing due to the failure to allege special damages because the zoning statute did not require parties to be "aggrieved" in order to file a declaratory judgment action and because the Declaratory Judgment Act did not require a pleading of special damages. Village Creek Property Owners Ass'n v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793, 1999 N.C. App. LEXIS 1159 (1999).

Jurisdiction Over Declaratory Judgment. — Although the industrial commission had exclusive jurisdiction over matters arising under the Workers' Compensation Act pursuant to G.S. 97-91, where an injured passenger's declaratory judgment claim under G.S. 1-253 and G.S. 1-254 was based on his standing as a third-party intended beneficiary of a contract between his employer, a subcontractor, and a contractor, wherein the contractor was to provide workers' compensation coverage to the subcontractor's employees, the claim was within the jurisdiction of the trial court. Lowery v. Campbell, 185 N.C. App. 659, 649 S.E.2d 453, 2007 N.C. App. LEXIS 1948 (2007).

Trial court's declaratory judgment need not be in any particular form, so long as it actually decides the issues in controversy. Poor Richard's, Inc. v. Stone, 86 N.C. App. 137, 356 S.E.2d 828 (1987), rev'd on other grounds, 322 N.C. 61, 366 S.E.2d 697 (1988).

§ 1-254. Courts given power of construction of all instruments.

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof. (1931, c. 102, s. 2.)

Legal Periodicals. — For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

CASE NOTES

Editor's Note. *— As to what matters may be determined by declaratory judgment, see also the case notes to G.S. 1-253.*

This section establishes the right to seek declaratory judgments concerning the construction of contracts and written instruments. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Including Liability Insurance Policies. — This section makes a declaratory judgment proceeding available where there is a dispute concerning contracts of any kind, including liability insurance policies. Barnes v. Hardy, 98 N.C. App. 381, 390 S.E.2d 758 (1990), aff'd, 329 N.C. 690, 407 S.E.2d 504 (1991).

Unless Petitioner Lacks Standing. — The plaintiff, who was injured in an automobile collision with the defendant's insured, lacked standing to seek a declaratory judgment construing the defendant insurer's policy provisions because the plaintiff was a stranger to the insurance contract; standing to seek a declaration as to the extent of coverage under an insurance policy requires that the party seeking relief have an enforceable contractual right under the insurance agreement. DeMent v. Nationwide Mut. Ins. Co., 142 N.C. App. 598, 544 S.E.2d 797, 2001 N.C. App. LEXIS 189 (2001).

Written Instruments Construed But Not Nullified. — The Declaratory Judgment Act is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments. Town of Nags Head v. Tillett, 68 N.C. App. 554, 315 S.E.2d 740 (1984), aff'd in part and rev'd in part on other grounds, 314 N.C. 627, 336 S.E.2d 394 (1985).

Swearing on the Quran. — Superior court erred in dismissing a complaint challenging G.S. 11-2 for lack of a justiciable controversy where an individual brought a declaratory judgment after her request to swear on the Quran was denied and an organization had sued after its Jewish members exhibited their intent to serve as jurors or witnesses if called. ACLU of N.C., Inc. v. State, 181 N.C. App. 430, 639 S.E.2d 136, 2007 N.C. App. LEXIS 153 (2007).

Construction of Contract Before or After Breach. — When jurisdiction exists, a contract may be construed either before or after there has been a breach of it. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Covenant Not to Compete. — Where record showed an actual controversy between the parties as to validity of a covenant not to compete, and that litigation was not only unavoidable but had actually begun, court had jurisdiction to hear declaratory judgment action on the issue. Stevenson v. Parsons, 96 N.C. App. 93, 384 S.E.2d 291 (1989), cert. denied, 326 N.C. 366, 389 S.E.2d 819 (1990).

Trial court had the power to determine the validity and enforceability of a non-competition clause in a contract between defendant and his former employer under the Declaratory Judgment Act. Bueltel v. Lumber Mut. Ins. Co., 134 N.C. App. 626, 518 S.E.2d 205, 1999 N.C. App. LEXIS 865 (1999), cert. denied, 351 N.C. 186, 541 S.E.2d 709 (1999).

Insurance Coverage. — A declaratory judgment action may brought to determine whether coverage exists under an insurance policy. Western World Ins. Co. v. Carrington, 90 N.C. App. 520, 369 S.E.2d 128 (1988).

Plaintiff's declaratory judgment action to have the rights and relations between the insured and insurers clarified was proper under this section. W & J Rives, Inc. v. Kemper Ins. Group, 92 N.C. App. 313, 374 S.E.2d 430 (1988), cert. denied, 324 N.C. 342, 378 S.E.2d 809 (1989).

Trial court erred in granting judgment notwithstanding the verdict to an auto accident victim who sought a declaratory judgment that he was a resident of his father's household and thus subject to coverage under his father's policy, as more than a scintilla of evidence supported the jury's verdict that the victim did not reside at his father's house. Monin v. Peerless Ins. Co., 159 N.C. App. 334, 583 S.E.2d 393, 2003 N.C. App. LEXIS 1522 (2003).

Where plaintiff's insured was being sued on a claim for which it denied coverage and for which, if coverage existed, it had a duty to defend, a declaratory judgment action was proper. Western World Ins. Co. v. Carrington, 90 N.C. App. 520, 369 S.E.2d 128 (1988).

The Declaratory Judgment Act permits any person affected by a statute or municipal ordinance to obtain a declaration of his rights thereunder. Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

The Uniform Declaratory Judgment Act furnishes a particularly appropriate method for determination of controversies relative to the construction and validity of a statute, provided there is an actual or justiciable controversy between the parties in respect to their rights under the statute. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

The Declaratory Judgment Act is designed to provide an expeditious method of procuring a judicial decree construing wills, contracts, and other written instruments and declaring the rights and liabilities of parties thereunder. It is not a vehicle for the nullification of such instruments. Town of Nags Head v. Tillett, 68 N.C. App. 554, 315 S.E.2d 740 (1984), aff'd in part and rev'd in part on other grounds, 314 N.C. 627, 336 S.E.2d 394 (1985).

A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties' desire and the public need requires a speedy determination of important public interests involved therein. Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967).

Trial court properly dismissed the teachers' request for declaratory relief against the county school board under G.S. 115C-84.2 and G.S. 115C-301.1 as the teachers failed to plead all the facts necessary to disclose the existence of an actual controversy between the parties; furthermore, neither section expressly or implicitly created a private cause of action for the teachers. However, the trial court erred by dismissing the teachers' breach of contract claims against the school board as the teachers' allegations were sufficient to withstand the motion to dismiss. Lea v. Grier, 156 N.C. App. 503, 577 S.E.2d 411, 2003 N.C. App. LEXIS 238 (2003).

A suit to determine the validity of a city zoning ordinance is a proper case for a declaratory judgment. Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); Taylor v. City of Raleigh, 22 N.C. App. 259, 206 S.E.2d 401 (1974), aff'd, 290 N.C. 608, 227 S.E.2d 576 (1976).

A property owner having standing to attack a zoning ordinance or amendment thereof may do so in an action under this section for a declaratory judgment. Taylor v. City of Raleigh, 290 N.C. 608, 227 S.E.2d 576 (1976); Stutts v. Swain, 30 N.C. App. 611, 228 S.E.2d 750, cert. denied, 291 N.C. 178, 229 S.E.2d 692 (1976).

Plaintiffs, adjoining property owners, were well within their rights in electing to challenge an amendment to a zoning ordinance through a declaratory judgment action rather than attempting, possibly in vain, to raise sufficient bond in order to procure an injunction. Godfrey v. Zoning Bd. of Adjustment, 317 N.C. 51, 344 S.E.2d 272 (1986).

Where plaintiff had clearly requested, obtained and accepted the benefits of a variance from a city ordinance, plaintiff was precluded from attacking the validity of the zoning ordinance through its complaint seeking declaratory judgment. Franklin Rd. Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989).

Owners of property in the adjoining area affected by a city zoning ordinance are parties in interest entitled to maintain an action under this section. Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972).

The validity of a resolution of intent to annex land for the purposes of determining prior jurisdiction is a justiciable controversy under the Declaratory Judgment Act. Town of Spencer v. Town of E. Spencer, 351 N.C. 124, 522 S.E.2d 297 (1999).

Interpretation of a Deed And a Lease Agreement. — Trial court properly granted summary judgment to a retailer in its declaratory judgment action against a tenant, the landlord, and the landlord's successor in interest because, while a restrictive covenant in a deed between the retailer and the landlord created a real covenant running with the land transferred in the deed and barred the retailer's use of that tract of land for a grocery store, the trial court correctly determined that the restrictive covenant did not impose upon the retailer the five-mile radius restriction to which the landlord earlier agreed in a negotiated commercial lease with the tenant. Wal-Mart Stores, Inc. v. Ingles Mkts., Inc., 158 N.C. App. 414, 581 S.E.2d 111, 2003 N.C. App. LEXIS 1175 (2003).

Interpretation of Property Settlement Agreement Incorporated Within a Consent Judgment of Divorce. — District court erred by interpreting a property settlement agreement via a declaratory judgment action brought by an ex-husband against his ex-wife because the proper remedy with regard to interpreting the agreement, which had been incorporated into a consent judgment of divorce, was a contempt proceeding and not an independent declaratory judgment action; as a result, the district court lacked subject matter jurisdiction of the matter and the order interpreting the agreement, which was in favor of the ex-husband, was vacated on appeal. Fucito v. Francis, 175 N.C. App. 144, 622 S.E.2d 660, 2005 N.C. App. LEXIS 2715 (2005).

Persons Entitled to Bring Action for Construction of Will. — Any interested party may obtain a declaration of rights, status or any other legal relation under a will by bringing an action for declaratory judgment. Taylor v. Taylor, 301 N.C. 357, 271 S.E.2d 506 (1980).

Questions as to the construction of a will may be brought in a declaratory judgment action; however, as there are limitations to the use of a declaratory judgment action, a caveat proceeding was appropriate to determine the validity of a document. Rogel v. Johnson, 114 N.C. App. 239, 441 S.E.2d 558, cert. denied, 336 N.C. 609, 447 S.E.2d 401 (1994).

Determination of the status of adopted children under the provisions of a will is clearly within the purpose of the Uniform Declaratory Judgment Act. Stoney v. MacDougall, 31 N.C. App. 678, 230 S.E.2d 592 (1976), cert. denied, 291 N.C. 716, 232 S.E.2d 208 (1977).

This section did not confer subject matter jurisdiction on the court to hear plaintiffs' challenge to defendant's right to dissent under former § 30-1; because former G.S. 30-1(c) and this section govern mutually exclusive subject matter, each must be construed separately; although both an action contesting a surviving spouse's right of dissent and an action construing a will in part involve estate valuations (the dissent action involving valuation of the entire estate and the declaratory judgment action involving valuation of the testamentary estate), the actions are still fundamentally different in nature. Ripley v. Day , 139 N.C. App. 630, 534 S.E.2d 620, 2000 N.C. App. LEXIS 992 (2000).

This section does not give the court subject matter jurisdiction over a dissent from a will. Section 30-1(c) (now repealed) governing the right to dissent from a will and G.S. 1-254 (the court's right to construe instruments such as wills) govern mutually exclusive subject matter and cannot be construed in pari materia. Ripley v. Day, 141 N.C. App. 546, 539 S.E.2d 384, 2000 N.C. App. LEXIS 1414 (2000), cert denied, 353 N.C. 380, 547 S.E.2d 415 (2001).

Release of Prospective Testamentary Benefit. — Where the heart of a case was the determination of the effect, meaning and validity of a release of a testamentary benefit from a prospective testator and the rights of the parties thereunder, there was a real controversy which plaintiffs were entitled to have determined. Stewart v. McDade, 256 N.C. 630, 124 S.E.2d 822 (1962).

In an action by an executor under the Declaratory Judgment Act for construction of a will and to determine the validity of an assignment of interest in a legacy, a motion to dismiss for want of jurisdiction would be denied where the controversy over the validity of assignment was originally brought into court by the executor, as the executor is entitled to have the matter determined. First Sec. Trust Co. v. Henderson, 226 N.C. 649, 39 S.E.2d 804 (1946).

Challenge brought by executor to validity of the stock transfers made pursuant to will to trustees was not a justiciable controversy in light of the transfer restrictions set out in the company's charter and on the stock certificates. Calton v. Calton, 118 N.C. App. 439, 456 S.E.2d 520 (1995).

Action taken to determine whether

plaintiff, county board of realtors, conducted lawful disciplinary proceedings against one of its members, the defendant, involved no actual controversy between the parties sufficient to invoke a court's jurisdiction under the Declaratory Judgment Act, as litigation between the parties did not appear unavoidable. Assuming *arguendo* that plaintiff board's Code of Ethics and bylaws constituted a contract with defendant, such a contract could not form the basis for jurisdiction in an action for a declaratory judgment absent an actual controversy about legal rights and liabilities arising under the contract. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

An action to modify or reform a judgment may not be maintained under the Declaratory Judgment Act. Howland v. Stitzer, 231 N.C. 528, 58 S.E.2d 104 (1950).

It is not required for purposes of jurisdiction that plaintiff allege or show that his rights have been invaded or violated by the defendants, or that the defendants have incurred liability to him, prior to the commencement of the action. Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

Standing to Challenge Act Requiring Town to Provide Beach Access. — A town had standing to challenge an act that provided that the town would be responsible for maintaining facilities for the provision of public pedestrian beach access. Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987).

Individual plaintiffs, taxpayers and property owners in a town had standing to challenge an act that provides the town would be responsible for maintaining facilities for the provision of public pedestrian beach access, since it required the expenditure of public funds. Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987).

Standing to Challenge Transfers from Highway Trust Fund. — Taxpayers had standing to challenge unlawful or unconstitutional government expenditures and were entitled to seek a declaratory judgment; a trial court erred in dismissing taxpayers' suit, on behalf of themselves and others similarly situated, which challenged money transfers from the North Carolina Highway Trust Fund to the general fund. Goldston v. State, 361 N.C. 26, 637 S.E.2d 876, 2006 N.C. LEXIS 1300 (2006).

Standing Found. — Appellee/buyer had standing pursuant to this section where it purportedly purchased the company at issue, purportedly owned most of its assets, and if the alleged contract between the appellant/seller and company was, in fact, enforceable, might find that it had also purchased some liability. Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 141 N.C. App. 569, 541 S.E.2d 157, 2000 N.C. App. LEXIS 1298 (2000), cert. denied, 353 N.C. 370, 547 S.E.2d 433 (2001).

Homeowners had standing to seek a declaration that a plan of development existed with a particular street as a 60-foot right of way, according to the plat referenced in their deed; further, the homeowners were entitled to take action to prevent the owner of a larger tract of land from departing from the development plan evidenced by a map made at the time the property was conveyed. Emick v. Sunset Beach & Twin Lakes, Inc., 180 N.C. App. 582, 638 S.E.2d 490, 2006 N.C. App. LEXIS 2516 (2006).

Parents of students alleged sufficient standing to allow their claims under the Declaratory Judgment Act, G.S. 1-254, because they were directly affected by a Board of Education's plan to convert traditional calendar schools to mandatory year round schools. While some of the students were re-assigned to attend traditional calendar schools, the students could still be assigned to year-round schools in the future; therefore, an actual controversy existed, and a declaratory judgment as to the authority of the Board and the rights of the parents and students would terminate and afford relief from the uncertainty, insecurity, and controversy currently existing. Wake Cares, Inc. v. Wake County Bd. of Educ., 190 N.C. App. 1, 660 S.E.2d 217, 2008 N.C. App. LEXIS 872 (2008), aff'd 363 N.C. 165, 675 S.E.2d 345 (2009).

Jurisdiction Over Declaratory Judgment. — Although the industrial commission had exclusive jurisdiction over matters arising under the Workers' Compensation Act pursuant to G.S. 97-91, where an injured passenger's declaratory judgment claim under G.S. 1-253 and G.S. 1-254 was based on his standing as a third-party intended beneficiary of a contract between his employer, a subcontractor, and a contractor, wherein the contractor was to provide workers' compensation coverage to the subcontractor's employees, the claim was within the jurisdiction of the trial court. Lowery v. Campbell, 185 N.C. App. 659, 649 S.E.2d 453, 2007 N.C. App. LEXIS 1948 (2007).

Based on an agreement between a contractor and a subcontractor that the contractor would provide workers compensation coverage for the subcontractor's employees, an injured passenger who was employed by the subcontractor had standing under G.S. 1-254 to seek a declaration regarding such coverage; the passenger was a third-party intended beneficiary. Lowery v. Campbell, 185 N.C. App. 659, 649 S.E.2d 453, 2007 N.C. App. LEXIS 1948 (2007).

County Considered to Be a Person. — As it has corporate powers under G.S. 1-265, a county is a person under this section. Town of Spruce Pine v. Avery County, 123 N.C. App. 704, 475 S.E.2d 233 (1996), rev'd on other grounds, 346 N.C. 787, 488 S.E.2d 144 (1997).

Any Person Interested. — The provision "any person interested under a deed, will, written contract or other writings constituting a contract" has been interpreted by the court to allow a party to a contract or a direct beneficiary to have standing under G.S. 1-254 to file a declaratory judgment action under G.S. 1-253. Whittaker v. Furniture Factory Outlet Shops, 145 N.C. App. 169, 550 S.E.2d 822, 2001 N.C. App. LEXIS 552 (2001).

Exhaustion of Administrative Remedies Not Required. — Claims for declaratory relief under G.S. § 1-254 made by parents of students were not barred for failure to exhaust administrative remedies because the parents challenged the validity of a Board of Education's plan to use year-round schools to alleviate overcrowding, which did not fall within the scope of G.S. 115C-369. None of the factors specified in G.S. 115C-369(c) for consideration by the Board in making a decision under the statute addressed the issues regarding the validity of the plan. Wake Cares, Inc. v. Wake County Bd. of Educ., 190 N.C. App. 1, 660 S.E.2d 217, 2008 N.C. App. LEXIS 872 (2008), aff'd 363 N.C. 165, 675 S.E.2d 345 (2009).

Applied in North Carolina State Art Soc'y v. Bridges, 235 N.C. 125, 69 S.E.2d 1 (1952); Walters v. Baptist Children's Home of N.C., Inc., 251 N.C. 369, 111 S.E.2d 707 (1959); Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961); Gregory v. Godfrey, 254 N.C. 215, 118 S.E.2d 538 (1961); City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969); Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970); Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971); North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Underwriters Nat'l Assurance Co., 48 N.C. App. 508, 269 S.E.2d 688 (1980); Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984); Alford v. Davis, 131 N.C. App. 214, 505 S.E.2d 917 (1998); Terrell v. Lawyers Mut. Liab. Ins., 131 N.C. App. 655, 507 S.E.2d 923 (1998); Harleysville Mut. Ins. Co. v. Narron, 155 N.C. App. 362, 574 S.E.2d 490, 2002 N.C. App. LEXIS 1615 (2002).

Cited in Rountree v. Rountree, 213 N.C. 252, 195 S.E. 784 (1938); First Sec. Trust Co. v. Henderson, 225 N.C. 567, 35 S.E.2d 694 (1945); Citizens Nat'l Bank v. Phillips, 235 N.C. 494, 70 S.E.2d 509 (1952); Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954); Bennette v. Attorney Gen., 245 N.C. 312, 96 S.E.2d 46 (1957); American Equitable Assurance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958); Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968); North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971); Langdon v. Hurdle, 15 N.C. App. 158, 189 S.E.2d 517 (1972); Griffin v. Fraser, 39 N.C. App. 582, 251 S.E.2d 650 (1979); Kerhulas v. Trakas, 83 N.C. App. 414, 350 S.E.2d 169 (1986); Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987); Cardwell v. Smith, 92 N.C. App. 505, 374 S.E.2d 625 (1988); King v. Cranford, Whitaker & Dickens, 96 N.C. App. 245, 385 S.E.2d 357 (1989); Townsend v. Harris, 102 N.C. App. 131, 401 S.E.2d 132 (1991); Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994); Budd v. Davie County, 116 N.C. App. 168, 447 S.E.2d 449 (1994); Town of Seven Devils v. Village of Sugar Mt., 125 N.C. App. 692, 482 S.E.2d 39 (1997); Lewis v. City of Kinston, 127 N.C. App. 150, 488 S.E.2d 274 (1997); Town of Pine Knoll Shores v. Carolina Water Serv., Inc., 128 N.C. App. 321, 494 S.E.2d 618 (1998); Malloy v. Cooper, 356 N.C. 113, 565 S.E.2d 76, 2002 N.C. LEXIS 543 (2002); Nat'l Travel Servs., Inc. v. State ex rel. Cooper, 153 N.C. App. 289, 569 S.E.2d 667, 2002 N.C. App. LEXIS 1136 (2002); Augur v. Augur, 356 N.C. 582, 573 S.E.2d 125, 2002 N.C. LEXIS 1262 (2002); Laurel Valley Watch, Inc. v. Mt. Enters. of Wolf Ridge, LLC, — N.C. App. —, 665 S.E.2d 561, 2008 N.C. App. LEXIS 1629 (2008).

§ 1-255. Who may apply for a declaration.

Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(1) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(2) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(3) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

(4) To determine the apportionment of the federal estate tax, interest and penalties under the provisions of Article 27 of Chapter 28A. (1931, c. 102, s. 3; 1985 (Reg. Sess., 1986), c. 878, s. 2.)

CASE NOTES

When parties have a genuine issue regarding rights and liabilities under a will, they are entitled to have them resolved; and where the trial court fails so to adjudicate, the cause will be remanded. Sherrod v. Any Child or Children Hereafter Born to Sherrod, 65 N.C. App. 252, 308 S.E.2d 904 (1983), modified, 312 N.C. 74, 320 S.E.2d 669 (1984).

Court will not determine matters purely speculative. Sherrod v. Any Child or Children Hereafter Born to Sherrod, 65 N.C. App. 252, 308 S.E.2d 904 (1983), modified, 312 N.C. 74, 320 S.E.2d 669 (1984).

Advice as to Inheritance Taxes. — An executor and trustee may institute an action in the superior court to obtain the advice of the court as to whether inheritance taxes should be paid from the corpus of the estate or deducted from annuities provided for in the will, and such action may be maintained under this section. Wachovia Bank & Trust Co. v. Lambeth, 213 N.C. 576, 197 S.E. 179, 117 A.L.R. 117 (1938).

An executor of an estate may properly maintain an action under the Declaratory Judgment Act to obtain the advice of the court as to the source of payment of inheritance taxes. Branch Banking & Trust Co. v. Staples, 120 N.C. App. 227, 461 S.E.2d 921 (1995).

Invocation of General Equitable Powers. — A proceeding may not be maintained under this Article by trustees under a will to invoke the general equitable powers of the court to authorize them to sell, mortgage or lease a part of the trust property for the benefit and preservation of the trust, since such remedy goes far beyond a mere declaration of plaintiffs' rights or a mere obtaining of direction to plaintiffs to do or refrain from doing any act in their fiduciary capacity. Brandis v. Trustees of Davidson College, 227 N.C. 329, 41 S.E.2d 833 (1947), commented on in 26 N.C.L. Rev. 69.

Applied in Rierson v. Hanson, 211 N.C. 203, 189 S.E. 502 (1937); Citizens Nat'l Bank v. Corl, 225 N.C. 96, 33 S.E.2d 613 (1945); Cunningham v. Brigman, 263 N.C. 208, 139 S.E.2d 353 (1964); Kale v. Forrest, 9 N.C. App. 82, 175 S.E.2d 752 (1970); Palmer v. Ketner, 29 N.C. App. 187, 223 S.E.2d 913 (1976); Wing v. Wachovia Bank & Trust Co., 44 N.C. App. 402, 261 S.E.2d 279 (1980); Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984).

Cited in Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959); Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960); Griffin v. Fraser, 39 N.C. App. 582, 251 S.E.2d 650 (1979); Town of Pine Knoll Shores v. Carolina Water Serv., Inc., 128 N.C. App. 321, 494 S.E.2d 618 (1998); Augur v. Augur, 356 N.C. 582, 573 S.E.2d 125, 2002 N.C. LEXIS 1262 (2002).

§ 1-256. Enumeration of declarations not exclusive.

The enumeration in G.S. 1-254 and 1-255 does not limit or restrict the exercise of the general powers conferred in G.S. 1-253 in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty. (1931, c. 102, s. 4.)

Legal Periodicals. — For comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

CASE NOTES

Purpose of Section. — The purpose of this section is to grant "declaratory relief" and remove uncertainties when properly presented. Brandis v. Trustees of Davidson College, 227 N.C. 329, 41 S.E.2d 833 (1947); Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

This section enlarges the specific categories mentioned elsewhere in the statute. Town of Tryon v. Duke Power Co., 222 N.C. 200, 22 S.E.2d 450 (1942).

Action to Declare Ownership Interest in Franchise. — A declaratory judgment was held appropriate in an action by a former husband against his former wife and her incorporated fast food restaurant franchise seeking a declaration of his entitlement to an ownership interest based on an oral agreement. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Action taken to determine whether plaintiff, county board of realtors, conducted lawful disciplinary proceedings against one of its members, the defendant, involved no actual controversy between the parties sufficient to invoke a court's jurisdiction under the Declaratory Judgment Act, as litigation between the parties did not appear unavoidable. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Applied in James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

Cited in Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954); Porter v. North Carolina Dep't of Ins., 40 N.C. App. 376, 253 S.E.2d 44 (1979); Wing v. Wachovia Bank & Trust Co., 44 N.C. App. 402, 261 S.E.2d 279 (1980); Town of Spencer v. Town of E. Spencer, 129 N.C. App. 751, 501 S.E.2d 367 (1998); Kiousis v. Kiousis, 130 N.C. App. 569, 503 S.E.2d 437 (1998); Town of Spencer v. Town of E. Spencer, 351 N.C. 124, 522 S.E.2d 297 (1999).

§ 1-257. Discretion of court.

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding; provided, however, that a controversy between insurance companies, arising either by direct action or by joinder or intervention, with respect to which of two or more of the insurers is liable under its particular policy and the insurers' respective liabilities and obligations, constitutes a justiciable issue and the court should, upon petition by one or more of the parties to the action, render a declaratory judgment as to the liabilities and obligations of the insurers. (1931, c. 102, s. 5; 1989, c. 183.)

Legal Periodicals. — For comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

CASE NOTES

The court dismissed the suit of one alleged company purchaser in favor of that of another, pursuant to its discretion under this section, where the second suit, unlike the first, addressed all of the issues and included all of the parties involved in the underlying controversy. Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 141 N.C. App. 569, 541 S.E.2d 157, 2000 N.C. App. LEXIS 1298 (2000), cert. denied, 353 N.C. 370, 547 S.E.2d 433 (2001).

When declaratory judgment would not alter legal position. — Appellate court erred in reversing a trial court's denial of a husband's request for a declaratory judgment on the constitutionality of the North Carolina Domestic Violence Act (DVA), G.S. ch. 50B since a declaration as to the constitutionality of the DVA could not have altered the husband's legal position. Augur v. Augur, 356 N.C. 582, 573 S.E.2d 125, 2002 N.C. LEXIS 1262 (2002).

Abuse of Discretion Not Found. — Trial court did not abuse its discretion in refusing to issue a declaratory judgment regarding the constitutionality of G.S. 90-270.15(a)(10) where it decided that further grounds for relief were unnecessary and would serve no useful purpose. Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 569 S.E.2d 287, cert. denied, 356 N.C. 612, 574 S.E.2d 679 (2002).

Applied in NAACP v. Eure, 245 N.C. 331, 95 S.E.2d 893 (1957).

Cited in Town of Pine Knoll Shores v. Carolina Water Serv., Inc., 128 N.C. App. 321, 494 S.E.2d 618 (1998).

§ 1-258. Review.

All orders, judgment and decrees under this Article may be reviewed as other orders, judgments and decrees. (1931, c. 102, s. 6.)

CASE NOTES

A declaratory judgment action is designed to establish in expeditious fashion the rights, duties and liabilities of parties in situations usually involving an issue of law or the construction of a document where the facts involved are largely undisputed. Its purpose is to settle uncertainty in regard to the rights and status of parties where there exists a real controversy of a justiciable nature. Hobson Constr. Co. v. Great Am. Ins. Co., 71 N.C. App. 586, 322 S.E.2d 632 (1984), cert. denied, 313 N.C. 329, 327 S.E.2d 890 (1985).

All orders, judgments and decrees in action for declaratory judgment may be reviewed as other orders, judgments and decrees. Hobson Constr. Co. v. Great Am. Ins. Co., 71 N.C. App. 586, 322 S.E.2d 632 (1984), cert. denied, 313 N.C. 329, 327 S.E.2d 890 (1985).

The scope of appellate review of a declaratory judgment action is the same as for other actions. Integon Indem. Corp. v. Universal Underwriters Ins. Co., 131 N.C. App. 267, 507 S.E.2d 66 (1998).

Review/Summary Judgment Standard. — On review of a declaratory judgment action, the appellate court applies the standards it would use when reviewing a trial court's denial of a motion for summary judgment. Medearis v. Trustees of Meyers Park Baptist Church, 148 N.C. App. 1, 558 S.E.2d 199, 2001 N.C. App. LEXIS 1265 (2001), cert. denied, 355 N.C. 493, 563 S.E.2d 190 (2002).

This section does not enlarge the right of an executor for a review, but provides for review under the same rules that apply in cases not brought pursuant to the Declaratory Judgment Act. Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959).

Conclusive Effect of Findings of Fact. — The trial court's findings of fact in a declaratory judgment action are conclusive if supported by any competent evidence, and a judgment supported by such findings will be affirmed even though there is evidence which might sustain findings to the contrary and even though incompetent evidence may have been admitted. Nationwide Mut. Ins. Co. v. Allison, 51 N.C. App. 654, 277 S.E.2d 473, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981).

However, trial court erred in granting judgment notwithstanding the verdict to an auto accident victim who sought a declaratory judgment that he was a resident of his father's household under an insurance policy, and thus subject to coverage under his father's policy, as more than a scintilla of evidence supported the jury's verdict that the victim did not reside at his father's house. Monin v. Peerless Ins. Co., 159 N.C. App. 334, 583 S.E.2d 393, 2003 N.C. App. LEXIS 1522 (2003).

Since (1) the appellate standard of review in declaratory judgment actions was the same as in any other kind of action, (2) the appellate standard of review was whether findings were supported by competent evidence, (3) an underinsured motorist carrier did not provide any proof in the record on appeal that a motorist received a benefit from a rehabilitative center that was paid through workers' compensation, (4) the carrier had the burden, as the appealing party, to provide a complete appellate record demonstrating all the errors, and (5) the lack of such evidence in the appellate record allowed the appellate court to assume there was sufficient evidence to support the lower court's findings, the lower court properly excluded the amounts paid to the center from its calculation of how much credit the carrier was entitled to against the motorist's personal injury recovery. Walker v. Penn Nat'l Sec. Ins. Co., 168 N.C. App. 555, 608 S.E.2d 107, 2005 N.C. App. LEXIS 349 (2005).

Declaratory judgment is appropriate for construction of insurance contracts and in determining the extent of coverage under an insurance policy. Hobson Constr. Co. v. Great Am. Ins. Co., 71 N.C. App. 586, 322 S.E.2d 632 (1984), cert. denied, 313 N.C. 329, 327 S.E.2d 890 (1985).

Applied in First Union Nat'l Bank v. Ingold, 136 N.C. App. 262, 523 S.E.2d 725, 1999 N.C. App. LEXIS 1375 (1999); Finch v. Wachovia Bank & Trust Co., N.A., 156 N.C. App. 343, 577 S.E.2d 306, 2003 N.C. App. LEXIS 108 (2003); Calhoun v. WHA Med. Clinic, PLLC, 178 N.C. App. 585, 632 S.E.2d 563, 2006 N.C. App. LEXIS 1654 (2006); Trent v. River Place, LLC, 179 N.C. App. 72, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006).

Cited in Cartner v. Nationwide Mut. Fire Ins. Co., 123 N.C. App. 251, 472 S.E.2d 389 (1996); North Carolina Farm Bureau Mut. Ins. Co. v. Briley, 127 N.C. App. 442, 491 S.E.2d 656 (1997); Teasley v. Beck, 155 N.C. App. 282, 574 S.E.2d 137, 2002 N.C. App. LEXIS 1600 (2002).

§ 1-259. Supplemental relief.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith. (1931, c. 102, s. 7.)

CASE NOTES

Waiver of Petition and Notice Requirement. — In a declaratory judgment action in which plaintiff sought an interpretation of a contract for sewer services, where defendant stipulated as to the exact amount of the "tapping privilege fees" collected by it and to the precise total amount of accumulated interest on the payments made under protest and did not object to the procedure of entering a judgment for money in the declaratory judgment proceeding, defendant waived the requirement of this section as to service of petition and notice. Raintree Corp. v. City of Charlotte, 49 N.C. App. 391, 271 S.E.2d 524 (1980).

Supplemental Proceeding to Determine Liability Under Contract Held Proper. — Where fire department and the county entered into a contract which required the fire department to provide fire protection services for all property located within the district, a dispute arose between the parties as to whether a certain area was within fire department's district and fire department brought a declaratory judgment action to determine the boundaries of the district and the applicability of the contract to it, fire department could file a supplemental proceeding to determine country's liability under the contract for fire taxes collected on various properties within the disputed area for 1985 and prior years; that the declaratory judgment granted no retroactive relief to petitioner was immaterial, since retroactive relief was neither sought by the action nor denied by the judgment; furthermore, it was not legally significant that county's liability for past tax collections was not raised in the declaratory judgment action since none of the declaratory judgment statutes require one seeking an adjudgment of contract rights to go further and seek an enforcement of those rights. Knotville Volunteer Fire Dep't, Inc. v. Wilkes County, 94 N.C. App. 377, 380 S.E.2d 422, cert. denied, 325 N.C. 432, 384 S.E.2d 538 (1989).

Applied in Northwestern Bank v. Robertson, 39 N.C. App. 403, 250 S.E.2d 727 (1979).

Cited in Inland Greens HOA, Inc. v. Dallas Harris Real Estate-Construction, Inc., 127 N.C. App. 610, 492 S.E.2d 359 (1997).

§ 1-260. Parties.

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard. (1931, c. 102, s. 8.)

Cross References. — As to necessary joinder of parties, see G.S. 1A-1, Rule 19.

CASE NOTES

The language of this section is clear and specific. McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Who Is a "Necessary Party". — A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action which completely and finally determines the controversy without his presence as a party. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

The term "necessary parties" embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

Who Are "Proper Parties". — Proper parties are those whose interests may be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the court. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

It was not necessary that a town be a party to the actual controversy over the width of a town street for the town to be a proper party in a declaratory judgment action seeking to obtain a determination of the width of the street; it was enough that the town's interest's would be affected by the outcome. Singleton v. Sunset Beach & Twin Lakes, Inc., 147 N.C. App. 736, 556 S.E.2d 657, 2001 N.C. App. LEXIS 1237 (2001).

Section Not Intended to Authorize Proceedings in Absence of Necessary Party. — The latter portion of the first sentence of this section ordinarily should not be relied on by the courts as authority to proceed to judgment without the presence of all necessary parties, when in the course of a trial the absence of such parties becomes apparent. Morganton v. Hutton & Bourbonnais Co., 247 N.C. 666, 101 S.E.2d 679 (1958).

And Judgment Should Not Be Entered Where Rights of Nonparties Would Be Prejudiced. — While persons who are not parties to a proceeding for a declaratory judgment would not be bound by the judgment, judgment should not be entered in their absence if they have such an interest in the controversy that their rights would be prejudicially affected by the judgment. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

Interest of Administratrix. — Administratrix had more than an incidental or indirect interest in appeal from summary judgment particularly since it would be conclusive on the issue of coverage, and as a party to the action the appeal presented her sole opportunity to contest the court's decision. Nationwide Mut. Ins. Co. v. Anderson, 118 N.C. App. 92, 453 S.E.2d 542 (1995).

Refusal to Proceed with Construction of Will in Absence of Necessary Party. — Where it appears in a case involving the construction of a will that the absence of a necessary party would prevent the entry of a judgment finally settling and determining the question of interpretation, the court should refuse to deal with the merits of the case until the absent person is brought in as a party to the action. Edmondson v. Henderson, 246 N.C. 634, 99 S.E.2d 869 (1957); North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

Person Contracting with City Must Be Made Party to Suit on Contract's Validity. — The court cannot pass upon the validity of a city's contract where the person contracting with the city had not been made a party. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

Where the purpose of an action was to obtain a declaration that a contract between defendant and another party was invalid, the other party, not being a party to the action, would not be legally bound by a judgment rendered therein, but its rights, if any, under the contract with the defendant would be adversely affected by a declaration of rights, and if the plaintiff were to prevail in the action, the defendant, though forbidden by the judgment of the court to perform its contract, might well be sued for nonperformance by the absent party; therefore, that party was a necessary party in a proceeding to declare its contract with the defendant invalid, and the court below could not properly determine the validity of that contract without making the absent party a party to the proceeding. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

Parties to Action to Determine Right to Close Alleyway. — The owners of the fee in an alleyway in which owners of contiguous lots had an easement were necessary parties in an action under the Declaratory Judgment Act to determine whether a part of the alleyway at the cul-de-sac end might be closed, as against the contention of one lot owner that he had the right to have the entire alleyway kept open. But neither a lot owner who had leased her entire interest, nor a party who had agreed to lease the alleyway only in the event that a part of it could be closed were necessary parties to the proceeding. Hine v. Blumenthal, 239 N.C. 537, 80 S.E.2d 458 (1954).

Authority of Parties Not Joined in Action Not Infringed. — Where the denial of a zoning certificate was not an issue before the superior court, and the zoning administrator and the Board of Adjustment were not parties to the current action, the trial court order ruling that a town and its historic preservation commission were estopped from contending that an owner's second application complied with the town's zoning ordinance did not infringe upon the authority vested by the zoning ordinance in the zoning administrator, the Board of Adjustment, or other parties not joined in the matter, pursuant to G.S. 1-260. Meares v. Town of Beaufort, — N.C. App. —, 667 S.E.2d 244, 2008 N.C. App. LEXIS 1764 (2008).

Applied in Marsden v. Southern Flight Serv., Inc., 192 F. Supp. 418 (M.D.N.C. 1961); Pitt & Greene Elec. Membership Corp. v. Carolina Power & Light Co., 261 N.C. 716, 136

S.E.2d 124 (1964); North Carolina Tpk. Auth. v. Pine Island, Inc., 265 N.C. 109, 143 S.E.2d 319 (1965); White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

Cited in Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959); Chadwick v. Salter, 254 N.C. 389, 119 S.E.2d 158 (1961); Elliott v. Ballentine, 7 N.C. App. 682, 172 S.E.2d 552 (1970); Griffin v. Fraser, 39 N.C. App. 582, 251 S.E.2d 650 (1979); Porter v. North Carolina Dep't of Ins., 40 N.C. App. 376, 253 S.E.2d 44 (1979); King v. Cranford, Whitaker, & Dickens, 96 N.C. App. 245, 385 S.E.2d 357 (1989); Welling v. Walker, 117 N.C. App. 445, 451 S.E.2d 329 (1994); Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996); Bethania Town Lot Comm. v. City of Winston-Salem, 126 N.C. App. 783, 486 S.E.2d 729 (1997); In re Springmoor, Inc., 348 N.C. App. 1, 498 S.E.2d 177 (1998); State v. Chisholm, 135 N.C. App. 578, 521 S.E.2d 487, 1999 N.C. App. LEXIS 1182 (1999); Augur v. Augur, 356 N.C. 582, 573 S.E.2d 125, 2002 N.C. LEXIS 1262 (2002); Good Hope Hosp., Inc. v. N.C. HHS, Div. of Facility Servs., 174 N.C. App. 266, 620 S.E.2d 873, 2005 N.C. App. LEXIS 2399 (2005).

§ 1-261. Jury trial.

When a proceeding under this Article involves the determination of an issue of fact, such issue may be determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. (1931, c. 102, s. 9.)

Legal Periodicals. — For article, "Advisory Rulings by Administrative Agencies: Their Benefits and Dangers," see 2 Campbell L. Rev. 1 (1980).

CASE NOTES

Factual questions pursuant to this section can be determined by jury, and questions of law determined by the court. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Absent waiver of jury trial, trial court may only determine questions of law under this Article. Hall v. Hall, 35 N.C. App. 664, 242 S.E.2d 170, cert. denied, 295 N.C. 260, 245 S.E.2d 777 (1978).

Exclusion Under Insurance Policy. — Where insurer alleged exclusion from liability on policy and insured alleged coverage, and coverage was conceded unless use of vehicle was within exception clause in policy, the issue of exclusion was an issue of fact which should have been determined by jury and rendering judgment on pleadings was error. Lumber Mut. Cas. Ins. Co. v. Wells, 225 N.C. 547, 35 S.E.2d 631 (1945).

Judgment Notwithstanding the Verdict. — Trial court erred in granting judgment notwithstanding the verdict to an auto accident victim who sought a declaratory judgment that he was a resident of his father's household under an insurance policy, and thus subject to coverage under his father's policy, as more than a scintilla of evidence supported the jury's verdict that the victim did not reside at his father's house. Monin v. Peerless Ins. Co., 159 N.C. App. 334, 583 S.E.2d 393, 2003 N.C. App. LEXIS 1522 (2003).

Applied in Iowa Mut. Ins. Co. v. Fred M. Simmons, Inc., 258 N.C. 69, 128 S.E.2d 19 (1962); Village Creek Property Owners Ass'n v. Town of Edenton, 135 N.C. App. 482, 520 S.E.2d 793, 1999 N.C. App. LEXIS 1159 (1999); Calhoun v. WHA Med. Clinic, PLLC, 178 N.C. App. 585, 632 S.E.2d 563, 2006 N.C. App. LEXIS 1654 (2006).

Cited in Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp. 647 (M.D.N.C. 1962); Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325 (1968); York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968); Brickhouse v. Brickhouse, 104 N.C. App. 69, 407 S.E.2d 607 (1991).

§ 1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.

Proceedings under this Article shall be tried at a session of court, as in other civil actions. If no issues of fact are raised, or if such issues are raised and the parties waive a jury trial, by agreement of the parties the proceedings may be heard before any judge of the trial division in which the proceeding is pending.

If the parties do not agree upon a judge for the hearing and the proceeding is in the Superior Court Division, then upon motion of the plaintiff, the proceeding may be heard by a resident superior court judge of the district, or a superior court judge holding the courts of the district, or by any judge holding a session of superior court within the district. If the parties do not agree upon a judge and the proceeding is in the District Court Division, then upon motion of the plaintiff, the proceeding may be heard by the chief district judge or by a district judge authorized by the chief judge to hear motions and enter interlocutory orders. Such motion shall be in writing, with 10 days' notice to the defendant, and the judge designated shall fix a time and place for the hearing and notify the parties. Upon notice given, the clerk of the court in which the action is pending shall forward the papers in the proceeding to the judge designated. The hearing by the judge shall be governed by the practice for hearings in other civil actions before a judge without a jury. References to judges of the superior court in this section include emergency and special judges. (1931, c. 102, s. 10; 1971, c. 268, s. 9.)

CASE NOTES

In an action under the Declaratory Judgment Act where the pleadings do not raise issues of fact, the court is without authority to consider evidence and find additional facts. Thus, where the facts were established by defendant's unequivocal admission of all of plaintiffs' factual allegations, the court should not have considered affidavits offered by plaintiffs, and the findings of fact incorporated in the judgment, to the extent that they differed from or went beyond the facts established by the pleadings, would not be considered on appeal. City of Greensboro v. Wall, 247 N.C. 516, 101 S.E.2d 413 (1958).

Jurisdiction — Easement over Street from Highway to Edge of State-Owned Lake. — The district court had subject matter jurisdiction to determine the parties' rights in an easement over a street from a highway to the edge of a state-owned lake. Woodlief v. Johnson, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

Same — Pier and Boat Ramp over State-Owned Lake. — Original jurisdiction for a declaratory ruling as to the rights and interest of parties in a pier and boat ramp extending over a state-owned lake rested in the Department of Natural Resources and Community Development (now the Department of Environment and Natural Resources). As the parties did not pursue such declaratory relief and failed to exhaust their administrative remedies prior to instituting their civil action, the trial court lacked subject matter jurisdiction. Woodlief v. Johnson, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

Applied in Breece v. Breece, 270 N.C. 605, 155 S.E.2d 65 (1967).

Cited in North Carolina State Ports Auth. v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955); Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp. 647 (M.D.N.C. 1962); Nationwide Mut. Ins. Co. v. Allison, 51 N.C. App. 654, 277 S.E.2d 473 (1981).

§ 1-263. Costs.

In any proceeding under this article the court may make such award of costs as may seem equitable and just. (1931, c. 102, s. 11.)

CASE NOTES

This section was not repealed by the enactment of § 1A-1, Rule 57. Citizens Nat'l Bank v. Grandfather Home for Children, Inc., 280 N.C. 354, 185 S.E.2d 836 (1972).

Award Proper. — Trial court did not abuse its discretion in ordering the lottery objectors to pay litigation costs pursuant to G.S. 1-263 regarding their unsuccessful declaratory judgment action seeking a determination that the state's lottery law was enacted in violation of constitutional requirements set forth in N.C. Const., Art. II, § 23. The lottery objectors delayed initiating litigation for more than three months after the law was enacted and the state lottery commission had started setting up lottery operations. Heatherly v. State, 189 N.C. App. 213, 658 S.E.2d 11, 2008 N.C. App. LEXIS 530 (2008).

Applied in Board of Managers v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749

(1953); Dillon v. North Carolina Nat'l Bank, 6 N.C. App. 584, 170 S.E.2d 571 (1969); National Medical Enters., Inc. v. Sandrock, 72 N.C. App. 245, 324 S.E.2d 268 (1985); City of New Bern v. New Bern-Craven County Bd. of Educ., 338 N.C. 430, 450 S.E.2d 735 (1994).

§ 1-264. Liberal construction and administration.

This Article is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered. (1931, c. 102, s. 12.)

Legal Periodicals. — For note on the Declaratory Judgment Act and due process in expulsions from voluntary trade associations in light of Harrison v. Gaston Bd. of Realtors, Inc., 311 N.C. 230, 316 S.E.2d 59 (1984), see 21 Wake Forest L. Rev. 121 (1985).

CASE NOTES

Jurisdiction Held Proper. — Where record showed an actual controversy between the parties as to validity of a covenant not to compete and that litigation was not only unavoidable but had actually begun, court had jurisdiction to hear declaratory judgment action on the issue. Stevenson v. Parsons, 96 N.C. App. 93, 384 S.E.2d 291 (1989), cert. denied, 326 N.C. 366, 389 S.E.2d 819 (1990).

Action taken to determine whether plaintiff, county board of realtors, conducted lawful disciplinary proceedings against one of its members, the defendant, involved no actual controversy between the parties sufficient to invoke a court's jurisdiction under the Declaratory Judgment Act, as litigation between the parties did not appear unavoidable. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984).

Applied in Woodard v. Carteret County, 270 N.C. 55, 153 S.E.2d 809 (1967); City of Raleigh v. Norfolk S. Ry., 275 N.C. 454, 168 S.E.2d 389 (1969); American Mfrs. Mut. Ins. Co. v. Ingram, 43 N.C. App. 621, 260 S.E.2d 120 (1979); Raintree Corp. v. City of Charlotte, 49 N.C. App. 391, 271 S.E.2d 524 (1980); Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984).

Cited in American Equitable Assurance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958); Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971); Pilot Title Ins. Co. v. Northwestern Bank, 11 N.C. App. 444, 181 S.E.2d 799 (1971); Wing v. Wachovia Bank & Trust Co., 44 N.C. App. 402, 261 S.E.2d 279 (1980); Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983); Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994); Town of Spencer v. Town of E. Spencer, 351 N.C. 124, 522 S.E.2d 297 (1999).

§ 1-265. Word "person" construed.

The word "person" wherever used in this Article, shall be construed to mean any person, State agency, partnership, joint-stock company, unincorporated association, or society, or municipal corporation or other corporation of any character whatsoever. (1931, c. 102, s. 13; 2001-192, s. 3.)

CASE NOTES

As it has corporate powers under this section, a county is a person under G.S. 1-254. Town of Spruce Pine v. Avery County, 123 N.C. App. 704, 475 S.E.2d 233 (1996), rev'd on other grounds, 346 N.C. 787, 488 S.E.2d 144 (1997).

Cited in American Equitable Assurance Co. v. Gold, 248 N.C. 288, 103 S.E.2d 344 (1958); Town of Seven Devils v. Village of Sugar Mt., 125 N.C. App. 692, 482 S.E.2d 39 (1997).

§ 1-266. Uniformity of interpretation.

This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees. (1931, c. 102, s. 15.)

§ 1-267. Short title.

This Article may be cited as the Uniform Declaratory Judgment Act. (1931, c. 102, s. 16.)

CASE NOTES

Cited in Atlantic Disct. Corp. v. Mangel's of N.C., Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968); North Carolina Consumers Power, Inc. v. Duke Power Co., 21 N.C. App. 237, 204 S.E.2d 399 (1974); Wing v. Wachovia Bank & Trust Co., 35 N.C. App. 346, 241 S.E.2d 397 (1978); Wing v. Wachovia Bank & Trust Co., 301 N.C. 456, 272 S.E.2d 90 (1980); Ward Lumber Co. v. Brooks, 50 N.C. App. 294, 273 S.E.2d 331 (1981); Pittman v. Thomas, 307 N.C. 485, 299 S.E.2d 207 (1983); Clark v. Craven Regional Medical Auth., 326 N.C. 15, 387 S.E.2d 168 (1990); Citizens Addressing Reassignment & Educ., Inc. v. Wake County Bd. of Educ., 182 N.C. App. 241, 641 S.E.2d 824, 2007 N.C. App. LEXIS 593 (2007).

ARTICLE 26A.

Three-Judge Panel for Redistricting Challenges.

§ 1-267.1. Three-judge panel for actions challenging plans apportioning or redistricting State legislative or congressional districts.

(a) Any action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall be filed in the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b) of this section.

(b) Whenever any person files in the Superior Court of Wake County any action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts, a copy of the complaint shall be served upon the senior resident superior court judge of Wake County, who shall be the presiding judge of the three-judge panel required by subsection (a) of this section. Upon receipt of that complaint, the senior resident superior court judge of Wake County shall notify the Chief Justice, who shall appoint two additional resident superior court judges to the three-judge panel of the Superior Court of Wake County to hear and determine the action. Before making those appointments, the Chief Justice shall consult with the North Carolina Conference of Superior Court Judges, which shall provide the Chief Justice with a list of recommended appointments. To ensure that members of the three- judge panel are drawn from different regions of the State, the Chief Justice shall appoint to the three-judge panel one resident superior court judge from the First through Fourth Judicial Divisions and one resident superior court judge from the Fifth through Eighth Judicial Divisions. In order to ensure fairness, to avoid the appearance of impropriety, and to avoid political bias, no member of the panel, including the senior resident superior court judge of Wake County, may be a former member of the General Assembly. Should the senior resident superior court judge of Wake County be disqualified or otherwise unable to serve on the three-judge panel, the Chief Justice shall appoint another resident superior court judge of Wake County as the presiding judge of the three-judge panel. Should any other member of the three-judge panel be disqualified or otherwise unable to serve on the three-judge panel, the Chief Justice shall appoint as a replacement another resident superior court judge from the same group of judicial divisions as the resident superior court judge being replaced.

(c) No order or judgment shall be entered affecting the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts except by the three-judge panel of the Superior Court of Wake County organized as provided by subsection (b) of this section. In the event of disagreement among the three resident superior court judges comprising the three-judge panel, then the opinion of the majority shall prevail. (2003-434, 1st Ex. Sess., s. 7(a).)

CASE NOTES

Constitutionality. — Three-judge panel of superior court judges required by G.S. 1-267.1 is not a new court outside of the contemplation of N.C. Const. art. IV, §§ 12 and 13(2), as a challenge to redistricting is a matter of procedure that lies within the purview of the General Assembly; accordingly, no new courts are created beyond those contemplated by N.C. Const. art. IV, §§ 1, 2. Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

The provisions of G.S. 1-267.1, within the specific context of a challenge to redistricting, do not impermissibly infringe on the Chief Justice's authority to assign judges, pursuant to his powers under N.C. Const. art. IV, § 11. Stephenson v. Bartlett, 358 N.C. 219, 595 S.E.2d 112 (2004).

Appeal. — G.S. 120-2.5 means that any appeal from a three-judge panel dealing with apportionment or redistricting pursuant to G.S. 1-267.1 is direct to the North Carolina Supreme Court. Pender County v. Bartlett, 361 N.C. 491, 649 S.E.2d 364, 2007 N.C. LEXIS 816 (2007).

ARTICLE 26B.

Distribution of Unpaid Residuals in Class Action Litigation.

§ 1-267.10. Distribution of unpaid residuals in class action litigation.

(a) It is the intent of the General Assembly to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action or to promote justice for all citizens of this State. The General Assembly finds that the use of funds collected by the State courts pursuant to this section for these purposes is in the public interest, is a proper use of the funds, and is consistent with essential public and governmental purposes.

(b) Prior to the entry of any judgment or order approving settlement in a class action established pursuant to Rule 23 of the Rules of Civil Procedure, the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise consistent with its obligations under Rule 23 of the Rules of Civil Procedure, shall direct the defendant to pay the sum of the unpaid residue, to be divided and credited equally, to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents. (2005-420, s. 1.)

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ 1-268. Writs of error abolished.

Writs of error in civil actions are abolished, and the only mode of reviewing a judgment, or order, in a civil action, is that prescribed by this Chapter. (C.C.P., s. 296; Code, s. 544; Rev., s. 583; C.S., s. 629.)

Cross References. — For the North Carolina Rules of Appellate Procedure, see the Annotated Rules of North Carolina.

CASE NOTES

For case holding that the Supreme Court had no power to issue a writ of error, see Smith v. Cheek, 50 N.C. 213 (1857).

As to abolition of writs of error and substitution of appeals therefor, see Lynn v. Lowe, 88 N.C. 478 (1883); White v. Morris, 107 N.C. 92, 12 S.E. 80 (1890).

To obtain relief from an irregular judgment, that is, one entered contrary in some material respect to the course of practice and procedure allowed and permitted by law, and not a mere erroneous interpretation of the law, the injured party should proceed by motion in the original cause. Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959).

To obtain relief from a mistaken interpretation of the law resulting in an erroneous judgment, the complaining party has his remedy by appeal or proceedings equivalent thereto taken in due time. Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959).

Cited in King v. Wilmington & W.R.R., 112 N.C. 318, 16 S.E. 929 (1893).

§ 1-269. Certiorari, recordari, and supersedeas.

Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is filed or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where execution is stayed. (1874-5, c. 109; Code, s. 545; Rev., s. 584; C.S., s. 630.)

Cross References. — As to supersedeas bond, see G.S. 1-289 et seq. As to stay of proceedings to enforce a judgment, see G.S. 1A-1, Rule 62. As to cash deposit in lieu of bond, see G.S. 58-75-1. For the North Carolina Rules of Appellate Procedure, see the Annotated Rules of North Carolina. As to recordari, supersedeas and certiorari in the superior courts, see Gen. Rules Prac., Rule 19, in the Annotated Rules of North Carolina.

Legal Periodicals. — For comment on the present and future use of the writ of recordari in North Carolina, see 2 Wake Forest Intra. L. Rev. 77 (1966).

As to form for writ of recordari, see 2 Wake Forest Intra. L. Rev. 88 (1966).

For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

CASE NOTES

I. In General.
II. Certiorari.
  A. In General.
  B. Grounds for Certiorari.

C. Application for Certiorari.
III. Recordari.
A. In General.
B. Grounds for Recordari.
IV. Supersedeas.

I. IN GENERAL.

History. — The original Code of Civil Procedure of 1868 abolished writs of error and substituted appeals, but did not provide for writs of certiorari and recordari. Marsh v. Williams, 63 N.C. 371 (1869).

When Supreme Court or Superior Courts May Issue Writs. — Whenever a substantial wrong has been done in judicial proceedings, giving a litigant legal right to redress, and no appeal has been provided by law, or the appeal that has been provided proves inadequate, the Supreme Court, as to all courts of the State, and the superior courts, as to all subordinate courts, over which they exercise appellate power, may issue one or more of these writs and thereby see that the error is corrected and justice administered. State v. Tripp, 168 N.C. 150, 83 S.E. 630 (1914).

Time for Applying for Recordari or Certiorari. — The writ of recordari or of certiorari, as a substitute for an appeal, should be applied for without any unreasonable delay, and any delay, after the earliest moment in the party's power to make the application, must be satisfactorily accounted for. Todd v. Mackie, 160 N.C. 352, 76 S.E. 245 (1912). See also, Koonce v. Pelletier, 83 N.C. 237 (1880).

Issuance at Term Following Trial. — The writ of certiorari or recordari to review the judgment of a lower court will be issued only at the next term of the supervising court following trial in the lower court. Boing v. Raleigh & G.R.R., 88 N.C. 62 (1883); Taylor v. Johnson, 171 N.C. 84, 87 S.E. 981 (1916).

Affidavit Showing Merits Required. — The writ of certiorari or recordari to review the judgment of a lower court will be issued only on a proper showing of merits, on affidavit filed. Taylor v. Johnson, 171 N.C. 84, 87 S.E. 981 (1916).

The scope of judicial review of a decision made by a town board sitting as a quasi-judicial body must include: (1) Reviewing the record for errors in law, (2) insuring that the procedures specified by law in both statute and ordinance are followed, (3) insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses and inspect documents, (4) insuring that decisions of town board are supported by competent, material and substantial evidence in the whole record, and (5) insuring that decisions are not arbitrary and capricious. In re Walsh, 79 N.C. App. 611, 340 S.E.2d 497 (1986).

Applied in Hamilton v. Southern Ry., 203 N.C. 468, 166 S.E. 392 (1932); Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).

Cited in Skinner v. Badham, 80 N.C. 14 (1879); Holmes v. Holmes, 84 N.C. 833 (1881); Cox v. Pruett, 109 N.C. 487, 13 S.E. 917 (1891); Sanders v. Thompson, 114 N.C. 282, 19 S.E. 225 (1894); Haynes v. Coward, 116 N.C. 840, 21 S.E. 690 (1895); Zell Guano Co. v. Hicks, 120 N.C. 29, 26 S.E. 650 (1897); Walsh v. Burleson, 154 N.C. 174, 69 S.E. 680 (1910); McNeil v. Virginia-Carolina R.R., 173 N.C. 729, 92 S.E. 484 (1917); Tripp v. Somersett, 182 N.C. 767, 108 S.E. 633 (1921); In re Guerin, 206 N.C. 824, 175 S.E. 181 (1934); Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954); Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959); In re McCoy, 233 F. Supp. 409 (E.D.N.C. 1964); Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977); Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980); Harper v. City of Asheville, 160 N.C. App. 209, 585 S.E.2d 240, 2003 N.C. App. LEXIS 1760 (2003).

II. CERTIORARI.

A. In General.

Certiorari may issue from the superior courts as well as the appellate court. Rhyne v. Lipscombe, 122 N.C. 650, 29 S.E. 57 (1898).

Function of Certiorari. — The writ of certiorari is an extraordinary remedial writ and lies for two purposes: (1) As a writ of false judgment to correct errors of law, and (2) As a substitute for an appeal. In either case, it can issue only to the court where the judgment is. Therefore when the cause has been transferred by appeal the writ must be dismissed. Williams v. Williams, 71 N.C. 427 (1874), aff'd upon rehearing, 74 N.C. 1 (1878).

A writ of certiorari to bring up the record is the proper substitute for an appeal. State v. McGimsey, 80 N.C. 377 (1879).

If an appeal is unavoidably lost, certiorari may be granted as a substitute. Anonymous, 2 N.C. 302 (1796); Norwood v. Pratt, 124 N.C. 745, 32 S.E. 979 (1899).

But where no appeal lay, a certiorari as a substitute therefor could not be granted. State v. Georgia Co., 109 N.C. 310, 13 S.E. 861 (1891); State v. Todd, 224 N.C. 776, 32 S.E.2d 313 (1944).

Proceedings of Inferior Courts and Quasi-Judicial Bodies. — Certiorari is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or quasi-judicial functions in cases where no appeal is provided by law. Russ v. Board of Educ., 232 N.C. 128, 59 S.E.2d 589 (1950); In re Burris, 261 N.C. 450, 135 S.E.2d 27 (1964).

Where a statute authorizing a proceeding makes no provision for a review, certiorari may be maintained for that purpose. Board of Comm'rs v. Smith, 110 N.C. 417, 14 S.E. 972 (1892).

Where no appeal to the superior court from an inferior court is prescribed by the statute creating such court, and where an appeal would otherwise lie, a certiorari in lieu of appeal will issue from the superior court. McPherson Drug Co. v. Norfolk S. Ry., 173 N.C. 87, 91 S.E. 606 (1917).

Habeas Corpus Proceedings. — Certiorari is the only method by which the appellate court can review the judgment in habeas corpus proceedings in matters not involving the custody of children. In re Holley, 154 N.C. 163, 69 S.E. 872 (1910).

Issuance of Writ from One Superior Court to Another. — Where a cause is removed from one superior court to another, the latter has the right to issue a writ of certiorari to the former, directing a more perfect transcript to be certified; for the right to issue writs of certiorari is not founded on the circumstance that the court from which the writ issues is superior to that to which it is directed, but upon the principle that all courts have the right to issue any writ necessary to the exercise of their powers. State v. Reid, 18 N.C. 377 (1835).

Certiorari is not a proper remedy where another adequate remedy is available. Petty v. Jones, 23 N.C. 408 (1841); Watson v. Shields, 67 N.C. 235 (1872).

Street preacher's challenge to the constitutionality of local noise ordinances was stayed under the Younger abstention doctrine where there remained state remedies available, even though the preacher was not actively pursuing them, including requesting certiorari to review a decision of the city manager pertaining to violations of the local noise ordinance. Moore v. City of Asheville, 290 F. Supp. 2d 664, 2003 U.S. Dist. LEXIS 20496 (W.D.N.C. 2003), aff'd, 396 F.3d 385 (4th Cir. 2005).

Interlocutory Judgments. — Where the judgment against a party is retained for further orders, the judgment is interlocutory and certiorari will not be granted. Smith v. Miller, 155 N.C. 247, 71 S.E. 355 (1911).

Who Is Entitled to Certiorari. — To entitle a person to a writ of certiorari he must have some interest in the proceeding sought to be reviewed, and sustain injury thereby. Petty v. Jones, 23 N.C. 408 (1841). See Otey v. Rogers, 26 N.C. 534 (1844); Shober v. Wheeler, 119 N.C. 471, 26 S.E. 26 (1896).

Applicant Must Negative Laches. — He who seeks a certiorari must negative laches. Mitchell v. Baker, 129 N.C. 63, 39 S.E. 633 (1901); Cox v. Kinston Carolina R.R., 177 N.C. 227, 98 S.E. 704 (1919); Peoples Bank & Trust Co. v. Parks, 191 N.C. 263, 131 S.E. 637 (1926).

Effect of Negligent Delay in Bringing Appeal. — One who negligently allows the time for bringing his appeal to expire without seeking such remedy is not entitled to the remedy by certiorari. Suiter v. Brittle, 92 N.C. 53 (1885); In re Brittain, 93 N.C. 587 (1885).

Necessity of Filing Record. — The appellant must aptly file a record proper in the case appealed from as a prerequisite for the appellate court to grant his motion for a certiorari to bring up the case for review. Lindsey v. Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916); Brock v. Ellis, 193 N.C. 540, 137 S.E. 585 (1927).

As to docketing of transcript as a condition precedent for certiorari, see Pittman v. Kimberly, 92 N.C. 562 (1885); Slocumb v. Construction Co., 142 N.C. 349, 55 S.E. 196 (1906); Walsh v. Burleson, 154 N.C. 174, 69 S.E. 680 (1910); Murphy v. Carolina Elec. Co., 174 N.C. 782, 93 S.E. 456 (1917).

As to procedure when transcript cannot be docketed, see Slocumb v. Construction Co., 142 N.C. 349, 55 S.E. 196 (1906). See Burrell v. Hughes, 120 N.C. 277, 26 S.E. 782 (1897); Parker v. Southern Ry., 121 N.C. 501, 28 S.E. 347 (1897); McMillan v. McMillan, 122 N.C. 410, 29 S.E. 361 (1898).

Necessity of Security. — Since certiorari is but a substitute for an appeal, it can only be allowed on the same security and justification thereof as in cases of appeal. Chastain v. Chastain, 87 N.C. 283 (1882).

Issuance of Writ Without Security. — The appellate court has the power, in a proper case, to allow the writ to issue without security. Brittain v. Mull, 93 N.C. 490 (1885).

Certiorari Denied When Appeal Waived. — A writ of certiorari will not issue where the right of appeal has been waived. King v. Taylor, 188 N.C. 450, 124 S.E. 751 (1924).

For cases in which certiorari would not issue for petitioner's failure to give the notice required by former Supreme Court Rule 34, see Keerans v. Keerans, 109 N.C. 101, 13 S.E. 895 (1891); Sanders v. Thompson, 114 N.C. 282, 19 S.E. 225 (1894).

Certiorari Cannot Be Dispensed with by Agreement. — Certiorari is a discretionary writ, and counsel may not dispense with it by agreement. In re McCade, 183 N.C. 242, 111 S.E. 3 (1922); State v. Hooker, 183 N.C. 763, 111 S.E. 351 (1922).

Discretion of Supreme Court. — The granting or refusing of a petition for a certiorari, is a matter within the discretion of the Supreme Court. King v. Taylor, 188 N.C. 450, 124 S.E. 751 (1924); Peoples Bank & Trust Co. v. Parks, 191 N.C. 263, 131 S.E. 637 (1926); Waller v. Dudley, 193 N.C. 354, 137 S.E. 149 (1927).

Imposition of Terms on Applicant. — When certiorari is granted, the applicant may be laid under terms not to avail himself of a technical advantage. Collins v. Nall, 14 N.C. 224 (1831).

Only Errors on the Face of the Record May Be Considered. — Under a writ of certiorari, the object of which is only to bring up the record of an inferior court, only such errors or defects as appear on the face of such record can be considered. Hartsfield v. Jones, 49 N.C. 309 (1857); Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922).

When a criminal action has been brought from an inferior court to the superior court by means of a writ of certiorari, the superior court acts only as a court of review, and in all ordinary instances must act on the facts as they appear of record, and can only revise the proceedings as to regularity or on questions of law or legal inference. State v. King, 222 N.C. 137, 22 S.E.2d 241 (1942).

As to issuance of successive writs where the transcript is defective, see State v. Munroe, 30 N.C. 258 (1848).

Treatment of Appeal as Certiorari. — Where plaintiff, appearing in propria persona because of an asserted inability to employ counsel, fails to comply with the rules of court governing appeals, the Supreme Court, in the exercise of its supervisory jurisdiction, may treat the purported appeal as a petition for certiorari. Huffman v. Douglass Aircraft Co., 260 N.C. 308, 132 S.E.2d 614 (1963), cert. denied, 379 U.S. 850, 85 S. Ct. 93, 13 L. Ed. 2d 53, rehearing denied, 379 U.S. 925, 85 S. Ct. 279, 13 L. Ed. 2d 338 (1964).

Effect of Certiorari as Stay. — Where a defendant has lost his appeal, but is granted a writ of certiorari in lieu thereof, the granting of the writ has the effect of an appeal as to stay of execution, and if the offense be bailable, he is entitled to bail. State v. Walters, 97 N.C. 489, 2 S.E. 539 (1887). See also, Pender v. Mallett, 122 N.C. 163, 30 S.E. 324 (1898).

When issued, the writ of certiorari suspends the authority of the lower court in a case, pending the action of the reviewing court. Wheeler v. Thabit, 261 N.C. 479, 135 S.E.2d 10 (1964).

When certiorari is addressed to boards of assessment or boards of assessment and equalization, where that practice is permitted, it is generally held that the power of review, as in other instances of its use under the common law, does not extend to questions of valuation, but only to jurisdictional or procedural irregularities or errors of law. Belk's Dep't Store, Inc. v. Guilford County, 222 N.C. 441, 23 S.E.2d 897 (1943).

Challenge to Zoning Decision. — Pursuant to a petition for certiorari, G.S. 1-269, or a writ of mandamus, N.C. R App. P. Art. V, R. 22, a town board's denial of an application for subdivision approval was reversed, because the application met the technical requirements of an open space district, and denial based on lack of consistency with other developments was arbitrary and capricious. William Brewster Co. v. Town of Huntersville, 161 N.C. App. 132, 588 S.E.2d 16, 2003 N.C. App. LEXIS 1978 (2003).

B. Grounds for Certiorari.

Deprivation of Appeal by Conduct of Opponent. — Certiorari will be granted, as a matter of right, where it appears that appellant has been deprived of his appeal by the conduct of the opposing party. State v. Bill, 35 N.C. 373 (1852); Walton v. Pearson, 83 N.C. 309 (1880); Wiley v. Lineberry, 88 N.C. 68 (1883); State v. Bennett, 93 N.C. 503 (1885).

Where appellant has lost right to appeal by neglect of an officer of the law, contrivance of opponent or improper conduct in the inferior court, a certiorari will be granted without reference to the merits of the cause. McConnell v. Caldwell, 51 N.C. 469 (1859).

After a party has prayed an appeal and offered his sureties, if he is defeated of the appeal by the neglect, omission or delay of the clerk, he shall have his cause carried up by a certiorari. Chambers v. Smith, 2 N.C. 366 (1796); Graves v. Hines, 106 N.C. 323, 11 S.E. 362 (1890). But see, Pittman v. Kimberly, 92 N.C. 562 (1885), as to clerk's failure to send up a transcript.

If a party prays an appeal, and the court refuses to allow it, the certiorari is granted as "a matter of course." Bledsoe v. Snow, 48 N.C. 99 (1855).

Fraud of Opponent Depriving Party of Defense. — Where a party was deprived, by the fraud of his opponent, of the opportunity of making a defense in the county court, which defense could be made in the superior court as well as in the county court, his proper remedy was by a writ of certiorari. Lunceford v. McPherson, 48 N.C. 174 (1855).

A mere suggestion of fraud is insufficient. McLaughlin v. McLaughlin, 47 N.C. 319 (1855). See also, Haddock v. Stocks, 167 N.C. 70, 83 S.E. 9 (1914).

Delay of Judge. — Where delay in prosecuting appeal is owing to no fault of the appellant, but to the delay of the judge, certiorari may be granted in lieu of an appeal. Sparks v. Sparks, 92 N.C. 359 (1885); Haynes v. Coward, 116 N.C. 840, 21 S.E. 690 (1895).

Retirement of Judge Before Preparing Case. — Where the trial judge goes out of office before preparing a case on appeal, certiorari is proper as a substitute for appeal, if the parties can agree on a statement of the case. Shelton v. Shelton, 89 N.C. 185 (1883).

Where the trial judge has died, certiorari will not lie. Taylor v. Simmons, 116 N.C. 70, 20 S.E. 961 (1895).

Sickness of Obligor. — Where the principal obligor in a bond was called, and after he failed to appear judgment was rendered against his surety, it was held that the fact that the principal was sick and unable to attend at the term for which he was bound did not entitle the surety to a certiorari to have the case removed into the superior court. Buis v. Arnold, 53 N.C. 233 (1860).

Sickness of Appellant. — Sickness of appellant is a sufficient excuse for failure to perfect an appeal so as to entitle him to certiorari as a substitute therefor. Howerton v. Henderson, 86 N.C. 718 (1882).

Sickness of Attorney. — The sickness of an attorney is a sufficient excuse for want of diligence in perfecting an appeal, and certiorari will lie. Mott v. Ramsay, 90 N.C. 372 (1884).

The sickness of one of two attorneys is not sufficient excuse for lack of diligence in preparing an appeal, even though the other attorney is absent from the county. Boyer v. Garner, 116 N.C. 125, 21 S.E. 180 (1895).

Error of counsel, whereby a party fails to appeal from a final judgment, is not ground for the certiorari, except under very exceptional circumstances. Barber v. Justice, 138 N.C. 20, 50 S.E. 445 (1905); Smith v. Miller, 155 N.C. 247, 71 S.E. 355 (1911).

Where appellant's counsel told him that he would do everything necessary toward perfecting his appeal, but counsel failed to file a proper appeal bond, there was no ground for certiorari. Winborne v. Byrd, 92 N.C. 7 (1885).

Failure to File Proper Appeal Bond. — Failure to perfect appeal because of failure of counsel to file a proper appeal bond is not ground for certiorari in lieu of appeal. Winborne v. Byrd, 92 N.C. 7 (1885); Churchill v. Brooklyn Life Ins. Co., 92 N.C. 485 (1885). See also, Turner v. Powell, 93 N.C. 341 (1885); Bowen v. Fox, 99 N.C. 127, 5 S.E. 437 (1888). But see, Manning v. Sawyer, 8 N.C. 37 (1820), where appellant failed to bring up the appeal bond along with the transcript through ignorance as to requirements.

Inability to Give Bond. — A certiorari will not be granted where the petitioner is unable to give bond for his appeal, unless it is shown that the judge below refused to make an order allowing the appeal in forma pauperis. Lindsay v. Moore, 83 N.C. 444 (1880).

Failure to Pay Clerk's Fees. — Certiorari will not be granted where it appears that petitioner lost his appeal owing to his failure to comply with a demand for the payment of clerk's fees for making out the transcript. Smith v. Lynn, 84 N.C. 837 (1881); Sanders v. Thompson, 114 N.C. 282, 19 S.E. 225 (1894); Brown v. House, 119 N.C. 622, 26 S.E. 160 (1896).

Mandatory Suspension of Driving Privilege. — Petitioner whose driving privilege was mandatorily suspended under G.S. 20-17(2) and G.S. 20-19(e) did not have the right to appeal under G.S. 20-25 or under Chapter 150B. However, the superior court could review the action of the Commissioner by issuing a writ of certiorari. Davis v. Hiatt, 326 N.C. 462, 390 S.E.2d 338 (1990).

Omission of Assignments of Error. — As to certiorari to have assignments of error which were omitted from the record on appeal without appellant's negligence sent up, see McDowell v. J.S. Kent Co., 153 N.C. 555, 69 S.E. 626 (1910). See also, Cameron v. Thornton Light & Power Co., 137 N.C. 99, 49 S.E. 76 (1904), as to incorporation of exceptions.

Stenographer's Notes. — The mistake of appellant's counsel in sending up stenographer's notes on appeal instead of a properly settled case did not entitle appellant to a certiorari. Cressler v. Asheville, 138 N.C. 482, 51 S.E. 53 (1905).

Executive action in personnel matters was not appealable on a writ of certiorari to the courts where departmental hearing conducted by fire department was not a judicial or quasi-judicial function which would permit review by certiorari. Foust v. City of Greensboro, 47 N.C. App. 159, 266 S.E.2d 835, cert. denied, 301 N.C. 88, 273 S.E.2d 297 (1980).

Removal of Public Officer or Employee. — If the act of removal of a public officer is executive it is not reviewable on certiorari, but if it is on hearing and formal findings, it is reviewable, as the writ may be invoked only to review acts which are clearly judicial or quasi-judicial. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

A hearing, pursuant to the act creating the civil service board of a city, with respect to the discharge of a classified employee of the city by the civil service board, was a quasi-judicial function and reviewable upon a writ of certiorari issued from the superior court. In re Burris, 261 N.C. 450, 135 S.E.2d 27 (1964); Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

An order entered by the civil service board of a city, dismissing a policeman from the police department, was properly brought up for the superior court's review by writ of certiorari. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

The action of a county board of education in removing a school committeeman from his office may be reviewed in the superior court by certiorari. Russ v. Board of Educ., 232 N.C. 128, 59 S.E.2d 589 (1950).

Demotion of Policeman. — Order entered by a chief of police, demoting a policeman from captain of detectives to patrolman, was the administrative act of the chief of police and neither judicial nor quasi-judicial in its nature; hence, the order was not reviewable by the superior court on certiorari. Bratcher v. Winters, 269 N.C. 636, 153 S.E.2d 375 (1967).

As to the use of certiorari in order that trial judge may make corrections in case on appeal, see Currie v. Clark, 90 N.C. 17 (1884); Cheek v. Watson, 90 N.C. 302 (1884); Ware v. Nisbet, 92 N.C. 202 (1885); State v. Gay, 94 N.C. 821 (1886); Porter v. Western N.C.R.R., 97 N.C. 63, 2 S.E. 580 (1887); Allen v. McLendon, 113 N.C. 319, 18 S.E. 205 (1893); City Nat'l Bank v. Bridgers, 114 N.C. 107, 19 S.E. 276 (1894); Slocumb v. Construction Co., 142 N.C. 349, 53 S.E. 196 (1906); Clark v. Saco-Pettee Mach. Works, 150 N.C. 88, 63 S.E. 153 (1908).

Failure to Plead and Appeal. — Where a defendant failed to enter a plea and to take an appeal, he was not entitled to a certiorari to bring the case into the superior court. Rule & Hall v. Council, 48 N.C. 33 (1855).

Failure to Timely Perfect Appeal Pursuant to Agreement to Waive Time. — To the rule that appeal will be dismissed on motion of the appellee if not perfected according to law, there are the following exceptions: (1) Where the record shows a written agreement of counsel waiving the lapse of time; and (2) Where the alleged agreement is oral and disputed, and such waiver can be shown by the affidavit of the appellee, rejecting that of the appellant. In either case certiorari is the proper substitute. Walton v. Pearson, 82 N.C. 464 (1880).

Where there is an undenied tacit agreement to waive delay, certiorari will issue. Holmes v. Holmes, 84 N.C. 833 (1881); Willis v. Atlantic & D.R.R., 119 N.C. 718, 25 S.E. 790 (1896).

A certiorari will not be granted where an alleged oral agreement between counsel to await the decision of a certain other case is denied. Hutchinson v. Rumfelt, 83 N.C. 441 (1880); Short v. Sparrow, 96 N.C. 348, 2 S.E. 233 (1887); Graves v. Hines, 106 N.C. 323, 11 S.E. 362 (1890).

When judgment has been entered in the recorder's court upon defendant's plea of guilty, certiorari will not lie from the superior court to the recorder's court. State v. Barber, 232 N.C. 577, 61 S.E.2d 714 (1950).

Review of Hearing on Lunacy Writ. — Where a writ of lunacy was issued by a county court, and the party was found non compos, and a guardian was appointed, in the absence of the said party and without notice, it was held that the petitioner was entitled to a certiorari to have the case taken into a superior court. Dowell v. Jacks, 53 N.C. 387 (1861).

C. Application for Certiorari.

Merits Must Be Shown. — An application for a writ of certiorari must show a prima facie case of merits. March v. Thomas, 63 N.C. 249 (1869); Short v. Sparrow, 96 N.C. 348, 2 S.E. 233 (1887).

Mere Allegation of Fraud Is Insufficient. — Conceding complaint to be a petition for writ of certiorari to review the ruling of the municipal board of control in respect to the sufficiency of the signatures to a petition to change the name of a town, it failed to make a proper showing of merit, upon which alone certiorari will issue, since the mere allegation in a pleading that an act was induced by fraud is insufficient. Hunsucker v. Winborne, 223 N.C. 650, 27 S.E.2d 817 (1943).

When Certiorari Granted Without Reference to Merits. — Where an opportunity of appealing has been lost by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior court, a certiorari will be granted, without reference to the merits. Collins v. Nall, 14 N.C. 224 (1831); McConnell v. Caldwell, 51 N.C. 469 (1859).

Where defendant is not able, at the time, to procure sufficient sureties for an appeal, he is entitled to a certiorari, without showing any merits in fact, where the case discloses that there were questions of law which he had a right to have decided by the superior court. Britt v. Patterson, 31 N.C. 197 (1848).

Failure to Pray That Writ Be Issued. — Where a verified petition of a district school committeeman alleged that the county board of education made an order purporting to remove the petitioner from his office without notice and an opportunity to be heard, and contained a general prayer for relief in addition to specific prayers, it would not be held inadequate as a petition for certiorari because of its failure to specifically pray that the writ be issued. Russ v. Board of Educ., 232 N.C. 128, 59 S.E.2d 589 (1950).

For case in which affidavit was held sufficient, see Bayer v. Raleigh & A. Air Line R.R., 125 N.C. 17, 34 S.E. 100 (1899).

Application Must Be Timely. — An application for certiorari to supply omissions in the appellate record must be presented to the appellate court with proper diligence, and the result of any laches by the applicant will fall upon him. Todd v. Mackie, 160 N.C. 352, 76 S.E. 245 (1912).

Time for Applying for Writ. — Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of the Supreme Court to which the appeal ought to have been taken, or if no appeal lay, then before or to the term of court next after the judgment complained of was entered in the superior court. If the writ is applied for after that term, sufficient cause for the delay must be shown. State v. Johnson, 93 N.C. 559 (1885); State v. Sloan, 97 N.C. 499, 2 S.E. 666 (1887).

An appellant who has ground for a certiorari as a substitute for appeal must move for it before the cause is reached for argument. State v. Harris, 114 N.C. 830, 19 S.E. 154 (1894); State v. Marsh, 134 N.C. 184, 47 S.E. 6 (1903).

Failure to properly file a petition for writ of certiorari with the superior court which would have allowed the court to exercise its jurisdiction following administrative hearing justified dismissal by the trial court. House of Raeford Farms, Inc. v. City of Raeford, 104 N.C. App. 280, 408 S.E.2d 885 (1991).

As to when certiorari is allowed after argument, see Boyer v. Teague, 106 N.C. 571, 11 S.E. 330 (1890).

III. RECORDARI.

A. In General.

The writ of recordari is used only in North Carolina, writs of error and certiorari being substituted for it elsewhere. State v. Griffis, 117 N.C. 709, 23 S.E. 164 (1895).

Recordari lies to an inferior tribunal whose proceedings are not recorded. Hartsfield v. Jones, 49 N.C. 309 (1857).

Function of Recordari. — The writ of recordari may be used, either as a substitute for an appeal from a justice's judgment to have a new trial on the merits, or as a writ of false judgment. Caldwell v. Beatty, 69 N.C. 365 (1873); Morton v. Rippy, 84 N.C. 611 (1881); King v. Wilmington & W.R.R., 112 N.C. 318, 16 S.E. 929 (1893); Marler-Dalton-Gilmer Co. v. Wadesboro Clothing & Shoe Co., 150 N.C. 519, 64 S.E. 366 (1909).

If a party has merits and desires a new trial in the superior court, upon a matter heard before a justice of the peace, he must, by a proper application, obtain a writ of recordari as a substitute for an appeal. Ledbetter v. Osborne, 66 N.C. 379 (1872).

The writ of recordari may be used as a writ of false judgment. Parker v. Gilreath, 28 N.C. 221 (1845); Kearney v. Jeffreys, 30 N.C. 96 (1847); Bailey v. Bryan, 48 N.C. 357 (1856).

The writ of recordari is in the nature of an extension of the power of appeal. Webb v. Durham, 29 N.C. 130 (1846).

Jurisdiction of Superior Courts. — The writs of certiorari and recordari are to be applied for in orderly procedure to the superior courts of general jurisdiction vested by the Constitution and statutes with appellate and supervisory powers over the judicial action of all the inferior courts of the State. Taylor v. Johnson, 171 N.C. 84, 87 S.E. 981 (1916).

Failure to Docket Appeal. — When an appeal from a justice's court has not been docketed within the time prescribed by former G.S. 1-300, the appellant should move for a recordari, at the first ensuing term of the superior court, that the appeal should be docketed. Peltz v. Bailey, 157 N.C. 166, 72 S.E. 978 (1911); Abell v. Thornton Light & Power Co., 159 N.C. 348, 74 S.E. 881 (1912); L.D. Powell & Co. v. Rogers, 180 N.C. 657, 104 S.E. 70 (1920).

Right to Object to Petition for Recordari Not Waived. — An appellee who does not docket an appeal from a justice's court that is not docketed in time by appellant and move for affirmance does not waive the right to object to appellant's petition to bring up the appeal by recordari. Pickens v. Whitten, 182 N.C. 779, 109 S.E. 836 (1921).

Dismissal for Failure to Docket. — A recordari granted defendant by the superior court as substitute for an appeal from a justice not being docketed at that or the succeeding term, plaintiff may at a subsequent term docket the case, and have it dismissed. Johnson v. Reformers, 135 N.C. 385, 47 S.E. 463 (1904).

Review of Judge's Decision upon Petition for Recordari. — The decision of the judge upon a petition for recordari as a substitute for an appeal, after proper notice to the adverse party, is final and can only be reviewed by appeal, or upon an application to vacate it for mistake, surprise or excusable negligence. Barnes v. Easton, 98 N.C. 116, 3 S.E. 744 (1887). See also, Stewart v. Craven, 205 N.C. 439, 171 S.E. 609 (1933).

Where, upon application to the superior court for a writ of recordari, the judge finds as facts, upon evidence, that the appellant has been guilty of laches in not giving the legal notice of appeal and refuses to grant the writ, his judgment will not be disturbed in the appellate court; praying for the appeal and the payment of the fees in the justice's court by the appellant are not sufficient to entitle him to the order as a matter of right. Tedder v. Deaton, 167 N.C. 479, 83 S.E. 616 (1914).

No appeal lies from the refusal of the court below to grant a motion to dismiss a petition for a writ of recordari. An appeal lies from the order of the court either granting or refusing to grant such writ. Perry v. Whitaker, 77 N.C. 102 (1877).

What Must Be Shown in Application. — Recordari will not be issued unless party applying shows (1) excuse for laches, and (2) meritorious grounds. Pritchard v. Sanderson, 92 N.C. 41 (1885).

Application Must Negative Laches. — An applicant for recordari must show that he has not been guilty of laches. Marler-Dalton-Gilmer Co. v. Wadesboro Clothing & Shoe Co., 150 N.C. 519, 64 S.E. 366 (1909). See March v. Thomas, 63 N.C. 249 (1869); Pritchard v. Sanderson, 92 N.C. 41 (1885); In re Brittain, 93 N.C. 587 (1885).

Sufficient Grounds for Recordari Must Be Shown. — It was incumbent on one failing to docket his appeal from justice court in the time required by law to show sufficient ground for a recordari in lieu of the appeal. Baltimore Bargain House v. Jefferson, 180 N.C. 32, 103 S.E. 922 (1920).

Applicant Must Show Merit. — An applicant for a writ of recordari must show merit. Marler-Dalton-Gilmer Co. v. Wadesboro Clothing & Shoe Co., 150 N.C. 519, 64 S.E. 366 (1909).

It is error to issue a writ of recordari to a justice's court, requiring him to send up the cause for trial de novo after entry of default judgment against defendant and loss of right to appeal, where there is no showing of a meritorious defense. Hunter v. Atlantic Coast Line R.R., 161 N.C. 503, 77 S.E. 678 (1913).

Averment as to Payment of Costs. — Before an application for a writ of recordari can be entertained, the petitioner must aver that he has paid or offered to pay the justice's fees. Steadman v. Jones, 65 N.C. 388 (1871).

Recordari Granted Without Notice and Affidavit or Petition Subject to Dismissal. — A recordari, granted upon the application of the plaintiff, without notice to the defendant, and without any petition or affidavit setting forth the grounds upon which it should be issued, is irregular, and will be dismissed upon the hearing. Wilcox v. Stephenson, 71 N.C. 409 (1874).

Procedure Where No Error Is Assigned or Appears. — Where no error is assigned, or none appears, the proper course is to dismiss the recordari, and award a procedendo. Leatherwood v. Moody, 25 N.C. 129 (1842); Sossamer v. Hinson, 72 N.C. 578 (1875).

Order for a recordari should be accompanied with an order for a supersedeas, and suspension of execution until the hearing. Steadman v. Jones, 65 N.C. 388 (1871).

Duty to File Motion. — On appeal from a justice of the peace to the superior court, where the justice did not make a return of the notice of appeal during the next term, it was appellant's duty, where the superior court judge was absent from such next term, to file a motion for a recordari during such next term to preserve his right to have the case tried at the next succeeding term of the superior court. Barnes v. Saleeby, 177 N.C. 256, 98 S.E. 708 (1919).

B. Grounds for Recordari.

Loss of Appeal by Misfortune. — As a rule the writ of recordari is not resorted to except in cases in which the party aggrieved has by his misfortune lost the opportunity of taking the ordinary statutory appeal. State v. Griffis, 117 N.C. 709, 23 S.E. 164 (1895). See also, Boing v. Raleigh & G.R.R., 88 N.C. 62 (1883); Davenport v. Grissom, 113 N.C. 38, 18 S.E. 78 (1893).

Loss of Appeal Without Fault of Applicant. — A recordari is a substitute for an appeal where the party has lost his right to appeal otherwise than by his own default. Marsh v. Cohen, 68 N.C. 283 (1873); Pickens v. Whitton, 182 N.C. 779, 109 S.E. 836 (1921).

Party Denied Right of Appeal. — If a party has been aggrieved in a trial before a justice of the peace and has been denied the right of appeal, he may obtain relief by a writ of recordari. Ledbetter v. Osborne, 66 N.C. 379 (1872); Birdsey v. Harris, 68 N.C. 92 (1873).

Refusal of Appeal on Frivolous Grounds. — If an appeal is refused by a magistrate on frivolous grounds, the remedy is by a writ of recordari. Bailey v. Bryan, 48 N.C. 357, 67 Am. Dec. 246 (1956).

Appeal Lost by Excusable Neglect. — Where a party has lost his appeal by excusable neglect, he may have relief by a writ of recordari as a substitute for an appeal. Navassa Guano Co. v. Bridgers, 93 N.C. 439 (1885).

Loss of Appeal by Technical Default. — Where a party has lost his appeal by a technical default, the superior court judge can have it brought up by recordari. Suttle v. Green, 78 N.C. 76 (1878).

Erroneous Supposition as to Agreement. — A writ of recordari is properly granted where the defendant had merits and lost his right to appeal without fault, having erroneously supposed that relief had been arranged with the plaintiff's attorney. Carmer v. Evers, 80 N.C. 56 (1879).

Where a party is not deprived of his appeal by any fraud, accident, surprise or denial by the court, he is not entitled to the aid of a writ of recordari. Satchwell v. Rispess, 32 N.C. 365 (1849); Hare v. Parham, 49 N.C. 412 (1857).

Failure to Perfect Appeal. — Where a party has a remedy by appeal which he willfully or negligently fails to exercise he is not entitled to a writ of recordari. State v. Griffis, 117 N.C. 709, 23 S.E. 164 (1895); Peltz v. Bailey, 157 N.C. 166, 72 S.E. 978 (1911).

A motion for recordari made in the superior court several terms after the judgment was entered in the justice's court for failure to send up the transcript would be denied where the appellant had not paid the required fees or taken proper steps to perfect the appeal. Helsabec v. Grubbs, 171 N.C. 337, 88 S.E. 473 (1916).

Illness of One Member of Law Firm. — As every member of a law firm is charged with knowledge of all the business of the firm, the illness of one member of a law firm which prevented him from attending a trial in justice court and thus caused defendant to suffer a default judgment and lose right of appeal was not a showing of excusable neglect which would warrant the issuance of a writ of recordari. Hunter v. Atlantic Coast Line R.R., 163 N.C. 281, 79 S.E. 610 (1913).

Appeal Lost Through Negligence of Applicant's Attorney. — A party is not entitled to a writ of recordari as a substitute for an appeal from a justice's court which was lost by delay through the negligence of his attorney. Boing v. Raleigh & G.R.R., 88 N.C. 62 (1883).

As to party's duty to see that appeal is filed in time, see Baltimore Bargain House v. Jefferson, 180 N.C. 32, 103 S.E. 922 (1920).

IV. SUPERSEDEAS.

"Supersedeas" is a writ issuing from an appellate court to preserve the status quo pending exercise of that court's jurisdiction, and issues only to hold the matter in abeyance pending review. It is granted only by the court ordering removal of the cause, and is regulated by statute. Seaboard Air Line Ry. v. Horton, 176 N.C. 115, 96 S.E. 954 (1918); City of New Bern v. Walker, 255 N.C. 355, 121 S.E.2d 544 (1961).

Writ of supersedeas may issue to vacate the order of the lower court. Arey v. Williams, 154 N.C. 610, 154 N.C. 910, 70 S.E. 931, 70 S.E. 931 (1911); McArthur v. Commonwealth Land & Timber Co., 164 N.C. 383, 80 S.E. 403 (1913); Page v. Page, 166 N.C. 90, 81 S.E. 1060 (1914); In re Blake, 184 N.C. 278, 114 S.E. 294 (1922); Clegg v. Clegg, 186 N.C. 28, 118 S.E. 824 (1923).

Supersedeas Must Be Auxiliary to Appellate Jurisdiction. — The superior court cannot supersede the process of an inferior court unless the writ of supersedeas is auxiliary to the appellate jurisdiction of the former. President & Dirs. v. Stanley, 13 N.C. 476 (1830).

A supersedeas is ancillary to a writ of error and the former may be granted by the same judge who has granted the latter. Seaboard Air Line Ry. v. Horton, 176 N.C. 115, 96 S.E. 954 (1918).

The Supreme Court of North Carolina has no power to grant a supersedeas pending a petition to the United States Supreme Court for certiorari. Seaboard Air Line Ry. v. Horton, 176 N.C. 115, 96 S.E. 954 (1918).

A writ of supersedeas is only granted in case of necessity. McArthur v. Commonwealth Land & Timber Co., 164 N.C. 383, 80 S.E. 403 (1913).

Where the rights of a party can be fully protected in other proceedings which he seeks to restrain, a writ of supersedeas will not be granted. McArthur v. Commonwealth Land & Timber Co., 164 N.C. 383, 80 S.E. 403 (1913).

An appeal duly taken and regularly prosecuted of itself operates as a stay of all proceedings in the trial court. Sykes v. Everett, 167 N.C. 600, 83 S.E. 585 (1914).

Appeal from Nonappealable Order. — Where an appeal is taken in a matter wherein no appeal lies, the court below need not stay the proceedings, but may disregard the attempted appeal. Dunn v. Marks, 141 N.C. 232, 53 S.E. 845 (1906).

Review of Clerk's Decision. — A supersedeas is the proper remedy to stay proceedings in a cause pending review of a decision of the clerk in regard to the sufficiency or insufficiency of an undertaking for an appeal. Saulsbury v. Cohen, 68 N.C. 289 (1873).

Grant of Injunction. — An appeal from an order granting an injunction does not stay the operation of the injunction pending the appeal. Green v. Griffin, 95 N.C. 50 (1886); Fleming v. Patterson, 99 N.C. 404, 6 S.E. 396 (1888).

Dissolution of Injunction. — It is not proper to allow a supersedeas for the purpose of continuing an injunction pending an appeal from an order dissolving it. James v. Markham, 125 N.C. 145, 34 S.E. 241 (1899).

An appeal from an order dismissing a temporary injunction could not have the effect of continuing the injunctions. Reyburn v. Sawyer, 128 N.C. 8, 37 S.E. 954 (1901).

An appeal from an order granting a supersedeas upon a judgment leaves the judgment creditor at liberty to enforce his judgment. Bank of Newbern v. Jones, 17 N.C. 284 (1832).

Custody of Child. — Where, in divorce proceedings, the trial court granted custody of a child to mother and husband appeals, and mother sued out habeas corpus for custody of the child pending appeal, the Supreme Court could supersede the order as to custody pending the appeal, by virtue of constitutional authorization to issue remedial writs. Page v. Page, 166 N.C. 90, 81 S.E. 1060 (1914).

§ 1-270. Appeal to appellate division; security on appeal; stay.

Cases shall be taken to the appellate division by appeal, as provided by law. All provisions in this Article as to the security to be given upon appeals and as to the stay of proceedings apply to appeals taken to the appellate division. (C.C.P., s. 312; Code, ss. 561, 946; Rev., ss. 595, 1540; C.S., s. 631; 1969, c. 444, s. 3.)

CASE NOTES

Cited in State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951) (con. op.); Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953).

§ 1-271. Who may appeal.

Any party aggrieved may appeal in the cases prescribed in this Chapter. A party who cross assigns error in the grant or denial of a motion under the Rules of Civil Procedure is a party aggrieved. (C.C.P., s. 298; Code, s. 547; Rev., s. 585; C.S., s. 632; 1969, c. 895, s. 15.)

Cross References. — As to appeal from superior or district court judge, see G.S. 1-277. For the Rules of Civil Procedure, see G.S. 1A-1. For the North Carolina Rules of Appellate Procedure, see the Annotated Rules of North Carolina.

CASE NOTES

I. In General.
II. Parties Held Entitled to Appeal.
III. Parties Held Not Entitled to Appeal.

I. IN GENERAL.

Common-Law Rule Codified. — At common law the right to appeal was limited to parties in the action who were aggrieved by the ruling of the court. This common-law rule has been codified in North Carolina under this section. Duke Power Co. v. Salisbury Zoning Bd. of Adjustment, 20 N.C. App. 730, 202 S.E.2d 607, cert. denied, 285 N.C. 235, 204 S.E.2d 22 (1974).

Appeals lie from the superior court to the appellate court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

The scope of review by an appellate court is usually limited to a consideration of the assignments of error in the record on appeal and it is well established that if the appealing party has no right to appeal the appellate court should dismiss the appeal ex mero motu. Harris v. Harris, 307 N.C. 684, 300 S.E.2d 369 (1983).

Therefore, when a party fails to raise an appealable issue, the appellate court will generally not raise it for that party. Harris v. Harris, 307 N.C. 684, 300 S.E.2d 369 (1983).

No appeal lies from a judgment until someone is hurt or "aggrieved" by it. Yadkin County v. City of High Point, 219 N.C. 94, 13 S.E.2d 71 (1941).

Only the party aggrieved may appeal from the superior court to the appellate court. Watkins v. Grier, 224 N.C. 334, 30 S.E.2d 219 (1944); Langley v. Gore, 242 N.C. 302, 87 S.E.2d 519 (1955); Dickey v. Herbin, 250 N.C. 321, 108 S.E.2d 632 (1959); Waldron Buick Co. v. GMC, 251 N.C. 201, 110 S.E.2d 870 (1959); State ex rel. Utilities Comm'n v. Maybelle Transp. Co., 252 N.C. 776, 114 S.E.2d 768 (1960); Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Boone v. Boone, 27 N.C. App. 153, 218 S.E.2d 221 (1975); Harris v. Harris, 307 N.C. 684, 300 S.E.2d 369 (1983); Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

Appeal can be taken only by the aggrieved real party in interest. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Where a party is not aggrieved, his appeal will be dismissed. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963); Boone v. Boone, 27 N.C. App. 153, 218 S.E.2d 221 (1975).

Where no error was found on plaintiff's appeal from a judgment in defendant's favor, defendant's appeal on the ground that the entire proceeding was void would be dismissed, since only the party aggrieved may appeal. In re Westover Canal, 230 N.C. 91, 52 S.E.2d 225 (1949).

Where both plaintiffs and defendants appealed from judgment in favor of defendants, defendants' appeals would not be considered when no error was found on plaintiffs' appeal, since in such instance defendants were not the parties aggrieved by the judgment. Teague v. Duke Power Co., 258 N.C. 759, 129 S.E.2d 507 (1963).

If the judicial order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967); State Farm

Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

Meaning of "Party Aggrieved". — The "party aggrieved" is the one whose rights have been directly and injuriously affected by the judgment entered in the superior court. Freeman v. Thompson, 216 N.C. 484, 5 S.E.2d 434 (1939); Waldron Buick Co. v. General Motors Corp., 251 N.C. 201, 110 S.E.2d 870 (1959); Absher v. Vannoy-Lankford Plumbing Co., 78 N.C. App. 620, 337 S.E.2d 877 (1985), cert. denied, State v. Gooch, 94 N.C. 982 (1886); North Carolina Trust Co. v. Taylor, 131 N.C. App. 690, 508 S.E.2d 809 (1998).

A party is aggrieved if his rights are substantially affected by judicial order. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967); State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

A party is not aggrieved unless the order complained of affects a substantial right or in effect determines the action. Wachovia Bank & Trust Co. v. Parker Motors, Inc., 13 N.C. App. 632, 186 S.E.2d 675 (1972).

A party aggrieved is one whose legal rights have been denied or directly and injuriously affected by the action of the trial court. Selective Ins. Co. v. Mid-Carolina Insulation Co., 126 N.C. App. 217, 484 S.E.2d 443 (1997).

For other definitions of the term "party aggrieved," see In re Applications for Reassignment, 247 N.C. 413, 101 S.E.2d 359 (1958).

Party aggrieved within the meaning of G.S. 1-271 is one whose rights are substantially affected by judicial order. Templeton v. Apex Homes, Inc., 164 N.C. App. 373, 595 S.E.2d 769, 2004 N.C. App. LEXIS 829 (2004).

Representative May be "Aggrieved". — One may be "aggrieved" within the meaning of the various statutes authorizing appeals when he is affected only in a representative capacity. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

An administrative agency cannot be a person aggrieved by its own order, but it may be an aggrieved party to secure judicial review of a decision of an administrative agency. State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975).

One who challenges neither the proceeding nor the judgment below and appeals only for delay is not a "party aggrieved" within the meaning of this section. Stephenson v. Watson, 226 N.C. 742, 40 S.E.2d 351 (1946).

One not a party or privy to the record cannot appeal. Siler v. Blake, 20 N.C. 90 (1838); In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981); In re Wharton, 54 N.C. App. 447, 283 S.E.2d 528 (1981), rev'd in part on other grounds, 305 N.C. 565, 290 S.E.2d 688 (1982).

A legal proceeding must be prosecuted by a legal person, whether it be a natural person, sui juris, or a group of individuals or other entity having the capacity to sue and be sued, such as a corporation, partnership, unincorporated association or governmental body or agency. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

Where no natural or other legal person appears as a party defendant, whether aggrieved or not aggrieved, the appeal must be dismissed for failure to comply with this section. State ex rel. Moore v. John Doe, 19 N.C. App. 131, 198 S.E.2d 236, cert. denied, 284 N.C. 121, 199 S.E.2d 663 (1973).

Class Members Must Prosecute or Defend Class Actions. — Even a class action must be prosecuted or defended by one or more named members of the class. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

A legal proceeding prosecuted by an aggregation of anonymous individuals, known only to their counsel, is a phenomenon unknown to the law of this jurisdiction. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

A party has no right to appeal from a judgment entered on his own motion. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

One whose claim to intervene in a suit has been rejected by the court cannot appeal from the judgment rendered in the suit. Phelps v. Long, 31 N.C. 226 (1848); Evans v. Governor's Creek Transp. & Mining Co., 50 N.C. 332 (1858); Rollins v. Rollins, 76 N.C. 264 (1877).

Applicability of Requirement that Appellant Be Aggrieved to Administrative Proceedings. — The rule that an appeal to the appellate division may be prosecuted only at the instance of a party or parties aggrieved by the judgment of the court or tribunal from which the appeal is taken applies with as much force to proceedings governed by the statute relating to judicial review of decisions of administrative agencies as to ordinary civil cases. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

As to joinder of parties on appeal from joint verdict and judgment, see Hicks v. Gilliam, 15 N.C. 217 (1833); Smith v. Cunningham, 30 N.C. 460 (1848); Mastin v. Porter, 32 N.C. 1 (1848); Kelly v. Muse, 33 N.C. 182 (1850).

As to appeal of judgment against one of two defendants, see Sharpe v. Jones, 7 N.C. 306 (1819); Stephens v. Batchelor, 23 N.C. 60 (1840).

Aggrieved Party Qualified to Give Oral Notice of Appeal. — Where the jury announced its verdict in open court, it "rendered judgment" according to N.C.R.A.P., Rule 3(a) and G.S. 1A-1, Rule 58, and oral notice of appeal was a proper procedure. As a party against whom the jury rendered the verdict, plaintiff was an "aggrieved party" who was entitled by law to orally appeal from the judgment; plaintiff's status as an aggrieved party qualified it to give oral notice of appeal, and its nonmovant status was irrelevant. Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

Applied in Canestrino v. Powell, 231 N.C. 190, 56 S.E.2d 566 (1949); Queen City Coach Co. v. Carolina Coach Co., 237 N.C. 697, 76 S.E.2d 47 (1953); State ex rel. Gold v. Equity Gen. Ins. Co., 255 N.C. 145, 120 S.E.2d 452 (1961); Lucas v. Felder, 261 N.C. 169, 134 S.E.2d 154 (1964); Martin v. Moss, 261 N.C. 737, 136 S.E.2d 90 (1964); Days Inn of Am., Inc. v. Board of Transp., 24 N.C. App. 636, 211 S.E.2d 864 (1975); Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977); Greene v. Town of Valdese, 306 N.C. 79, 291 S.E.2d 630 (1982); Lone Star Indus., Inc. v. Ready Mixed Concrete of Wilmington, Inc., 68 N.C. App. 308, 314 S.E.2d 302 (1984); In re B.D., 174 N.C. App. 234, 620 S.E.2d 913, 2005 N.C. App. LEXIS 2387 (2005); Greene v. Royster, 187 N.C. App. 71, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007).

Cited in Simmons v. Andrews, 106 N.C. 201, 106 N.C. 210, 10 S.E. 1052, 10 S.E. 1052 (1890); In re Central Bank & Trust Co., 206 N.C. 251, 173 S.E. 340 (1934); In re Adams, 218 N.C. 379, 11 S.E.2d 163 (1940); Yancey v. North Carolina State Hwy. & Pub. Works Comm'n, 221 N.C. 185, 19 S.E.2d 489 (1942); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950); State ex rel. Utilities Comm'n v. City Coach Co., 234 N.C. 489, 67 S.E.2d 629 (1951); In re Fitzgerald, 242 N.C. 732, 89 S.E.2d 462 (1955); Bell v. Smith, 263 N.C. 814, 140 S.E.2d 542 (1965); In re Kowalzek, 32 N.C. App. 718, 233 S.E.2d 655 (1977); Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978); Rheinberg-Kellerei GMBH v. Vineyard Wine Co., 53 N.C. App. 560, 281 S.E.2d 425 (1981); Green v. Duke Power Co., 305 N.C. 603, 290 S.E.2d 593 (1982); Shillington v. K-Mart Corp., 102 N.C. App. 187, 402 S.E.2d 155 (1991); Bumpers v. Cmty. Bank of N. Va., — N.C. App. —, 675 S.E.2d 697, 2009 N.C. App. LEXIS 516 (2009).

II. PARTIES HELD ENTITLED TO APPEAL.

Construction With Other Laws. — Husband had standing to appeal under G.S. 35A-1115 the clerk of the trial court's decision that the wife was incompetent since the husband was an interested party entitled to notice of the incompetency proceeding. Although the county social services agency alleged that G.S. 1-271 and G.S. 1-301.2 applied and controlled whether the husband had standing, G.S. 35A-1115 spoke more specifically to incompetency proceedings, while G.S. 1-271 involved appeals in cases "prescribed in this Chapter," and G.S. 1-301.2(a) specifically addressed special proceedings. In re Winstead, 189 N.C. App. 145, 657 S.E.2d 411, 2008 N.C. App. LEXIS 417 (2008).

A party who prevails at trial may appeal from a judgment that is only partly in its favor or is less favorable than the party thinks it should be. Casado v. Melas Corp., 69 N.C. App. 630, 318 S.E.2d 247 (1984).

Standing of Third-Party Defendant to Appeal. — Where third-party defendant not only had an opportunity to participate, but, in fact, did fully participate in the determination of third-party plaintiff's liability and was bound by the judgment in favor of plaintiff entered against defendants as third-party plaintiffs, it was clearly an aggrieved party within the meaning of this section; therefore, third-party defendant had standing to appeal the judgment entered against third-party plaintiffs. Barker v. Agee, 326 N.C. 470, 389 S.E.2d 803 (1990).

Where, in proceedings by administrator to sell lands of the estate to pay debts, the judge ordered claimants to file original evidence of their indebtedness and then referred the matter, the proceedings assumed the character of a creditor's bill, in which a creditor whose claim has been disallowed may appeal as a party aggrieved. Irvin v. Harris, 182 N.C. 647, 109 S.E. 867 (1921).

A creditor on rejection of his claim by the referee was such a "party aggrieved" as had a right of appeal under this section. Irvin v. Harris, 182 N.C. 647, 109 S.E. 867 (1921).

Where defendants were not appealing from a nonsuit in their favor, but from a judgment upon the verdict which adversely affected their interest, they had the right to appeal under this section. Hargett v. Lee, 206 N.C. 536, 174 S.E. 498 (1934).

Where judgment for costs was rendered in a claim and delivery proceeding against a person who was not a party thereto, and who did not appear on the record as a party, such person could appeal on a special appearance made for that purpose. Loven v. Parson, 127 N.C. 301, 37 S.E. 271 (1900).

Researcher Who Was Required to Produce Documents in Criminal Case Was Aggrieved Party. — Where the trial court ordered a researcher to produce certain documents for defendant's appellate counsel, the researcher, which claimed that the documents were privileged, had grounds to appeal under G.S. 1-271 and G.S. 1-277; requiring disclosure of the allegedly privileged documents affected a substantial right, and thus the researcher was an aggrieved party. State v. Bradley, 179 N.C. App. 551, 634 S.E.2d 258, 2006 N.C. App. LEXIS 1968 (2006).

Appeal by Justices of County. — Where, in a proceeding against the justices of a county, in their official capacity as justices of the county court, a judgment was rendered against them, they could appeal, even though a minority of the justices refused to join in the appeal. State ex rel. Kelly v. Justices of Moore County, 24 N.C. 430 (1842).

When an application to be made a party defendant is denied, the applicant is a "party aggrieved" for all the purposes of an appeal under this section. Rollins v. Rollins, 76 N.C. 264 (1877).

III. PARTIES HELD NOT ENTITLED TO APPEAL.

In a caveat proceeding where the jury found against propounders and the trial court set aside the verdict as being against the weight of the evidence and ordered a new trial, the propounders were not the "parties aggrieved" by the order setting aside the verdict and they could not appeal. In re Will of Hargrove, 207 N.C. 280, 176 S.E. 752 (1934).

Where order was issued that certain funds be turned over to plaintiffs, and defendants appealed on the ground that plaintiffs were not entitled to the funds, but defendants had no interest in or claim to the funds, defendants were not the parties aggrieved within the meaning of this section. Langley v. Gore, 242 N.C. 302, 87 S.E.2d 519 (1955).

A commissioner appointed to make a deed was not a "party to the action," and having no personal interest in the subject of it could not appeal from an order of the court requiring him to correct his deed. Summerlin v. Morrisey, 168 N.C. 409, 84 S.E. 689 (1915).

Parties Whose Only Interest Was Payment of Moneys Secured by Trust Deed. — In an action to restrain a trustee from selling lands under a trust deed until the determination of plaintiff's interest in the premises, parties whose only interest in the suit was the payment of the moneys secured to them by the trust deed could not appeal from a judgment declaring a parol trust in the equity of redemption in favor of plaintiff. Faison v. Hardy, 118 N.C. 142, 23 S.E. 959 (1896).

The holder of the legal title as security for a debt has no right to demand possession or foreclose the instrument until requested to do so by a party secured, and therefore the trustee, in the absence of a showing of such request, is not the party aggrieved by, and may not appeal from, a judgment declaring that under former subdivision (5) of G.S. 45-37 (see now subsection (b)) the right to possession and the right to foreclose were barred. Gregg v. Williamson, 246 N.C. 356, 98 S.E.2d 481 (1957).

Where a trustor's equity was divested by foreclosure of a junior deed of trust on the property, he had no rights in the property, and he was not a party aggrieved by an order dissolving an injunction against foreclosure of the senior deed of trust. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

Where plaintiffs were estopped to assert title to land, an order enjoining them from cutting timber which they did not own did not affect any substantial right of theirs; hence, plaintiffs were not parties aggrieved. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963).

Where an action was entitled in the name of certain individuals "t/a" a named corporation, the corporation could not be the party aggrieved by an order striking the names of the individuals and the letters "t/a" from the captions of the summons and complaint and the references to said individuals from the complaint. Williams v. Denning, 260 N.C. 540, 133 S.E.2d 148 (1963).

Receivers of a corporation could not appeal from a judgment of instructions on the grounds that the instructions were, as between classes of stockholders, prejudicial to one of such classes. Strauss v. Carolina Interstate Bldg. & Loan Ass'n, 117 N.C. 308, 23 S.E. 450 (1895), reaff'd 118 N.C. 556, 24 S.E. 116 (1896).

Where a proceeding to garnishee funds belonging to delinquent taxpayer was dismissed for want of jurisdiction, neither the garnishee nor the alleged delinquent taxpayer was the "party aggrieved," within the meaning of this section and neither could prosecute an appeal. Gill v. McLean, 227 N.C. 201, 41 S.E.2d 514 (1947).

In a criminal action involving the possession of controlled substances, it was clear that the governmental agency attempting to appeal, the Department of Revenue, was not a party to the judgment ordering the forfeiture of a sum of money. Therefore, the Department had no right to appeal a forfeiture order contained in the judgment in the underlying criminal action. State v. Sneed, 112 N.C. App. 361, 435 S.E.2d 579 (1993).

Party Not Served with Process. — One who is not a party cannot appeal, and the entry of a special appearance for one who is not served with process, though named as a defendant, did not authorize counsel so appearing to appeal from a default judgment against his client. Houston v. Lumber Co., 136 N.C. 328, 48 S.E. 738 (1904).

Dismissal of a Third Party's Claim. — Limited liability company that bought a mobile home at a tax sale was not aggrieved by the trial court's decision to dismiss a claim that was filed against the North Carolina Department of Motor Vehicles by a company that held a lien on the mobile home, and the company therefore did not have the right to appeal the trial court's decision. Oakwood Acceptance Corp., LLC v. Massengill, 162 N.C. App. 199, 590 S.E.2d 412, 2004 N.C. App. LEXIS 118 (2004).

Third-party Defendant. — In case involving assault on retail store employee in shopping mall, court dismissed appeal by third-party defendant/retail store as improper because it was not a party aggrieved by dismissal of suit against security company. Hoisington v. ZT-Winston-Salem Assocs., 133 N.C. App. 485, 516 S.E.2d 176, 1999 N.C. App. LEXIS 608 (1999), cert. granted sub nom. Hoisington v. Smith, 351 N.C. 104, 540 S.E.2d 361 (1999), cert. dismissed, 351 N.C. 342, 525 S.E.2d 173 (2000).

A defendant who asked for no affirmative relief was not the "party aggrieved" by a judgment of nonsuit within the meaning of this section and could not appeal. Guy v. Aetna Life Ins. Co., 206 N.C. 118, 172 S.E. 885 (1934).

Where defendant was granted a new trial in superior court on two of his exceptions, he could not have the rulings upon his other exceptions reviewed unless reversible error appeared on plaintiff's appeal, as defendant was not the "party aggrieved" within the meaning of this section. Starnes v. Tyson, 226 N.C. 395, 38 S.E.2d 211 (1946).

Submission of Controversy. — Parties to an equity suit, who agreed that the judge should find the facts, were precluded from asking the appellate court, on appeal, to review the finding. Runnion v. Ramsay, 93 N.C. 410 (1885).

Where trial court entered judgment that plaintiff recover nothing of certain defendants, such defendants could not, upon plaintiff's appeal from refusal of the court to enter judgment on the verdict, appeal from the court's refusal to set aside the verdict for errors committed during the trial, since, until a judgment was entered against them, they were not parties aggrieved. Bethea v. Town of Kenly, 261 N.C. 730, 136 S.E.2d 38 (1964).

Instruction on Negligence of Codefendant. — In an action against each of two defendants as joint tortfeasors, one defendant could not be the party aggrieved by error in the court's instruction to the jury as to the negligence of the other defendant where they were not adversaries inter se. Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

Where plaintiff wife sought specific performance of part of separation agreement requiring defendant ex-husband to pay all of children's college costs, and the defendant asserted the defense that the consent judgment modified the terms of the separation agreement to require only that the defendant assist in the payment of college expenses, and the court found that the defendant was not in breach of the agreement as he had paid daughter's tuition, room and board so that the plaintiff was not entitled to the relief requested, the defendant had no right to appeal based on the trial court's additional conclusion that the consent order was without force and effect as to the terms regarding education contained in the separation agreement, as such conclusions would not be binding on any court in any future litigation concerning the separation agreement, and the defendant therefore was not an "aggrieved party" within the meaning of this section. Lennon v. Wahler, 84 N.C. App. 141, 351 S.E.2d 843 (1987).

Plaintiff, defendant's ex-husband, was not directly or injuriously affected by order appointing a guardian ad litem for defendant; his argument that future settlements or orders might later be disavowed by defendant on grounds that the appointment procedure was irregular was speculative and alleged at best a possible indirect injury to plaintiff's purported rights. Thus, because he was not an aggrieved party, plaintiff had no standing to challenge on appeal the order entered by the trial court. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

Guardian Ad Litem Not Served in Parental Rights Termination Case. — Trial court did not err by exercising personal jurisdiction over a mother with regard to terminating her parental rights to her son by serving the summons required by G.S. 7B-1106(a)(5) upon the attorney advocate of the child's guardian ad litem rather than the guardian ad litem, because the guardian ad litem did not object at trial to the sufficiency of service nor did the guardian ad litem argue the issue on appeal; the mother actually lacked standing to challenge service of the summons in that she was not an aggrieved party on that issue. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

Reduction Pursuant to § 97-10.2. — Plaintiff was not a "party aggrieved" by judgment entered in superior court reducing her ultimate recovery to the difference between jury award and workers' compensation award pursuant to G.S. 97-10.2 so as to permit her appeal from such recovery. Absher v. Vannoy-Lankford Plumbing Co., 78 N.C. App. 620, 337 S.E.2d 877 (1985), cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Attorney Appealing Fees Awarded to Her Client. — An attorney was not a party to an action brought on behalf of her client and therefore could not appeal on her own behalf the amount of attorney fees awarded her client. Seely v. Seely, 102 N.C. App. 572, 402 S.E.2d 870 (1991).

Appeal of Pre-Trial Order. — In an action by car purchasers against car dealerships and manufacturers for negligence and unfair and deceptive trade practices, an appeal from a trial court's pre-trial orders was dismissed as interlocutory and not affecting a substantial right. Alexander v. DaimlerChrysler Corp., 158 N.C. App. 637, 582 S.E.2d 57, 2003 N.C. App. LEXIS 1220 (2003).

Developer who obtained dismissal of suit was not an aggrieved party because the judgment from which the developer appealed was that the homeowners recover nothing from the developer and that the complaint alleging violations of the Unfair and Deceptive Trade Practices Act be dismissed. McInerney v. Pinehurst Area Realty, Inc., 162 N.C. App. 285, 590 S.E.2d 313, 2004 N.C. App. LEXIS 123 (2004).

Homeowners who were successful in obtaining a judgment against their neighbors causing their neighbors to remove a house from the property next door due to violation of restrictive covenants were not aggrieved by the trial court's order and therefore lacked standing to appeal. Templeton v. Apex Homes, Inc., 164 N.C. App. 373, 595 S.E.2d 769, 2004 N.C. App. LEXIS 829 (2004).

Consumer Was Not Party Aggrieved. — Consumer was not entitled by law to file an appeal under N.C.R. App. P. 3(a) because he lacked standing to appeal a North Carolina court's refusal to grant full faith and credit to an Illinois judge's settlement of a class action against a merchant where the consumer was not a "party aggrieved" by the denial. The consumer presumably received his settlement from the merchant in the Illinois case and was in compliance with that judge's order directing him to dismiss his North Carolina lawsuit; his rights were not directly or injuriously affected merely because the merchant remained open to claims from other consumers. Moody v. Sears Roebuck & Co., 191 N.C. App. 256, 664 S.E.2d 569, 2008 N.C. App. LEXIS 1324 (2008).

Appellant was Not Aggrieved. — Appellant did not present a question for review by the appellate court because the record contained no order or ruling of the trial court forcing the appellant to redact evidence. Therefore, the appellant was not considered aggrieved by the trial court when the appellant consciously made a bargain with the appellee regarding the presentation of evidence and then received the benefit of it. Kor Xiong v. Marks, — N.C. App. —, 668 S.E.2d 594, 2008 N.C. App. LEXIS 2016 (2008).

§§ 1-272 through 1-276: Repealed by Session Laws 1999-216, s. 2, effective January 1, 2000.

Cross References. — As to appeals and transfers from the clerk of superior court to the trial courts, see G.S. 1-301.1 et seq.

§ 1-277. Appeal from superior or district court judge.

(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause. (1818, c. 962, s. 4, P.R.; C.C.P., s. 299; Code, s. 548; Rev., s. 587; C.S., s. 638; 1967, c. 954, s. 3; 1971, c. 268, s. 10.)

Cross References. — As to appellate jurisdiction of the Supreme Court and Court of Appeals, see N.C. Const., Art. IV, § 12. As to who may appeal, see G.S. 1-271. As to appealability of judgment as to one or more but fewer than all claims or parties, see G.S. 1A-1, Rule 54(b). As to costs on appeal, see G.S. 6-23 et seq. As to the jurisdiction of the Supreme Court and the Court of Appeals, and as to appeals of right and discretionary review, see Article 5 of Chapter 7A, G.S. 7A-25 et seq. As to appeals in criminal cases, see Subchapter XIV of Chapter 15A, G.S. 15A-1401 et seq. For the North Carolina Rules of Appellate Procedure, see the Annotated Rules of North Carolina.

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

For survey of 1981 law on civil procedure, see 60 N.C.L. Rev. 1214 (1982).

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

For 1984 survey, "Double Jeopardy and Substantial Rights in North Carolina Appeals," see 63 N.C.L. Rev. 1061 (1985).

For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

I. In General.
II. From What Decisions, etc., Appeal Lies.
  A. In General.
  B. Interlocutory Orders.
    1. In General.
    2. Substantial Right.
  C. Grant or Denial of New Trial.
  D. Jurisdiction.
  E. Injunctions.
  F. Costs.
III. Scope of Review.
IV. Presumptions and Burden of Proof.
V. Illustrative Cases.
  A. Appellant Held Entitled to Appeal.
    1. In General.
    2. Domestic Relations.
    3. Summary Judgment.
  B. Appellant Not Entitled to Appeal.
    1. In General.
    2. Pleading.
    3. Summary Judgment.
    4. Denial of Motion to Dismiss.

I. IN GENERAL.

Purpose of Section. — The reason for this section, along with G.S. 7A-27 and G.S. 1A-1, Rule 54 is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. Blue Ridge Sportcycle Co. v. Schroader, 53 N.C. App. 354, 280 S.E.2d 799 (1981).

As to the reason for this section, see also Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

This section and G.S. 7A-27 prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983).

The reason for the rules embodied in subsection (a) of this section and G.S. 7A-27(d)(1) is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. McKinney v. Royal Globe Ins. Co., 64 N.C. App. 370, 307 S.E.2d 390 (1983).

This section and G.S. 7A-27, taken together, provide that no appeal lies to an appellate court from an interlocutory order unless such order deprives the appellant of a substantial right which he would lose if the order is not reviewed before final judgment. State v. Jones, 67 N.C. App. 413, 313 S.E.2d 264 (1984).

This section was not repealed or nullified by enactment of Chapter 1A of the General Statutes, prescribing the presently effective Rules of Civil Procedure. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

G.S. 1-277 limited appeals to judicial orders or determinations actually made by the trial judge; therefore, because the trial judge heard defendant's motion in limine pretrial, but decided to defer ruling upon the motion until the appropriate time during the trial, but defendant did not attempt to introduce the evidence during trial and the judge did not rule on the motion in limine, defendant did not properly preserve the issue for review. State

v. Howell, 191 N.C. App. 349, 662 S.E.2d 922, 2008 N.C. App. LEXIS 1312 (2008).

Federal Requirements Distinguished. — The statutes setting forth the appeals process do not include the same jurisdictional "finality" requirement as does the federal statute. Goldston v. AMC, 326 N.C. 723, 392 S.E.2d 735 (1990).

The right to appeal is available through two channels. Section 1A-1, Rule 54(b) allows appeal if there has been a final judgment as to all of the claims and parties, or if the specific action of the trial court from which appeal is taken is final and the trial judge expressly determines that there is no just reason for delaying the appeal. The second channel to an appeal is by way of this section or G.S. 7A-27; an appeal will be permitted under these statutes if a substantial right would be affected by not allowing appeal before final judgment. Brown v. Brown, 77 N.C. App. 206, 334 S.E.2d 506 (1985), cert. denied, 315 N.C. 389, 338 S.E.2d 878 (1986).

An interlocutory order can be immediately appealed under G.S. 1A-1-54(b) if the order is final as to some but not all of the claims and the trial court certifies that there is no just reason to delay the appeal, or an interlocutory order can be appealed under this subsection and G.S. 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. First Atl. Mgt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 507 S.E.2d 56 (1998).

Right of Appeal Not Restricted by § 1A-1, Rule 54(b) Requirements. — The General Assembly did not restrict the right of appeal provided by this section and G.S. 7A-27(d) by engrafting the requirements of G.S. 1A-1, Rule 54 upon them. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

This section is not such an express authorization of review of a final judgment upon multiple claims or involving multiple parties as is referred to in the second sentence of G.S. 1A-1, Rule 54(b). Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974).

As to the appeal certification procedure under § 1A-1, Rule 54(b), see Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240, appeal dismissed, 301 N.C. 92, 273 S.E.2d 298 (1980).

Extent to Which Certification Procedure of § 1A-1, Rule 54(b) May Be Bypassed. — To the extent that judgments as to one or more but fewer than all parties are determined by the appellate courts of this State to affect a "substantial right" of one of the litigants under this section and G.S. 7A-27(d), the procedure for trial court certification of such judgments as appealable established in G.S. 1A-1, Rule 54(b) is bypassed and the appellate court is substituted as the true dispatcher of appeals. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240, appeal dismissed, 301 N.C. 92, 273 S.E.2d 298 (1980). See also, Jones v. Clark, 36 N.C. App. 327, 244 S.E.2d 183 (1978); Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982).

Actions by the trial court, if not final or if final but not properly certified by the trial judge pursuant to G.S. 1A-1, Rule 54(b), are nonetheless immediately appealable if denial of an immediate appeal would affect a substantial right and work an injury to the appellant. Harris v. DePencier, 52 N.C. App. 161, 278 S.E.2d 759 (1981).

No Appeal from Interlocutory Order in Criminal Proceeding Absent Statutory Provision. — In light of the legislature's enactment of G.S. 15A-1444(d) and the decision in State v. Henry 318 N.C. 408, 348 S.E.2d 593 (1986), this section, the statutory basis for the holding in State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965) (per curiam) and dictum in State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972) is no longer relevant to the appeal of interlocutory orders in criminal proceedings; accordingly, the court of appeals declined to follow State v. Jones, 67 N.C. App. 413, 313 S.E.2d 264 (1984); State v. Montalbano, 73 N.C. App. 259, 326 S.E.2d 634, disc. rev. denied, 313 N.C. 608, 332 S.E.2d 182 (1985); and State v. Major, 84 N.C. App. 421, 352 S.E.2d 862 (1987) insofar as they might allow interlocutory appeals in criminal proceedings based on Childs, Bryant, or this section. State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

Purpose of Appeal. — The purpose of an appeal is to submit to the decision of a superior court a cause which has been tried in an inferior tribunal. Its object is to review the whole case and secure a just judgment upon the merits. Rush v. Halcyon Steamboat Co., 67 N.C. 47 (1872), modified on rehearing, 68 N.C. 72 (1873).

Remedy for Legal Errors Is Appeal. — Where an adjudication is based on the erroneous application of legal principles, the proper remedy to correct the error is by a proceeding in appeal. Stafford v. Gallops, 123 N.C. 19, 31 S.E. 265 (1898); McLeod v. Graham, 132 N.C. 473, 43 S.E. 935 (1903); Rawls v. Mayo, 163 N.C. 177, 79 S.E. 298 (1913).

And Not Application to Another Superior Court Judge. — The proper method for obtaining relief from legal errors is by appeal under this section and not by application to another superior court. In such cases, a judgment entered by one judge of the superior court may not be modified, reversed or set aside by another superior court judge. Nowell v. Neal, 249 N.C. 516, 107 S.E.2d 107 (1959); North Carolina State Hwy. Comm'n v. Nuckles, 271

N.C. 1, 155 S.E.2d 772 (1967).

Record Must Show Jurisdiction. — As appellate jurisdiction is derived from that previously acquired in the court from which the cause is removed, the record must show the possession of that jurisdiction, and that the cause was then properly constituted. Gordon v. Sanderson, 83 N.C. 1 (1880).

Jurisdiction of an appeal cannot be given by consent of the parties. Rodman v. Davis, 53 N.C. 134 (1860); J.R. Cary Co. v. Allegood, 121 N.C. 54, 28 S.E. 61 (1897).

An attempted appeal from a nonappealable order is a nullity and does not deprive the tribunal from which the appeal is taken of jurisdiction. Harris v. Harris, 58 N.C. App. 175, 292 S.E.2d 775 (1982), rev'd on other grounds, 307 N.C. 684, 300 S.E.2d 369 (1983).

Appeals lie from the superior court to the appellate court as a matter of right rather than as a matter of grace. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

But Right of Appeal Depends on Compliance with Rules and Statutes. — An appeal is not a matter of absolute right; rather, appellant must comply with the statutes and rules of court as to the time and manner of taking and perfecting it. Caudle v. Morris, 158 N.C. 594, 74 S.E. 98 (1912); Byrd v. Southerland, 186 N.C. 384, 119 S.E. 2 (1923).

An appellant's right of appeal is dependent upon his observance of the rules regulating appeals. Lindsey v. Supreme Lodge of Knights of Honor, 172 N.C. 818, 90 S.E. 1013 (1916); Kerr v. Drake, 182 N.C. 764, 108 S.E. 393 (1921).

Dismissal for Failure to Comply. — Neither the parties in litigation nor their attorneys have authority, by agreement among themselves, to disregard the rules regulating appeals, and where the appellant has failed to comply with these rules the appeal will be dismissed. Rose v. Rocky Mount, 184 N.C. 609, 113 S.E. 506 (1922).

"Substantial Right." — In deciding what constitutes a substantial right, it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984).

Examples of when a substantial right is affected include cases where there is a possibility of a second trial on the same issues and where there is a possibility of inconsistent verdicts. Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984).

An appeal must be prosecuted by the aggrieved real party in interest. Carawan v. Tate, 304 N.C. 696, 286 S.E.2d 99 (1982).

Where a party is not aggrieved, his appeal will be dismissed. Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

A party not appealing or assigning any errors is not in position to complain of a ruling. Hannah v. Hyatt, 170 N.C. 634, 87 S.E. 517 (1916).

No Right to Object to Order in Furtherance of Own Demand — In General. — A party has no right of appeal from an order which does not affect a substantial right claimed in the action and which is in furtherance of his own demand. Leak v. Covington, 87 N.C. 501 (1882); Hocutt v. Wilmington & W.R.R., 124 N.C. 214, 32 S.E. 681 (1899).

Same — Joinder of Party. — A defendant cannot ask that a party be brought in and then object because he is an improper party. Armfield Co. v. Saleeby, 178 N.C. 298, 100 S.E. 611 (1919).

Same — Instructions. — A party to an action cannot except to an instruction which was given by the trial court at his request. Bell v. Harrison, 179 N.C. 190, 102 S.E. 200 (1920); Washington Horse Exch. Co. v. Bonner, 180 N.C. 20, 103 S.E. 907 (1920).

Evidence Elicited by Own Cross-Examination. — The defendant cannot object on appeal to evidence to the same effect as that elicited by his cross-examination of the witness. Jenkins v. Long, 170 N.C. 269, 87 S.E. 47 (1915).

No appeal lies from a consent judgment. Union Bank v. Commissioners of Oxford, 119 N.C. 214, 25 S.E. 966 (1896); Overman v. Lanier, 156 N.C. 537, 72 S.E. 575 (1911); Hartsoe v. Southern Ry., 161 N.C. 215, 76 S.E. 684 (1912).

No Right to Appeal from Favorable Judgment. — A plaintiff has no right to appeal or bring error from a judgment in his own favor, particularly if he is not injured by it. Doe v. South, 32 N.C. 237 (1849); Hoke v. Carter, 34 N.C. 327 (1851).

If a judgment is only partly in favor of a party, or is less favorable than he thinks it should be, he may appeal to correct the judgment or to obtain a more favorable verdict and judgment on a new trial; but where the judgment is entirely in his favor, so that he does not desire a new trial, his appeal must be dismissed. McCullock v. North Carolina R.R., 146 N.C. 316, 59 S.E. 882 (1907).

Nor from Errors Favorable to Party Complaining. — A party cannot complain of error in his favor. Shaw v. North Carolina Pub. Serv. Corp., 168 N.C. 611, 84 S.E. 1010 (1915); Gaston Farmers Whse. Co. v. American Agrl. Chem. Co., 176 N.C. 509, 97 S.E. 472 (1918); Nance v. King, 178 N.C. 574, 101 S.E. 212 (1919).

A ruling in appellant's favor is not reviewable, where appellee does not complain of it. Hendon v. North Carolina R.R., 127 N.C. 110, 37 S.E. 155 (1900); Miller v. Curl, 162 N.C. 1, 77 S.E. 952 (1913).

A party cannot complain of charges favorable to himself. Lupton v. Southern Express Co., 169 N.C. 671, 86 S.E. 614 (1915); Borden v. Carolina Power & Light Co., 174 N.C. 72, 93 S.E. 442 (1917); Belk v. Belk, 175 N.C. 69, 94 S.E. 726 (1917).

Plaintiff cannot complain of technical error where he could not recover in any event. Wilcox v. McLeod, 182 N.C. 637, 109 S.E. 875 (1921); Rankin v. Oates, 183 N.C. 517, 112 S.E. 32 (1922).

Where the jury's answer to one issue was a complete bar to plaintiff's right of action, and no error was alleged in the determination of that issue, it was unnecessary to consider exceptions relating to other issues. Lamm v. Holloman, 176 N.C. 686, 97 S.E. 161 (1918).

Duty to Dismiss Appeal. — It is the duty of an appellate court to dismiss an appeal if there is no right to appeal. Pasour v. Pierce, 46 N.C. App. 636, 265 S.E.2d 652 (1980).

Where an appealing party has no right to appeal, an appellate court should on its own motion dismiss the appeal even though the question of appealability has not been raised by the parties themselves. Metcalf v. Palmer, 46 N.C. App. 622, 265 S.E.2d 484 (1980).

Dismissal of Frivolous or Dilatory Appeal. — Where it appears upon record that no serious assignment of error is made and that appeal is frivolous and taken solely for delay, appeal will be dismissed. Blount v. Jones, 175 N.C. 708, 95 S.E. 541 (1918); Barnes v. Saleeby, 177 N.C. 256, 98 S.E. 708 (1919).

An appeal by defendant from an order denying a change of venue made at a term subsequent to denial of a motion for change of venue on another ground would be dismissed as made for delay. Ludwick v. Uwarra Mining Co., 171 N.C. 60, 87 S.E. 949 (1916).

Separate Appeals in Related Causes. — Where causes of action which could not be merged were tried together merely for convenience, and were not united or consolidated by order of the court into one action, there should be separate appeals. Williams v. Carolina & W.R.R., 144 N.C. 498, 57 S.E. 216 (1907).

A party who loses on appeal cannot review such decision by a second appeal, but the only way is by petition to rehear. Carter v. White, 134 N.C. 466, 46 S.E. 983 (1904); Holland v. Railroad, 143 N.C. 435, 55 S.E. 835 (1906).

Causes Coming Before a Judge Are in the Bosom of the Court During Term Time (Session). So long as his orders, judgments and rulings do not fall within the classifications set out in this section, no appeal therefrom will lie. Hollingsworth GMC Trucks, Inc. v. Smith, 249 N.C. 764, 107 S.E.2d 746 (1959).

Applied in Goldston v. Wright, 257 N.C. 279, 125 S.E.2d 462 (1962); Pearsall v. Duke Power Co., 258 N.C. 639, 129 S.E.2d 217 (1963); Rouse v. Snead, 269 N.C. 623, 153 S.E.2d 1 (1967); Decker v. Coleman, 6 N.C. App. 102, 169 S.E.2d 487 (1969); Patrick v. Hurdle, 16 N.C. App. 28, 190 S.E.2d 871 (1972); In re Northwestern Bonding Co., 16 N.C. App. 272, 192 S.E.2d 33 (1972); Sides v. Cabarrus Mem. Hosp., 22 N.C. App. 117, 205 S.E.2d 784 (1974); Wachovia Bank & Trust Co. v. Smith, 24 N.C. App. 133, 210 S.E.2d 212 (1974); Sides v. Cabarrus Mem. Hosp., 287 N.C. 14, 213 S.E.2d 297 (1975); State Farm Mut. Auto. Ins. Co. v. Ingram, 288 N.C. 381, 218 S.E.2d 364 (1975); Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379 (1975); Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975); Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976); Bridges v. Bridges, 29 N.C. App. 209, 223 S.E.2d 845 (1976); In re Metric Constructors, Inc., 31 N.C. App. 88, 228 S.E.2d 533 (1976); Lundy Packing Co. v. Amalgamated Meat Cutters, 31 N.C. App. 595, 230 S.E.2d 181 (1976); Lineberry v. Wilson, 36 N.C. App. 649, 244 S.E.2d 702 (1978); Smith v. American Radiator & Std. San. Corp., 38 N.C. App. 457, 248 S.E.2d 462 (1978); Whalehead Properties v. Coastland Corp., 299 N.C. 270, 261 S.E.2d 899 (1980); Phoenix Am. Corp. v. Brissey, 46 N.C. App. 527, 265 S.E.2d 476 (1980); Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981); Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981); Boyce v. Boyce, 51 N.C. App. 422, 276 S.E.2d 494 (1981); Briggs v. Mid-State Oil Co., 53 N.C. App. 203, 280 S.E.2d 501 (1981); Green v. Duke Power Co., 305 N.C. 603, 290 S.E.2d 593 (1982); American Motors Sales Corp. v. Peters, 58 N.C. App. 684, 294 S.E.2d 764 (1982); Peloquin Assocs. v. Polcaro, 61 N.C. App. 345, 300 S.E.2d 477 (1983); Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Perry v. Aycock, 68 N.C. App. 705, 315 S.E.2d 791 (1984); Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354 (1984); In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984); Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984); Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984); Case v. Case, 73 N.C. App. 76, 325 S.E.2d 661 (1985); Abner Corp. v. City Roofing & Sheetmetal Co., 73 N.C. App. 470, 326 S.E.2d 632 (1985); Rivenbark v. Southmark Corp., 77 N.C. App. 225, 334 S.E.2d 451 (1985); Soares v. Soares, 86 N.C. App. 369, 357 S.E.2d 418 (1987); Kirkman v. Wilson, 86 N.C. App. 561, 358 S.E.2d 550 (1987); Automotive Restyling Concepts, Inc. v. Central Serv. Lincoln Mercury, Inc., 87 N.C. App. 173, 360 S.E.2d 141 (1987); Langley v. R.J. Reynolds Tobacco Co., 92 N.C. App. 327, 374 S.E.2d 443 (1988); Hooper v. C.M. Steel, Inc., 94 N.C. App. 567, 380 S.E.2d 593 (1989); Howard v. Parker, 95 N.C. App. 361, 382 S.E.2d 808 (1989); Vinson v. Wallace, 96 N.C. App. 372, 385

S.E.2d 810 (1989); Looney v. Wilson, 97 N.C. App. 304, 388 S.E.2d 142 (1990); Stallings v. Hahn, 99 N.C. App. 213, 392 S.E.2d 632 (1990); Combustion Sys. Sales v. Hatfield Heating & Air Conditioning Co., 102 N.C. App. 751, 403 S.E.2d 600 (1991); Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176 (1991); Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921 (1991); North Carolina DOT v. Davenport, 108 N.C. App. 178, 423 S.E.2d 327 (1992); Slade v. Vernon, 110 N.C. App. 422, 429 S.E.2d 744 (1993); Dillard v. USAir, Inc., 114 N.C. App. 791, 443 S.E.2d 80 (1994); Bowden v. Latta, 337 N.C. 794, 448 S.E.2d 503 (1994); Godwin v. Walls, 118 N.C. App. 341, 455 S.E.2d 473 (1995); Crossman v. Moore, 341 N.C. 185, 459 S.E.2d 715 (1995); Kath v. H.D.A. Entertainment, Inc., 120 N.C. App. 264, 461 S.E.2d 778 (1995); In re Browning, 124 N.C. App. 190, 476 S.E.2d 465 (1996); United Servs. Auto. Ass'n v. Simpson, 126 N.C. App. 393, 485 S.E.2d 337 (1997); Barrett v. Hyldburg, 127 N.C. App. 95, 487 S.E.2d 803 (1997); Lang v. Lang, 132 N.C. App. 580, 512 S.E.2d 788 (1999); Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999); Eastover Ridge, L.L.C. v. Metric Constructors, Inc., 139 N.C. App. 360, 533 S.E.2d 827, 2000 N.C. App. LEXIS 900 (2000); Cooper v. Shealy, 140 N.C. App. 729, 537 S.E.2d 854, 2000 N.C. App. LEXIS 1265 (2000); Stewart v. Stewart, 141 N.C. App. 236, 541 S.E.2d 209, 2000 N.C. App. LEXIS 1439 (2000); Data Gen. Corp. v. County of Durham, 143 N.C. App. 97, 545 S.E.2d 243, 2001 N.C. App. LEXIS 218 (2001); Sherlock v. Sherlock, 143 N.C. App. 300, 545 S.E.2d 757, 2001 N.C. App. LEXIS 262 (2001); Moore v. North Carolina Coop. Extension Serv., 146 N.C. App. 89, 552 S.E.2d 662, 2001 N.C. App. LEXIS 796 (2001); Corbin Russwin, Inc. v. Alexander's Hdwe., Inc., 147 N.C. App. 722, 556 S.E.2d 592, 2001 N.C. App. LEXIS 1230 (2001); Boynton v. ESC Med. Sys., 152 N.C. App. 103, 566 S.E.2d 730, 2002 N.C. App. LEXIS 873 (2002); RPR & Assocs. v. Univ. of North Carolina-Chapel Hill, 153 N.C. App. 342, 570 S.E.2d 510, 2002 N.C. App. LEXIS 1191 (2002); Batts v. Batts, 160 N.C. App. 554, 586 S.E.2d 550, 2003 N.C. App. LEXIS 1837 (2003); Shealy v. Lunsford, 355 F. Supp. 2d 820, 2005 U.S. Dist. LEXIS 2043 (M.D.N.C. 2005); Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 611 S.E.2d 179, 2005 N.C. App. LEXIS 799 (2005); In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005); Brown v. Refuel Am., Inc., 186 N.C. App. 631, 652 S.E.2d 389, 2007 N.C. App. LEXIS 2242 (2007); Eaker v. Gower, 189 N.C. App. 770, 659 S.E.2d 29, 2008 N.C. App. LEXIS 691 (2008); Rossetto United States, Inc. v. Greensky Fin., LLC, 191 N.C. App. 196, 662 S.E.2d 909, 2008 N.C. App. LEXIS 1227 (2008); Michael v. Huffman Oil Co., 190 N.C. App. 256, 661 S.E.2d 1, 2008 N.C. App. LEXIS 823 (2008); Wells Fargo Bank, N.A. v. Affiliated FM Ins. Co., — N.C. App. —, 666 S.E.2d 774, 2008 N.C. App. LEXIS 1766 (2008).

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S.E.2d 65 (1956); Harrill v. Taylor, 247 N.C. 748, 102 S.E.2d 223 (1958); Waldron Buick Co. v. GMC, 251 N.C. 201, 110 S.E.2d 870 (1959); State ex rel. Gold v. Equity Gen. Ins. Co., 255 N.C. 145, 120 S.E.2d 452 (1961); Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Bell v. Smith, 263 N.C. 814, 140 S.E.2d 542 (1965); State Hwy. Comm'n v. Raleigh Farmers Mkt., Inc., 264 N.C. 139, 141 S.E.2d 10 (1965); North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967); Hagins v. Aero Mayflower Transit Co., 1 N.C. App. 51, 159 S.E.2d 592 (1968); GMAC v. Feder, 12 N.C. App. 696, 184 S.E.2d 383 (1971); George W. Shipp Travel Agency, Inc. v. Dunn, 20 N.C. App. 706, 202 S.E.2d 812 (1974); Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); Smith v. Pacific Intermountain Express Co., 34 N.C. App. 694, 239 S.E.2d 614 (1977); Digsby v. Gregory, 35 N.C. App. 59, 240 S.E.2d 491 (1978); Hudspeth v. Bunzey, 35 N.C. App. 231, 241 S.E.2d 119 (1978); Hamilton v. 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Yancey Trucking Co., 62 N.C. App. 602, 303 S.E.2d 600 (1983); Salvation Army v. Welfare, 63 N.C. App. 156, 303 S.E.2d 658 (1983); Wright v. Fiber Indus., Inc., 60 N.C. App. 486, 299 S.E.2d 284 (1983); Swindell v. Overton, 62 N.C. App. 160, 302 S.E.2d 841 (1983); Terry's Floor Fashions, Inc. v. Murray, 61 N.C. App. 569, 300 S.E.2d 888 (1983); Schmitt v. Schmitt, 61 N.C. App. 750, 301 S.E.2d 741 (1983); Raines v. Thompson, 62 N.C. App. 752, 303 S.E.2d 413 (1983); Porter v. Matthews Enters., Inc., 63 N.C. App. 140, 303 S.E.2d 828 (1983); Lewis v. City of Washington, 63 N.C. App. 552, 305 S.E.2d 752 (1983); Tastee Freez Cafeteria v. Watson, 64 N.C. App. 562, 307 S.E.2d 800 (1983); Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983); Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984); Wallace Butts Ins. Agency, Inc. v. Runge, 68 N.C. App. 196, 314 S.E.2d 293 (1984); Elks v. Hannan, 68 N.C. App. 757, 315 S.E.2d 553 (1984); Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984); Sola Basic Indus., Inc. v. Parke County Rural Elec. Membership Corp., 70 N.C. App. 737, 321 S.E.2d 28 (1984); Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985); Patrum v. Anderson, 75 N.C. App. 165, 330 S.E.2d 55 (1985); Ciba-Geigy Corp. v. Barnett, 76 N.C. App. 605, 334 S.E.2d 91 (1985); Grant & Hastings, P.A. v. Arlin, 77 N.C. App. 813, 336 S.E.2d 111 (1985); City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986); B.F. Goodrich Co. v. Tire King of Greensboro, Inc., 80 N.C. App. 129, 341 S.E.2d 65 (1986); Bowers v. Billings, 80 N.C. App. 330, 342 S.E.2d 58 (1986); County of Dare v. R.O. Givens Signs, Inc., 81 N.C. App. 526, 344 S.E.2d 324 (1986); Little v. City of Locust, 83 N.C. App. 224, 349 S.E.2d 627 (1986); In re Woodie, 85 N.C. App. 533, 355 S.E.2d 163 (1987); Jenkins v. Jenkins, 89 N.C. App. 705, 367 S.E.2d 4 (1988); Atkins v. Mitchell, 91 N.C. App. 730, 373 S.E.2d 152 (1988); Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 373 S.E.2d 449 (1988); Buck v. Heavner, 93 N.C. App. 142, 377 S.E.2d 75 (1989); Cochran v. Cochran, 93 N.C. App. 574, 378 S.E.2d 580 (1989); Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990); Telerent Leasing Corp. v. Barbee, 102 N.C. App. 129, 401 S.E.2d 122 (1991); Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991); Peoples Sav. & Loan Assoc. v. Citicorp Acceptance Co., 103 N.C. App. 762, 407 S.E.2d 251 (1991); Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992); Bennish v. North Carolina Dance Theater, Inc., 108 N.C. App. 42, 422 S.E.2d 335 (1992); Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); Thrift v. Food Lion, Inc., 111 N.C. App. 758, 433 S.E.2d 481 (1993); Milner Airco, Inc. v. Morris, 111 N.C. App. 866, 433 S.E.2d 811 (1993); T.H. Blake Contracting Co. v. Sorrells, 109 N.C. App. 119, 426 S.E.2d 85 (1993); McNeil v. Hicks, 111 N.C. App. 262, 431 S.E.2d 868 (1993); Retail Investors, Inc. v. Henzlik Inv. Co., 113 N.C. App. 549, 439 S.E.2d 196 (1994); Adams v. Jones, 114 N.C. App. 256, 441 S.E.2d 699 (1994); Epps v. Duke Univ., Inc., 116 N.C. App. 305, 447 S.E.2d 444 (1994); State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995); Biggers v. John Hancock Mut. Life Ins. Co., 127 N.C. App. 199, 487 S.E.2d 829 (1997); Town Ctr. Assocs. v. Y & C Corp., 127 N.C. App. 381, 489 S.E.2d 434 (1997); Burchette v. Lynch, 128 N.C. App. 65, 493 S.E.2d 334 (1997); Rousselo v. Starling, 128 N.C. App. 439, 495 S.E.2d 725 (1998); Reunion Land Co. v. Village of Marvin, 129 N.C. App. 249, 497 S.E.2d 446 (1998); DKH Corp. v. Rankin-Patterson Oil Co., 348 N.C. 583, 500 S.E.2d 666 (1998); Inspirational Network, Inc. v. Combs, 131 N.C. App. 231, 506 S.E.2d 754 (1998); Lee v. Mutual Cmty. Sav. Bank, 136 N.C. App. 808, 525 S.E.2d 854, 2000 N.C. App. LEXIS 156 (2000); Sharpe v. Worland, 137 N.C. App. 82, 527 S.E.2d 75 (2000); Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 532 S.E.2d 215 (2000); Norris v. Sattler, 139 N.C. App. 409, 533 S.E.2d 483, 2000 N.C. App. LEXIS 894 (2000); Gaunt v. Pittaway, 139 N.C. App. 778, 534 S.E.2d 660, 2000 N.C. App. LEXIS 1036 (2000); Smith v. Young Moving & Storage, Inc., 141 N.C. App. 469, 540 S.E.2d 383, 2000 N.C. App. LEXIS 1297 (2000); Desmond v. City of Charlotte, 142 N.C. App. 590, 544 S.E.2d 269, 2001 N.C. App. LEXIS 176 (2001); Summey v. Barker, 142 N.C. App. 688, 544 S.E.2d 262, 2001 N.C. App. LEXIS 180 (2001); Thompson v. Town of Dallas, 142 N.C. App. 651, 543 S.E.2d 901, 2001 N.C. App. LEXIS 191 (2001); Golds v. Central Express, Inc., 142 N.C. App. 664, 544 S.E.2d 23, 2001 N.C. App. LEXIS 192 (2001); Triangle Bank v. Eatmon, 143 N.C. App. 521, 547 S.E.2d 92, 2001 N.C. App. LEXIS 306 (2001); Mabrey v. Smith, 144 N.C. App. 119, 548 S.E.2d 183, 2001 N.C. App. LEXIS 349 (2001); Fox v. Health Force, Inc., 143 N.C. App. 501, 547 S.E.2d 83, 2001 N.C. App. LEXIS 298 (2001); Darroch v. Lea, 150 N.C. App. 156, 563 S.E.2d 219, 2002 N.C. App. LEXIS 390 (2002); Fairfield Mt. Prop. Owners Ass'n v. Doolittle, 149 N.C. App. 486, 560 S.E.2d 604, 2002 N.C. App. LEXIS 189 (2002); Butler v. Butler, 152 N.C. App. 74, 566 S.E.2d 707, 2002 N.C. App. LEXIS 858 (2002); Murphy v. First Union Capital Mkts. Corp., 152 N.C. App. 205, 567 S.E.2d 189, 2002 N.C. App. LEXIS 865 (2002); Van Engen v. Que Scientific, Inc., 151 N.C. App. 683, 567 S.E.2d 179, 2002 N.C. App. LEXIS 871 (2002); McDonald v. Skeen, 152 N.C. App. 228, 567 S.E.2d 209; Long v. Joyner, 155 N.C. App. 129, 574 S.E.2d 171, 2002 N.C. App. LEXIS 1587 (2002); Powell v. Bulluck, 155 N.C. App. 613, 573 S.E.2d 699, 2002 N.C. App. LEXIS 1628 (2002); Hunter-McDonald, Inc. v. Edison Foard, Inc., 157 N.C. App. 560, 579 S.E.2d 490, 2003 N.C. App. LEXIS 733 (2003); State ex rel. Utils. Comm'n v. Buck Island, Inc., 158 N.C. App. 536, 581 S.E.2d 122, 2003 N.C. App. LEXIS 1186 (2003); Carson v. Brodin, 160 N.C. App. 366, 585 S.E.2d 491, 2003 N.C. App. LEXIS 1801 (2003); Fox v. Gibson, 176 N.C. App. 554, 626 S.E.2d 841, 2006 N.C. App. LEXIS 534 (2006); Deer Corp. v. Carter, 177 N.C. App. 314, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006); Bowling v. Margaret R. Pardee Mem'l Hosp., — N.C. App. —, 635 S.E.2d 624, 2006 N.C. App. LEXIS 2115 (2006); Strates Shows, Inc. v. Amusements of Am., Inc., 184 N.C. App. 455, 646 S.E.2d 418, 2007 N.C. App. LEXIS 1479 (2007); State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 188 N.C. App. 302, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008); State v. Philip Morris USA, Inc., — N.C. App. —, 666 S.E.2d 783, 2008 N.C. App. LEXIS 1757 (2008).

II. FROM WHAT DECISIONS, ETC., APPEAL LIES.

A. In General.

Right of appeal conferred by this section is from a judicial order or determination and not from the extrajudicial decision of private persons to whom the parties have agreed to submit their dispute. In re Estate of Reynolds, 221 N.C. 449, 20 S.E.2d 348 (1942).

Not every order or judgment of the superior court is immediately appealable to the Supreme Court. Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976).

Whether a substantial right is affected usually depends on the facts and circumstances of each case and the procedural context of the orders appealed from. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Denial of a motion for summary judgment based on the defense of res judicata may affect a substantial right, making the order immediately appealable. Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993).

When Immediate Right of Appeal Is Available. — This section gives any party to a lawsuit a right to an immediate appeal from every judicial determination which affects a substantial right of that party, or which constitutes a final adjudication, even when that determination disposes of only a part of the lawsuit. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

An order is immediately appealable if the order affects a substantial right and the loss of that right will injure the party appealing if not corrected prior to final judgment. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

An appeal lies in all cases from judgment applying the law to the facts found. Norton v. McLaurin, 125 N.C. 185, 34 S.E. 269 (1899); Ladd v. Teague, 126 N.C. 544, 36 S.E. 45 (1900); Stokes v. Cogdell, 153 N.C. 181, 69 S.E. 65 (1910).

But No Appeal Lies to Review the Jury's Findings of Fact. — Where there is legal evidence submitted to the jury, under correct instructions from the trial judge, no appeal lies from the verdict and judgment to review the findings of fact. Pender v. North State Life Ins. Co., 163 N.C. 98, 79 S.E. 293 (1913).

Cause of Action at Issue Must Be Directly Affected. — An appeal lies from an order or determination in an action which affects the right litigated, i.e., the cause of action in controversy therein, in respects and ways specified; but it does not lie from an order or determination that is merely incidental, and which does not affect directly the cause of action litigated. Bynum v. Board of Comm'rs, 101 N.C. 412, 8 S.E. 136 (1888).

And Appellant's Substantial Rights Must Be Affected. — If the judicial order complained of does not adversely affect the substantial rights of appellant, the appeal will be dismissed. Coburn v. Roanoke Land & Timber Corp., 260 N.C. 173, 132 S.E.2d 340 (1963); Childers v. Seay, 270 N.C. 721, 155 S.E.2d 259 (1967).

Substantial Right May Be Affected Despite Procedures for Staying Execution of Judgment. — The existence of the procedures under G.S. 1-269, 1-289 and 1A-1, Rule 62 for staying execution on the judgment does not prevent the entry of the judgment from affecting a substantial right of the judgment debtor. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

Except where statute otherwise expressly provides, appeal lies only from final judgment or one in its nature final. Gilbert v. Waccamaw Shingle Co., 167 N.C. 286, 83 S.E. 337 (1914); McIntosh Grocery Co. v. Newman, 184 N.C. 370, 114 S.E. 535 (1922); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377, rehearing denied, 232 N.C. 744, 59 S.E.2d 429 (1950). See also, Thomas v. Carteret, 180 N.C. 109, 104 S.E. 75 (1920).

As a general rule, an appeal will not lie until there is a final disposition of the whole case. Moore v. Hinnant, 87 N.C. 505 (1882); Norfolk & S.R.R. v. Warren, 92 N.C. 620 (1885); Hailey v. Gray, 93 N.C. 195 (1885); Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949).

All issues should be determined, and a final judgment rendered, before an appeal should be permitted. Yates v. Dixie Fire Ins. Co., 176 N.C. 401, 97 S.E. 209 (1918).

An appeal will lie only from a final judgment. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963).

An appeal lies from a final judgment. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

A party may properly appeal only from a final order, which disposes of all the issues as to all parties, or an interlocutory order affecting a substantial right of the appellant. Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984).

Trial court's order granting a partial new trial and its judgment fixing the issue of liability were interlocutory and they were not appealable under the exceptions allowed by G.S. 1A-1, Rule 54(b), G.S. 1-277(a), or G.S. 7A-27(d), where the trial court did not certify either the order granting a partial new trial or the underlying judgment for immediate review, and where defendant failed to argue why the order and judgment appealed affected a substantial right. Loy v. Martin, 144 N.C. App. 414, 547 S.E.2d 843, 2001 N.C. App. LEXIS 424 (2001).

Right to avoid possibility of two trials on same issues can be a substantial right; this general proposition is based on following rationale: when common facts issues overlap claim appealed and any remaining claims have been adjudicated, the possibility is created that appellant will undergo second trial of same fact issues if appeal is eventually successful. Davidson v. Knauff Ins. Agency, Inc., 93 N.C. App. 20, 376 S.E.2d 488, cert. denied, 324 N.C. 577, 381 S.E.2d 772 (1989).

Where dismissal of an appeal of a summary judgment could result in two different trials on the same issues, thereby creating the possibility of inconsistent verdicts, a substantial right is prejudiced and the summary judgment is immediately appealable. Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429, cert. denied, 333 N.C. 795, 431 S.E.2d 30 (1993).

The necessity of a second trial, standing alone, does not affect a substantial right. However, in certain cases the appellate courts have held that a plaintiff's right to have all his claims heard before the same jury affects a substantial right. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Nonfinal Orders and Judgments Are Not Generally Reviewable. — As a general rule orders and judgments which are not final in their nature, but leave something more to be done with the case, are not immediately reviewable. The remedy is to note an exception at the time, to be considered on appeal from final judgment. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

Unless the Right to Appeal Is Conferred by Statute. — Where the right to appeal is conferred by statute, i.e., where a substantial right of the parties would be affected if immediate appeal were not permitted under this section or G.S. 7A-27, the judgment is appealable whether it is final or interlocutory in nature. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240, appeal dismissed, 301 N.C. 92, 273 S.E.2d 298 (1980).

Finding Under § 1A-1, Rule 54(b) Is Not Enough. — While the trial judge found that there was no reason for delay in obtaining appellate review, a trial judge cannot by denominating his decree a "final judgment" make it immediately appealable under G.S. 1A-1, Rule 54(b) if it is not such a judgment. A finding that there is no just reason for delay under G.S. 1A-1, Rule 54(b) is not enough. The judgment must also be final. Pelican Watch v. United States Fire Ins. Co., 90 N.C. App. 140, 367 S.E.2d 351 (1988), rev'd on other grounds, 323 N.C. 700, 375 S.E.2d 161 (1989).

What Is a Final Judgment. — A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

Decision Ending Proceedings Is Final. — Any decision, order or decree of the circuit court which puts an end to the proceedings between the parties to a cause in that court is final, and may be reviewed upon appeal. Ex parte Spencer, 95 N.C. 271 (1886); Bain v. Bain, 106 N.C. 239, 11 S.E. 327 (1890).

As Is Decision Disposing of One Branch of the Matter at Issue. — A decision which disposes not of the whole but merely of a separate and distinct branch of the subject matter in litigation is final in nature and is immediately appealable. North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

The appellate court will not entertain premature or fragmentary appeals. Cape Fear & Y.V. Ry. v. King, 125 N.C. 454, 34 S.E. 541 (1899); Thomas v. Carteret, 180 N.C. 109, 104 S.E. 75 (1920); Farr v. Babcock Lumber Co., 182 N.C. 725, 109 S.E. 833 (1921). See also, Joyner v. Reflector Co., 176 N.C. 274, 97 S.E. 44 (1918).

When No Substantial Right Is Jeopardized. — Fragmentary appeals will not be entertained when no substantial right is put in jeopardy by such refusal. Brown v. Nimocks, 126 N.C. 808, 36 S.E. 278 (1900).

Where no final judgment was given, nor any interlocutory order or determination that put an end to the proceeding or that could destroy or seriously impair some substantial right of the appellants should the appeal be delayed until final judgment, an appeal would not lie. Fragmentary appeals are not allowed. Leak v. Covington, 95 N.C. 193 (1886); Martin v. Flippin, 101 N.C. 452, 8 S.E. 345 (1888).

When Appeal Is Premature. — Where the pleadings present issues of fact that have not been tried below, an appeal is premature. Goode v. Rogers, 126 N.C. 62, 35 S.E. 185 (1900).

Though exceptions are noted, an appeal before a final judgment is rendered is premature, and will be dismissed. Graded School Trustees v. Hinton, 156 N.C. 586, 71 S.E. 1087 (1911); Ingle v. McCurry, 243 N.C. 65, 89 S.E.2d 745 (1955).

The appellate court will sometimes express its opinion on a question involved in an appeal not properly before it where the matter is of moment and the decision may serve to save the parties cost and harassment of further litigation. Taylor v. Johnson, 171 N.C. 84, 87 S.E. 981 (1916); Bargain House v. Jefferson, 180 N.C. 32, 103 S.E. 922 (1920).

Even though an appeal is fragmentary and premature, the appellate court may exercise its discretionary power to express an opinion upon the question which the appellant has attempted to raise. Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962); Barrier v. Randolph, 260 N.C. 741, 133 S.E.2d 655 (1963).

An order of the superior court remanding a case to the Industrial Commission is an interlocutory order, and an appeal therefrom to the appellate court is premature and is subject to dismissal. However, the appellate court in the exercise of its supervisory jurisdiction may, in proper instances, determine the matter in order to obviate a wholly unnecessary and circuitous course of procedure. Edwards v. City of Raleigh, 240 N.C. 137, 81 S.E.2d 273 (1954).

Discretion of the Appellate Court. — The trial court's determination that there is no just reason to delay the appeal, while accorded great deference, cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court. First Atl. Mgt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 507 S.E.2d 56 (1998).

As a Guide in Further Proceedings. — On dismissal of a fragmentary appeal, the appellate court may in its discretion express its opinion upon the merits, so far as it may be a guide in further proceedings in the court below. Penn-Allen Cement Co. v. Phillips, 182 N.C. 437, 109 S.E. 257 (1921).

And Its Opinion Will Be Authoritative on Subsequent Appeal. — Where appellate court, on premature appeal, rendered opinion on the merits, though dismissing the appeal, its opinion would be authoritative on subsequent appeal. Yates v. Dixie Fire Ins. Co., 176 N.C. 401, 97 S.E. 209 (1918); North Carolina Pub. Serv. Co. v. Southern Power Co., 181 N.C. 356, 107 S.E. 226 (1921).

But agreement that other cases would abide determination in the case at hand was a matter between the parties, and does not authorize the appellate court to assume jurisdiction in cases not before it, or warrant the expression of a purely speculative opinion. Belden v. Snead, 84 N.C. 243 (1881).

An order compelling discovery is not a final judgment, nor does it affect a substantial right, and consequently, it is not appealable; however, when the order is enforced by sanctions pursuant to G.S. 1A-1, Rule 37(b), the order is appealable as a final judgment. Walker v. Liberty Mut. Ins. Co., 84 N.C. App. 552, 353 S.E.2d 425 (1987).

Where a party is adjudged to be in contempt for noncompliance with a discovery order or has been assessed with certain other sanctions, the order is immediately appealable, since it affects a substantial right under this section and G.S. 7A-27(d)(1). Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

Trial court order holding that an administrative agency does not have subject

matter jurisdiction over the issues on appeal is immediately appealable under subsection (a) of this section because it determines or discontinues the action. Batten v. North Carolina Dep't of Cor., 326 N.C. 338, 389 S.E.2d 35 (1990), overruled on other grounds, Empire Power Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 337 N.C. 569, 447 S.E.2d 168 (1994).

As to appeals involving orders of reference and referee's reports, see Vest v. Cooper, 68 N.C. 131 (1873); Sutton v. Schonwald, 80 N.C. 20 (1879); Sloan v. McMahon, 85 N.C. 296 (1881); Lutz v. Cline, 89 N.C. 186 (1883); Jones v. Call, 89 N.C. 188 (1883); Grant v. Reese, 90 N.C. 3 (1884); Braid v. Lukins, 95 N.C. 123 (1886); Leak v. Covington, 95 N.C. 193 (1886); Stevenson v. Felton, 99 N.C. 58, 5 S.E. 399 (1888); Wallace Bros. v. Douglas, 105 N.C. 42, 10 S.E. 1043 (1890); Jones v. Beaman, 117 N.C. 259, 23 S.E. 248 (1895); Royster v. Wright, 118 N.C. 152, 24 S.E. 746 (1896); Austin v. Stewart, 126 N.C. 525, 36 S.E. 37, appeal dismissed, 127 N.C. 580, 38 S.E. 1006 (1900); Jones v. Wooten, 137 N.C. 421, 49 S.E. 915 (1905); Duckworth v. Duckworth, 144 N.C. 620, 57 S.E. 396 (1907); Richardson v. Southern Express Co., 151 N.C. 60, 65 S.E. 616 (1909); Pritchard v. Panacea Spring Co., 151 N.C. 249, 65 S.E. 968 (1909); Pritchett v. Greensboro Supply Co., 153 N.C. 344, 69 S.E. 249 (1910); Smith v. Miller, 155 N.C. 242, 71 S.E. 353 (1911); John Church Co. v. Dawson, 157 N.C. 566, 72 S.E. 1009 (1911); International Waste Co. v. Bloomfield Mfg. Co., 168 N.C. 92, 83 S.E. 609 (1914); State ex rel. Marler-Dalton-Gilmer Co. v. Golden, 172 N.C. 823, 90 S.E. 909 (1916); Lewis v. May, 173 N.C. 100, 91 S.E. 691 (1917); Leroy v. Saliba, 182 N.C. 757, 108 S.E. 303 (1921); Cox v. Shaw, 243 N.C. 191, 90 S.E.2d 327 (1955); Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

As to appeals involving nonsuits prior to enactment of the Rules of Civil Procedure, G.S. 1A-1, see Wharton v. Commissioners of Currituck, 82 N.C. 11 (1880); Hedrick v. Pratt, 94 N.C. 101 (1886); Warner v. Western N.C.R.R., 94 N.C. 250 (1886); Davis v. Ely, 100 N.C. 283, 5 S.E. 239 (1888); Tiddy v. Harris, 101 N.C. 589, 8 S.E. 227 (1888); Hayes v. Railroad, 140 N.C. 131, 52 S.E. 416 (1905); Midgett v. Manufacturing Co., 140 N.C. 361, 53 S.E. 178 (1906); Morton v. Blades Lumber Co., 144 N.C. 31, 56 S.E. 551 (1907); White v. Harris, 166 N.C. 227, 81 S.E. 687 (1914); Gilbert v. Waccamaw Shingle Co., 167 N.C. 286, 83 S.E. 337 (1914); Ridge v. Norfolk S.R.R., 167 N.C. 510, 83 S.E. 762 (1914); Quelch v. Futch, 172 N.C. 316, 90 S.E. 259 (1916); McKinney v. Patterson, 174 N.C. 483, 93 S.E. 967 (1917); Munick v. City of Durham, 181 N.C. 188, 106 S.E. 665 (1921); Allen v. Gardner, 182 N.C. 425, 109 S.E. 260 (1921); Farr v. Babcock Lumber Co., 182 N.C. 725, 109 S.E. 833 (1921); City of Goldsboro v. Holmes, 183 N.C. 203, 111 S.E. 1 (1922); Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925); Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957); Hollingsworth GMC Trucks, Inc. v. Smith, 249 N.C. 764, 107 S.E.2d 746 (1959).

B. Interlocutory Orders.

1. In General.

What Orders Are Interlocutory. — An order is interlocutory if it does not determine the issues but directs some further proceeding preliminary to the final decree. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983); Heavener v. Heavener, 73 N.C. App. 331, 326 S.E.2d 78, cert. denied, 313 N.C. 601, 330 S.E.2d 610 (1985).

In deciding whether an appeal is interlocutory, this section and G.S. 7A-27 require a two-part test: (1) does the trial court's order affect a substantial right; and (2) if so, will the loss of that right injure the party appealing if it is not corrected prior to final judgment. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

An order is interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree.

In dependency proceedings, a trial court's order finding that an agency should pursue termination of a father's parental rights and adoption of the father's child by the child's foster parents, based on a finding that the child's placement with the father was "unlikely" and that it was in the child's best interests for the agency to pursue termination, was not an order from which an interlocutory appeal could be taken under G.S. 1-277(a) because the father offered no argument that the order affected a substantial right. In re A.R.G., 361 N.C. 392, 646 S.E.2d 349, 2007 N.C. LEXIS 597 (2007).

Particular Facts and Procedural History Must Be Considered. — In determining which interlocutory orders are appealable and which are not, the Supreme Court must consider the particular facts of each case and the procedural history of the order from which an appeal is sought. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

Motion to Dismiss. — Appellate court found that (1) the appeal of a motion to dismiss under G.S. 1A-1, N.C. R. Civ. P. 12(b)(2) based on sovereign immunity was a question of personal jurisdiction rather than subject matter jurisdiction, and was immediately appealable; (2) the appeal from the denial of a G.S. 1A-1, N.C. R. Civ. P. 12(b)(1) motion based on sovereign immunity was neither immediately appealable, nor affected a substantial right; (3) the appeal from the denial of the G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion to dismiss based on sovereign immunity affected a substantial right and was therefore immediately appealable. Meherrin Indian Tribe v. Lewis, — N.C. App. —, 677 S.E.2d 203, 2009 N.C. App. LEXIS 661 (2009).

An order requiring an election of remedies is an interlocutory order. Charles Vernon Floyd, Jr. & Sons v. Cape Fear Farm Credit, 350 N.C. 47, 510 S.E.2d 156 (1999).

An order compelling plaintiffs to elect remedies was interlocutory and not immediately appealable, where the order was entered two days before the end of trial, the plaintiff's timely objection to the order was overruled, and the order did not deprive plaintiffs of any substantial right that would be lost barring immediate review. Charles Vernon Floyd, Jr. & Sons v. Cape Fear Farm Credit, 350 N.C. 47, 510 S.E.2d 156 (1999).

An order denying the motion to amend a complaint is interlocutory, for it does not determine the entire controversy and requires further action by the trial court. Mauney v. Morris, 73 N.C. App. 589, 327 S.E.2d 248 (1985), rev'd on other grounds, 316 N.C. 67, 340 S.E.2d 397 (1986).

The refusal to grant permissive intervention is an interlocutory order. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

G.S. 1-277(b) does not apply to challenges to sufficiency of service of process. — Autec, Inc. v. Southlake Holdings, LLC, 171 N.C. App. 147, 613 S.E.2d 727, 2005 N.C. App. LEXIS 1162 (2005).

Ruling striking attorney's charging lien was not a final order, since a charging lien is not available until there is a final judgment or decree to which the lien can attach, and no final judgment had yet been entered in the underlying divorce action. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

Order Compelling Discovery. —

A discovery order in a malpractice case requiring the defendant hospital to produce records concerning the defendant physician was not immediately appealable, where the order did not interfere with substantial rights, and it was not associated with sanctions. Sharpe v. Worland, 132 N.C. App. 223, 511 S.E.2d 35 (1999).

Because a physician's assertions of statutory privilege related directly to the matters to be disclosed under a trial court's interlocutory discovery order, the challenged discovery order affected a substantial right and the physician's interlocutory appeal was properly before the appellate court under G.S. 1-277(a) and G.S. 7A-27(d)(1). Armstrong v. Barnes, 171 N.C. App. 287, 614 S.E.2d 371, 2005 N.C. App. LEXIS 1262 (2005), cert. denied, 360 N.C. 60, 621 S.E.2d 173 (2005).

Order imposing sanctions for discovery violations and ordering the production of documents was an interlocutory order that was appealable because the order imposed sanctions pursuant to G.S. 1A-1, Rule 37(b). Such an appeal tests the validity of both the discovery order and the sanctions imposed. In re Pedestrian Walkway Failure, 173 N.C. App. 254, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005).

Court's ruling on a separation-property settlement agreement did not dispose of plaintiff's claims for equitable distribution and alimony but only disposed of defendant's plea in bar to those claims; the court's ruling was thus interlocutory, and although the court's order stated that its ruling affected a substantial right and was a proper subject of immediate appeal, the court's order could not be certified as a final appealable order under G.S. 1A-1, Rule 54(b). Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988).

Because a partial summary judgment giving a wife two parcels of land, before the divorcing parties' property was equitably divided, was an interlocutory order, a husband was not required to file an appeal from the interlocutory order; no substantial right of either party was involved, and the partial summary judgment was appealable when the husband filed his appeal from the equitable distribution judgment. Davis v. Davis, 360 N.C. 518, 631 S.E.2d 114, 2006 N.C. LEXIS 593 (2006).

Trial court's denial of a motion to enforce a settlement did not resolve the underlying personal injury claim, and the order of denial was therefore interlocutory; since the trial court did not certify that there was no just reason to delay the appeal, and the denial did not affect a substantial right, there was no right to an immediate appeal since an appeal of the denial was still allowed once there was a final judgment. Milton v. Thompson, 170 N.C. App. 176, 611 S.E.2d 474, 2005 N.C. App. LEXIS 903 (2005).

The effect of an order denying the release of the funds held in escrow under G.S. 58-36-25 was temporary and not permanent where the Commissioner's order only determined that the funds were not to be released then, and did not purport to determine who was entitled to the money; for these reasons, an appeal of the order was interlocutory and was not immediately appealable under either 1A-1 Rule 54(b) or this section and G.S. 7A-27(d). State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 102 N.C. App. 809, 403 S.E.2d 597 (1991).

An order setting aside a default judgment is interlocutory, as it does not finally dispose of the case and requires further action by the trial court. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988).

Appeal of Order Denying Motion to Disqualify Law Firm Was Interlocutory. — Where defendant maintained that because law firm representing plaintiff represented defendant in previous matters of a similar nature (but not involving plaintiff), that firm could not represent plaintiff in the present matter, it did have a substantial right to prevent prior counsel from using confidential information gleaned from a prior representation and utilizing it against the client in subsequent litigation; however, it could not be found that the deprivation of this right would injure defendant if not corrected before a final judgment, and defendant's appeal of the trial court's order denying its motion to disqualify law firm was interlocutory. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

Appeal of Order Denying Motion for Partial Summary Judgment Was Interlocutory. — Defendant's appeal of an order denying its motion for partial summary judgment on the issue of punitive damages was interlocutory. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593, aff'd, 332 N.C. 288, 420 S.E.2d 426 (1992).

As the trial court granted summary judgment only to a town, not the other defendants, and did not certify the court's order under N.C. R. Civ. P. 54(b), and plaintiff did not voluntarily dismiss her claims against the other defendants or argue that her appeal affected a substantial right, she was not entitled to appeal the trial court's interlocutory order under G.S. 7A-27(b). Hyatt v. Town of Lake Lure, 191 N.C. App. 386, 663 S.E.2d 320, 2008 N.C. App. LEXIS 1322 (2008).

This section and § 7A-27, considered together, provide that no appeals lies to an appellate court from an interlocutory judgment unless that ruling deprives the appellant of a substantial right which it would lose if the ruling were not reviewed before final judgment. State ex rel. Employment Sec. Comm'n v. IATSE Local 574, 114 N.C. App. 662, 442 S.E.2d 339 (1994).

For discussion of apparent doctrinal inconsistency concerning the requirements for appealing interlocutory orders, which may produce irreconcilable results in cases which include counterclaims, see J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

An appeal from an interlocutory order brings up only such order, and no order in the main case can be made. Perry v. Tupper, 71 N.C. 380 (1874).

When Interlocutory Orders Are Appealable. — An appeal lies from an interlocutory order when it puts an end to the action, or where it may destroy or impair a substantial right of the complaining party to delay his appeal. Skinner v. Carter, 108 N.C. 106, 12 S.E. 908 (1891); Warren v. Stancill, 117 N.C. 112, 23 S.E. 216 (1895). See Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949).

It is only when the judgment or order appealed from in the course of the action puts an end to it, or may put an end to it, or has the effect to deprive the party complaining of some substantial right, or will seriously impair such right if the error is not corrected at once, and before the final hearing, that an appeal lies before final judgment. Acorn v. Jones Knitting Corp., 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511, 183 S.E.2d 686 (1971); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Smart v. Smart, 59 N.C. App. 533, 297 S.E.2d 135 (1982).

Appeals will be entertained from interlocutory orders or decrees that put an end to the action or seriously imperil some substantial right of the appellant. Martin v. Flippin, 101 N.C. 452, 8 S.E. 345 (1888).

Where an interlocutory order "affects a substantial right" of the party appealing or "in effect determines the action and prevents a judgment from which an appeal might be taken," the party has a right to appeal under this section or G.S. 7A-27. Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is immediately appealable. Webb v. Triad Appraisal & Adjustment Serv., Inc., 84 N.C. App. 446, 352 S.E.2d 859 (1987).

An appeal will lie from an interlocutory order that affects a substantial right and will work injury if not corrected before final judgment. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963); North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967); Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976); Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977); Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979); Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980); Ball v. Ball, 55 N.C. App. 98, 284 S.E.2d 555 (1981); Smart v. Smart, 59 N.C. App. 533, 297 S.E.2d 135 (1982); Sims v. Ritter Constr., Inc., 62 N.C. App. 52, 302 S.E.2d 293 (1983).

An interlocutory order is appealable if it affects some substantial right claimed by the appellant and if it will work injury if not corrected before final judgment. Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190, cert. denied, 309 N.C. 319, 307 S.E.2d 162 (1983).

For an interlocutory order to be immediately appealable under North Carolina law, it must: (1) affect a substantial right, and (2) work injury if not corrected before final judgment. Goldston v. AMC, 326 N.C. 723, 392 S.E.2d 735 (1990).

For plaintiff to be entitled to appeal of right from an interlocutory order namely, granting defendant's motion for the appointment of a guardian ad litem, plaintiff was required to establish that it either: (1) affected a substantial right, or (2) in effect determined the action and prevented a judgment from which appeal might be taken, or (3) discontinued the action, or (4) granted or refused a new trial. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

An interlocutory order not appealable under Rule 54(b) of the Rules of Civil Procedure may nevertheless be appealed pursuant to this section and G.S. 7A-27(d) which permit an appeal of an interlocutory order which (1) affects a substantial right, or (2) in effect determines the action and prevents a judgment from which appeal might be taken, or (3) discontinues the action, or (4) grants or refuses a new trial. Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

There are two avenues by which a party may immediately appeal an interlocutory order of judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to G.S. 1A-1-54(b) an immediate appeal may lie. Second, an appeal is permitted under subsection (a) of this section and G.S. 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. Tinch v. Video Indus. Servs., Inc., 124 N.C. App. 391, 477 S.E.2d 193 (1996), rev'd on other grounds, 347 N.C. 380, 493 S.E.2d 426 (1997).

There are two avenues by which an interlocutory judgment or order can be immediately appealed; first, if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal, and second, an interlocutory order can be immediately appealed under subsection (a) of this section and G.S. 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. Bartlett v. Jacobs, 124 N.C. App. 521, 477 S.E.2d 693 (1996).

Trial court erred in holding that contractor's withdrawal of appeal from the order dismissing its claims against a manufacturer became a final judgment and the law of the case because the contractor was not required to immediately appeal the trial court's order dismissing its claims. The contractor did not waive its right to appeal after the entry of final judgment by foregoing an interlocutory appeal since the appeal was permissive rather than mandatory, under G.S. 1-277, and the dismissal order was subject to appellate review. Atl. Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc., 175 N.C. App. 339, 623 S.E.2d 334, 2006 N.C. App. LEXIS 58 (2006).

Because the appeal was final as to the appealing defendants, and the trial court certified the appeal, the appellate court was required to review plaintiff's appeal on the merits. James River Equip., Inc v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006), review denied, appeal dismissed, 361 N.C. 167, 639 S.E.2d 651 (2006).

When a patient sued a pharmacy for negligence, breach of implied warranties, liability under G.S. 99B-6, and to pierce the pharmacy's corporate veil and hold its president liable, and the warranty claim and claim to pierce the corporate veil were dismissed, the patient did not show, in an interlocutory appeal of that dismissal, that she would lose a substantial right if she could not immediately appeal the dismissal. Rauch v. Urgent Care Pharm., Inc., 178 N.C. App. 510, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006).

Where the question to be presented involves property rights and relates to a matter of public importance, and a decision will aid State agencies in the performance of their duties, the appellate court may determine the appeal on the merits even though the appeal is from an interlocutory order and is premature. Moses v. State Hwy. Comm'n, 261 N.C. 316, 134 S.E.2d 664, cert. denied, 379 U.S. 930, 85 S. Ct. 327, 13 L. Ed. 2d 342 (1964).

As to the purpose of the general rule against immediate appeal of interlocutory orders, see Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961); Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975).

By special act the legislature may provide that no appeal lies from an interlocutory order in a specific proceeding. Norfolk & S.R.R. v. Warren, 92 N.C. 620 (1885).

When Appeal from Interlocutory Order Will Be Dismissed. — An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from the final judgment. Cole v. Farmers' Bank & Trust Co., 221 N.C. 249, 20 S.E.2d 54 (1942); Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377, rehearing denied, 232 N.C. 744, 59 S.E.2d 429 (1950); Gardner v. Price, 239 N.C. 651, 80 S.E.2d 478 (1954); Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963); Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976); Lundy Packing Co. v. Amalgamated Meat Cutters, 31 N.C. App. 595, 230 S.E.2d 181 (1976); Wachovia

Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

Husband's appeal from a divorce proceeding was dismissed because the trial court's order continuing a show cause hearing and directing the husband to comply with a memorandum order distributing the marital property or be subject to contempt was not a final judgment, since further action was to be taken, nor did it affect a substantial right for the purposes of G.S. 1-277(a). Blythe v. Blythe, 163 N.C. App. 198, 593 S.E.2d 403, 2004 N.C. App. LEXIS 293 (2004).

Dismissal of All Claims Against Less Than All Defendants. — Because the appeal was final as to the appealing defendants, and the trial court certified the appeal, the appellate court was required to review plaintiff's appeal on the merits. James River Equip., Inc v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006), review denied, appeal dismissed, 361 N.C. 167, 639 S.E.2d 651 (2006).

Interlocutory Denial of Motion to Dismiss Reviewed Pursuant to Writ of Certiorari. — Motion to dismiss an interlocutory appeal of the denial of healthcare providers' motion to dismiss an administrator's wrongful death complaint was denied because the healthcare providers' petition for a writ of certiorari was granted. Reid v. Cole, 187 N.C. App. 261, 652 S.E.2d 718, 2007 N.C. App. LEXIS 2355 (2007).

Interlocutory summary judgments in favor of third-party and fourth-party defendants in a negligence action were appealable as to the question of negligence, which presented common factual issues with the remaining claim of plaintiff against defendant, but not as to the issue of indemnity, which did not. Britt v. American Hoist & Derrick Co., 97 N.C. App. 442, 388 S.E.2d 613 (1990).

Reviewability of Nonappealable Interlocutory Orders on Appeal from Final Judgment. — A nonappealable interlocutory order which involves the merits and necessarily affects the judgment, is reviewable on appropriate exception upon an appeal from the final judgment in the cause. An earlier appeal from such an interlocutory order is fragmentary and premature, and will be dismissed. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979); Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980); Shaw v. Pedersen, 53 N.C. App. 796, 281 S.E.2d 700 (1981).

If the appellant's rights would be fully and adequately protected by an exception to the order at issue, that could then be assigned as error on appeal after final judgment, there is no right to an immediate appeal. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988); Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

It is the appellant's burden to present appropriate grounds for the acceptance of an interlocutory appeal. Jeffreys v. Raleigh Oaks Joint Venture, 115 N.C. App. 377, 444 S.E.2d 252 (1994).

Review of Interlocutory Order by Writ of Certiorari. — Court denied an estate administrator's motion to dismiss the healthcare providers' appeal from a denial of their motion to dismiss a wrongful death complaint because, even if the notice of appeal was untimely filed, the healthcare providers petitioned for a writ of certiorari that was granted. Reid v. Cole, 187 N.C. App. 299, 653 S.E.2d 164, 2007 N.C. App. LEXIS 2321 (2007).

As to appeals involving demurrers prior to abolition of demurrer by G.S. 1A-1, Rule 7(c), see State ex rel. Comm'rs of Wake County v. Magnin, 78 N.C. 181 (1878); Gay v. Brookshire, 82 N.C. 409 (1880); Bazemore v. Bridges, 105 N.C. 191, 10 S.E. 888 (1890); Walters v. Starness, 118 N.C. 842, 24 S.E. 713 (1896); Pender v. Maliett, 122 N.C. 163, 30 S.E. 324 (1898); Abbott v. Hancock, 123 N.C. 89, 31 S.E. 271 (1898); Morgan v. Harris, 141 N.C. 358, 54 S.E. 381 (1906); Shelby v. Charlotte Elec. Ry., Light & Power Co., 147 N.C. 537, 61 S.E. 377 (1908); Chambers v. Seaboard Air Line Ry., 172 N.C. 555, 90 S.E. 590 (1916); Headman v. Board of Comm'rs, 177 N.C. 261, 98 S.E. 776 (1919); Joyner v. Champion Fibre Co., 178 N.C. 634, 101 S.E. 373 (1919); Teal v. Liles, 183 N.C. 678, 111 S.E. 617 (1922); Mills v. Richardson, 240 N.C. 187, 81 S.E.2d 409 (1954); Etheridge v. Carolina Power & Light Co., 249 N.C. 367, 106 S.E.2d 560 (1959); Mercer v. Hilliard, 249 N.C. 725, 107 S.E.2d 554 (1959); Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962); Housing Auth. v. Wooten, 257 N.C. 358, 126 S.E.2d 101 (1962); Hardin v. American Mut. Fire Ins. Co., 261 N.C. 67, 134 S.E.2d 142 (1964); Kleibor v. Rogers, 265 N.C. 304, 144 S.E.2d 27 (1965); Quick v. High Point Mem. Hosp., 269 N.C. 450, 152 S.E.2d 527 (1967); Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967); Davis v. North Carolina State Hwy. Comm'n, 271 N.C. 405, 156 S.E.2d 685 (1967); McAdams v. Blue, 3 N.C. App. 169, 164 S.E.2d 490 (1968).

2. Substantial Right.

Section Prohibits Appeal of Interlocutory Orders Unless Substantial Right Is Affected. — This section and G.S. 7A-27 in effect provide that no appeal lies to an appellate court from an interlocutory ruling or order of the trial court unless such ruling or order deprives the appellant of a substantial right. Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975); Williams v. Williams, 29 N.C. App. 509, 224 S.E.2d 656, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976); Appert v.

Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

The effect of both this section and G.S. 7A-27(d) is to provide that no appeal will lie to an appellate court from an interlocutory order or ruling of a trial court unless such order or ruling deprives the appellant of a substantial right which he will lose if the order or ruling is not reviewed before final judgment. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Clark v. Clark, 42 N.C. App. 84, 255 S.E.2d 568 (1979); Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

This section serves as a roadblock to appeals from interlocutory orders which do not deprive appellant of a substantial right. Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

An appeal does not lie to the appellate court from an interlocutory order of the superior court unless such order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. Shelby v. Lackey, 235 N.C. 343, 69 S.E.2d 607 (1952); Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956); Tucker v. State Hwy. & Pub. Works Comm'n, 247 N.C. 171, 100 S.E.2d 514 (1957); Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Setzer v. Annas, 21 N.C. App. 632, 205 S.E.2d 553 (1974), rev'd on other grounds, 286 N.C. 534, 212 S.E.2d 154 (1975); Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975); Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976); Lundy Packing Co. v. Amalgamated Meat Cutters, 31 N.C. App. 595, 230 S.E.2d 181 (1976); Citicorp Person-to-Person Fin. Center, Inc. v. Stallings 601 Sales, Inc., 49 N.C. App. 187, 270 S.E.2d 567 (1980); Smart v. Smart, 59 N.C. App. 533, 297 S.E.2d 135 (1982); A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

No appeal lies from an interlocutory order unless such ruling or order deprives an appellant of a "substantial right" which may be lost if appellate review is disallowed. Hopper v. Mason, 71 N.C. App. 448, 322 S.E.2d 193 (1984).

No appeal lies to an appellate court from an interlocutory order unless the order deprives the appellant of a substantial right which he would lose absent a review prior to final determination. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. Robins & Weill, Inc. v. Mason, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 558, 322 S.E.2d 559 (1984).

No appeal lies from an interlocutory order or ruling of a trial judge unless the order or ruling deprives the appellant of a substantial right which he would lose if the order or ruling is not reviewed before the final judgment. Heavener v. Heavener, 73 N.C. App. 331, 326 S.E.2d 78, cert. denied, 313 N.C. 601, 330 S.E.2d 610 (1985); Thompson v. Newman, 74 N.C. App. 597, 328 S.E.2d 597 (1985); Charles Vernon Floyd, Jr. & Sons v. Cape Fear Farm Credit, 350 N.C. 47, 510 S.E.2d 156 (1999).

No appeal lies from an interlocutory order unless it affects a substantial right and will result in injury if not reviewed before final judgment. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988); Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

Although it is the general rule that no appeal lies from an interlocutory order, this section and G.S. 7A-27(d) permit an immediate appeal from an interlocutory order which affects a substantial right. Fox v. Wilson, 85 N.C. App. 292, 354 S.E.2d 737 (1987).

An interlocutory order is immediately appealable only when it affects a substantial right of the appellant. Helms v. Griffin, 64 N.C. App. 189, 306 S.E.2d 530 (1983).

An appeal from an interlocutory order will not be considered premature if it adversely affects a substantial right of the appellants. Freeland v. Greene, 33 N.C. App. 537, 235 S.E.2d 852 (1977).

This section and G.S. 7A-27, taken together, provide that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983).

No appeal lies from an interlocutory order unless such order deprives an appellant of a substantial right and will result in injury if not reviewed prior to the final judgment. Pitt v. Williams, 101 N.C. App. 402, 399 S.E.2d 366 (1991).

An appeal of an interlocutory order or judgment is permitted if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. North Carolina DOT v. Page, 119 N.C. App. 730, 460 S.E.2d 332 (1995).

An interlocutory order was immediately appealable, where substantial rights were affected by the trial court's denial of a motion by a physician and his employer to intervene in a declaratory judgment action brought by an infant patient's estate. Alford v. Davis, 131 N.C. App. 214, 505 S.E.2d 917 (1998).

Appellate court refused to review the neighbors' interlocutory appeal of the trial court's grant of partial summary judgment, where the neighbors failed to comply with N.C. R. App. P.

28(b)(4) by failing to state in their brief the substantial right that would have been lost if the appeal was not heard, as was required under G.S. 1-277(a), 7A-27(d)(1). Munden v. Courser, 155 N.C. App. 217, 574 S.E.2d 110, 2002 N.C. App. LEXIS 1582 (2002).

Where an interlocutory appeal affected a substantial right of one of the parties, such an appeal could be brought pursuant to G.S. 1-277 and G.S. 7A-27(d), and whether or not an appeal affected a substantial right had to be decided on a case by case basis. Ussery v. Taylor, 156 N.C. App. 684, 577 S.E.2d 159, 2003 N.C. App. LEXIS 326 (2003).

In an action by car purchasers against car dealerships and manufacturers for negligence and unfair and deceptive trade practices, an appeal from a trial court's pre-trial orders was dismissed as interlocutory and not affecting a substantial right. Alexander v. DaimlerChrysler Corp., 158 N.C. App. 637, 582 S.E.2d 57, 2003 N.C. App. LEXIS 1220 (2003).

Because the trial court did not rule on the merits of an employee's claim for unemployment benefits, but found that the Employment Security Commission's order did not address all of the relevant issues raised by the record, and the findings were incomplete and failed to set out the sequence of events regarding the timing and notification of the employee's discharge, the order was clearly interlocutory; hence, without evidence that the employee's substantial rights were affected, or that any criteria for an immediate appeal was required, the employee's appeal was dismissed. Reeves v. Yellow Transp., Inc., 170 N.C. App. 610, 613 S.E.2d 350, 2005 N.C. App. LEXIS 1076 (2005), review denied, — N.C. —, 619 S.E.2d 511 (2005).

As a trial court awarded a former husband temporary custody of the parties' child and the former wife made no showing that the order adversely affected a substantial right which could not be protected by a timely appeal of the trial court's ultimate disposition of the entire controversy on the merits, review of the interlocutory order was not warranted under G.S. 1-277(a) and G.S. 7A-27(d)(1). File v. File, — N.C. App. —, 673 S.E.2d 405, 2009 N.C. App. LEXIS 205 (2009).

"Substantial" Defined. — The word "substantial" is defined as "of real worth and importance; of considerable value, valuable." Setzer v. Annas, 21 N.C. App. 632, 205 S.E.2d 553 (1974), rev'd on other grounds, 286 N.C. 534, 212 S.E.2d 154 (1975); Smart v. Smart, 59 N.C. App. 533, 297 S.E.2d 135 (1982).

A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment. In other words, the right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983); Brown v. Brown, 77 N.C. App. 206, 334 S.E.2d 506 (1985), cert. denied, 315 N.C. 389, 338 S.E.2d 878 (1986).

The Supreme Court has adopted the definition of "substantial right" as: "A legal right affecting or involving a matter of substance as distinguished from matters of form: A right materially affecting those interests which a man is entitled to have preserved and protected by law: A material right." LaFalce v. Wolcott, 76 N.C. App. 565, 334 S.E.2d 236 (1985).

In determining the appealability of interlocutory orders, a substantial right is a right which will be lost or irremediably adversely affected if the order is not reviewable before the final judgment. Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985).

The "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983).

There has evolved a two-part test of the appealability of interlocutory orders under the "substantial right" exception provided in subsection (a) of this section and G.S. 7A-27(d)(1). First, the right itself must be "substantial," and second, the enforcement of the substantial right must be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Interlocutory order "affects a substantial right" so that it is appealable under subsection (a) of this section and G.S. 7A-27(d)(1) if right affected is "substantial" and right will "be lost, prejudiced, or be less than adequately protected" if order is not reviewed before final judgment. T'ai Co. v. Market Square Ltd. Partnership, 92 N.C. App. 234, 373 S.E.2d 885 (1988).

The appealability of interlocutory orders pursuant to the "substantial right" exception is determined by a two-step test. The right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment. Miller v. Swann Plantation Dev. Co., 101 N.C. App. 394, 399 S.E.2d 137 (1991); Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

Vital Preliminary Issue. — Since an appeal specifically contested the trial court's determination of the area affected by the taking, which was a "vital preliminary issue," the case was properly before the appellate court to review the trial court's determination that tracts of land were not united for condemnation purposes. DOT v. Airlie Park, Inc., 156 N.C. App. 63, 576 S.E.2d 341, 2003 N.C. App. LEXIS 29 (2003), appeal dismissed sub nom. DOT v. Airlie, 357 N.C. 504, 587 S.E.2d 417 (2003).

Trial court's order in a declaration of taking action by the North Carolina Department of Transportation and inverse condemnation counterclaim by the landowner that the Department acquired a public right-of-way over the landowner's property without compensation and that a jury determination as to any damages was to be conducted was properly before the appellate court because the orders were vital preliminary issues that could be immediately appealed. DOT v. Elm Land Co., 163 N.C. App. 257, 593 S.E.2d 131, 2004 N.C. App. LEXIS 383 (2004), cert. denied, 358 N.C. 542, 599 S.E.2d 42 (2004).

Trial court's judgment that the energy company had a right to condemn part of the property owner's property in order to condemn an easement as part of a plan to build a power line across the forum county, based on findings about how the condemnation would affect the property owner's property, was appealable even though the judgment entered was an interlocutory order that was normally not appealable; an exception existed where a "vital preliminary issue" was involved and the effect on the land condemned was a "vital preliminary issue." Progress Energy Carolinas, Inc. v. Strickland, 181 N.C. App. 610, 640 S.E.2d 856, 2007 N.C. App. LEXIS 404 (2007).

In order to determine whether a substantial right will be affected by delaying an interlocutory appeal, the appellate court must examine each case by considering the particular facts of the case and the procedural context in which the order from which appeal is sought was entered. Myers v. Barringer, 101 N.C. App. 168, 398 S.E.2d 615 (1990).

Substantial Rights Analysis in Criminal Appeals. — Reliance upon a substantial rights analysis as the basis for appellate review appears contrary to the plain and unambiguous language of the statutes governing criminal appeals. State v. Shoff, 118 N.C. App. 724, 456 S.E.2d 875 (1995), appeal dismissed, 340 N.C. 572, 460 S.E.2d 328 (1995), aff'd, 342 N.C. 638, 466 S.E.2d 277 (1996).

Qualified Immunity. — Appeal from defendants who made cross-assignments of error based on the defense of qualified immunity involved a substantial right and was properly before the court. Staley v. Lingerfelt, 134 N.C. App. 294, 517 S.E.2d 392, 1999 N.C. App. LEXIS 763 (1999), cert. denied, 351 N.C. 109, 540 S.E.2d 367 (1999).

Governmental Immunity. — Orders denying motions to dismiss grounded on the defense of governmental immunity through the public duty doctrine affect a substantial right and are immediately appealable. Lovelace v. City of Shelby, 133 N.C. App. 408, 515 S.E.2d 722 (1999).

The denial of the defendant school board's motion for summary judgment grounded on governmental immunity affected a substantial right and was immediately appealable. Craig v. Asheville City Bd. of Educ., 142 N.C. App. 518, 543 S.E.2d 186, 2001 N.C. App. LEXIS 145 (2001).

Case involving a government's assertion of sovereign immunity and the public duty doctrine wherein summary judgment was denied to the governmental entity is immediately reviewable as affecting a substantial right. Lassiter v. Cohn, 168 N.C. App. 310, 607 S.E.2d 688, 2005 N.C. App. LEXIS 258 (2005), cert. denied, — N.C. —, 613 S.E.2d 686 (2005).

County board of education was entitled to an interlocutory appeal of the denial, in part, of its motion to dismiss and for summary judgment under G.S. 1-277(a), as the board argued that it was entitled to governmental immunity for any negligence arising out of a cheerleader's injuries during a practice. Lail v. Cleveland County Bd. of Educ., — N.C. App. —, 645 S.E.2d 180, 2007 N.C. App. LEXIS 1153 (2007).

Denial of an officer's and department's motion for summary judgment grounded on the defense of governmental immunity affected a substantial right and was immediately appealable; with respect to the balance of their arguments, however, the officer and the department showed no substantial right that would have been lost or irreparably prejudiced if the order was not reviewed before final judgment and those arguments were premature. Showalter v. N.C. Dep't of Crime Control & Pub. Safety, 183 N.C. App. 132, 643 S.E.2d 649, 2007 N.C. App. LEXIS 836 (2007).

Appeal by a county, the county department of social services (DSS), DSS supervisory employees, and social workers of a trial court's order denying their motions under G.S. 1A-1, N.C. R. Civ. P. 12(b)(6), to dismiss a father's claims against them in their official capacities were properly before the court of appeals because they asserted that they were not liable for the death of the father's son on the ground that the public duty doctrine provided immunity. Christmas v. Cabarrus County, — N.C. App. —, 664 S.E.2d 649, 2008 N.C. App. LEXIS 1532 (2008).

Determination of Which Defendants Caused Damage. — Trial court's dismissal of plaintiffs' claims against aircraft manufacturer for, inter alia, negligence, breach of warranties, strict liability and infliction of emotional distress, affected a substantial right to have determined in a single proceeding, i.e., whether plaintiffs were damaged by the actions of one, some or all defendants, where their claims arose upon the same series of transactions. Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993).

Order Determining Only Issue of Liability. — A judgment which determines only that there has in fact been a breach by defendant and leaves unresolved the issue of plaintiffs' damage is clearly an interlocutory order; furthermore, an order determining only the issue of liability and leaving unresolved other issues such as that of damages cannot be held to "affect a substantial right". Johnston v. Royal Indem. Co., 107 N.C. App. 624, 421 S.E.2d 170 (1992).

Order Compelling Payment of Funds. — Trial court's order requiring a county Department of Social Services (DSS) to pay a dependent's mortgage and make repairs on the mortgaged premises affected a substantial right of the DSS, entitling it to interlocutory review of the order, as the case affected more than just money since it affected the DSS's right to choose how to dispose of its funds that it received in its capacity as a representative payee for the dependent and its right to use its discretion as representative payee. In re J.G., 186 N.C. App. 496, 652 S.E.2d 266, 2007 N.C. App. LEXIS 2252 (2007).

Monetary Awards Affecting Substantial Right. — Although a money judgment may involve a substantial right, where jury awarded plaintiff $1.00 nominal damages, payment of the $1.00 would not potentially work injury to plaintiff if not corrected before appeal from the final judgment. Therefore, plaintiff did not have a statutory right to appeal pursuant to this section or G.S. 7A-27. Donnelly v. Guilford County, 107 N.C. App. 289, 419 S.E.2d 365 (1992).

Arbitration Order. — An order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed. Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

An order compelling arbitration is interlocutory, does not affect a substantial right, and is not immediately appealable. Laws v. Horizon Hous., Inc., 137 N.C. App. 770, 529 S.E.2d 695, 2000 N.C. App. LEXIS 534 (2000).

Where evidence showed that plaintiff knew that the terms of a Dispute Resolution Agreement (DRA) would apply to her should she continue her employment, and she did continue, sufficient consideration existed to support the agreement, plaintiff relinquished the right to pursue disputes in court, and the trial court's refusal to compel arbitration deprived defendants of a substantial right entitling them to immediate appeal. Howard v. Oakwood Homes Corp., 134 N.C. App. 116, 516 S.E.2d 879, 1999 N.C. App. LEXIS 671 (1999), cert. denied, 350 N.C. 832, 539 S.E.2d 288 (1999), cert. denied, 528 U.S. 1155, 120 S. Ct. 1161, 145 L. Ed. 2d 1072 (2000).

Trial court's order denying a home inspector's motion to compel arbitration pursuant to a written agreement was immediately appealable, under G.S. 1-277 and G.S. 7A-27(d)(l), because it affected a substantial right of the home inspector. Edwards v. Taylor, — N.C. App. —, 643 S.E.2d 51, 2007 N.C. App. LEXIS 805 (2007).

Appellate review of an interlocutory order concerning the right to arbitration was permitted under G.S. 7A-27(d)(1) because the order affected a substantial right, and review was permitted under G.S. 1-277(a) of any order involving a matter of law or legal inference which affected a substantial right. In re W. W. Jarvis & Sons, — N.C. App. —, 671 S.E.2d 534, 2009 N.C. App. LEXIS 8 (2009).

Although the employer admitted that the trial court's order denying its motion to dismiss an ophthalmologist's breach of contract claim was interlocutory, it was not apparent that the denial of the motion to dismiss affected a substantial right, and thus, the order was not immediately appealable under G.S. 1-277(a); similarly, it was not apparent that the denial of the motion to compel the ophthalmologist to return records and confidential material affected a substantial right. Griessel v. Temas Eye Ctr., P.C., — N.C. App. —, 678 S.E.2d 773, 2009 N.C. App. LEXIS 1083 (July 7, 2009).

Possibility of Inconsistent Verdicts. — Plaintiffs' appeal is reviewable under the substantial right exception where a dismissal would raise the possibility of inconsistent verdicts in later proceedings. Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269, cert. denied, 332 N.C. 344, 421 S.E.2d 148 (1992).

Where dismissal of appeal as interlocutory could result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right was prejudiced; therefore, defendant's motion for summary judgment which was granted by the trial court was immediately appealable by plaintiff. Hartman v. Walkertown Shopping Ctr., Inc., 113 N.C. App. 632, 439 S.E.2d 787, cert. denied, 336 N.C. 780, 447 S.E.2d 422 (1994).

Summary judgment as to two of five defendants in a case alleging fraudulent inducement was appealable because the claims against the various defendants rested upon nearly identical factual allegations, requiring a jury to render essentially identical factual determinations, and the possibility for inconsistent verdicts existed, affecting the plaintiff's substantial rights. Ussery v. Taylor, 156 N.C. App. 684, 577 S.E.2d 159, 2003 N.C. App. LEXIS 326 (2003).

Under circumstances in which a patient's suit alleged multiple, overlapping acts of medical malpractice resulting in harm, it was best that one jury hear the case to avoid inconsistent verdicts; accordingly, a summary judgment in favor of a radiologist affected a substantial right and the appeal from the summary judgment was considered, despite the fact that the summary judgment was granted as to one but not all of the defendants and the trial court did not certify that there was "no just reason for delay." Burgess v. Campbell, 182 N.C. App. 480, 642 S.E.2d 478, 2007 N.C. App. LEXIS 692 (2007).

When a party asserts a statutory privilege, such as that set out by G.S. 90-21.22(e) (right to non-disclosure of confidential information), which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under subsection (a) of this section and G.S. 7A-27(d)(1) and is immediately reviewable; to the extent that cases like Kaplan v. Prolife Action League of Greensboro, 123 N.C.App. 677, 474 S.E.2d 408 (1996) differ, they are overruled. Sharpe v. Worland, 351 N.C. 159, 522 S.E.2d 577 (1999).

Avoidance of Rehearing or Trial Is Not a Substantial Right. — An interlocutory order which does not affect a "substantial right" of one of the parties under this section and G.S. 7A-27(d) is not appealable, and the avoidance of a rehearing or trial is not considered to be such a "substantial right." Davis v. Mitchell, 46 N.C. App. 272, 265 S.E.2d 248 (1980).

Avoidance of a rehearing or trial is not a "substantial right" entitling a party to an immediate appeal. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983).

Denial of a motion to dismiss is interlocutory because it simply allows an action to proceed and will not seriously impair any right of defendant that cannot be corrected upon appeal from final judgment, and the avoidance of trial is not a "substantial right" that would make such an interlocutory order appealable under this section or G.S. 7A-27(d). Howard v. Ocean Trail Convalescent Ctr., 68 N.C. App. 494, 315 S.E.2d 97 (1984).

The mere avoidance of a rehearing on a motion or the avoidance of a trial when summary judgment is denied is not a "substantial right." LaFalce v. Wolcott, 76 N.C. App. 565, 334 S.E.2d 236 (1985).

Avoidance of a trial is not a substantial right entitling plaintiff to an immediate appeal. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988).

Avoidance of a trial is not a substantial right. Subsection (b) of this statute, however, provides an exception to the general rule by allowing an "immediate appeal from the adverse ruling as to the jurisdiction of the court over the person." Burlington Indus., Inc. v. Richmond County, DOT, 90 N.C. App. 577, 369 S.E.2d 119 (1988).

But a party has a "substantial right" to avoid separate trials of the same legal issues Whitehurst v. Corey, 88 N.C. App. 746, 364 S.E.2d 728 (1988).

Simply having all claims determined in one proceeding is not a substantial right. A party has instead the substantial right to avoid two separate trials of the same "issues," but avoiding separate trials of different issues is not a substantial right. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

The right to avoid the possibility of two trials on the same issues can be a substantial right so as to warrant an immediate appeal under this section and G.S. 7A-27(d). Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

The right to avoid the possibility of two trials on the same issues can be a substantial right that permits an appeal of an interlocutory order when there are issues of fact common to the claim appealed and remaining claims. Allen v. Sea Gate Ass'n, 119 N.C. App. 761, 460 S.E.2d 197 (1995).

Possibility of undergoing two trials could affect a substantial right where the same issues were present in both trials, thereby creating the possibility that a party would be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issues. Ussery v. Taylor, 156 N.C. App. 684, 577 S.E.2d 159, 2003 N.C. App. LEXIS 326 (2003).

Injured party's appeal from the trial court's judgment dismissing the injured party's claims against a church and a landowner was interlocutory because the trial court did not dismiss the injured party's claims against the landowner's son: however, the judgment was appealable under this section and G.S. 7A-27(d) because the injured party had a substantial right in having the case against all defendants tried by the same jury. Clontz v. St. Mark's Evangelical Lutheran Church, 157 N.C. App. 325, 578 S.E.2d 654, 2003 N.C. App. LEXIS 537 (2003), cert. denied, 357 N.C. 249, 582 S.E.2d 29 (2003).

Under subsection (a) of this section and G.S. 7A-27(d), although an interlocutory order is ordinarily not immediately appealable, an interlocutory order may be immediately appealed if it affects a substantial right; the subcontractors' interlocutory appeal was supported by their assertion of a substantial right to have the case heard in a particular county and to have the liability of all of the defendants determined in one proceeding, which would have been lost without appellate review. Cencomp, Inc. v. Webcon, Inc., 157 N.C. App. 501, 579 S.E.2d 482, 2003 N.C. App. LEXIS 731 (2003).

Deprivation of Immediate Appellate Review Not a Substantial Right. — Where the only possible "injury" defendant would suffer if not permitted immediate appellate review was the necessity of proceeding to trial before the matter was reviewed by the appellate court, defendant was not faced with the deprivation of a substantial right under this section. Anderson v. Atlantic Cas. Ins. Co., 134 N.C. App. 724, 518 S.E.2d 786 (1999).

Denial of Motion to Compel Completion of Deposition Questions. — Denial of the caveators' motion to compel the decedent's former attorney to answer deposition questions was an interlocutory order that was not appealable, because the order did not affect a substantial right pursuant to this section and G.S. 7A-27(d)(1); the caveators failed to demonstrate that the attorney, who was discharged prior to the drafting of the will at issue in the case, possessed relevant information concerning the decedent's health or relationship with the propounder of the will at the time the will was drafted. In re Will of Johnston, 157 N.C. App. 258, 578 S.E.2d 635, 2003 N.C. App. LEXIS 642 (2003).

Immediate Appeal of Motion to Compel Not Required. — Surety waived any right to arbitrate the subcontractor's action on the payment bonds because, although the surety was not required under G.S. 1-277(a) to immediately appeal the denial of its motion to compel, the surety prejudiced the subcontractor and waived the right to arbitrate by failing to appeal or take exception to the order and actively litigating the dispute by seeking multiple extensions, engaging in discovery, and participating in a full bench trial. Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co., — N.C. App. —, 665 S.E.2d 505, 2008 N.C. App. LEXIS 1628 (2008).

Denial of Appeal of Summary Judgement on Contract Claim Where Tort Claim Survived. — Plaintiff, the administrator of the estates of his wife and two children, and guardian ad litem of a surviving injured child, who sued defendants/railroad company and engineering firm, would be denied the right to an immediate interlocutory appeal of a summary judgment on his contract claim where his tort claim survived the summary judgment and the trial court reserved the right to rule on matters of evidence that judge considered competent, relevant and admissible on the remaining issues. Turner v. Norfolk S. Corp., 137 N.C. App. 138, 526 S.E.2d 666, 2000 N.C. App. LEXIS 256 (2000).

Preliminary Injunction Is Interlocutory. — Purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits, its impact is temporary and lasts no longer than the pendency of the action, and its decree bears no precedent to guide the final determination of the rights of the parties; so in form, purpose, and effect, it is purely interlocutory so that as a result, issuance of a preliminary injunction cannot be appealed prior to final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order escape appellate review before final judgment, and the appellant has the burden of showing that a substantial right would be prejudiced without immediate review. CB&I Constructors, Inc. v. Town of Wake Forest, 157 N.C. App. 545, 579 S.E.2d 502, 2003 N.C. App. LEXIS 736 (2003).

Denial of a Preliminary Injunction. — Court of appeals found that deciding if operating video games in arcade was a substantial right was not necessary where a trial court's denial of a preliminary injunction did not strip the operators of a substantial right and the operators' appeal was interlocutory. Bessemer City Express, Inc. v. City of Kings Mt., 155 N.C. App. 637, 573 S.E.2d 712, 2002 N.C. App. LEXIS 1605 (2002), cert. denied, 357 N.C. 61, 579 S.E.2d 384 (2003).

Motion For Change of Venue. — In cases where a trial court's decision deprives an appellant of a substantial right that would be lost absent immediate review, appellate court was allowed to review the appeal; motions for change of venue because the county designated was not proper affected a substantial right and were immediately appealable. Hawley v. Hobgood, 174 N.C. App. 606, 622 S.E.2d 117, 2005 N.C. App. LEXIS 2478 (2005).

Deprivation of Property. — Defendants were allowed to make an interlocutory appeal of plaintiff's motion for partial summary judgment pursuant to G.S. 1A-1, Rule 56; although the appeal was interlocutory, to deny appellate review would have allowed the judgment to strip defendants of their property without any possible redress except another lawsuit, and therefore would have affected a substantial right pursuant to G.S. 1-277. Estate of Graham v. Morrison, 156 N.C. App. 154, 576 S.E.2d 355, 2003 N.C. App. LEXIS 81 (2003).

Questions affecting title to property immediately reviewable. — Possible existence of an easement, the basis upon which a trial court ordered joinder of individual unit owners in a townhome development, was a question affecting title, and thus the trial court's joinder order in a suit seeking a condemnation of a homeowners' association's common area was subject to immediate review. N.C. DOT v. Stagecoach Vill., 360 N.C. 46, 619 S.E.2d 495, 2005 N.C. LEXIS 996 (2005).

Partial Dismissal of Cause of Action. — A shooting victim's interlocutory claims against the defendants were appealable, where summary judgment was granted as to certain of the victim's premises liability claims as the victim had a substantial right to have all liability issues resolved by the same jury and in avoiding inconsistent verdicts. Vera v. Five Crow

Promotions, Inc., 130 N.C. App. 645, 503 S.E.2d 692 (1998).

Interlocutory Appeal Allowed Where Order Affected Potential Inheritance. — Interlocutory order denying siblings' motion to intervene in a G.S. 49-14 paternity action was permitted to be considered under G.S. 1-277 and G.S. 7A-27(a) (as the order adversely affected a substantial right which they could lose — part of their inheritance from their deceased father's estate), but denial of the motion was affirmed. Stockton v. Estate of Thompson, 165 N.C. App. 899, 600 S.E.2d 13, 2004 N.C. App. LEXIS 1515 (2004).

The trial court's dismissal of all claims against defendant insurer and some but not all claims against defendant landlords affected a substantial right where plaintiff sought relief against them based on negligence, violation of the statutory duty of a landlord to repair premises, unfair and deceptive trade practices, and wrongful death, all arising from the single occurrence of a fire in a rental home and where she had the right to have all her claims adjudicated in a single proceeding. Prince v. Wright, 141 N.C. App. 262, 541 S.E.2d 191, 2000 N.C. App. LEXIS 1389 (2000).

Denial of defendant's motion to dismiss on the basis of res judicata did not affect a substantial right entitling it to immediate appeal where no possibility of inconsistent verdicts existed and no "manifest" injustice would result absent immediate appeal. Country Club of Johnston County, Inc. v. United States Fid. & Guar. Co., 135 N.C. App. 159, 519 S.E.2d 540 (1999).

Substantial Right Held Not Affected, Precluding Immediate Appeal. — Trial court's order granting a motion to set aside a prior voluntary dismissal of a tort lawsuit, and its order denying defendants' motion to dismiss, (1) were interlocutory, (2) were not based on "minimum contacts," and (3) did not involve possible inconsistent jury verdicts; thus, there was no right of immediate appeal because defendants did not demonstrate any substantial right that qualified them for immediate appeal. Robinson v. Gardner, 167 N.C. App. 763, 606 S.E.2d 449, 2005 N.C. App. LEXIS 20 (2005), cert. denied, 359 N.C. 322, 611 S.E.2d 417 (2005).

Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. Estate of Spell v. Ghanem, 175 N.C. App. 191, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

Because there was a question of fact as to whether defendants followed the applicable standard of care, they were not entitled to qualified immunity under G.S. 122C-210.1 on plaintiff's wrongful death claims as a matter of law; accordingly, the denial of their motion for summary judgment did not deprive them of a substantial right, and their appeal was dismissed as interlocutory. Snyder v. Learning Servs. Corp., 187 N.C. App. 480, 653 S.E.2d 548, 2007 N.C. App. LEXIS 2454 (2007).

Defendant seller's assignment of error regarding the court's denial of its motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(6) was premature, and therefore not appealable. Baker v. Lanier Marine Liquidators, Inc., 187 N.C. App. 711, 654 S.E.2d 41, 2007 N.C. App. LEXIS 2571 (2007).

Substantial Right Held Affected. — Where a trial court granted plaintiff summary judgment as to liability on a criminal conversation claim, and granted defendant summary judgment as to an alienation of affections claim, though no final judgment was entered as to the issue of damages for the criminal conversation claim, nor was certification granted under G.S. 1A-1, N.C. R. Civ. P. 54(b) as to the alienation of affections claim, the appeal affected a substantial right that would be lost absent immediate review, because the elements of damages were so closely related that they did not support separate awards for each tort. McCutchen v. McCutchen, 170 N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005).

In a defamation action, the appeal of the candidate and campaign from the trial court's denial of their G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion was interlocutory, and the denial did not challenge a substantial right that was to be lost absent immediate appellate review pursuant to G.S. 1-277(a); the instant case was akin to a previous case in which an appeal from a motion for judgment on pleadings pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(c) was dismissed, and the instant case was distinguishable from a previous case in which an appeal on a ruling on a motion for summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56 was allowed, as a motion under G.S. 1A-1, N.C. R. Civ. P. 12(c) was more similar to a G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion. Grant v. Miller, 170 N.C. App. 184, 611 S.E.2d 477, 2005 N.C. App. LEXIS 902 (2005).

Widow sufficiently established that the order below affected a substantial right and that interlocutory review was therefore appropriate under circumstances in which the trial court had ordered the widow to pay $150,000 which she had withdrawn from a decedent's bank account. Estate of Redden v. Redden, 179 N.C. App. 113, 632 S.E.2d 794, 2006 N.C. App. LEXIS 1638 (2006).

Shareholders were entitled to an interlocutory appeal of the trial court's denial of their motion for the appointment of a receiver because they established a substantial right to the preservation of what they alleged were their corporation's assets and opportunities under G.S. 1-277(a) and G.S. 7A-27(d)(1), which right was substantially affected by the trial court's denial of the appointment of a receiver. Barnes v. Kochhar, 178 N.C. App. 489, 633 S.E.2d 474, 2006 N.C. App. LEXIS 1574 (2006).

Even though an order dismissing a backseat passenger as a defendant in a negligence action did not contain a certification under G.S. 1A-1-54(b) that there was no just reason for delay for the entry of final judgment, the order was reviewable under G.S. 1-277 because all of the claims of negligence arose from the same accident and the order of dismissal affected plaintiffs' substantial right to have their claims of joint and concurrent negligence heard in a single proceeding. Harris v. DaimlerChrysler Corp., 180 N.C. App. 551, 638 S.E.2d 260, 2006 N.C. App. LEXIS 2500 (2006).

Trial court orders from which the plaintiffs appealed affected a substantial right and were immediately appealable because the plaintiffs demonstrated that the denial of an immediate appeal created the potential for inconsistent verdicts resulting from two trials on the same factual issues. Crouse v. Mineo, 189 N.C. App. 232, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (2008).

Trial court's partial summary judgment order that two insurers were obligated to defend an insured in an underlying litigation was immediately appealable under G.S. 1-277 and 7A-27(d) and G.S. 1A-1, N.C. R. Civ. P. 54(b) because the judgment affected a substantial right that might have been lost absent an immediate appeal. Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield L.L.C., 190 N.C. App. 28, 664 S.E.2d 317, 2008 N.C. App. LEXIS 873 (2008).

Trial court's order denying defendant's motion to dismiss based upon collateral estoppel affected a substantial right, was immediately appealable, and was properly before the court. Because the prior action resulted in a final judgment on the merits, the present action presented the possibility of a result inconsistent with the prior trial court's decision. Turner v. Hammocks Beach Corp., — N.C. App. —, 664 S.E.2d 634, 2008 N.C. App. LEXIS 1547 (2008).

Order denying a taxpayer's motion to dismiss an administrative summons requesting documents was appealable because it was an intermediate order that involved the merits and affected the final judgment in that if the motion had been granted, the trial court would not have issued the order to comply with the summons. Even if the appeal was not from a final judgment, the appeal of a discovery order asserting a statutory or a common-law privilege affected a substantial right. In re Summons Issued to Ernst & Young, LLP, 191 N.C. App. 668, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (2008).

North Carolina State Bar's interlocutory appeal from a superior court order enjoining the bar from proceeding in a disciplinary action against an attorney was not barred under G.S. 1-277(a) and G.S. 7A-27(d)(1) because a substantive right, the right of the Bar to investigate and prosecute allegations of attorney misconduct, was involved. Gilbert v. N.C. State Bar, 363 N.C. 70, 678 S.E.2d 602, 2009 N.C. LEXIS 238 (2009).

Partial Summary Judgment Granted. — The appellate court eliminated specifically the application of the doctrine of substantial rights to cases wherein partial summary judgment has been granted denying a claim for punitive damages. Moose v. Nissan of Statesville, Inc., 115 N.C. App. 423, 444 S.E.2d 694 (1994).

The plaintiff's appeal of the trial court's partial grant of summary judgment on the issue of breach of contract was interlocutory with no immediate right to appeal because it did not affect substantial rights. Alexander Hamilton Life Ins. Co. of Am. v. J&H Marsh & McClennan, Inc., 142 N.C. App. 699, 543 S.E.2d 898, 2001 N.C. App. LEXIS 186 (2001).

Reinstatement of Lawsuits Not Affecting Substantial Right. — Defendant's appeal of an order granting plaintiffs' motions for reinstatement of their lawsuits for payment of materials provided on a county improvement project was interlocutory and not appealable although a denial of review might force them "to continue the defense of th[e] action." Interior Distribs., Inc. v. Autry, 140 N.C. App. 541, 536 S.E.2d 853, 2000 N.C. App. LEXIS 1217 (2000), cert denied, 353 N.C. 375, 547 S.E.2d 411 (2001).

Class Action. — Because no substantial right was involved in a trial court's determination that the case met the prerequisites to utilizing a class action, the general rule disallowing interlocutory appeals of such orders applied. Frost v. Mazda Motor of Am., 353 N.C. 188, 540 S.E.2d 324, 2000 N.C. LEXIS 903 (2000).

Appellate court affirmed a trial court's judgment denying a motion filed by a person who represented a class of consumers to intervene in a class action filed under G.S. 75-1 et seq., where the class representative had already objected to a proposed settlement in a timely manner at a fairness hearing and had the right to appeal the trial court's judgment approving settlement without intervening. Nicholson v. F. Hoffmann-Laroche, Ltd., 156 N.C. App. 206,

576 S.E.2d 363, 2003 N.C. App. LEXIS 71 (2003).

Attorney-Client Privilege. — The trial court's orders requiring that the defendants-insurers produce material protected by the attorney-client privilege affected a substantial right and entitled them to a hearing on appeal. Evans v. United Servs. Auto. Ass'n, 142 N.C. App. 18, 541 S.E.2d 782, 2001 N.C. App. LEXIS 48 (2001), cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001).

Collateral Estoppel. — The denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right. McCallum v. North Carolina Coop. Extension Serv., 142 N.C. App. 48, 542 S.E.2d 227, 2001 N.C. App. LEXIS 51 (2001), cert. denied, 353 N.C. 452, 548 S.E.2d 527 (2001).

Res judicata. — Interlocutory appeal of the denial of defendants' motion for summary judgment in a constructive trust action was allowed; the basis of the motion for summary judgment was that res judicata barred the constructive trust action and in such a case, the failure to allow an appeal might affect a substantial right in that the possibility existed that without an immediate appeal, they would be required to twice defend against the same claim by plaintiffs. Tiber Holding Corp. v. DiLoreto, 170 N.C. App. 662, 613 S.E.2d 346, 2005 N.C. App. LEXIS 1081 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

C. Grant or Denial of New Trial.

Application for New Trial Is Within Discretion of Trial Judge. — An application for a new trial, except for error of law in its conduct, is addressed solely to the discretion of the presiding judge, whose decision is not reviewable on appeal. Thomas v. Myers, 87 N.C. 31 (1882); Carson v. Dellinger, 90 N.C. 226 (1884).

And Is Not Reviewable Absent Abuse. — The determination of a motion to set aside the verdict and grant a new trial is a matter within the sound discretion of the trial judge, and is not reviewable, except where there has been an abuse of discretion. Coats v. Norris, 180 N.C. 77, 104 S.E. 71 (1920); Harrill v. Seaboard Air Line Ry., 181 N.C. 315, 107 S.E. 136 (1921).

Appeal Only Lies as to Matters of Law. — An appeal from an order granting or refusing a new trial only lies from some order or judgment involving a matter of law or legal inference; that is, the order or judgment must be one that involves the question whether or not a party to the action is entitled to a new trial as of right and as a matter of law. Braid v. Lukins, 95 N.C. 123 (1886).

The appellate court has jurisdiction to review, upon appeal, the decision of the court below granting or refusing to grant a new trial where a matter of law or legal inference is involved. Johnson v. Bell, 74 N.C. 355 (1876).

Order setting aside verdict as a matter of law is appealable. Tuthill v. Norfolk S.R.R., 174 N.C. 77, 93 S.E. 446 (1917).

Grant of Partial New Trial. — The language in subsection (a) of this section which provides that an appeal may be taken from every judicial order or determination of a judge of a superior or district court which "grants or refuses a new trial" does not apply to an order which grants only a partial new trial. Unigard Carolina Ins. Co. v. Dickens, 41 N.C. App. 184, 254 S.E.2d 197 (1979).

An order granting a partial new trial is not immediately appealable, despite the language of subsection (a) of this section. LaFalce v. Wolcott, 76 N.C. App. 565, 334 S.E.2d 236 (1985).

A discretionary new trial order, as opposed to order granting new trial as matter of law, is not reviewable on appeal in the absence of manifest abuse. Edge v. Metropolitan Life Ins. Co., 78 N.C. App. 624, 337 S.E.2d 672 (1985).

New Trial on Damage Issue. — Defendant may not appeal from an order directing a new trial solely on the issue of damages. Johnson v. Garwood, 49 N.C. App. 462, 271 S.E.2d 544 (1980).

Contents of Record When Grant or Denial of New Trial Is Appealed. — To give parties the benefit of the provision of this section allowing an appeal from an order granting or refusing a new trial, the presiding judge should put upon the record the matters inducing the order, so that the appellate court can see whether the order presents a matter of law which is a subject of review or a matter of discretion which is not. Carson v. Dellinger, 90 N.C. 226 (1884).

D. Jurisdiction.

Purpose of Subsection (b). — Subsection (b) of this section simply allows a defendant, when the trial court has denied his motion to dismiss on the ground that the court lacked jurisdiction over the defendant, a means of immediate appellate determination as to whether the trial court has jurisdiction, so that it can then proceed to answer the questions raised by the lawsuit. Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Subsection (b) was not enacted as a means of allowing litigants to seek advisory opinions from the appellate courts before necessary questions are resolved by the trial courts. Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979).

Subsection (b) Applies to Jurisdictional Power. — Subsection (b) of this section applies to the State's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint. If the court has the jurisdictional power to require that the party defend, and the challenge is merely to the process or service used to bring the party before the court, subsection (b) does not apply. Love v. Moore, 305 N.C. 575, 291 S.E.2d 141, rehearing denied, 306 N.C. 393, 294 S.E.2d 221 (1982); Sigman v. R.R. Tydings, Inc., 59 N.C. App. 346, 296 S.E.2d 659 (1982).

The provision in subsection (b) of this section for immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of defendant applies to the State's authority to bring a defendant before its courts, not to challenges to sufficiency of process and service. Howard v. Ocean Trail Convalescent Ctr., 68 N.C. App. 494, 315 S.E.2d 97 (1984).

Because the plaintiff's claim against one of the defendants was dismissed as a result of the trial court's decision that the court lacked personal jurisdiction over the defendant, the plaintiff had a right under G.S. 1-277(b) to an immediate appeal of that order. Dailey v. Popma, 191 N.C. App. 64, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (2008).

And Is Limited to "Minimum Contacts" Questions. — The right of immediate appeal of an adverse ruling as to jurisdiction over the person, under subsection (b) of this section, is limited to rulings on "minimum contacts" questions. To the extent that they are inconsistent with this interpretation, the decisions in Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975); Smith v. American Radiator & Std. San. Corp., 38 N.C. App. 457, 248 S.E.2d 462, cert. denied, 296 N.C. 586, 254 S.E.2d 33 (1978); Kahan v. Lonzigiotti, 45 N.C. App. 367, 263 S.E.2d 345, cert. denied, 300 N.C. 374, 267 S.E.2d 675 (1980), are overruled. Love v. Moore, 305 N.C. 575, 291 S.E.2d 141, rehearing denied, 306 N.C. 393, 294 S.E.2d 221 (1982).

Allowing an immediate appeal only for "minimum contacts" jurisdictional questions precludes premature appeals to the appellate courts about issues of technical defects which can be fully and adequately considered on an appeal from final judgment, while ensuring that parties who have less than "minimum contacts" with this State will never be forced to trial against their wishes. Love v. Moore, 305 N.C. 575, 291 S.E.2d 141, rehearing denied, 306 N.C. 393, 294 S.E.2d 221 (1982).

Subsection (b) of this section allows immediate appeals concerning only "minimum contacts" questions: the question of whether the courts of this state have the authority to require defendant to defend the claim. This question involves a two-fold determination: whether the North Carolina statutes permit the courts of this jurisdiction to entertain this action against defendant, and, if so, whether this exercise of jurisdiction violates due process. Styleco, Inc. v. Stoutco, Inc., 62 N.C. App. 525, 302 S.E.2d 888 (1983).

The right of immediate appeal of an adverse ruling as to jurisdiction over the person, under this statute, is limited to rulings on "minimum contacts" questions. Burlington Indus., Inc. v. Richmond County, DOT, 90 N.C. App. 577, 369 S.E.2d 119 (1988).

Defendants had no immediate right of appeal based on procedural issues regarding plaintiffs' issuance of service of process, rather than allegations defendants had insufficient minimum contacts to establish personal jurisdiction. Hart v. F.N. Thompson Constr. Co., 132 N.C. App. 229, 511 S.E.2d 27 (1999).

Appeal as to Personal Jurisdiction Lies at Any Stage. — An immediate appeal lies from an adverse ruling as to the personal, in rem or quasi in rem jurisdiction of the court at any stage of the proceedings. Stahl-Rider, Inc. v. State, 48 N.C. App. 380, 269 S.E.2d 217 (1980).

Denial of the motion to dismiss for lack of in personam jurisdiction is immediately appealable. Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983).

An appeal from denial of a subsidiary motion, while the main motion is pending, would ordinarily be dismissed as interlocutory. Where the court expressly denies a subsidiary motion on the basis that it does not have authority to grant the relief sought in the main motion, such ruling is equivalent to a denial of the main motion. The order thus in effect determines the action, and is therefore immediately appealable. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

While G.S. 1-278 provides that interlocutory orders affecting a judgment appealed from can be reviewed with the judgment, that section applies only to interlocutory orders that are not appealable; here, the order upholding the court's jurisdiction over the defendant was immediately appealable under the express provisions of subsection (b) of this section. Gualtieri v. Burleson, 84 N.C. App. 650, 353 S.E.2d 652, cert. denied, 320 N.C. 168, 358 S.E.2d 50 (1987).

Although denial of a motion for summary judgment ordinarily is not appealable, an appeal will lie when the summary judgment motion is based on a challenge to personal jurisdiction. Hargett v. Reed, 95 N.C. App. 292, 382 S.E.2d 791 (1989).

Denial of a chemical company's and a related corporation's motions to dismiss for lack of jurisdiction was immediately appealable under G.S. 1-277(b). Cambridge Homes of N.C. L.P. v. Hyundai Constr., Inc., — N.C. App. —, 670 S.E.2d 290, 2008 N.C. App. LEXIS 2242 (2008).

But Substance and Not Form Controls. — Subsection (b) of this section allows interlocutory appeals only where the authority of the court to exercise jurisdiction over the person is contested. Merely making a motion to dismiss for lack of such jurisdiction will not ipso facto make an otherwise interlocutory order appealable, as substance, not form, controls. Poret v. State Personnel Comm'n, 74 N.C. App. 536, 328 S.E.2d 880, cert. denied, 341 N.C. 117, 332 S.E.2d 491, 332 S.E.2d 492 (1985).

Denial of a motion to dismiss for lack of jurisdiction over the person does not give rise to an automatic right of appeal, despite statutory language appearing to have such effect. Poret v. State Personnel Comm'n, 74 N.C. App. 536, 328 S.E.2d 880, cert. denied, 314 N.C. 117, 332 S.E.2d 491, 332 S.E.2d 492 (1985).

Determinations of Subject Matter Jurisdiction. — The denial of a motion to dismiss for lack of subject matter jurisdiction was properly appealable. North Carolina R.R. v. City of Charlotte, 112 N.C. App. 762, 437 S.E.2d 393 (1993), appeal dismissed, review denied, 336 N.C. 608, 447 S.E.2d 397 (1994), cert. denied, 515 U.S. 1130, 115 S. Ct. 2554, 132 L. Ed. 2d 808 (1995).

Denial of Motions Challenging Personal and Subject Matter Jurisdiction Distinguished. — While subsection (b) of this section permits the immediate appeal of an order denying a motion made pursuant to G.S. 1A-1, Rule 12(b)(2) to dismiss for lack of jurisdiction over the person, it does not apply to orders denying motions made pursuant to G.S. 1A-1, Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction. Such orders, like other orders not determinative of an action, are interlocutory and therefore not immediately appealable. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

Subsection (b) of this section has no application in the denial of a motion challenging "subject matter" jurisdiction. A trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable. Shaver v. N.C. Monroe Constr. Co., 54 N.C. App. 486, 283 S.E.2d 526 (1981).

Sovereign Immunity. — Whether sovereign immunity is a question of subject matter jurisdiction or personal jurisdiction is an unsettled area of the law in this State. The distinction is important because the denial of a motion to dismiss for lack of subject matter jurisdiction pursuant to G.S. 1A-1, Rule 12(b)(1) is nonappealable, but the denial of a motion challenging the jurisdiction of the court over the person of the defendant pursuant to G.S. 1A-1, Rule 12(b)(2) is immediately appealable. Zimmer v. North Carolina Dep't of Transp., 87 N.C. App. 132, 360 S.E.2d 115 (1987).

Sovereign immunity is a matter of personal jurisdiction, not subject matter jurisdiction; therefore, the trial court's refusal to dismiss a suit against the state on these grounds is immediately appealable under this section. Colombo v. Dorrity, 115 N.C. App. 81, 443 S.E.2d 752, cert. denied, 337 N.C. 689, 448 S.E.2d 517 (1994).

Refusal to Dismiss Suit on Grounds of Governmental Immunity. — An immediate appeal lies under subsection (b) of this section from the trial court's refusal to dismiss a suit against the State on the grounds of governmental immunity. Stahl-Rider, Inc. v. State, 48 N.C. App. 380, 269 S.E.2d 217 (1980); Huyck Corp. v. C.C. Mangum, Inc., 58 N.C. App. 532, 293 S.E.2d 846 (1982), modified on other grounds, 309 N.C. 788, 309 S.E.2d 183 (1983).

Although the federal courts have tended to minimize the importance of the designation of a sovereign immunity defense as either a G.S. 1A-1, Rule 12(b)(1) motion regarding subject matter jurisdiction or a G.S. 1A-1, Rule 12(b)(2) motion regarding jurisdiction over the person, the distinction is crucial in this State because subsection (b) of this section allows the immediate appeal of a denial of a G.S. 1A-1, Rule 12(b)(2) motion but not the immediate appeal of a denial of a G.S. 1A-1, Rule 12(b)(1) motion. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

Where the defendants asserted governmental immunity from suit through the public duty doctrine, plaintiff's interlocutory appeal was therefore properly before the court. Clark v. Red Bird Cab Co., 114 N.C. App. 400, 442 S.E.2d 75 (1994).

E. Injunctions.

Appeal from Order Refusing Injunction. — A plaintiff can appeal from a decision of a judge at chambers refusing an injunction. First Nat'l Bank v. Jenkins, 64 N.C. 719 (1870).

Appeal from Order Continuing Injunction. — While the overruling of a motion to dismiss is not ordinarily an appealable order, as no substantial right of the litigant is thereby affected, when an injunction has been issued an order continuing the same affects a substantial right, and an appeal may be taken from an order entered on a motion to dismiss. Warlick v. H.P. Reynolds & Co., 151 N.C. 606, 66 S.E. 657 (1910).

An appeal from an interlocutory order will not be considered premature if a substantial right of the appellant would be adversely affected by continuance of an injunction in effect pending final determination of the case. Seaboard Indus., Inc. v. Blair, 10 N.C. App. 323, 178 S.E.2d 781 (1971); Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

An order granting or refusing a preliminary injunction is an interlocutory order governed by the requirements of this section.

Gunkel v. Kimbrell, 29 N.C. App. 586, 225 S.E.2d 127 (1976).

For a defendant to have a right of appeal from a mandatory preliminary injunction, substantial rights of the appellant must be adversely affected. Otherwise, an appeal from such an interlocutory order is subject to being dismissed. Dixon v. Dixon, 62 N.C. App. 744, 303 S.E.2d 606 (1983).

When Grant of Preliminary Injunction Is Appealable. — The threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. If no such right is endangered, the appeal cannot be maintained. State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908, appeal dismissed, 449 U.S. 807, 101 S. Ct. 55, 66 L. Ed. 2d 11 (1980).

Appeal from an interlocutory injunction is not considered premature and will be entertained by the Court of Appeals if a substantial right of the appellant would be adversely affected by continuance of the injunction in effect pending final determination of the case. Cablevision of Winston-Salem v. City of Winston-Salem, 3 N.C. App. 252, 164 S.E.2d 737 (1968).

Trial court's order granting a preliminary injunction restraining the sale of real proptery was immediately appealable; the merits of the underlying special proceeding between an executor and a widow in which the executor's right to partition property and to sell the widow's interest therein were decided by the entry of the widow's default nearly 10 years before, and there could have been no final order confirming a sale of the widow's allotted portion of the farm until a sale, which the trial court's order enjoined, was accomplished. Revelle v. Chamblee, 168 N.C. App. 227, 606 S.E.2d 712, 2005 N.C. App. LEXIS 158 (2005).

A preliminary injunction did not affect a substantial right and was therefore not appealable where the appellee/purchaser could still operate its business apart from the portion involving the company it allegedly purchased and where the trial court provided protection for the rights of the purchaser and company by requiring the plaintiff/seller to post security bonds. Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 141 N.C. App. 569, 541 S.E.2d 157, 2000 N.C. App. LEXIS 1298 (2000), cert. denied, 353 N.C. 370, 547 S.E.2d 433 (2001).

Scope of Review of Order Granting or Refusing Preliminary Injunction. — On appeal from an order of a superior court judge granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge but may review and weigh the evidence and find the facts for itself. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975).

In reviewing on appeal an order granting or continuing an interlocutory injunction in effect pending final determination of the case, the Court of Appeals is not bound by the findings of fact made by the trial court, but may review and weigh the evidence and find the facts for itself. Cablevision of Winston-Salem v. City of Winston-Salem, 3 N.C. App. 252, 164 S.E.2d 737 (1968).

Defendant could appeal trial court's issuance of a preliminary injunction enjoining defendant from operating a used car lot in violation of plaintiff's zoning ordinance; although defendant's appeal was from an interlocutory order, defendant would have been deprived of a substantial right, the right to operate his business, absent a review prior to determination on the merits. Town of Knightdale v. Vaughn, 95 N.C. App. 649, 383 S.E.2d 460 (1989).

Dissolution of Restraining Order Involving Act Already Committed. — The correctness of a ruling dissolving a restraining order will not be considered on appeal when it is made to appear that the act sought to be restrained has been committed. Wallace v. Town of N. Wilkesboro, 151 N.C. 614, 66 S.E. 657 (1910); Moore v. Cooper Monument Co., 166 N.C. 211, 81 S.E. 170 (1914); Kilpatrick v. Harvey, 170 N.C. 668, 86 S.E. 596 (1915); Galloway v. Board of Educ., 184 N.C. 245, 114 S.E. 165 (1922).

F. Costs.

Appeal Involving Only Costs Will Generally Be Dismissed. — An appeal will be dismissed where it satisfactorily appears that the question of costs is the only matter involved. Martin v. Sloan, 69 N.C. 128 (1873); State v. Richmond & D.R.R., 74 N.C. 287 (1876); Hasty v. Funderburk, 89 N.C. 993 (1883); Russell v. Campbell, 112 N.C. 404, 17 S.E. 149 (1893).

Where, pending appeal, the subject matter of an action or the cause of action is destroyed, the appellate court will not consider the abstract question of which party should rightly have won, merely in order to adjudicate the costs, but the judgment below as to the costs will stand. Wikel v. Board of Comm'rs, 120 N.C. 451, 27 S.E. 117 (1897); Herring v. Pugh, 125 N.C. 437, 34 S.E. 538 (1899).

Unless a Substantial Right Is Involved. — If some important substantial right is involved, an exception will be made to the general rule that the appellate court will not decide a mere question of costs and an opinion will be given. Martin v. Sloan, 69 N.C. 128 (1873).

When Appeal Lies for Costs. — The appellate court will decide the question of costs when the very question at issue is the legality of a particular item of costs. Elliott v. Tyson, 117 N.C. 114, 23 S.E. 102 (1895); Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897).

The appellate court will decide the question of costs where, taking the case below as properly decided, the issue is whether the costs of the lower court were adjudicated against the proper party. Herring v. Pugh, 125 N.C. 437, 34 S.E. 538 (1899).

Rulings Founded upon Lack of Power. — A ruling of the court below on a motion to allow and apportion costs founded upon a lack of power is reviewable. Martin v. Bank of Fayetteville, 131 N.C. 121, 42 S.E. 558 (1902); Horner v. Oxford Water & Elec. Co., 156 N.C. 494, 72 S.E. 624 (1911).

An order taxing defendant with the entire cost of copying the transcript on plaintiffs' appeal, it having been adjudged that unnecessary matter was sent up at the instance of plaintiff, was appealable. Waldo v. Wilson, 177 N.C. 461, 100 S.E. 182 (1919).

Denial of Motion to Retax Costs. — Denial of party's motion to retax costs is reviewable on questions as to what are the costs, how much is due from the party taxed, or whether one or more items have been erroneously inserted in bills of costs. Van Dyke v. Aetna Life Ins. Co., 174 N.C. 78, 93 S.E. 444 (1917).

Order Staying Collection of Deposition Costs. — There was no right or injury to justify an immediate appeal from a discretionary order staying collection of deposition costs where the moving party had clearly expressed an intention to institute an action in which the same depositions would be material, and where the nonmoving party incurred those costs three months after filing responsive motions and over one month after taking an affidavit which revealed insufficiency of service of process, and then waited an additional six months for a hearing upon a motion to dismiss for insufficient service. Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976).

Fiduciaries. — Although the general rule is that no appeal lies from a judgment for costs only, yet there is an exception in favor of fiduciaries from the statutes which makes the decision in those cases "one affecting substantial rights." May v. Darden, 83 N.C. 237 (1880).

III. SCOPE OF REVIEW.

This section applies only to "matters of law or legal inferences," and not to an order involving a mere discretion. Jenkins v. North Carolina Ore Dressing Co., 65 N.C. 563 (1871).

Where the record discloses no error of law or legal inference made upon the trial, the appellate court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. Rawls v. Lupton, 193 N.C. 428, 137 S.E. 175 (1927).

Judgment of Superior Court Is Final as to Matters of Fact. — The superior court is the court of final jurisdiction and has power to completely determine a controversy properly before it; its judgment is final as to all matters of fact established in accordance with procedure and is subject to appeal and review only on matters of law. State ex rel. Utilities Comm'n v. Carolina Scenic Coach Co., 218 N.C. 233, 10 S.E.2d 824 (1940).

Finality of Matters in Discretion of the Trial Court. — The discretion of the trial court will not be reviewed unless it appears that such discretion was abused or that the ruling was based upon a matter of law. Fayetteville Light & Power Co. v. Lessem Co., 174 N.C. 358, 93 S.E. 836 (1917); Gordon v. Pintsch Gas Co., 178 N.C. 435, 100 S.E. 878 (1919).

A judgment or order rendered by a judge of the superior court in the exercise of a discretionary power is not subject to review in any event, unless there has been an abuse of discretion on his part. Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377, rehearing denied, 232 N.C. 744, 59 S.E.2d 429 (1950).

Constitutional Questions. — The appellate courts will not pass upon a constitutional question unless it affirmatively appears that the question was raised and passed upon in the trial court. Motor Inn Mgt., Inc. v. Irvin-Fuller Dev. Co., 46 N.C. App. 707, 266 S.E.2d 368, appeal dismissed and cert. denied, 301 N.C. 73, 273 S.E.2d 299 (1980).

Order Setting Aside Verdict. — When a trial judge, in the exercise of his discretion, sets aside a verdict, his action may not be reviewed in the absence of any suggestion of an abuse of discretion. Atkins v. Doub, 260 N.C. 678, 133 S.E.2d 456 (1963).

If the verdict of the jury is, in the opinion of the presiding judge, contrary to the weight of the evidence, the judge has a discretion to set such verdict aside, which discretion cannot be reviewed in an appellate court. Watts v. Beli, 71 N.C. 405 (1874).

Orders regarding discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion. Dworsky v. Travelers Ins. Co., 49 N.C. App. 446, 271 S.E.2d 522 (1980).

Review of Evidence on Appeal from Grant or Denial of Preliminary Injunction. — On appeal from an order of a superior court judge granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge, but may review and weigh the evidence and find the facts for itself. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975).

Review of Probate Matters. — Where a case is appealed from the probate court to the judge, and there is a further appeal from the judge to the appellate court, the latter tribunal can review no point before the probate court that was not passed upon by the judge. Rowland v. Thompson, 64 N.C. 714 (1870).

The appellate court will only pass on questions decisive of the appeal. Richardson v. Southern Express Co., 151 N.C. 60, 65 S.E. 616 (1909).

And Not on Questions Which May Not Arise on New Trial. — Where a new trial must be granted for certain reasons, questions in controversy, which may not arise again in the case, need not be decided. Supervisor & Comm'rs v. Jennings, 181 N.C. 393, 107 S.E. 312 (1921); Moore v. Chicago Bridge & Iron Works, 183 N.C. 438, 111 S.E. 776 (1922).

Moot Cases Will Not Be Decided. — Appellate courts will not hear and decide what may prove to be only a moot case, or review a judgment at the instance of appellants who represent that compliance will be forthcoming only in the event of a favorable decision. In re Morris, 225 N.C. 48, 33 S.E.2d 243 (1945).

Where the record on appeal presents only a moot question, the court will not express an opinion concerning it. Kistler v. Southern Ry., 164 N.C. 365, 79 S.E. 676 (1914); Waters v. Boyd, 179 N.C. 180, 102 S.E. 196 (1920); Greenleaf Johnson Lumber Co. v. Valentine, 179 N.C. 423, 102 S.E. 774 (1920).

The appellate court will not entertain a cause to settle abstract propositions that are no longer at issue. Reid v. Norfolk S.R.R., 162 N.C. 355, 78 S.E. 306 (1913); Davis v. Pierce, 167 N.C. 135, 83 S.E. 182 (1914).

Where an appeal becomes irrelevant and improvident through a decision of the material questions in another appeal taken in the same case, it will be dismissed. Page v. Page, 167 N.C. 350, 83 S.E. 627 (1914); Cannon v. Commissioners of Pender County, 170 N.C. 677, 87 S.E. 31 (1915).

To warrant reversal, error must be prejudicial. McKeel v. Holloman, 163 N.C. 132, 79 S.E. 445 (1913); Brogden v. Gibson, 165 N.C. 16, 80 S.E. 966 (1914); Steeley v. Dare Lumber Co., 165 N.C. 27, 80 S.E. 963 (1914).

Error alone is not sufficient to reverse, but there must be harm to the party who excepts, by reason thereof; not that he must affirmatively show injury, but if it appears that there is none, his exception fails. Carter v. Seaboard Air Line R.R., 165 N.C. 244, 81 S.E. 321 (1914).

A finding for defendant upon an issue renders any error in regard to that issue harmless, and judgment for plaintiff is not reversible therefor. Vickers v. Leigh, 104 N.C. 248, 10 S.E. 308 (1889); Perry v. Insurance Co., 137 N.C. 402, 49 S.E. 889 (1905), petition for rehearing dismissed, 140 N.C. 649, 52 S.E. 1039 (1906).

And Material. — Mere error in the trial of a cause is not sufficient grounds for reversal, but it should be made to appear that the ruling was material and prejudicial to appellant's rights. Schas v. Equitable Life Assurance Soc'y of U.S., 170 N.C. 420, 87 S.E. 222 (1915); Shaw Cotton Mills v. Acme Hosiery Mills, 181 N.C. 33, 106 S.E. 24 (1921).

And Involve Denial of a Substantial Right. — Verdicts and judgments will not be set aside nor new trial granted for a technical or formal error, but to accomplish this result it must appear not only that the ruling was erroneous, but that it amounted to a denial of some substantial right; this rule applies especially where the trial involved a long and vigorous contest. In re Will of Ross, 182 N.C. 477, 109 S.E. 365 (1921).

No Reversal for Trivial Errors. — Courts do not lightly grant reversals or set aside verdicts, and a motion for such, to be meritorious, should not be based on any merely trivial errors committed manifestly without prejudice. Rierson v. Carolina Steel & Iron Co., 184 N.C. 363, 114 S.E. 467 (1922).

A judgment will be affirmed where the correct result was accomplished, even though it was irregularly rendered. Rankin v. Oates, 183 N.C. 517, 112 S.E. 32 (1922).

A correct judgment will not be disturbed because the trial court gave a wrong reason therefor. Burns v. McFarland, 146 N.C. 382, 59 S.E. 1011 (1907); Brown v. Elm City Lumber Co., 167 N.C. 9, 82 S.E. 961 (1914); King v. McRacken, 171 N.C. 752, 88 S.E. 226 (1916).

IV. PRESUMPTIONS AND BURDEN OF PROOF.

On appeal there is a presumption against error. In re Will of Ross, 182 N.C. 477, 109 S.E. 365 (1921); Fellows v. Dowd, 182 N.C. 776, 109 S.E. 69 (1921); Carstarphen v. Carstarphen, 193 N.C. 541, 137 S.E. 658 (1927); Mason v. Andrews, 193 N.C. 854, 138 S.E. 341 (1927).

And in Favor of the Correctness of the Court's Rulings. — The presumptions are in favor of the correctness of the rulings of law of the superior court, with the burden upon appellant to show error. Rawls v. Lupton, 193 N.C. 428, 137 S.E. 175 (1927).

Unchallenged Findings Are Presumed Correct. — Where findings of fact are not challenged by exceptions in the record, they are presumed to be supported by competent evidence and are binding upon appeal. Motor Inn Mgt., Inc. v. Irvin-Fuller Dev. Co., 46 N.C. App. 707, 266 S.E.2d 368, appeal dismissed and cert. denied, 301 N.C. 73, 273 S.E.2d 299 (1980).

Prejudicial error will not be presumed. Blevins v. Norfolk & W. Ry., 184 N.C. 324, 114 S.E. 298 (1922).

Where the testimony on which the trial

court based its findings is not in the record, the findings must be accepted on appeal as final, as it is presumed that they are supported by the evidence. Caldwell v. Robinson, 179 N.C. 518, 103 S.E. 75 (1920).

In the absence of a statement of facts, it will be presumed that the trial court found such facts as would support its judgment. Bowers v. Bryan Lumber Co., 152 N.C. 604, 68 S.E. 19 (1910).

Where the charge is not in the record, it will be presumed that it correctly stated the law. Ellison v. Western Union Tel. Co., 163 N.C. 5, 79 S.E. 277 (1913); Harrison v. Western Union Tel. Co., 163 N.C. 18, 79 S.E. 281 (1913).

Burden Is on Appellant to Show Error. — The burden is on the party alleging error to show it affirmatively by the record. Quelch v. Futch, 175 N.C. 694, 94 S.E. 713 (1917); Baggett v. Lanier, 178 N.C. 129, 100 S.E. 254 (1919); Rawls v. Lupton, 193 N.C. 428, 137 S.E. 175 (1927).

And Resulting Prejudice. — The burden is on the appellant to show clearly that error was prejudicial. Mercer v. Frank Hitch Lumber Co., 173 N.C. 49, 91 S.E. 588 (1917); Universal Oil & Fertilizer Co. v. Burney, 174 N.C. 382, 93 S.E. 912 (1917); Quelch v. Futch, 175 N.C. 694, 94 S.E. 713 (1917).

V. ILLUSTRATIVE CASES.

A. Appellant Held Entitled to Appeal.

1. In General.

When a motion on which an order is based is made as a matter of right and is not addressed to the court's discretion, upon its denial the movant may appeal immediately and have his motion decided there on its merits. Parrish v. Atlantic Coast Line R.R., 221 N.C. 292, 20 S.E.2d 299 (1942).

An erroneous order denying party the right to have the case heard in the proper court would work an injury to the aggrieved party which could not be corrected if no appeal was allowed before the final judgment. DesMarais v. Dimmette, 70 N.C. App. 134, 318 S.E.2d 887 (1984).

An order granting a motion to dismiss for lack of subject matter jurisdiction is immediately appealable under subsection (a) of this section, because it determines or discontinues the action. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

If a motion to dismiss is allowed, plaintiff would have a right of immediate appeal, because further proceedings would be precluded by the order. Acorn v. Jones Knitting Corp., 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511, 183 S.E.2d 686 (1971).

Researcher Who Was Required to Produce Documents in Criminal Case Was Aggrieved Party. — Where the trial court ordered a researcher to produce certain documents for defendant's appellate counsel, the researcher, which claimed that the documents were privileged, had grounds to appeal under G.S. 1-271 and G.S. 1-277; requiring disclosure of the allegedly privileged documents affected a substantial right, and thus the researcher was an aggrieved party. State v. Bradley, 179 N.C. App. 551, 634 S.E.2d 258, 2006 N.C. App. LEXIS 1968 (2006).

Grant of motion to dismiss for lack of personal jurisdiction, though interlocutory, is immediately appealable. Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986).

Dismissal of Claim Against One Defendant. — Dismissal of Count II of plaintiff's amended complaint, resulting in dismissal of plaintiff's claim against defendant professional corporation, affected her substantial right to have determined in a single proceeding the issues of whether she had been damaged by the actions of one, some or all of the defendants, especially since her claims against all of them arose upon the same series of transactions. Therefore, her appeal was not premature. Fox v. Wilson, 85 N.C. App. 292, 354 S.E.2d 737 (1987).

Underinsured Motorist Carrier's Right to Appear as Unnamed Defendant. — An underinsured motorist carrier could appeal from an order denying its motion to appear unnamed in the liability phase of a trial against its insured, since the right of an underinsured motorist carrier to defend unnamed is substantial. Church v. Allstate Ins. Co., 143 N.C. App. 527, 547 S.E.2d 458, 2001 N.C. App. LEXIS 315 (2001).

Factual Issue Central to Claim and Counterclaim. — In a suit for malicious prosecution in which defendant counterclaimed requesting a constructive trust, a factual issue of whether plaintiff forged defendant's name on a check was central to both actions; therefore, denial of appeal from summary judgment against defendant could have resulted in two juries in separate trials reaching different resolutions of this same issue if subsequent trial on the merits and appeal were successful. Consequently, the order dismissing defendant's counterclaim affected a substantial right and appeal was granted. Lamb v. Lamb, 92 N.C. App. 680, 375 S.E.2d 685 (1989).

Order Allowing Assertion of Counterclaims Only as Set-Offs. — In an action arising out of a contract whereby defendants agreed to construct a house on a piece of property owned by them and to convey the completed house and property to plaintiffs, the trial court's order dismissing defendants' counterclaims for overages, interest expenses, liquidated damages, attorneys' fees and trespass, but allowing defendants to assert these counterclaims as set-offs to plaintiffs' claim, was not a final judgment; however, the judgment in question affected a substantial right of defendants, their right to recover on their claims based on the contract, and the absence of an immediate appeal would work an injury to them, the possibility of being forced to undergo two full trials on the merits and to incur the expense of litigating twice, if not corrected before an appeal from a final judgment. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Grant of Jury Trial. — Where superior court's refusal to invalidate plaintiffs' demand for a jury trial in a stockholder's derivative action amounted to a ruling that plaintiffs were entitled to a jury trial, denial of defendants' motion to invalidate the demand was appealable. Faircloth v. Beard, 320 N.C. 505, 358 S.E.2d 512 (1987), overruled in part, Jacobs v. City of Asheville, 137 N.C. App. 441, 528 S.E.2d 905 (2000).

Order Requiring Jury Trial. — If an order denying a jury trial is appealable, an order requiring a jury trial should be appealable. If a denial of a jury trial affects a substantial right which would be lost absent a review prior to final determination, the requirement that a case will be tried by a jury should have the same effect. Faircloth v. Beard, 320 N.C. 505, 358 S.E.2d 512 (1987), overruled in part, Jacobs v. City of Asheville, 137 N.C. App. 441, 528 S.E.2d 905 (2000).

Preliminary injunction against defendant, pursuant to a covenant not to compete, was appealable prior to final determination on the merits, as it deprived defendant of a substantial right which he would lose absent review prior to a final determination. Masterclean of N.C., Inc. v. Guy, 82 N.C. App. 45, 345 S.E.2d 692 (1986).

Where a former employer sued a former employee for violating a covenant not to compete, the employee was entitled to interlocutory review of the trial court's decision to issue a preliminary injunction which, inter alia, prohibited the employee from working for the employer's competitors in North Carolina or South Carolina, as the injunction adversely affected the employee's substantial right to earn a living and to practice the employee's livelihood. Precision Walls, Inc. v. Servie, 152 N.C. App. 630, 568 S.E.2d 267, 2002 N.C. App. LEXIS 980 (2002).

Order Dismissing Charge of Indirect Civil Contempt. — An appeal would lie under subsection (a) of this section to review an order dismissing a charge of indirect civil contempt where the order affected a substantial right claimed by the appellant. Piedmont Equip. Co. v. Weant, 30 N.C. App. 191, 226 S.E.2d 688 (1976).

Order holding defendant in contempt of court for his failure to comply with discovery order was appealable and tested the validity both of the original discovery order and the contempt order. Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

When Order for Discovery Appealable. — If the desired discovery would not have delayed trial or have caused the opposing party any reasonable annoyance, embarrassment, oppression or undue burden or expense, and if the information desired is highly material to a determination of the critical question to be resolved in the case, an order denying such discovery does affect a substantial right and is appealable. Dworsky v. Travelers Ins. Co., 49 N.C. App. 446, 271 S.E.2d 522 (1980).

Order Prohibiting Taking of Deposition of Plaintiff's Expert. — Where the order of the superior court prohibiting the taking of the deposition of the plaintiff's expert metallurgist by the defendant effectively precluded the defendant from introducing evidence of "readings" concerning the hardness of the metal obtained by the tests which the expert made, the order affected a substantial right of the defendant and was appealable. Tennessee-Carolina Transp., Inc. v. Strick Corp., 291 N.C. 618, 231 S.E.2d 597 (1977).

In wrongful death action, the defendant declined to answer certain interrogatories on the grounds of self-incrimination, but was ordered to do so by the court and he appealed. Although this appeal was from an interlocutory order, it was nevertheless authorized, because if some of the interrogatories were incriminating and the defendant was compelled to answer them, his constitutional right could have been lost beyond recall and his appeal at the end of the trial would have been of no value. Shaw v. Williamson, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

Removal of Counsel. — Plaintiff had a substantial right to have attorney of her choice, properly admitted pro hac vice under G.S. 84-4.1, represent her in her lawsuit, and order removing him as counsel affected a substantial right of the plaintiff and was immediately appealable. Goldston v. AMC, 326 N.C. 723, 392 S.E.2d 735 (1990).

Removal of Public Officer. — An appeal from proceedings in superior court to remove a public officer for willful misconduct or maladministration in office would be allowed by this section. State ex rel. Hyatt v. Hamme, 180 N.C. 684, 104 S.E. 174 (1920).

An order appointing a next friend for plaintiff was an order affecting a substantial right from which plaintiff could appeal. Hagins v. Redevelopment Comm'n, 1 N.C. App. 40, 159 S.E.2d 584 (1968), rev'd on other grounds, 275 N.C. 90, 165 S.E.2d 490 (1969).

In an action seeking to quiet title to

property which the plaintiffs, the original owners, alleged was secured by two of the defendants by fraud or by mutual mistake and conveyed to the other defendant, the current owner, by general warranty deed, summary judgment in favor of the current owner precluded the plaintiffs from obtaining reformation of the deed and reconveyance of the property, thereby affecting a substantial right; and, therefore, the interlocutory order was appealable. Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985).

Order Was Final Judgment Despite Reserving Issue for Jury. — Where the trial court in its order and partial summary judgment reserved for the jury the issue as to whether defendant has waived any objection to, or is estopped to deny, the tenant's renewal of the lease, the order left no further action for the trial court to dispose of the case. Although the order reserved an issue for the jury, the trial court determined that it was irrelevant whether notice was received; therefore, there was no requirement for a trial on the issues of waiver or estoppel, and the order was effectively a final judgment and affected a substantial right. Janus Theatres of Burlington, Inc. v. Aragon, 104 N.C. App. 534, 410 S.E.2d 218 (1991).

An order requiring petitioners in a boundary dispute to elect between the boundary described in their petition and their claim of title to another line by adverse possession under their amendment to their petition affected a substantial right and was appealable. Jenkins v. Trantham, 244 N.C. 422, 94 S.E.2d 311 (1956).

An order entered in a proceeding to abate a public nuisance directing the reopening of defendant's safe and the making of an inventory of the contents, without any showing that the contents of the safe were relevant to that proceeding, was an order affecting a substantial right of defendant, from which appeal would lie under this section. State ex rel. Hooks v. Flowers, 247 N.C. 558, 101 S.E.2d 320 (1958).

An order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991); Hackett v. Bonta, 113 N.C. App. 89, 437 S.E.2d 687 (1993).

Issue of Damages. — Although this section provides that an order granting a new trial solely as to the issue of damages is interlocutory, where the issue of damages was the only contested issue at trial, plaintiff could obtain immediate appellate review of the trial court's order. Burgess v. Vestal, 99 N.C. App. 545, 393 S.E.2d 324 (1990).

Denial of Motion to Disqualify Counsel Not Immediately Appealable. — An order granting disqualification of counsel seriously disrupts the progress of litigation while new counsel is obtained, but one refusing such relief merely allows the action to proceed and has no permanent effect of any kind. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

Where defendant moved to disqualify one of several law firms representing plaintiff because that firm had obtained confidential information during representation of defendant in a previous unrelated matter, denial of the motion was not immediately appealable. Defendant could adequately protect its right not to have its confidences used against it to its detriment by appealing any adverse final judgment. Travco Hotels, Inc. v. Piedmont Natural Gas Co., 332 N.C. 288, 420 S.E.2d 426 (1992).

Forum Selection Clause. — The trial court's denial of a motion to dismiss was immediately appealable, where the trial court denied the employer's motion to dismiss the employee's breach of contract suit on the ground of a forum selection clause, finding that the clause was a product of unequal bargaining power, because the trial court's decision could deprive the employer of a substantial right if it were not immediately reviewed. Cox v. Dine-A-Mate, Inc., 129 N.C. App. 773, 501 S.E.2d 353 (1998), cert. denied, 349 N.C. 355 (1998).

2. Domestic Relations.

Dismissal of Equitable Distribution Claim Was Appealable Order. — Where trial court's summary judgment did not determine wife's contract claim against husband's company, the court's dismissal of wife's equitable distribution claim was an appealable interlocutory order; given the factual issues overlapping the company's contract claim retained by the court and the equitable distribution counterclaim it dismissed, wife could appeal the dismissal of the equitable distribution counterclaim as a matter of right since a substantial right would otherwise be affected. Small v. Small, 93 N.C. App. 614, 379 S.E.2d 273, cert. denied, 325 N.C. 273, 384 S.E.2d 519 (1989).

Order Barring Equitable Distribution. — Trial court's order denying defendant's motion to amend his answer in divorce action, which he filed following grant of absolute divorce to plaintiff, had the effect of forever barring defendant from asserting a claim for equitable distribution, and thus affected a substantial right; it was therefore appealable as a matter of right. Goodwin v. Zeydel, 96 N.C. App. 670, 387 S.E.2d 57 (1990).

As the court's judgment determined all matters pertaining to alimony and equitable distribution, the judgment was appealable under this section. Truesdale v. Truesdale,

89 N.C. App. 445, 366 S.E.2d 512 (1988).

Termination of Temporary Alimony. — Appeal of an order terminating dependent spouse's right to receive temporary alimony was not premature, as the question of plaintiff's continued entitlement to the previously ordered alimony pendente lite until such time as her prayer for permanent alimony could be heard affected a "substantial right" of the dependent spouse. Brown v. Brown, 85 N.C. App. 602, 355 S.E.2d 525, cert. denied, 320 N.C. 511, 358 S.E.2d 516 (1987).

Order Granting Claim for Alimony and Child Support. — An order granting a plaintiff-wife's claim for $4,225.00 in alimony and child-support arrearages and granting full faith and credit to a decree imposing a continuing support obligation affected a "substantial right" of defendant and was therefore reviewable by virtue of this section and G.S. 7A-27(d), even though the trial court's order did not determine all the issues raised in the action. McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

Order which clearly affected the right of plaintiff to receive support on behalf of minor children from defendant on a monthly basis as needed and in the amount which had been found reasonably necessary for the support and maintenance of the children involved a substantial right, and therefore the order in question was immediately appealable. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986).

Contempt Order in Child Custody Case Where Punishment Was Withheld. — Plaintiff was entitled to appeal the order of the trial court finding that she was in contempt of child custody orders even though the trial court withheld punishment and only made the findings a part of the record, since withholding punishment without further limitation retains the right to impose it in the future. Under such circumstances the order holding the plaintiff in contempt affected a substantial right and was therefore appealable. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978).

Since the court's order constituted a final judgment as to alimony and equitable distribution, the order was immediately appealable. Atassi v. Atassi, 117 N.C. App. 506, 451 S.E.2d 371, cert. denied, 340 N.C. 109, 456 S.E.2d 310 (1995).

Interlocutory order denying a motion for jury trial in a proceeding to terminate parental rights affected a substantial right and was immediately appealable. In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

3. Summary Judgment.

Order Granting Partial Summary Judgment. — Where trial court's summary judgment determined fewer than all claims between parties, plaintiff could maintain interlocutory appeals from court's judgment; the trial court's dismissal of plaintiff's negligence, fraud and unfair trade practice claims against defendant insurance company and unfair trade claim against defendant insurance agency affected a substantial right since there were factual issues common to claims dismissed by the trial court and the negligence claim it did not dismiss. Davidson v. Knauff Ins. Agency, Inc., 93 N.C. App. 20, 376 S.E.2d 488, cert. denied, 324 N.C. 577, 381 S.E.2d 772 (1989).

Order granting partial summary judgment to an injured woman who sued a city as a result of having been struck by a police car, which was enroute on an emergency back-up call, was reviewable by the appellate court because the dispositive motion affected a substantial right with regard to the city's assertion of sovereign immunity. Jones v. City of Durham, 168 N.C. App. 433, 608 S.E.2d 387, 2005 N.C. App. LEXIS 337 (2005), aff'd, 360 N.C. 81, 622 S.E.2d 596 (2005).

Partial Summary Judgment Coupled with Mandatory Injunction. — While ordinarily the allowance of a motion for summary judgment on the issue of liability, reserving for trial the issue of damages, will not be appealable, where a mandatory injunction was part of the order for partial summary judgment, it clearly affected a "substantial right" of the defendant and the allowance of the motion for partial summary judgment was appealable. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Where defendants would immediately suffer the consequences of complying with the mandatory injunction order that they remove anchors and boat slips constructed on plaintiff's submerged lands, this affected a substantial right of defendants, giving them the right to appeal from the interlocutory order granting summary judgment for plaintiffs except on the issue of damages. Steel Creek Dev. Corp. v. James, 300 N.C. 631, 268 S.E.2d 205 (1980).

Where partial summary judgment included a mandatory injunction directing the defendant to remove a roadway, the Court of Appeals held that the order affected a substantial right of the defendant and was thus immediately appealable pursuant to this section and G.S. 7A-27. Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Order of partial summary judgment dismissing a punitive damages claim was appealable, though interlocutory, since claims for compensatory and punitive damages depended upon the same evidence and plaintiff's right to try them before the same jury and avoid the possible travesty of different juries rendering conflicting verdicts was a substantial one. Nance v. Robertson, 91 N.C. App. 121, 370 S.E.2d 283, cert. denied, 323 N.C. 477, 373 S.E.2d 865 (1988).

Partial Dismissal of Cause of Action. — Where the plaintiff alleged (1) breach of contract and fraud, (2) bad faith, and (3) unfair and deceptive trade practices, the plaintiff had a right to appeal the action of the trial court in striking portions of her cause of action as to bad faith and unfair trade practices; if the plaintiff's claims were not subject to dismissal, she had a substantial right to have all three causes tried at the same time by the same judge and jury, and the interlocutory order would work injury if not corrected before the final judgment. Webb v. Triad Appraisal & Adjustment Serv., Inc., 84 N.C. App. 446, 352 S.E.2d 859 (1987).

If summary judgment is allowed, the aggrieved party may have appellate review as a matter of right. Carr v. Great Lakes Carbon Corp., 49 N.C. App. 631, 272 S.E.2d 374 (1980), cert. denied, 302 N.C. 217, 276 S.E.2d 914 (1981). See also, Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

There is a right of appeal under this section from an order granting summary judgment, notwithstanding the failure to meet the requirements for appeal under G.S. 1A-1, Rule 54(b) where a substantial right is affected. Jones v. Clark, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

Order allowing summary judgment as to fewer than all defendants held to affect a substantial right. Federal Land Bank v. Lieben, 86 N.C. App. 342, 357 S.E.2d 700 (1987).

When, in a personal injury case, a trial court granted summary judgment in favor of some of the parties sued, the judgment was appealable, under G.S. 1-277(a) and G.S. 7A-27(d)(1), because it was alleged that the parties as to whom summary judgment was granted were joint tortfeasors with the remaining parties, so many of the same factual issues would apply to the claims against the parties awarded summary judgment and to the remaining parties, and separate trials could result in inconsistent judgments, so the alleged injured parties who brought suit asserted a substantial right to immediate review, and their appeals were properly before the appellate court. Walden v. Morgan, — N.C. App. —, 635 S.E.2d 616, 2006 N.C. App. LEXIS 2169 (2006).

Summary Judgment Held to Affect Substantial Right. — In case involving nurse who struck decedent on his way to work, summary judgment as to nursing agency/supplier affected plaintiffs' substantial right to have issues pertaining to victim's death determined in a single proceeding and entitled them to immediate appeal. Rhoney v. Fele, 134 N.C. App. 614, 518 S.E.2d 536 (1999).

While an order granting summary judgment was interlocutory, it was appealable because the cause of action for criminal conversation, which was still before the trial court, was so connected with the claim for alienation of affections that only one issue of damages should be submitted to the jury, and thus, a substantial right was at stake to have the same jury hear the wife's two claims. McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006).

Grant of Summary Judgment on Plaintiff's Claim. — Where defendants' defense to plaintiff's promissory note claim, as well as their counterclaims, were both founded on proving plaintiff's breach of a fiduciary relationship with defendants, defendants' substantial right to avoid separate trials of the same issue would be prejudiced absent immediate review of the trial court's grant of summary judgment on plaintiff's claim. Whitehurst v. Corey, 88 N.C. App. 746, 364 S.E.2d 728 (1988).

Summary Judgment Dismissing Plaintiffs' Claims. — Where the possibility of an inconsistent verdict in defendants' counterclaim trial could irreparably prejudice any subsequent trial of plaintiff's negligence and contract claims, the trial court's summary judgment dismissing plaintiff's claims affected a substantial right such that it was immediately appealable under G.S. 7A-27(d)(1) and subsection (a) of this section. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Summary Judgment Dismissing Defendant. — Where the same factual issues applied to all claims against the various defendants, and many of the damages alleged were identical, and where several different proceedings could bring about inconsistent verdicts, plaintiffs had a substantial right to have the liability of all defendants determined in one proceeding; hence, grant of summary judgment to one defendant would be considered by the appellate court. Camp v. Leonard, 133 N.C. App. 554, 515 S.E.2d 909 (1999).

The trial court's entry of summary judgment for a monetary sum against one of two defendants affected a "substantial right" of that defendant, and such judgment was therefore immediately appealable under this section and G.S. 7A-27, notwithstanding the absence of an express determination by the trial judge that there was "no just reason for delay" under G.S. 1A-1, Rule 54(b). Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

In action by discharged employee seeking to recover accumulated vacation leave, a "substantial right" of the plaintiff was affected by the granting of summary judgment for the defendant, so that the order granting the motion for summary judgment was appealable, despite the defendant's pending counterclaim for wrongful conversion of company funds, and despite the absence of a determination by the trial judge under G.S. 1A-1, Rule 54(b) that "there was no just reason for delay." Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Fact that plaintiff waived her right to appeal the order granting summary judgment to one of three defendants in no way affected her statutory right to appeal from the final judgment, since although she could have appealed the entry of summary judgment as to that defendant, she was not required to do so. Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984), cert. denied, 313 N.C. 508, 329 S.E.2d 391 (1985).

Denial of Summary Judgment on Grounds of Sovereign and Qualified Immunity. — This section, in effect, provides that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. Generally, the denial of summary judgment does not affect a substantial right and is not appealable. However, the denial of a motion for summary judgment on the grounds of sovereign and qualified immunity is immediately appealable. Herndon v. Barrett, 101 N.C. App. 636, 400 S.E.2d 767 (1991).

Denial of a motion to dismiss or for summary judgment is interlocutory and not immediately appealable. However, recent case law clearly establishes that if immunity is raised as a basis in the motion for summary adjudication, a substantial right is affected and the denial is immediately appealable. EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources, 108 N.C. App. 24, 422 S.E.2d 338 (1992), overruled on other grounds, Meyer v. Walls, 347 N.C. 97, 489 S.E.2d 880 (1997).

Defendant members of county board of commissioners and county appealed a trial court's denial of their motion for summary judgment, claiming they were entitled to immunity in libel case under the doctrine of governmental immunity. The order denying their motion was immediately appealable. Dickens v. Thorne, 110 N.C. App. 39, 429 S.E.2d 176 (1993).

While denial of summary judgment is generally considered interlocutory and not immediately appealable, when the grounds for a motion for summary judgment are governmental immunity the denial of the motion is immediately appealable. Lyles v. City of Charlotte, 120 N.C. App. 96, 461 S.E.2d 347 (1995).

Public Official Immunity and Denial of Summary Judgment Motion. — Denial of defendants' motion for summary judgment which was based on defendants' assertion of public official immunity affected a substantial right and was subject to immediate review. Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 191 N.C. App. 581, 664 S.E.2d 8, 2008 N.C. App. LEXIS 1494 (2008).

Employer's appeal of a denial of its motion for summary judgment in a wrongful death suit was properly before the appellate court; the summary judgment motion argued that the employer was immune from the suit, and, although the appeal was interlocutory, appellate review was necessary on the grounds that the North Carolina's Workers' Compensation Act granted employers who complied with the Act immunity from suit, which would have been lost if the case was permitted to go to trial. This immunity from suit affected a substantial right. Edwards v. GE Lighting Sys., — N.C. App. —, 668 S.E.2d 114, 2008 N.C. App. LEXIS 1980 (2008).

B. Appellant Not Entitled to Appeal.

1. In General.

No Appeal from Interlocutory Order in Criminal Proceeding Absent Statutory Provision. — In light of the legislature's enactment of G.S. 15A-1444(d) and the decision in State v. Henry, 318 N.C. 480, 348 S.E.2d 593 (1986), this section, the statutory basis for the holding in State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965) (per curiam) and dictum in State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972) is no longer relevant to the appeal of interlocutory orders in criminal proceedings; accordingly, the Court of Appeals has declined to follow State v. Jones, 67 N.C. App. 413, 313 S.E.2d 264 (1984); State v. Montalbano, 73 N.C. App. 259, 326 S.E.2d 634, disc. rev. denied, 313 N.C. 608, 332 S.E.2d 182 (1985); and State v. Major, 84 N.C. App. 421, 352 S.E.2d 862 (1987), insofar as they might allow interlocutory appeals in criminal proceedings based on Childs, Bryant, or this section. State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

Denial of defendant's motion to dismiss, which was based on double jeopardy grounds, was an interlocutory order from which no appeal would lie in absence of statutory provision. State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989).

Ordinarily, no appeal will lie from an order permitting intervention of parties, unless the order adversely affects a substantial right which the appellant may lose if not granted on appeal before final judgment. The rule applies with equal vigor without regard to whether the trial court grants a motion to intervene as a matter of right pursuant to G.S. 1A-1, Rule 24(a) or as permissive intervention pursuant to G.S. 1A-1, Rule 24(b). Wood v. City of Fayetteville, 35 N.C. App. 738, 242 S.E.2d 640, cert. denied, 295 N.C. 264, 245 S.E.2d 781 (1978).

Refusal to Join Parties. — The addition of parties where they are not necessary is a matter within the trial court's discretion, and the judge's order refusing to join additional parties is not ordinarily reviewable. Henredon Furn. Indus., Inc. v. Southern Ry., 27 N.C. App. 331, 219 S.E.2d 238 (1975), cert. denied, 289 N.C. 298, 222 S.E.2d 697 (1976).

Joinder and restraining orders are in the nature of interlocutory orders. As such, they are generally held nonappealable unless some substantial right will be affected if the appeal is not immediately perfected. Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975).

Preliminary Injunction Upholding Covenant Not to Compete. — In an action for injunctive relief and damages based on alleged breach of a covenant not to compete, defendant's appeal of trial court's preliminary injunction barring him from participating in any employment that competed with plaintiff's business in certain geographic locations would be dismissed as interlocutory where there was no evidence in the record to show that defendant was presently working in any of those areas, as the injunction did not deprive defendant of any substantial right which he would lose absent a review prior to final determination. Automated Data Sys. v. Myers, 96 N.C. App. 624, 386 S.E.2d 432 (1989).

The trial court's denial of defendants' constitutional challenge and its conclusion that the defendants' four tracts formed a physically unified parcel affected by the taking were interlocutory and did not affect any substantial rights, so the defendants were not required to appeal the trial court's orders immediately. DOT v. Rowe, 351 N.C. 172, 521 S.E.2d 707 (1999).

The appeal from a preliminary injunction restraining defendant bank from disposing of shares of corporate stock it held as executor under the will of a stockholder who died owning eighty-eight percent (88%) of the capital stock of a North Carolina corporation was unauthorized and was dismissed since fragmentary, piecemeal appeals from interlocutory orders are not usually permitted in this State; they are authorized only when it appears that a substantial right of the appellant will be lost if the order is not reviewed before the case has finally run its course in the trial court, and the preliminary injunction appealed from in this case was such an order, as its effect was temporary rather than permanent. Shuping v. NCNB Nat'l Bank, 93 N.C. App. 338, 377 S.E.2d 802 (1989).

Order Limiting Scope of Lis Pendens. — In an action to quiet title to property which defendants had incorporated into a residential subdivision, an order limiting the scope of the lis pendens filed by plaintiffs only to the area of the subdivision which they claimed was interlocutory and not immediately appealable. Whyburn v. Norwood, 37 N.C. App. 610, 246 S.E.2d 540 (1978).

An order denying a motion to cancel a notice of lis pendens is not immediately appealable where the property owner fails to show that a substantial right of his has been impaired. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Order to Post Secured Bond. — Where brothers were equal shareholders in company, company could no longer be conducted to the advantage of both of the shareholders, and the judge ordered the brothers to post a secured bond to ensure compliance with any judgment rendered, the appeal of the order by one of the brothers was interlocutory and was dismissed; no substantial right was affected since the amount of the bond reasonably approximated the value of the assets in the brother's possession, and the bond would be cancelled if the opposing sibling was unsuccessful in obtaining judgment in his favor. Stancil v. Stancil, 94 N.C. App. 760, 381 S.E.2d 720 (1989).

Order Increasing Attachment Bond Where No Findings Were Made. — Where the trial court was not required to make findings of fact in order to modify the plaintiffs' attachment bond on the motion of the defendant, pursuant to G.S. 1-440.40(a), and where the plaintiffs failed to request such findings, they could not assert that the order had affected their substantial rights and they were not entitled to review. Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794, 1999 N.C. App. LEXIS 1228 (1999).

Order compelling arbitration was interlocutory and did not affect a substantial right. North Carolina Elec. Membership Corp. v. Duke Power Co., 95 N.C. App. 123, 381 S.E.2d 896, cert. denied, 325 N.C. 709, 388 S.E.2d 461 (1989).

There is no immediate right of appeal from an order compelling arbitration. Bluffs, Inc. v. Wysocki, 68 N.C. App. 284, 314 S.E.2d 291 (1984).

Orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before final judgment. Dworsky v. Travelers Ins. Co., 49 N.C. App. 446, 271 S.E.2d 522 (1980); Casey v. Grice, 60 N.C. App. 273, 298 S.E.2d 744 (1983).

Order with Regard to Interrogatories and Requested Admissions. — Trial court's order sustaining objections to, and granting a motion to strike, certain interrogatories, denying defendants' motion to compel answers to those interrogatories, and also denying defendants' motion to permit them to respond to plaintiff's request for admissions was interlocutory, and defendants' appeal was fragmentary and premature. First Union Nat'l Bank v. Olive, 42 N.C. App. 574, 257 S.E.2d 100 (1979).

Order of the trial court that plaintiff not be required to answer certain interrogatories did not affect a substantial right of defendant where defendant had received answers to other interrogatories which gave it detailed information as to all written and oral transactions conducted by plaintiff in regard to the subject of the controversy and the information denied to the defendant was not crucial to its defense. Starmount Co. v. City of Greensboro, 41 N.C. App. 591, 255 S.E.2d 267, cert. denied, 298 N.C. 300, 259 S.E.2d 915 (1979).

Order denying plaintiff's motion to reconsider an order denying attorney's motion for admission pro hac vice was an interlocutory order and was not immediately appealable; it did not come within the statutory appeals in subsection (a) or G.S. 7A-27(d). Leonard v. Johns-Manville Sales Corp., 57 N.C. App. 553, 291 S.E.2d 828, cert. denied, 306 N.C. 558, 294 S.E.2d 371 (1982).

Denial of attorneys' fees under § 50-16.4 was not a final order of the trial court, where at the time appellant's motion was filed, there had been no determination that his client, defendant, was entitled to alimony pendente lite under G.S. 50-16.3, so that appellant was not yet entitled to attorneys' fees under G.S. 50-16.4, and as appellant could appeal the denial of his motion after final judgment, or could bring a separate lawsuit to collect his fees, no substantial right of appellant was affected by the Court of Appeals' failure to entertain an interlocutory appeal on this issue. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

Dismissal of Treble Damage Claim. — A plaintiff in an Unfair Trade Practices action has no right of immediate appeal from an interlocutory order dismissing her claim for treble damages. Simmons v. C.W. Myers Trading Post, Inc., 68 N.C. App. 511, 315 S.E.2d 75, cert. denied, 312 N.C. 85, 321 S.E.2d 898 (1984).

Denial of Motion to Dismiss Punitive Damages Claim. — An order denying defendant's motion to dismiss plaintiff's claim for punitive damages was not immediately appealable. Williams v. East Coast Sales, Inc., 50 N.C. App. 565, 274 S.E.2d 276 (1981).

The avoidance of having to affirmatively prove one's claim was not a "substantial" right, where plaintiff was affected by inability to immediately appeal an order setting aside a judgment only to the extent that it would have to establish defendants' liability and the amount thereof by proper evidence, rather than by relying upon a purported confession of judgment. First Am. Sav. & Loan Ass'n v. Satterfield, 87 N.C. App. 160, 359 S.E.2d 812 (1987).

Denial of a motion to strike an order vacating a default judgment does not affect a substantial right within the meaning of this section. Love v. Moore, 305 N.C. 575, 291 S.E.2d 141, rehearing denied, 306 N.C. 393, 294 S.E.2d 221 (1982).

An order by the trial court denying defendants' motions for judgment on special verdict, setting aside the verdict on one issue, and continuing the cause for the trial of such further issue as might be necessary to determine the rights of the parties, with leave to file amended pleadings, was not a final judgment. Thomas v. Carteret, 180 N.C. 109, 104 S.E. 75 (1920).

An order setting aside default judgment did not affect a substantial right of plaintiffs, the avoidance of a full trial on the merits not being a substantial right in the case. Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980).

Order withdrawing an upset bid could not have been appealed immediately, as it merely interrupted and delayed the foreclosure proceeding and had no ascertainable effect upon the appellants' rights, since the ordered resale could have ended with a bid of the same amount or even higher. In re Allan & Warmbold Constr. Co., 88 N.C. App. 693, 364 S.E.2d 723, cert. denied, 322 N.C. 480, 370 S.E.2d 222 (1988).

Order to Allow Surveyor to Enter upon Land. — Interlocutory order by which defendants were simply ordered to allow a neutral third party, a surveyor, to enter upon their land for the purpose of completing an accurate survey of the property was not appealable. Ball v. Ball, 55 N.C. App. 98, 284 S.E.2d 555 (1981).

Adjudication that a release for personal injury signed by plaintiff was obtained by fraud did not prejudice defendant in trying the cause on its merits on the issue of negligence, and therefore an appeal taken prior to the trial on the merits from the adjudication that the release was void was premature and would be dismissed. Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 382 (1962).

Interim Equitable Distribution Order. — Permitting an immediate appeal from an interim equitable distribution order would be contrary to the policy of this state discouraging fragmentary appeals. Hunter v. Hunter, 126 N.C. App. 705, 486 S.E.2d 244 (1997).

Alimony, Child Support, and Attorneys' Fees Pendente Lite. — Husband's appeal of an order by the trial court in a divorce action for alimony pendente lite, child support pendente lite, and attorneys' fees pendente lite was premature and would be dismissed. Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981).

Orders and awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to G.S. 7A-27(d). Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1981), overruling Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970).

An appeal from an order requiring resident father to have child in court in order that the question of custody might be considered and determined in a habeas corpus proceeding between the parents of the child, who were separated but not divorced, was premature and would be dismissed, since the order was interlocutory and affected no substantial right. In re Fitzgerald, 242 N.C. 732, 89 S.E.2d 462 (1955).

Order to Submit to Psychiatric Examination in Custody Case. — An order that the parties and the child submit to a psychiatric examination prior to final determination on the question of custody was interlocutory and did not deprive plaintiff of a substantial right which she might lose if the order was not reviewed before a final determination of custody. Williams v. Williams, 29 N.C. App. 509, 224 S.E.2d 656, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976).

No Substantial Right Affected. — Where only the issue of damages remained, no final judgment had been made and no substantial right was affected, the appellate court found the trial court's certification ineffective and saw no impediment to trial court's sorting out various claims and affirmative defenses intertwined with the damages issue. CBP Resources, Inc. v. Mountaire Farms of N.C., Inc., 134 N.C. App. 169, 517 S.E.2d 151 (1999).

Appellant was Not Aggrieved. — Appellant did not present a question for review by the appellate court because the record contained no order or ruling of the trial court forcing the appellant to redact evidence. Therefore, the appellant was not considered aggrieved by the trial court when the appellant consciously made a bargain with the appellee regarding the presentation of evidence and then received the benefit of it. Kor Xiong v. Marks, — N.C. App. —, 668 S.E.2d 594, 2008 N.C. App. LEXIS 2016 (2008).

2. Pleading.

Appeal does not lie from denial of a motion for judgment on the pleadings. Barrier v. Randolph, 260 N.C. 741, 133 S.E.2d 655 (1963).

Denial of Motion to Strike Answer and Counterclaim. — An order which denies plaintiff's motion to strike defendant's answer and counterclaim does not affect a substantial right of plaintiff, nor does it in effect determine the action, and therefore no appeal lies from that order. Wachovia Bank & Trust Co. v. Parker Motors, Inc., 13 N.C. App. 632, 186 S.E.2d 675 (1972).

Motions to Strike Allegations from Motion. — While the appellate court may entertain an appeal from an order denying a motion to strike allegations from the pleadings, since the pleadings are read to the jury and chart the course of the trial and determine in large measure the competency of the evidence, and therefore denial of the motion may impair or imperil substantial rights, this reasoning does not apply to motions to strike allegations from a motion before the court, since no substantial right is likely to be impaired or seriously imperiled by the denial of the motion. Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949).

An order allowing amendment of a pleading is interlocutory and not appealable. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

An order of the trial court allowing a motion to amend a complaint is interlocutory and is not immediately appealable. Barber v. Woodmen of World Life Ins. Soc'y, 88 N.C. App. 666, 364 S.E.2d 715 (1988).

Unless Substantial Rights Are Affected. — Where an order of court allowing amendments to pleadings does not affect a substantial right, an appeal therefrom is fragmentary and premature, and the appeal will be dismissed. George E. Nissen Co. v. Nissen, 198 N.C. 808, 153 S.E. 450 (1930).

Ruling on a Plea in Bar. — No substantial right of defendant would be lost or prejudiced by delaying his appeal from an adverse ruling to his plea in bar to plaintiff's complaint until the final judgment on plaintiff's equitable distribution and alimony claims; therefore, appeal of the trial court's interlocutory ruling on defendant's plea in bar as a matter of right was not permitted. Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988).

3. Summary Judgment.

Grant of Partial Summary Judgment on Issue of Liability. — An order of the trial court allowing plaintiff's motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, and denying defendant's motion for summary judgment was not appealable. Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979); Pelican Watch v. United States Fire Ins. Co., 323 N.C. 700, 375 S.E.2d 161 (1989).

Ordinarily, an order granting summary judgment on the issue of liability and reserving for trial the issue of damages is not immediately appealable. Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984), cert. denied, 313 N.C. 509, 329 S.E.2d 394 (1985).

Where insured homeowners were awarded a partial summary judgment as to the replacement cash value of their severely damaged home by the trial court, which was a reversal of the insurance appraiser's determination that the actual cash value applied as the appropriate damage award, a substantial right of the insurer was affected allowing an appeal of that interlocutory order pursuant to G.S. 1-277. Gilbert v. N.C. Farm Bur. Mut. Ins. Cos., 155 N.C. App. 400, 574 S.E.2d 115, 2002 N.C. App. LEXIS 1608 (2002), aff'd, 357 N.C. 244, 580 S.E.2d 691 (2003).

Partial summary judgment holding that third party defendant must indemnify defendant for any judgment on plaintiff's claim was interlocutory and not appealable under this section or G.S. 7A-27(d) since the judgment would not work injury to third party defendant if not corrected before appeal from a final judgment. Cook v. Export Leaf Tobacco Co., 47 N.C. App. 187, 266 S.E.2d 754 (1980).

Generally, orders denying motions for summary judgment are not appealable. Hill v. Smith, 38 N.C. App. 625, 248 S.E.2d 455 (1978).

Ordinarily, denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken. The moving party is free to preserve his exception for consideration on appeal from the final judgment, and in case a substantial right is thought to be affected to the prejudice of the movant, then a petition for a writ of certiorari is available. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

An order setting aside without prejudice a summary judgment on the grounds of procedural irregularity is interlocutory and not immediately appealable. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978).

Unless a Substantial Right Is Affected. — The denial of summary judgment is interlocutory in nature and not appealable under this section and G.S. 7A-27, unless a substantial right of one of the parties would be affected if the appeal were not heard prior to final judgment. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

No Substantial Right Affected. — Where insurance company considered itself prejudiced by having the issue of insurance coverage heard before a jury which was also weighing the issue of liability, it nonetheless had other options or "remedies" available to it other than current consideration of its appeal, including severability of the issues or bifurcation of the trial; therefore, there was no "substantial interest" exception present to permit appeal under this section and G.S. 7A-27 of the court's order denying defendant's summary judgment. Cagle v. Teachy, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

There were no factual issues common to the claims determined by summary judgments or the claims remaining, so that no substantial right was affected and plaintiff was not entitled to interlocutory appeal of summary judgments, since plaintiff did not present identical factual issues creating the possibility of two trials on the same issue. Jarrell v. Coastal Emergency Servs. of Carolinas, Inc., 121 N.C. App. 198, 464 S.E.2d 720 (1995).

Grant of Summary Judgment Against Certain Defendants. — Appeal from the grant of summary judgment for a psychiatric hospital in a medical malpractice action against the hospital and independent contractor physicians was premature, where the remaining defendants had separate and distinct contracts and each owed a different duty to the patient. Myers v. Barringer, 101 N.C. App. 168, 398 S.E.2d 615 (1990).

Where summary judgment is allowed for fewer than all the defendants and the judgment does not contain a certification pursuant to G.S. 1A-1, Rule 54(b), that there is "no just reason for delay," an appeal is premature unless the order allowing summary judgment affects a substantial right. Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982).

Summary Judgment on Dependent Claim. — Plaintiffs had no right to an immediate appeal from summary judgment granted to defendant attorney where plaintiffs sought to recover against defendant attorney only if they were unable to recover against the other defendants on their primary claims. Blue Ridge Sportcycle Co. v. Schroader, 53 N.C. App. 354, 280 S.E.2d 799 (1981).

Summary judgment on complaint was not appealable before counterclaim for attorneys' fees had been adjudicated by the trial court, since there was no possibility of inconsistent results in complaint and counterclaim; therefore, as parties did not address any other substantial right which could have been affected, no substantial right was involved which would have been "lost, prejudiced, or less than adequately protected" if court did not review appeal before final judgment. T'ai Co. v. Market Square Ltd. Partnership, 92 N.C. App. 234, 373 S.E.2d 885 (1988).

Summary Judgment on Counterclaims. — Trial court's order for partial summary judgment in favor of plaintiff employee, who sued for payment of a commission, as to defendant employer's four counterclaims—wrongful attachment, negligence, breach of contract, and breach of fiduciary duty—was interlocutory where no overlapping factual issues existed between plaintiff's complaint and defendant's counterclaims, and the order appealed from did not deprive defendant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. Murphy v. Coastal Physician Group, 139 N.C. App. 290, 533 S.E.2d 817, 2000 N.C. App. LEXIS 893 (2000).

4. Denial of Motion to Dismiss.

An appeal does not lie from refusal to dismiss an action. Winder v. Penniman, 181 N.C. 7, 105 S.E. 884 (1921); Capps v. Atlantic Coast Line R.R., 182 N.C. 758, 108 S.E. 300 (1921); City of Goldsboro v. Holmes, 183 N.C. 203, 111 S.E. 1 (1922); Johnson v. Pilot Life Ins. Co., 215 N.C. 120, 1 S.E.2d 381 (1939); Acorn v. Jones Knitting Corp., 12 N.C. App. 266, 182 S.E.2d 862, cert. denied, 279 N.C. 511, 183 S.E.2d 686 (1971). See also, Mitchell v. Kilburn, 74 N.C. 483 (1876); Mitchell v. Hubbs, 74 N.C. 484 (1876); Mitchell v. West, 74 N.C. 485 (1876).

Refusal of a motion to dismiss is not a final determination within the meaning of the statute and is not subject to appeal. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957); Broaddus v. Broaddus, 45 N.C. App. 666, 263 S.E.2d 842 (1980).

Ordinarily, there is no right of appeal from refusal of a motion to dismiss. The refusal to dismiss the action generally will not seriously impair any right of defendant that cannot be corrected upon appeal from final judgment. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

While an appeal lies from the dismissal of an action or of an appeal from a justices' court, it does not lie from a refusal to dismiss; in such a case, an exception should be noted, and an appeal will lie from the final judgment. Bargain House v. Jefferson, 180 N.C. 32, 103 S.E. 922 (1920).

The trial court's denial of defendant's motion to dismiss clearly represented an interlocutory order, which was not properly before the Court of Appeals. Southern Uniform Rentals, Inc. v. Iowa Nat'l Mut. Ins. Co., 90 N.C. App. 738, 370 S.E.2d 76 (1988).

Order Denying Motion to Dismiss for Lack of Subject Matter Jurisdiction Is Not Immediately Appealable. — While subsection (b) of this section provides that appeal does lie from denial of a motion to dismiss for lack of personal jurisdiction, this does not apply to the denial of a motion challenging subject matter jurisdiction. A trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable. Duke Univ. v. Bryant-Durham Elec. Co., 66 N.C. App. 726, 311 S.E.2d 638 (1984).

Denial of a motion to dismiss for failure to state a claim upon which relief can be granted is not a final determination within the meaning of subsection (a) of this section, and it does not affect a substantial right, and is not appealable. Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

An order denying a motion under G.S. 1A-1, Rule 12(b)(6) is interlocutory and clearly not appealable. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

The trial court's refusal to allow defendant's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to G.S. 1A-1, Rule 12(b)(6) did not put an end to the action or seriously impair any substantial right of defendant that could not be corrected upon appeal from final judgment. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Denial of Motion to Dismiss for Failure to Join Necessary Party. — No substantial right of the defendant was impaired by the trial court's denial of the motion to dismiss for failure to join a necessary party. The trial court did not rule that other parties were not necessary to be joined. It ruled that the action should not be dismissed for that purpose. Defendant still had adequate opportunity in the trial court for a determination on the question of the joinder of parties. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Denial of Motion to Dismiss Based on Expiration of Statute of Limitations. — Denial of plaintiff's motion to dismiss defendant railroad's counterclaim for being filed beyond the three-year statute of limitations did not affect a substantial right and therefore was not appealable. Thompson v. Norfolk S. Ry., 140 N.C. App. 115, 535 S.E.2d 397, 2000 N.C. App. LEXIS 1100 (2000).

Appeal by Defendants Not Party to Extension of Statute. — The right to immediate appellate review under the substantial right doctrine applied only to a substantive, rather than a merely procedural, jurisdictional challenge; thus, defendants who were neither named in motion requesting nor order granting an extension of the statute of limitations and were not served with notice of that extension could not immediately appeal, and the trial court's Rule 54(b) certification was made in error. Howze v. Hughs, 134 N.C. App. 493, 518 S.E.2d 198 (1999).

§ 1-278. Interlocutory orders reviewed on appeal from judgment.

Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment. (C.C.P., s. 313; Code, s. 562; Rev., s. 589; C.S., s. 640.)

Cross References. — As to appeals from interlocutory orders, see also G.S. 1-277.

CASE NOTES

Application of Section. — While this section provides that interlocutory orders affecting a judgment appealed from can be reviewed with the judgment, this section applies only to interlocutory orders that are not appealable. Gualtieri v. Burleson, 84 N.C. App. 650, 353 S.E.2d 652, cert. denied, 320 N.C. 168, 358 S.E.2d 50 (1987).

This section applies only to those interlocutory orders that are not immediately appealable. Charles Vernon Floyd, Jr. & Sons v. Cape Fear Farm Credit, 350 N.C. 47, 510 S.E.2d 156 (1999).

Trial court's order retaining jurisdiction to determine custody was interlocutory in nature. No substantial right of defendant was affected which could not be protected by timely appeal from trial court's ultimate disposition of the entire controversy on the merits. Walleshauser v. Walleshauser, 100 N.C. App. 594, 397 S.E.2d 371 (1990).

Preservation of Issue for Review. — Even though appellants did not specifically mention in their notice of appeal an interlocutory order requiring them to elect remedies, the issue was properly preserved for appellate review by objection at trial. Charles Vernon Floyd, Jr. & Sons v. Cape Fear Farm Credit, 350 N.C. 47, 510 S.E.2d 156 (1999).

Plaintiffs' request for appellate review of intermediate orders dismissing plaintiffs' action for "unfair and deceptive acts or practices" for failure to state a claim and granting defendants' motions for partial summary judgment was defeated under this section for failure to object to those orders. Gaunt v. Pittaway, 135 N.C. App. 442, 520 S.E.2d 603, 1999 N.C. App. LEXIS 1147 (1999).

Because defendants did not specifically reference the trial court's order of substitution in the notice of appeal, and because the record contained no indication that they had objected to the entry of that order, the appellate court lacked jurisdiction to review their contentions regarding the order. Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005), cert. denied, — U.S. —, 126 S. Ct. 2972, 165 L. Ed. 2d 954 (2006).

Order for Specific Performance Reviewable. — Grant of the counterclaim for specific performance of separation agreement was reviewable on appeal from summary judgment, even though the wife's notice of appeal did not reference the counterclaim, as she did assign error to it, it was an interlocutory order, and it indisputably involved the merits. Wells v. Wells, 132 N.C. App. 401, 512 S.E.2d 468 (1999).

Review of Intermediate Order Striking Upset Bid. — On appeal of resale of land being foreclosed, the Court of Appeals was not barred from considering the validity of the order withdrawing an upset bid and directing a resale of the foreclosed property merely because the appellants did not appeal from it within the time required by N.C.R.A.P., Rule 3, as this section permits the court, incident to an appeal from a final judgment or order, to review intermediate orders "involving the merits and necessarily affecting the judgment," and the order striking the upset bid and requiring a resale was such an order. In re Allan & Warmbold Constr. Co., 88 N.C. App. 693, 364 S.E.2d 723, cert. denied, 322 N.C. 480, 370 S.E.2d 222 (1988).

Plaintiffs' appeal was reviewable pursuant to this section, because the order dismissing their claims for unfair and deceptive practices deprived them of one of their claims, involved the merits and affected the judgment, and because the order granting defendants' motions for partial summary judgment on public figure issue involved the merits and necessarily affected the judgment. Gaunt v. Pittaway, 139 N.C. App. 778, 534 S.E.2d 660, 2000 N.C. App. LEXIS 1036 (2000), cert. denied and appeal dismissed, 353 N.C. 262, 546 S.E.2d 401 (2000), cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001), cert. denied, 534 U.S. 950, 122 S. Ct. 345, 151 L. Ed. 2d 261 (2001).

While protective order denied plaintiff access to certain evidence, it did not resolve any substantive legal issues related to his negligence claim, nor did it deny him his right to pursue his negligence claim, or to prove his negligence claim through introduction of other evidence and examination of witnesses; therefore, the protective order did not involve the merits and necessarily affect the judgment. The court lacked jurisdiction under either N.C. R. App. P. 3(d) or G.S. 1-278 to consider whether the trial court erred by granting defendants' motion for a protective order. Yorke v. Novant Health, Inc., — N.C. App. —, 666 S.E.2d 127, 2008 N.C. App. LEXIS 1620 (2008).

The trial court's order dismissing defendants, doctor and medical service providers, deprived defendant pharmacy of its claims against those other defendants, effectively rendered it solely liable on any judgment in favor of plaintiff customer, and was therefore appealable pursuant to this section. Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000).

Interlocutory Order Concerning an Administrative Summons. — Order denying a taxpayer's motion to dismiss an administrative summons requesting documents was appealable because it was an intermediate order that involved the merits and affected the final judgment in that if the motion had been granted, the trial court would not have issued the order to comply with the summons. Even if the appeal was not from a final judgment, the appeal of a discovery order asserting a statutory or a common-law privilege affected a substantial right. In re Summons Issued to Ernst & Young, LLP, 191 N.C. App. 668, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (2008).

Interlocutory Appeal from Summary Judgment. — Because the investors' theory of the insurance and securities broker's liability was that the broker was vicariously liable for the agent's and subagent's actions, many of the same factual issues applied to the claims against the broker, the agent, and the subagent and inconsistent verdicts could result from separate trials; therefore, the appellate court had jurisdiction to review the appeal of the trial court's grant of summary judgment to the broker on all the investors' claims as a substantial right was affected. Estate of Redding v. Welborn, 170 N.C. App. 324, 612 S.E.2d 664, 2005 N.C. App. LEXIS 1001 (2005).

Directed Verdict Order Reviewable. — Defendants did not dispute that plaintiff objected to the trial court's directed verdict order at trial, or that the directed verdict order was interlocutory and not immediately appealable, and the court further concluded that because the directed verdict order wholly denied plaintiff one of his theories of recovery, namely, res ipsa loquitur, the order involved the merits and necessarily affected the judgment. Therefore, the court had jurisdiction to review the trial court's directed verdict order pursuant to G.S. 1-278. Yorke v. Novant Health, Inc., — N.C. App. —, 666 S.E.2d 127, 2008 N.C. App. LEXIS 1620 (2008).

Applied in Patterson v. Durham Hosiery Mills, 214 N.C. 806, 200 S.E. 906 (1939); Goldston v. Wright, 257 N.C. 279, 125 S.E.2d 462 (1962); Inman v. Inman, 136 N.C. App. 707, 525 S.E.2d 820, 2000 N.C. App. LEXIS 136 (2000).

Cited in Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950); City of Raleigh v. Edwards, 234 N.C. 528, 67 S.E.2d 669 (1951); Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976); State ex rel. Cooper v. NCCS Loans, Inc., 174 N.C. App. 630, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005); Estate of Gainey v. S. Flooring & Acoustical Co., 184 N.C. App. 497, 646 S.E.2d 604, 2007 N.C. App. LEXIS 1468 (2007).

§ 1-279: Repealed by Session Laws 1989, c. 377, s. 1.

§ 1-279.1. Manner and time for giving notice of appeal to appellate division in civil actions and in special proceedings.

Any party entitled by law to appeal from a judgment or order rendered by a judge in superior or district court in a civil action or in a special proceeding may take appeal by giving notice of appeal within the time, in the manner, and with the effect provided in the rules of appellate procedure. (1989, c. 377, s. 2.)

CASE NOTES

***Editor's Note.** — Most of the cases below were decided under former G.S. 1-279, which was repealed by Session Laws 1989, c. 377, s. 1.*

The provisions of former § 1-279 are jurisdictional, and unless they are complied with the appellate court acquires no jurisdiction of an appeal and must dismiss it. Aycock v. Richardson, 247 N.C. 233, 100 S.E.2d 379 (1957); Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963); Teague v. Teague, 266 N.C. 320, 146 S.E.2d 87 (1966); Oliver v. Williams, 266 N.C. 601, 146 S.E.2d 648 (1966); Dunn v. North Carolina State Hwy. Comm'n, 1 N.C. App. 116, 160 S.E.2d 113 (1968); O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979); Woodworth v. Woodworth, 58

N.C. App. 237, 292 S.E.2d 774 (1982).

N.C.R.A.P., Rule 3(a) was almost identical to former G.S. 1-279(a) of this section, and both are jurisdictional. Giannitrapani v. Duke Univ., 30 N.C. App. 667, 228 S.E.2d 46 (1976).

The requirement of timely filing and service of notice of appeal is jurisdictional, and unless the requirements of former G.S. 1-279 and N.C.R.A.P., Rules 3 and 26 are met, the appeal must be dismissed. Smith v. Smith, 43 N.C. App. 338, 258 S.E.2d 833 (1979), cert. denied, 299 N.C. 122, 262 S.E.2d 6 (1980).

Failure to give timely notice of appeal in compliance with former G.S. 1-279 and N.C.R.A.P., Rule 3 is jurisdictional, and an untimely attempt to appeal must be dismissed. Booth v. Utica Mut. Ins. Co., 308 N.C. 187, 301 S.E.2d 98 (1983).

N.C.R.A.P., Rule 3(c) and subsection (c) of former G.S. 1-279 are jurisdictional. First Union Nat'l Bank v. King, 63 N.C. App. 757, 306 S.E.2d 508 (1983).

Failure to give timely notice of appeal in compliance with former G.S. 1-279 and N.C.R.A.P., Rule 3 is jurisdictional, and an untimely attempt to appeal must be dismissed. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985); L. Harvey & Son Co. v. Shivar, 83 N.C. App. 673, 351 S.E.2d 335 (1987).

The first indispensable step in appealing from a judgment or order is to give notice of appeal in the manner provided and within the time stated therein; where defendant did not take that first step, he lost his right to contest the validity of that order because the statutory requirements are jurisdictional. Gualtieri v. Burleson, 84 N.C. App. 650, 353 S.E.2d 652, cert. denied, 320 N.C. 168, 358 S.E.2d 50 (1987).

Appeal from a judgment may be taken by giving oral notice of appeal at trial, but an appeal so taken is by its nature limited to the issues dealt with in the judgment announced and cannot apply to subsequent written orders determining other issues in the same case. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

Former § 1-279 provided that notice of appeal must be given within 10 days after entry of judgment. Woodworth v. Woodworth, 58 N.C. App. 237, 292 S.E.2d 774 (1982).

Announcing of the court's decision in open court constitutes "entry" for purposes of determining when notice of appeal must be filed, even if the formal written order is not written until a later date, since G.S. 1A-1, Rule 58 provides that the rendering of judgment in open court constitutes entry of judgment for purposes of the Rules of Civil Procedure. In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982), appeal dismissed, 459 U.S. 1139, 103 S. Ct. 776, 74 L. Ed. 2d 987 (1983).

For purposes of determining when notice of appeal must be given, the court's announcement of its decision in open court constitutes entry of judgment even if a formal written order is not filed until a later date. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

Oral Notice of Appeal Held Effective. — Where written judgment did not determine any issue different from those dealt with in judgment announced in open court, defendant's oral notice of appeal, though given in open court prior to the entry of judgment, was effective to give notice of appeal to the written judgment under former G.S. 1-279(a). Morris v. Bailey, 86 N.C. App. 378, 358 S.E.2d 120 (1987).

Letter to Clerk Not Notice of Appeal. — Where defendant, challenging a divorce judgment, wrote a letter to the clerk of the court explaining her reasons for not attending the divorce proceedings and requesting that the judgment decreeing the divorce be set aside, her letter was not a written notice of appeal showing that she sought a review by the Court of Appeals, but was a motion for a new trial, and the trial court had no authority to cause an appeal to be entered for the defendant absent her request. Williford v. Williford, 51 N.C. App. 150, 275 S.E.2d 216 (1981).

Appeal to Be Dismissed Absent Timely Notice. — Under former G.S. 1-279, where the notice of appeal was dated and filed more than 10 days after the rendition of a default judgment, and no notice of appeal was served on the plaintiff, the appeal from the entry of the judgment should be dismissed because timely notice was not given or properly served. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

Where an appeal is taken more than 10 days after the "entry" of judgment and the time within which appeal can be taken is not otherwise tolled as provided in former G.S. 1-279 and N.C.R.A.P., Rule 3, the appellate court obtains no jurisdiction in the matter and the appeal must be dismissed. Brooks v. Matthews, 29 N.C. App. 614, 225 S.E.2d 159 (1976); Housing Auth. v. Truesdale, 40 N.C. App. 425, 253 S.E.2d 47 (1979); Cochrane v. Sea Gate, Inc., 42 N.C. App. 375, 256 S.E.2d 504 (1979).

Appellate court was without jurisdiction to hear a father's appeal of a termination of parental rights case under circumstances in which the father failed to satisfy the jurisdictional requirement of filing a notice of appeal and including the same in the record on appeal. In re Me.B., 181 N.C. App. 597, 640 S.E.2d 407, 2007 N.C. App. LEXIS 364 (2007).

For case holding that the filing by defendant of its motion pursuant to § 1A-1, Rules 60(b) and 52(a)(b) did not toll the running of time within which to file notice of appeal, since motions pursuant to these rules apply only to final judgments and orders and have no application to interlocutory orders, see O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Withdrawal of motion under § 1A-1, Rule 59 did not entitle defendants to 10 days from their withdrawal to file notice of appeal from judgment; to hold otherwise would thwart the tolling provision of N.C.R.A.P., Rule 3(c) and circumvent G.S. 1A-1, Rule 58, i.e., to give all interested parties a definite fixed time of a judicial determination they can point to as the time of entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Third paragraph of § 1A-1, Rule 58 held inapplicable. — Where the record affirmatively demonstrated that defendant did not give notice of appeal "within 30 days" after entry of order, the court had no jurisdiction to hear appeal; inasmuch as judge had announced his order in open court and directed counsel to prepare formal order, which the judge signed and entered on the same day, at the same session of court, the third paragraph of G.S. 1A-1, Rule 58, which states that in cases where judgment is not rendered in open court, entry of judgment shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties, had no application. Bunting v. Bunting, 100 N.C. App. 294, 395 S.E.2d 713 (1990).

Cross-notice of appeal filed by defendants on October 4, 1984, supported the trial court's finding that it was not defendants' intention to give notice of appeal at the September 1984 calendar call on their motion under G.S. 1A-1, Rule 59. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Intimation of Intent to Appeal. — It is not necessary that there should be at the time of the trial an intimation by the dissatisfied party that he desires to appeal, it being a sufficient indication of his desire at the time of the trial if he fulfills the requirements of the statute within the time prescribed by law. Russell v. Hearne, 113 N.C. 361, 18 S.E. 711 (1893).

Fact that plaintiff waived her right to appeal the order granting summary judgment to one of three defendants in no way affected her statutory right to appeal from the final judgment, since although she could have appealed the entry of summary judgment as to that defendant, she was not required to do so. Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984), cert. denied, 313 N.C. 508, 329 S.E.2d 391 (1985).

Applied in Mason v. Moore County Bd. of Comm'rs, 229 N.C. 626, 51 S.E.2d 6 (1948); Mitchell v. North Carolina, 247 F. Supp. 139 (E.D.N.C. 1964); Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971); Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975); State v. Harold, 27 N.C. App. 588, 219 S.E.2d 528 (1975); Clark v. Wallace, 27 N.C. App. 589, 219 S.E.2d 501 (1975); Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977); Ramsey v. Rudd, 49 N.C. App. 670, 272 S.E.2d 162 (1980); Byrd v. Byrd, 51 N.C. App. 707, 277 S.E.2d 472 (1981); North Carolina State Bar v. Frazier, 62 N.C. App. 172, 302 S.E.2d 648 (1983); Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984); John T. Council, Inc. v. Balfour Prods. Group, Inc., 74 N.C. App. 668, 330 S.E.2d 6 (1985); Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986); McLaurin v. Winston-Salem Southbound Ry., 87 N.C. App. 413, 361 S.E.2d 95 (1987); Patel v. Mid. S.W. Elec., 88 N.C. App. 146, 362 S.E.2d 577 (1987).

Cited in Brantley v. Jordan, 90 N.C. 25 (1884); Jones v. City of Asheville, 114 N.C. 620, 19 S.E. 631 (1894); Delafield v. Lewis Mercer Constr. Co., 115 N.C. 21, 20 S.E. 167 (1894); Houston v. Lumber Co., 136 N.C. 328, 48 S.E. 738 (1904); Fisher v. Fisher, 164 N.C. 105, 80 S.E. 395 (1913); Seaboard Air Line Ry. v. Brunswick County, 198 N.C. 549, 152 S.E. 627 (1930); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950); Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961); State v. Ferebee, 266 N.C. 606, 146 S.E.2d 666 (1966); Fox v. North Carolina, 266 F. Supp. 19 (E.D.N.C. 1967); Hagins v. Redevelopment Comm'n, 1 N.C. App. 40, 159 S.E.2d 584 (1968); Hagins v. Aero Mayflower Transit Co., 1 N.C. App. 51, 159 S.E.2d 592 (1968); Summey v. McDowell, 4 N.C. App. 62, 165 S.E.2d 768 (1969); Partin v. Carolina Power & Light Co., 40 N.C. App. 630, 253 S.E.2d 605 (1979); Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); Rokes v. Rokes, 55 N.C. App. 397, 285 S.E.2d 306 (1982); Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Prevatte v. Prevatte, 74 N.C. App. 582, 329 S.E.2d 413 (1985).

§ 1-280: Repealed by Session Laws 1975, c. 391, s. 4.

Cross References. — For the North Carolina Rules of Appellate Procedure, see the Annotated Rules of North Carolina.

§ 1-281. Appeals from judgments not in session.

When appeals are taken from judgments of the clerk or judge not made in session, the clerk is authorized to make any and all necessary orders for the perfecting of such appeals. (Ex. Sess. 1921, c. 92, s. 19a; C.S., s. 642(a); 1971, c. 381, s. 12.)

CASE NOTES

Cited in Little v. Sheets, 239 N.C. 430, 80 S.E.2d 44 (1954).

§ 1-282: Repealed by Session Laws 1975, c. 391, s. 7.

Cross References. — For the North Carolina Rules of Appellate Procedure, see the Annotated Rules of North Carolina.

§ 1-283. Trial judge empowered to settle record on appeal; effect of leaving office or of disability.

Except as provided in this section, only the judge of superior court or of district court from whose order or judgment an appeal has been taken is empowered to settle the record on appeal when judicial settlement is required. A judge retains power to settle a record on appeal notwithstanding he has resigned or retired or his term of office has expired without reappointment or reelection since entry of the judgment or order. Proceedings for judicial settlement when the judge empowered by this section to settle the record on appeal is unavailable for the purpose by reason of death, mental or physical incapacity, or absence from the State shall be as provided by the rules of appellate procedure. (C.C.P., s. 301; Code, s. 550; 1889, c. 161; Rev., s. 591; 1907, c. 312; C.S., s. 644; 1971, c. 381, s. 12; 1975, c. 391, s. 8.)

Legal Periodicals. — For article, “Functus Officio: Authority of the Trial Court after Notice of Appeal,” see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

For cases involving this section as it read prior to the 1975 amendment, which rewrote the section, see Whitesides v. Williams, 66 N.C. 141 (1872); Kirkman v. Dixon, 66 N.C. 406 (1872); Isler v. Haddock, 72 N.C. 119 (1875); Adams v. Reeves, 74 N.C. 106 (1876); Simonton v. Simonton, 80 N.C. 7 (1879); McDaniel v. King, 89 N.C. 29 (1883); Mott v. Ramsay, 91 N.C. 249 (1884); Owens v. Phelps, 92 N.C. 231 (1885); McCoy v. Lassiter, 94 N.C. 131 (1886); State v. Gooch, 94 N.C. 982 (1886); Board of Comm’rs v. Old Dominion S.S. Co., 98 N.C. 163, 3 S.E. 505 (1887); Walton v. McKesson, 101 N.C. 428, 7 S.E. 566 (1888); Rodman v. Harvey, 102 N.C. 1, 8 S.E. 888 (1889); Walker v. Scott, 102 N.C. 487, 9 S.E. 488 (1889); Walker v. Scott, 106 N.C. 56, 11 S.E. 364 (1890); Boyer v. Teague, 106 N.C. 571, 11 S.E. 330 (1890); Booth v. Ratcliffe, 107 N.C. 6, 12 S.E. 112 (1890); Peebles v. Braswell, 107 N.C. 68, 12 S.E. 44 (1890); State v. Williams, 109 N.C. 846, 13 S.E. 880 (1891); Arrington v. Arrington, 114 N.C. 115, 19 S.E. 145 (1894); Ritter v. Grimm, 114 N.C. 373, 19 S.E. 239 (1894); McDaniel v. Scurlock, 115 N.C. 295, 20 S.E. 451 (1894); Heath v. Lancaster, 116 N.C. 69, 20 S.E. 962 (1895); State v. King, 119 N.C. 910, 26 S.E. 261 (1896); Stroud v. Western Union Tel. Co., 133 N.C. 253, 45 S.E. 592 (1903); Blair v. Coakley, 136 N.C. 405, 48 S.E. 804 (1904); Cameron v. Power Co., 137 N.C. 99, 49 S.E. 76 (1904); Barber v. Justice, 138 N.C. 20, 50 S.E. 445 (1905); Slocumb v. Construction Co., 142 N.C. 349, 55 S.E. 196 (1906); Gaither v. Carpenter, 143 N.C. 240, 55 S.E. 625 (1906); Board of Water & Light Comm’rs v. Chapman, 151 N.C. 327, 66 S.E. 221 (1909); Chauncey v. Chauncey, 153 N.C. 12, 68 S.E. 906 (1910);

Burlingham v. Canady, 156 N.C. 177, 72 S.E. 324 (1911); Queen v. Snowbird Valley R.R., 161 N.C. 217, 76 S.E. 682 (1912); Green v. Dunn, 162 N.C. 340, 78 S.E. 211 (1913); Waynesville Transp. Co. v. Waynesville Lumber Co., 168 N.C. 60, 84 S.E. 54 (1915); Turner v. Southern Gas Imp. Co., 171 N.C. 750, 87 S.E. 970 (1916); Thompson v. Williams, 175 N.C. 696, 95 S.E. 100 (1918); Ingram v. Yadkin River Power Co., 181 N.C. 359, 107 S.E. 209 (1921); State v. Humphrey, 186 N.C. 533, 120 S.E. 85 (1923); King v. Taylor, 188 N.C. 450, 124 S.E. 751 (1924); Waller v. Dudley, 193 N.C. 749, 138 S.E. 128 (1927); State v. Angel, 194 N.C. 715, 140 S.E. 727 (1927); Metropolitan Life Ins. Co. v. Boddie, 196 N.C. 666, 146 S.E. 598 (1929); Penland v. French Broad Hosp., 199 N.C. 314, 154 S.E. 406 (1930); McMahan v. Southern Ry., 203 N.C. 805, 167 S.E. 225 (1933); Weaver v. Hampton, 206 N.C. 741, 175 S.E. 110 (1934); Messick v. Hickory, 211 N.C. 531, 191 S.E. 43 (1937); State v. Parnell, 214 N.C. 467, 199 S.E. 601 (1938); White Way Laundry, Inc. v. Underwood, 220 N.C. 152, 16 S.E.2d 703 (1941); Chozen Confections, Inc. v. Johnson, 220 N.C. 432, 17 S.E.2d 505 (1941); Lindsay v. Brawley, 226 N.C. 468, 38 S.E.2d 528 (1946); State v. Cannon, 227 N.C. 336, 42 S.E.2d 343 (1947); Hoke v. Atlantic Greyhound Corp., 227 N.C. 374, 42 S.E.2d 407 (1947); Russos v. Bailey, 228 N.C. 783, 47 S.E.2d 22 (1948); Western N.C. Conference v. Talley, 229 N.C. 1, 47 S.E.2d 467 (1948); State v. Johnson, 230 N.C. 743, 55 S.E.2d 690 (1949); Hall v. Hall, 235 N.C. 711, 71 S.E.2d 471 (1952); Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953); Conrad v. Conrad, 252 N.C. 412, 113 S.E.2d 912 (1960); Wiggins v. Tripp, 253 N.C. 171, 116 S.E.2d 355 (1960); Wagner v. Eudy, 257 N.C. 199, 125 S.E.2d 598 (1962); Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963); American Floor Mach. Co. v. Dixon, 260 N.C. 732, 133 S.E.2d 659 (1963); State v. Stubbs, 265 N.C. 420, 144 S.E.2d 262 (1965); State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968); State v. Waddell, 3 N.C. App. 58, 164 S.E.2d 75 (1968).

Settlement of record. — Trial court's settlement of the record on appeal was final and could not be reviewed by the appellate court. Accordingly, the appellant's request that the appellate court not consider his deposition testimony, which appeared in the record even though it was not relied upon by the trial court, was denied. North Carolina Farm Bur. Mut. Ins. Co. v. Allen, 146 N.C. App. 539, 553 S.E.2d 420, 2001 N.C. App. LEXIS 988 (2001).

Applied in State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973).

Cited in Lewter v. Herndon, 13 N.C. App. 242, 184 S.E.2d 926 (1971); Von Hagel v. Blue Cross & Blue Shield, 91 N.C. App. 58, 370 S.E.2d 695 (1988).

§ 1-284: Repealed by Session Laws 1975, c. 391, s. 9.

Cross References. — For the North Carolina Rules of Civil Procedure, see G.S. 1A-1.

§ 1-285. Undertaking on appeal.

(a) To render an appeal effectual for any purpose in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in the sum of two hundred fifty dollars ($250.00), or any lesser sum as might be adjudged by the court, to the effect that the appellant will pay all costs awarded against him on the appeal, and this undertaking must be filed with the clerk with whom the judgment or order was filed; or such sum must be deposited with the appropriate clerk of the appellate division in compliance with the North Carolina Rules of Appellate Procedure.

(b) The provisions of this section do not apply to the State of North Carolina, a city or a county or a local board of education, an officer thereof in his official capacity, or an agency thereof. (C.C.P., ss. 303, 312; 1871-2, c. 31; Code, ss. 552, 561; 1889, c. 135, s. 2; Rev., ss. 593, 595; C.S., s. 646; 1969, c. 44, s. 5; 1975, c. 391, s. 1; 1985, c. 468; 1987, c. 462, s. 2; 1995 (Reg. Sess., 1996), c. 742, s. 42.3.)

Cross References. — As to appeals in forma pauperis, see G.S. 1-288. As to undertaking to stay execution on a money judgment, see G.S. 1-289 et seq. As to costs on appeal, see G.S. 6-33. For the North Carolina Rules of Appellate Procedure, see the Annotated Rules of North Carolina.

CASE NOTES

This section has no application to appeals from a justice of the peace to the superior court. Massenburg v. Fogg, 256 N.C. 703, 124 S.E.2d 868 (1962).

Bond Requirements Are Jurisdictional. — Giving bond on appeal or the granting of leave to appeal without bond are jurisdictional, and unless the statute is complied with, the appeal will be dismissed. Smith v. Reeves, 85 N.C. 594 (1881); Honeycutt v. Watkins, 151 N.C. 652, 65 S.E. 762 (1909). See also, Brown v. S.H. Kress & Co., 207 N.C. 722, 178 S.E. 248 (1935).

Necessity of Security to Perfect Appeal. — An appeal bond or undertaking is necessary to the perfection of an appeal. Hinton v. Pritchard, 107 N.C. 128, 12 S.E. 242 (1890), appeal dismissed, 108 N.C. 412, 12 S.E.2d 838 (1891); Ex parte Berry, 107 N.C. 326, 12 S.E. 125 (1890).

Secured Performance Bond Not Condition Precedent to Appeal. — An appeal must be dismissed when a party does not provide the appeal bond ordered by the trial judge. However, posting a "secured performance bond" is not a condition precedent to appeal under statute or appellate rules. Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987), rev'd on other grounds, 322 N.C. 396, 368 S.E.2d 595 (1988).

The appellate court has no power to order a certiorari without requiring bond and security thereon. Weber v. Taylor, 66 N.C. 412 (1872). See also, Walsh v. Burleson, 154 N.C. 174, 69 S.E. 680 (1910).

Effect of Failure to Give Undertaking. — Absent an affidavit for leave to appeal without bond, an appeal must be dismissed where a party neither gives the appeal bond nor makes a deposit in lieu thereof. Lunsford v. Alexander, 162 N.C. 528, 78 S.E. 275 (1913).

Duty of Appellant to Provide Bond. — Providing an appeal bond is the duty of the appellant and not of his attorney, and when the latter is authorized to act therein, he does so as the agent of the party appealing, who is, in the relation of principal, responsible for his laches. Lunsford v. Alexander, 162 N.C. 528, 78 S.E. 275 (1913).

Trial Court Has No Jurisdiction After Perfection of Appeal. — When an appeal is perfected, the trial court no longer has any jurisdiction of the cause, and he cannot require an additional bond. McRae v. Board of Comm'rs, 74 N.C. 415 (1876).

New Security After Remand. — After a cause has been remanded because the record is imperfect, the trial court may order that an appeal bond be filed to perfect the appeal, an undertaking previously filed having been defective. Spence v. Tapscott, 93 N.C. 250 (1885).

Deposit as Security. — Under this section, the clerk may accept a deposit of such sum of money as may be ordered by the court in lieu of an undertaking on appeal. Graves v. Hines, 106 N.C. 323, 11 S.E. 362 (1890); State v. Parish, 151 N.C. 659, 65 S.E. 762 (1909).

No Substitute for Undertaking or Deposit. — The clerk has no authority to accept any substitute for the undertaking or deposit provided for by the statute. Eshon v. Board of Comm'rs, 95 N.C. 75 (1886).

Waiver of Timely Filing. — The necessity of filing the appeal bond within the prescribed time may be waived by agreement. Wade v. City of Newbern, 72 N.C. 498 (1875).

Agreement to Waiver Must Appear of Record. — No agreement of parties waiving the necessity of timely filing of an appeal bond will be respected by the appellate court unless it appears on the record. Wade v. City of Newbern, 72 N.C. 498 (1875).

Verbal agreements to waive the statutory requirements will not be regarded. McCanless v. Reynolds, 91 N.C. 244 (1884). See also, Skinner v. Bland, 91 N.C. 1 (1884).

Effect of Acceptance of Bond in Court. — Where the appellant was in court and the bond was offered and accepted without objection, and this was noted in the record, this was construed to be a sufficient waiver in writing under the statute. Howerton v. Henderson, 86 N.C. 718 (1882); Harshaw v. McDowell, 89 N.C. 181 (1883).

Effect of Delay in Making Objection. — Where the absence of a bond on appeal was not objected to for two years, and in the meantime the cause was continued, and witnesses were summoned, respondent would be deemed to have waived objection to the defect. Arrington v. Smith, 26 N.C. 59 (1843).

An appeal bond made payable to the State is void. The State will not become a trustee for a citizen in the pursuit of his personal rights, except in cases specially provided by law, such as guardian bonds, etc. Dorsey v. Raleigh & G.R.R., 91 N.C. 201 (1884).

Liability of Surety Misinformed Concerning Legal Effect of Bond. — One who has signed a bond given to stay execution pending an appeal cannot defend on the ground that he was misinformed concerning the legal effect of the bond. McMinn v. Patton, 92 N.C. 371 (1885). See also, Oakley v. Van Noppen, 100 N.C. 287, 5 S.E. 1 (1888).

An appeal bond given to secure "all costs" means appellee's costs. Morris v. Morris, 92 N.C. 142 (1885).

And Sureties Are Not Liable for Appellant's Costs. — When there is a judgment in the appellate court in favor of the appellant, his sureties are not liable on their undertaking for his costs, when such costs cannot be made out of the appellee or their principal. Clerk's Office v. Huffsteller, 67 N.C. 449 (1872). See also, Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

Effect of Party Acting as Surety. — An undertaking on appeal may be good even though it is signed by one of the parties defendant as surety, if the record shows that he is not affected by the appeal. Syme v. Badger, 91 N.C. 272 (1884).

Appellee as Obligee. — An undertaking on appeal, though not so expressed, is by implication taken to be made with the appellee. Clerk's Office v. Huffsteller, 67 N.C. 449 (1872).

The undertaking for costs and damages on appeal operates in favor of the respondent, although he is not required to be named in it as a party. Clerk's Office v. Huffsteller, 67 N.C. 449 (1872).

The signature of the appellant is not essential to a bond or undertaking on appeal or error. Cohoon v. Morton, 49 N.C. 256 (1857); Walker v. Williams, 88 N.C. 7 (1883).

Omission of Obligor's Name. — The omission of the name of an obligor in the body of an appeal bond or undertaking is no substantial objection to it. Chamblee v. Baker, 95 N.C. 98 (1886).

Surety's Signature by Mark. — An appeal bond may be executed by the surety making his mark. State v. Byrd, 93 N.C. 624 (1885).

A misstatement in the appeal bond of the date of the judgment or order appealed from is not a fatal error if the judgment or order is otherwise correctly and sufficiently described. Lackey v. Pearson, 101 N.C. 651, 8 S.E. 121 (1888).

A magistrate who has rendered a judgment on a warrant is not a fit person to sign the name of another as obligor on the appeal bond. Weaver v. Parish, 8 N.C. 319 (1821).

Where defendant appeals, plaintiff cannot be principal obligor on appeal bond. Speed v. Harris, 4 N.C. 317 (1816).

Cited in Cape Fear & Deep River Nav. Co. v. Costen, 63 N.C. 264 (1869); Robeson v. Lewis, 64 N.C. 734 (1870); Wade v. City of Newbern, 72 N.C. 498 (1875); Sever v. McLaughlin, 82 N.C. 332 (1880); Smith v. Reeves, 85 N.C. 594 (1881); Applewhite v. Fort, 85 N.C. 596 (1881); McCanless v. Reynolds, 90 N.C. 648 (1884); Worthy v. Brady, 91 N.C. 265 (1884); Boyden v. Williams, 92 N.C. 546 (1885); Chamblee v. Baker, 95 N.C. 98 (1886); Gwathney v. Savage, 101 N.C. 103, 7 S.E. 661 (1888); Harrison v. Hoff, 102 N.C. 25, 8 S.E. 887 (1889); Jones v. Wilson, 103 N.C. 13, 9 S.E. 580 (1889); Howerton v. Sexton, 104 N.C. 75, 10 S.E. 148 (1889); Graves v. Hines, 106 N.C. 323, 11 S.E. 362 (1890); Jones v. City of Asheville, 114 N.C. 620, 19 S.E. 631 (1894); In re Snow's Will, 128 N.C. 100, 38 S.E. 295 (1901); Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953); Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323 (1984).

§ 1-286. Justification of sureties.

The written undertaking on appeal must be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. The respondent may except to the sufficiency of the sureties within ten days after the notice of appeal; and unless they or other sureties justify within the ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification must be upon a notice of not less than five days. (C.C.P., s. 310; Code, s. 560; 1887, c. 121; Rev., s. 594; C.S., s. 647; 1995 (Reg. Sess., 1996), c. 742, s. 42.4.)

CASE NOTES

Purpose of Section. — The purpose of this section is to protect the appellee in respect to costs. He has a substantial interest in the undertaking, upon appeal, and it cannot be dispensed with without his consent in writing unless a sum of money is deposited with the clerk by order of the court in lieu of the undertaking. The language is plain and mandatory and very little is left to construction. The appellee has the substantial right under the statute to insist upon a substantial compliance with it in all respects. State v. Wagner, 91 N.C. 521 (1884).

Necessity for Justification. — An appeal bond is of no effect unless it is accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. Greenlee v. McCelvey, 92 N.C. 530 (1885); Singer Mfg. Co. v. Barrett, 94 N.C. 219 (1886).

An appeal will be dismissed when the surety on the undertaking does not justify in double the amount thereof. McCanless v. Reynolds, 91 N.C. 244 (1884); State v. Roper, 94 N.C. 859 (1886).

Justification Must Be by Surety. — The justification of a surety to an undertaking on appeal must be made by the surety himself. The affidavit of another as to the pecuniary reputation of the surety will not answer the demands of the law. Morphew v. Tatem, 89 N.C. 183 (1883).

Endorsement of Clerk Not a Substitute for Justification. — An endorsement on the back of an appeal bond by the clerk, "The within bond is good," is not a sufficient compliance with the statutory requirement that the bond must be accompanied by an affidavit of the sureties showing their justification. Bryson v. Lucas, 85 N.C. 397 (1881).

When Justification Is Sufficient. — The justification of a surety on an appeal bond is sufficient under this section where it states that the surety is worth double the amount therein specified, without stating that it is above his liabilities and homestead and exemption allowed by law. Witt v. Long, 93 N.C. 388 (1885).

Failure to Show Proper Amount. — A justification of two sureties that each is worth the amount of the bond is not a sufficient compliance with this section. Anthony v. Carter, 91 N.C. 229 (1884).

Justification May Be Waived. — While this section seems to require that bond shall be justified in the first instance by at least one of the sureties swearing that he is worth double the amount therein specified, a failure to do this does not necessarily void the bond. It is a defect which may be cured by waiver. McMillan v. Baker, 92 N.C. 110 (1885); Becton v. Dunn, 137 N.C. 559, 50 S.E. 289 (1905).

As to necessity of written waiver, see Lytle v. Lytle, 90 N.C. 647 (1884).

Where approval of unjustified bond is the act of the clerk, there is no waiver, unless the appellee is present or afterwards assents. Gruber v. Washington & J.R.R., 92 N.C. 1 (1885).

Acceptance in court of an appeal bond not justified is a waiver of justification, and a subsequent motion to dismiss the appeal on the ground that the bond is not justified cannot be sustained. Jones v. Potter, 89 N.C. 220 (1883).

Waiver Held Sufficient. — Where the record stated "Plaintiff appealed. Notice waived. Bond filed," and was signed by the judge, it was a sufficient waiver in writing of a formal justification of the bond, and the appeal would not be dismissed because the sureties did not justify in double the amount. Singer Mfg. Co. v. Barrett, 94 N.C. 219 (1886).

An acceptance by the appellee of the surety tendered on an appeal bond constituted a waiver of the justification required by statute. Greenlee v. McCelvey, 92 N.C. 530 (1885).

When it appeared by the case settled that the appellees were present when the appeal bond was taken and made no objection to the sufficiency of the sureties, such objection would be deemed waived. Gruber v. Washington & J.R.R., 92 N.C. 1 (1885); Moring v. Little, 95 N.C. 87 (1886).

An entry on the record, "Bond fixed at $25; filed and approved," was held a sufficient waiver in writing. Hancock v. Bramlett, 85 N.C. 393 (1881). See also, State v. Wagner, 91 N.C. 521 (1884).

Cited in Howerton v. Henderson, 86 N.C. 718 (1882); McMillan v. Nye, 90 N.C. 11 (1884); Gruber v. Washington & J.R.R., 92 N.C. 1 (1885); Armstrong v. Armstrong, 85 N.C. App. 93, 354 S.E.2d 350 (1987).

§ 1-287: Repealed by Session Laws 1975, c. 391, s. 2.

Cross References. — For the North Carolina Rules of Appellate Procedure, see the Annotated Rules of North Carolina.

§ 1-287.1: Repealed by Session Laws 1975, c. 391, s. 10.

Cross References. — For the North Carolina Rules of Appellate Procedure, see the Annotated Rules of North Carolina.

§ 1-288. Appeals by indigents; clerk's fees.

When any party to a civil action tried and determined in the superior or district court at the time of trial or special proceeding desires an appeal from the judgment rendered in the action to the Appellate Division, and is unable, by reason of poverty, to make the deposit or to give the security required by law for the appeal, it shall be the duty of the judge or clerk of said court to make an order allowing the party to appeal from the judgment to the Appellate Division as in other cases of appeal, without giving security therefor. The party desiring to appeal from the judgment or order in a civil action or special proceeding shall, within 30 days after the entry of the judgment or order, make affidavit that he or she is unable by reason of poverty to give the security required by law. Nothing contained in this section deprives the clerk of the superior court of the right to demand the fees for the certificate and seal as now allowed by law in such cases. Provided, that where the judge or the clerk has made an order allowing the appellant to appeal as an indigent and the appeal has been filed in the Appellate Division, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission. (1873-4, c. 60; Code, s. 553; 1889, c. 161; Rev., s. 597; 1907, c. 878; C.S., s. 649; 1937, c. 89; 1951, c. 837, s. 7; 1969, c. 44, s. 8; 1971, c. 268, s. 12; 1991, c. 563, s. 1; 1993, c. 435, s. 3; 1995, c. 536, s. 1.)

Legal Periodicals. — For comment on access of indigents to the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

CASE NOTES

Editor's Note. — *Many of the cases below were decided under this section as it read prior to the 1993 amendment, which formerly provided for appeals as a pauper.*

Purpose of Section. — The statutory provision for appeals in forma pauperis is designed to preserve the right of appeal for those who, by reason of their poverty, are unable to make a reasonable deposit or give security for the payment of costs incurred on appeal. It is not to be used as a subterfuge to escape payment of costs which otherwise might be taxed against the appellant. Perry v. Perry, 230 N.C. 515, 53 S.E.2d 457 (1949).

Section Not Applicable in Termination of Parental Rights Proceedings. — In a termination of parental rights action, G.S. 1-288 did not control the father's right to appointed counsel because G.S. 7A-450 dealt specifically with the determination of indigency of a termination of parental rights respondent seeking appointed counsel, and the more specific statute controlled. In re D.Q.W., 167 N.C. App. 38, 604 S.E.2d 675, 2004 N.C. App. LEXIS 2077 (2004).

This section is applicable to appeals in juvenile proceedings tried in the district court. Compliance with its terms is necessary to entitle juveniles to an order allowing them to appeal in forma pauperis. The requirements are mandatory and must be observed. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1970).

Appeals in forma pauperis from juvenile actions tried in district court are governed by the provisions of this section, the requirements of which are mandatory and must be observed. Failure to comply with these requirements deprives the appellate court of any jurisdiction. In re Shields, 68 N.C. App. 561, 315 S.E.2d 797 (1984).

The requirements of this section are mandatory and jurisdictional, and unless this section is complied with the appellate court will take no cognizance of a case, except to dismiss it. Clark v. Clark, 225 N.C. 687, 36 S.E.2d 261 (1945); Dobson v. Johnson, 237 N.C. 275, 74 S.E.2d 652 (1953); Anderson v. Worthington, 238 N.C. 577, 78 S.E.2d 333 (1953).

The requirements of this section are mandatory, not directory, and a failure to comply with the requirements deprives the appellate court of any appellate jurisdiction. Williams v. Tillman, 229 N.C. 434, 50 S.E.2d 33 (1948); Dobson v. Johnson, 237 N.C. 275, 74 S.E.2d 652 (1953); Prevatte v. Prevatte, 239 N.C. 120, 79 S.E.2d 264 (1953).

Where a party to a civil action which has been tried in the superior court desires to appeal from a judgment rendered at such trial to the appellate court without giving security, he must comply strictly with the provisions of this section, which are mandatory. McIntire v. McIntire, 203 N.C. 631, 166 S.E. 732 (1932).

The provisions of this section are mandatory and jurisdictional, and the purported appeal is subject to dismissal where affidavits are not filed within 10 days from the expiration of the session of court, as required by this section. Department of Social Servs. v. Johnson, 70 N.C. App. 383, 320 S.E.2d 301 (1984).

The requirement of this section that motions to appeal in forma pauperis be made at the latest 10 days after the expiration of the session at which judgment is rendered is mandatory. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

Discretion of Court. — If a defendant against whom a magistrate has rendered a judgment may appeal as a pauper it is within the discretion of the judge as to whether it shall be allowed. Atlantic Ins. & Realty Co. v. Davidson, 82 N.C. App. 251, 346 S.E.2d 218 (1986), rev'd on other grounds, 320 N.C. 159, 357 S.E.2d 668 (1987).

District court did not abuse its discretion by not allowing petitioner to appeal as a pauper when her affidavit showed that she owned a home worth $27,150. Atlantic Ins. & Realty Co. v. Davidson, 82 N.C. App. 251, 346 S.E.2d 218 (1986).

Trial de Novo of Small Claims Action. — Plaintiff or defendant may petition to appear in forma pauperis in the trial de novo of cases appealed to the district court judge from judgments of a magistrate in small claims actions. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

Ownership of House. — District judge erred in entering order denying petition to appear in forma pauperis of defendant who owned a home valued at $27,150 and other unencumbered personal property in view of abundant evidence as to defendant's age, health, income, living expenses, inability to work or borrow, indebtedness and unreasonable of selling her house. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 357 S.E.2d 668 (1987).

Application May Be Made to Either Trial Judge or Clerk. — Under this section, the party aggrieved by the judgment of the superior court may apply to either the trial judge or the clerk of the superior court for leave to appeal to the appellate division in forma pauperis. Anderson v. Worthington, 238 N.C. 577, 78 S.E.2d 333 (1953).

Necessity of Obtaining Order Allowing Appeal. — To appeal as a pauper, the statutory leave must be obtained, and the mere leave to sue as a pauper is not sufficient. Queen v. Snowbird Valley R.R., 161 N.C. 217, 76 S.E. 682 (1912).

Failure to Obtain Order Allowing Appeal. — Where the judge wrote on the judgment that plaintiff would be allowed to appeal in forma pauperis upon compliance with this section, but plaintiff obtained no order allowing appeal in forma pauperis after the filing of an affidavit of poverty subsequent to the term, the appeal would be dismissed for failure to comply with the mandatory provisions of this section. Prevatte v. Prevatte, 239 N.C. 120, 79 S.E.2d 264 (1953).

Order Must Be Obtained Within Statutory Time. — An order allowing an appeal in forma pauperis, entered by the clerk after the expiration of the statutory time, was beyond the clerk's authority, and such appeal would be dismissed, the provisions of this section being mandatory and not directory. Powell v. Moore, 204 N.C. 654, 169 S.E. 281 (1933); Franklin v. Gentry, 222 N.C. 41, 21 S.E.2d 828 (1942).

Where application to the clerk of the superior court, supported by affidavit and certificate, for leave to appeal in forma pauperis, was not made until more than 10 days after expiration of the term of court at which the judgment was rendered (now 30 days after entry of the judgment or order), the appeal would be dismissed, the requirements of this section being mandatory and jurisdictional. Anderson v. Worthington, 238 N.C. 577, 78 S.E.2d 333 (1953).

Trial court did not abuse its discretion in denying an injured party's motion to proceed in forma pauperis on appeal under G.S. 1-288, as the injured party's motion was filed more than 30 days after the entry of judgment. Griffis v. Lazarovich, 164 N.C. App. 329, 595 S.E.2d 797, 2004 N.C. App. LEXIS 821 (2004).

The late filing of appeal entries had no bearing on the question of this section's requirement that a motion to appeal in forma pauperis be made within 10 days after the expiration of the session at which judgment is rendered (now 30 days after entry of the judgment or order); appeal entries are simply a convenient means of providing a record entry of the fact that an appeal has been taken, and do not constitute the taking of the appeal itself. In re Caldwell, 75 N.C. App. 299, 330 S.E.2d 513 (1985).

Necessity of Affidavit. — In pauper appeals it is required by this section that appellant file the statutory affidavit in order to confer jurisdiction on the appellate court, and a provision in the judgment allowing plaintiff to appeal in forma pauperis does not relieve plaintiff of the necessity of filing the jurisdictional affidavit. Brown v. S.H. Kress & Co., 207 N.C. 722, 178 S.E. 248 (1935).

Where the order allowing the appeal in forma pauperis is not supported by the statutory affidavit, there can be no authority for granting the appeal in forma pauperis, and in such a case the appellate court will acquire no jurisdiction and can take no cognizance of the case except to dismiss it from the docket. Williams v. Tillman, 229 N.C. 434, 50 S.E.2d 33 (1948). See also, Gilmore v. Imperial Life Ins. Co., 214 N.C. 674, 200 S.E. 407 (1939).

Statement of Attorney. — On an appeal in forma pauperis, an affidavit not containing the averment that appellant is advised by counsel that there is error in matter of law in the decision of the superior court is fatally defective. Russell v. Hearne, 113 N.C. 361, 18 S.E. 711 (1893); Honeycutt v. Watkins, 151 N.C. 652, 65 S.E. 762 (1909). See also, Hanna v. Timberlake, 203 N.C. 556, 166 S.E. 733 (1932);

Lupton v. Hawkins, 210 N.C. 658, 188 S.E. 110 (1936).

Applicability of Proviso Permitting Correction of Affidavit or Certificate. — The proviso permitting corrections of errors or omissions in the affidavit or certificate of counsel at any time prior to the hearing of the argument of the case on appeal applies only to this section pertaining to appeals in civil actions. State v. Mitchell, 221 N.C. 460, 20 S.E.2d 292 (1942).

Untimely Filing of Affidavit or Certificate Not Permitted. — The proviso at the end of this section does not permit the filing of an affidavit or certificate of counsel when no such certificate or affidavit was filed within the time prescribed by this section. Clark v. Clark, 225 N.C. 687, 36 S.E.2d 261 (1945).

An affidavit which is defective in that it fails to aver that appellant is advised that there is error of law in the judgment may not be cured by an additional affidavit filed after the expiration of the time prescribed by the statute, or filed after the date for docketing the appeal. Berwer v. Union Cent. Life Ins. Co., 210 N.C. 814, 188 S.E. 618 (1936).

Effect of Order Allowing Appeal. — An order allowing a party to appeal in forma pauperis dispenses with the security for costs, but does not operate to stay further proceedings upon the judgment appealed from. Leach v. Jones, 86 N.C. 404 (1882).

Duty of Appellant to Pay for Transcript. — An order granted under this section, permitting an appeal without giving bond or making a deposit, does not relieve the appellant in civil actions from the payment of the costs of the transcript in advance. Martin v. Chasteen, 75 N.C. 96 (1876); Speller v. Speller, 119 N.C. 356, 26 S.E. 160 (1896).

Proceeding as a pauper under this section may be a great deal more expensive and burdensome than proceeding as a prepaid appellant. Moreover, a prepaid appellant is free to urge upon the court a change in the law, a position apparently not open to an indigent proceeding under this section. Ganey v. Barefoot, 749 F.2d 1124 (4th Cir. 1984), cert. denied, 472 U.S. 1019, 105 S. Ct. 3484, 87 L. Ed. 2d 619 (1985).

Applied in Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984).

Cited in Mason v. Osgood, 71 N.C. 212 (1874); Russell v. Hearne, 113 N.C. 361, 18 S.E. 711 (1893); Skipper v. Kingsdale Lumber Co., 158 N.C. 322, 74 S.E. 342 (1912); Richardson v. Cooke, 238 N.C. 449, 78 S.E.2d 208 (1953); North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976); In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

§ 1-289. Undertaking to stay execution on money judgment.

(a) If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal, except as provided in subsection (b) of this section. Whenever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given. The court in which the action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In a case where, by this section, the money is to be deposited with an officer, a judge of the court, upon the application of either party, may, at any time before the deposit is made, order the money deposited in court instead of with the officer; and a deposit made pursuant to such order is of the same effect as if made with the officer. The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

(b) If the appellee in a civil action brought under any legal theory obtains a judgment directing the payment or expenditure of money in the amount of twenty five million dollars ($25,000,000) or more, and the appellant seeks a stay of execution of the judgment within the period of time during which the appellant has the right to pursue appellate review, including discretionary review and certiorari, the amount of the undertaking that the appellant is required to execute to stay execution of the judgment during the entire period of the appeal shall be twenty five million dollars ($25,000,000).

(c) If the appellee proves by a preponderance of the evidence that the appellant for whom the undertaking has been limited under subsection (b) of this section is, for the purpose of evading the judgment, (i) dissipating its assets, (ii) secreting its assets, or (iii) diverting its assets outside the jurisdiction of the courts of North Carolina or the federal courts of the United States other than in the ordinary course of business, then the limitation in subsection (b) of this section shall not apply and the appellant shall be required to make an undertaking in the full amount otherwise required by this section. (C.C.P., ss. 304, 311; Code, s. 554; Rev., s. 598; C.S., s. 650; 2000, Ex. Sess., c. 1, s. 2; 2003-19, s. 3.)

Cross References. — As to stay of proceedings to enforce a judgment, see G.S. 1A-1, Rule 62.

CASE NOTES

Purpose. — Since the primary purpose of a bond is to provide a source of funds to be applied to the satisfaction of a valid judgment, as a matter of public policy, a party is not permitted to post a cash bond to stay execution of a money judgment and then avoid forfeiture of the bond after default by claiming debtor's exemptions. Barrett v. Barrett, 122 N.C. App. 264, 468 S.E.2d 264 (1996).

The statute does not require an appellant to post a bond; rather, it gives an appellant the option to stay the execution of a judgment by posting a bond. Haker-Volkening v. Haker, 143 N.C. App. 688, 547 S.E.2d 127, 2001 N.C. App. LEXIS 343 (2001).

Applicability of Section to Alimony Order. — This section is applicable only in cases involving a "judgment directing the payment of money," and the courts have generally held that an order requiring the payment of alimony is a "judgment directing the payment of money." Faught v. Faught, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

Portions of a judgment requiring a defendant to pay alimony and counsel fees constituted a "judgment directing the payment of money" within the meaning of this section, and the court had authority to require the defendant to post a bond in order to stay execution pending appeal of the judgment; however, the court did not have authority under this section to dismiss the defendant's appeal for failure to post the required bond, but had authority only to dissolve any stay already issued. Faught v. Faught, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

When husband elected to deposit cash bond in lieu of surety bond to stay the execution of a judgment against him for spousal support and breach of separation agreement, husband waived any exemption to which he otherwise may have been entitled. Barrett v. Barrett, 122 N.C. App. 264, 468 S.E.2d 264 (1996).

Child Support Order. — Trial court did not err when it ordered a father to pay a bond in the amount of $2,000 toward his alleged child support arrearage, because an order for child support was a money judgment for which a trial court had authority to order a bond to stay the proceeding for appeal. Clark v. Gragg, 171 N.C. App. 120, 614 S.E.2d 356, 2005 N.C. App. LEXIS 1187 (2005).

Undertaking Not Necessary to Appeal. — Security for payment of the judgment, in addition to the security for costs, is not necessary to bring up the appeal if a stay of execution is not desired. Bledsoe v. Nixon, 69 N.C. 81 (1873).

No Particular Form Required. — No particular form is required for an undertaking to stay execution upon appeal; and if words are inserted in such an undertaking which are repugnant to its intent, they will be rejected as surplusage. Oakley v. Van Noppen, 100 N.C. 287, 5 S.E. 1 (1888).

Bond Given to Mortgagee by Mortgagor. — This section did not apply to a bond given by a mortgagor to the mortgagee stipulating that the mortgagor would not commit waste on the premises and that if the judgment was affirmed, that he would pay for the use and occupation. Alderman v. Rivenbark, 96 N.C. 134, 1 S.E. 644 (1887).

Operation of Security as Stay. — Upon compliance with this section, there will be a stay of execution as to parties appealing from a final judgment. Bryan v. Hubbs, 69 N.C. 423 (1873); Smith v. Miller, 155 N.C. 247, 71 S.E. 355 (1911).

Trial court's order that appellant file supersedeas bond with another surety, upon its finding that the surety upon the first bond was not sufficient, was not error, as such matter rested within the sound discretion of the court. Love v. Queen City Lines, 206 N.C. 575, 174 S.E. 514 (1934).

Surety Held Bound When Defendant Abandoned Appeal. — Where the trial judge, upon sufficient findings, properly adjudged that the defendant had abandoned his appeal to the appellate court, it was not required that the appeal should have been docketed and dismissed in the appellate court in order to bind the surety on his bond given to stay execution in accordance with the terms of this section. Murray v. Bass, 184 N.C. 318, 114 S.E. 303 (1922).

Effect of Appeal on Trial Courts' Jurisdiction. — Where plaintiff appealed to the appellate court from an order of the superior court requiring him to pay alimony pendente lite and counsel fees, and the cause was removed thereto, the superior court was thereafter without jurisdiction to order the sale of plaintiff's land to satisfy the judgment or the execution of a stay bond. Vaughan v. Vaughan, 211 N.C. 354, 190 S.E. 492 (1937).

Lessees could proceed against subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessees, where the lessees had been granted a stay of execution and left in possession of the property, as by maintaining possession pursuant to the stay of execution order, lessees remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. Backer v. Gomez, 80 N.C. App. 228, 341 S.E.2d 90, cert. denied, 317 N.C. 700, 347 S.E.2d 35 (1986).

Civil Contempt for Failure to Pay Attorneys' Fees. — The mother was properly held in civil contempt, where she failed to comply with the trial court's order to pay $7,500 of father's attorney fees, and she did not have a written undertaking executed by a surety for payment of the fees. Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999).

Applied in Hamilton v. Southern Ry., 203 N.C. 136, 164 S.E. 834 (1932); Hamilton v. Southern Ry., 203 N.C. 468, 166 S.E. 392 (1932); Jim Walter Corp. v. Gilliam, 260 N.C. 211, 132 S.E.2d 313 (1963); Tucker v. Tucker, — N.C. App. —, 675 S.E.2d 676, 2009 N.C. App. LEXIS 499 (2009).

Cited in Hinson v. Adrian, 91 N.C. 372 (1884); Adams v. Guy, 106 N.C. 275, 11 S.E. 535 (1890); Laffoon v. Kerner, 138 N.C. 281, 50 S.E. 654 (1905); Murray v. Bass, 184 N.C. 318, 114 S.E. 303 (1922); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934); Current v. Church, 207 N.C. 658, 178 S.E. 82 (1935); Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977); Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977); Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980); Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982); Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985); Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987); Hieb v. Howell's Child Care Ctr., Inc., 123 N.C. App. 61, 472 S.E.2d 208 (1996).

§ 1-290. How judgment for personal property stayed.

If the judgment appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment is not stayed by appeal, unless the things required to be assigned or delivered are brought into court, or placed in the custody of such officer or receiver as the court appoints, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court or a judge thereof directs, to the effect that the appellant will obey the order of the appellate court upon the appeal. (C.C.P., s. 305; Code, s. 555; Rev., s. 599; C.S., s. 651.)

CASE NOTES

No Authority to Dismiss Appeal for Failure to Post Bond. — While this section and G.S. 1-292 give the court authority to stay execution on a judgment requiring a party to transfer personal and real property upon the posting of a bond, the court has no authority to dismiss an appeal for an appellant's failure to post the bond. Faught v. Faught, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

A trial court possesses the legal authority to stay its own orders pending appeal in cases involving the Public Records Act. Wilmington Star-News, Inc. v. New Hanover Regional Medical Ctr., Inc., 125 N.C. App. 174, 480 S.E.2d 53 (1997), appeal dismissed, 346 N.C. 557, 488 S.E.2d 826 (1997).

Cited in Adams v. Guy, 106 N.C. 275, 11 S.E. 535 (1890); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934); Babb v. Graham, 190 N.C. App. 463, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

§ 1-291. How judgment directing conveyance stayed.

If the judgment appealed from directs the execution of a conveyance or other instrument, the execution of the judgment is not stayed by the appeal until the instrument has been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court. (C.C.P., s. 306; Code, s. 556; Rev., s. 600; C.S., s. 652.)

CASE NOTES

Duty of Clerk to Notify Sheriff. — After the undertaking has been given, it is the duty of the clerk to give notice thereof to the sheriff, in order that any execution which may have issued may be superseded. Bryan v. Hubbs, 69 N.C. 423 (1873).

Stay Pending Appeal Not Mandatory. — Trial court did not err in denying a stay of a judgment pending appeal. Under G.S. 1-291, a stay was not compelled, and the wording of N.C. R. Civ. P. 62(d) was that an appellant may obtain a stay of execution. Meares v. Town of Beaufort, — N.C. App. —, 667 S.E.2d 244, 2008 N.C. App. LEXIS 1764 (2008).

Cited in Hancock v. Bramlett, 85 N.C. 393 (1881); Hannon v. Commissioners of Halifax, 89 N.C. 123 (1883); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934); Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975); Babb v. Graham, 190 N.C. App. 463, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

§ 1-292. How judgment for real property stayed.

If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of this deficiency. (C.C.P., s. 307; Code, s. 557; Rev., s. 601; C.S., s. 653.)

CASE NOTES

Effect of § 45-21.16. — Section 45-21.16 governs only the bond covering the appeal from the clerk to the trial court; bonds for appeals from the traditional trial courts to the Court of Appeals in foreclosure actions are governed as they previously were by this section. In re Simon, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

Construction with Other Sections. — This section must be complied with notwithstanding defendant's appeal rights under G.S. 1A-1, Rule 62. Venture Properties I v. Anderson, 120 N.C. App. 852, 463 S.E.2d 795 (1995).

Where defendant did not request the setting of a bond nor post a bond, the defendant made no attempt to comply with the requirements of this section; thus, he was not entitled to a stay of execution under G.S. 1A-1, Rule 62. Venture Properties I v. Anderson, 120 N.C. App. 852, 463 S.E.2d 795 (1995).

No Authority to Dismiss for Failure to Post Bond. — While G.S. 1-290 and this section give the court authority to stay execution on a judgment requiring a party to transfer personal and real property upon the posting of a bond, the court has no authority to dismiss an appeal for an appellant's failure to post the bond. Faught v. Faught, 50 N.C. App. 635, 274 S.E.2d 883 (1981).

In foreclosure proceedings a clerk may require a bond by an appealing respondent pursuant to G.S. 45-21.16(d), and a superior court judge may require a bond upon appeal from that court pursuant to this section, and if the bond is not posted, the trustee may proceed with foreclosure; however, neither statute gives the clerk or judge the power to make the posting of a bond a condition to the appeal, and it is error for the superior court to dismiss an appeal from that court when the bond required by the court is not posted. In re Coley Properties, Inc., 50 N.C. App. 413, 273 S.E.2d 738 (1981).

No Authority to Set Bond. — Because the trial court's judgment did not direct the sale or delivery of possession of real property, the trial court erred in setting an appeal bond under G.S. 1-292. Jones v. Robbins, 190 N.C. App. 405, 660 S.E.2d 118, 2008 N.C. App. LEXIS 901 (2008).

Measure of Damages Under Bond. — The only proper measure of damages under a bond using the very same language as this section would be waste plus the value of the use and occupation of the property. In re Simon, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

Use of Interest on Indebtedness as Measure of Damages. — Where the bond posted by respondents protected petitioner from "any probable loss by reason of delay" in a proceeding to foreclose a deed of trust, there was no error in the trial court's use of interest on the indebtedness as a measure of damages, even though this section does not require a bond using language so expansive. In re Simon, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

Liability of Purchaser Where Sale Overturned. — Where an appeal was taken from the order of confirmation of a sale under decree of a foreclosure of a deed of trust, and an appeal bond was filed to stay execution under this section and G.S. 1-293 and 1-294, and the judgment of the lower court was reversed on appeal, the purchaser at the sale could be held liable to the mortgagor for having taken immediate possession of the property. Dixon v. Smith, 204 N.C. 480, 168 S.E. 683 (1933).

Lessees could proceed against subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessees, where the lessees had been granted a stay of execution and left in possession of the property, as by maintaining possession pursuant to the stay of execution order, lessees remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. Backer v. Gomez, 80 N.C. App. 228, 341 S.E.2d 90, cert. denied, 317 N.C. 700, 347 S.E.2d 35 (1986).

Factors to Consider in Setting Bond Amount. — Where appellants sought a bond under G.S. 1-292 for a stay pending appeal of an order requiring them to sell land to appellee, the trial court had to determine the value of the loss to the appellee of the use and occupancy of the property during the appeal; appellants' affidavit asserting that the bond should be $1 because they did not intend to use or occupy the property was, therefore, beside the point. Currituck Assocs.-Residential P'ship v. Hollowell, 170 N.C. App. 399, 612 S.E.2d 386, 2005 N.C. App. LEXIS 1000 (2005).

Insufficient Evidence to Support Bond Amount. — Where appellants sought a bond under G.S. 1-292 for a stay pending appeal of an order requiring them to sell land to appellee, an affidavit stating that appellee would incur damages of about $1.369 million per year if delayed in developing the land did not support the trial court's $1 million bond requirement, as there was no showing the affidavit was based on the affiant's personal knowledge. Currituck Assocs.-Residential P'ship v. Hollowell, 170 N.C. App. 399, 612 S.E.2d 386, 2005 N.C. App. LEXIS 1000 (2005).

Applied in Nugent v. Beckham, 43 N.C. App. 703, 260 S.E.2d 172 (1979).

Cited in Cox v. Hamilton, 69 N.C. 30 (1873); Hancock v. Bramlett, 85 N.C. 393 (1881); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934); Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977); Taylor v. Bailey, 49 N.C. App. 216, 271 S.E.2d 296 (1980); Babb v. Graham, 190 N.C. App. 463, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

§ 1-293. Docket entry of stay.

When an appeal from a judgment is pending, and the undertaking requisite to stay execution on the judgment has been given, and the appeal perfected, the court in which the judgment was recovered may, on special motion, after notice to the person owning the judgment, on such terms as it sees fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is secured on appeal, and no execution can issue upon such judgment during the pendency of the appeal. (C.C.P., s. 254; Code, s. 435; 1887, c. 192; Rev., s. 621; C.S., s. 654.)

CASE NOTES

Failure to Comply with Requirements for Stay. — Trial court did not err by failing to order a stay of execution on a money judgment because the appellant took no action following an insufficient deposit with the clerk of court and, therefore, did not proceed in accordance with G.S. 1-293. Babb v. Graham, 190 N.C. App. 463, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

Cited in Alderman v. Rivenbark, 96 N.C. 134, 1 S.E. 644 (1887); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934); Queen v. DeHart, 209 N.C. 414, 184 S.E. 7 (1936).

§ 1-294. Scope of stay; security limited for fiduciaries.

When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. The court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity. It may also limit such security to an amount not more than fifty thousand dollars ($50,000), where it would otherwise exceed that sum. (C.C.P., s. 308; Code, s. 558; Rev., s. 602; C.S., s. 655.)

Cross References. — As to effect of stay on the judgment, see G.S. 1-296. As to stay of proceedings to enforce a judgment, see G.S. 1A-1, Rule 62.

Legal Periodicals. — For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

The general rule is that once an appeal is perfected, the lower court is divested of jurisdiction, but the lower court nonetheless retains jurisdiction to take action which aids the appeal, and to hear motions and grant orders, so long as they do not concern the subject matter of the suit and are not affected by the judgment appealed from. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curiam, 335 N.C. 158, 436 S.E.2d 821 (1993).

Section Not Controlling over Specific Statute. — Although this section states the general rule regarding jurisdiction of the trial court pending appeal, it is not controlling where there is a specific statute such as former G.S. 7A-668 addressing the matter in question. In re Huber, 57 N.C. App. 453, 291 S.E.2d 916, appeal dismissed and cert. denied, 306 N.C. 557, 294 S.E.2d 223 (1982).

Where the trial court terminated the mother's parental rights during the pendency of the mother's custody review order appeal, G.S. 1-294 did not deprive the trial court of jurisdiction to terminate the mother's parental rights, as such jurisdiction was granted under G.S. 7B-1101 and G.S. 7B-1103. In re R.T.W., 359 N.C. 539, 614 S.E.2d 489, 2005 N.C. LEXIS 646 (2005).

The perfection of an appeal terminates the authority of the inferior court. — Governor ex rel. State Bank v. Twitty, 13 N.C. 386 (1830).

An appeal does not take the case beyond the control of the superior court, until it is perfected. Coates Bros. v. Wilkes, 94 N.C. 174 (1886).

An appeal removes a cause from the trial court, which is thereafter without power to proceed further until the cause is returned by mandate of the appellate court. Upton v. Upton,

14 N.C. App. 107, 187 S.E.2d 387 (1972).

An appeal takes the case out of the jurisdiction of the trial court. Carpenter v. Carpenter, 25 N.C. App. 307, 212 S.E.2d 915 (1975).

An appeal to the courts divests the Industrial Commission of jurisdiction to issue opinions and awards, and while an appeal is not perfected until docketed, perfection relates back to the time that the notice of appeal is given; a second workers' compensation order and award made after a prior order and award was being appealed was vacated because it was made after the Commission was divested of jurisdiction. Roberts v. Century Contrs., Inc., 162 N.C. App. 688, 592 S.E.2d 215, 2004 N.C. App. LEXIS 268 (2004).

Trial court was without jurisdiction to reduce a supersede as bond amount because the amount of the security and terms of a stay order and bond order were the subject matter of a husband's appeal; therefore, once the husband perfected his appeal of the stay order and the bond order, the trial court was divested of jurisdiction to enter an order modifying the terms of those orders. Ross v. Ross, — N.C. App. —, 669 S.E.2d 828, 2008 N.C. App. LEXIS 2245 (2008).

And Operates as a Stay of All Proceedings in the Trial Court. — An appeal duly taken and regularly prosecuted operates as a stay of all proceedings in the trial court relating to the issues included therein, until the matters are determined in the appellate court. Pruett v. Charlotte Power Co., 167 N.C. 598, 83 S.E. 830 (1914); Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377, rehearing denied, 232 N.C. 744, 59 S.E.2d 429 (1950).

An appeal from a judgment rendered in the superior court suspends all further proceedings in the cause in that court, pending the appeal. Harris v. Fairly, 232 N.C. 555, 61 S.E.2d 619 (1950).

An appeal, timely docketed and regularly prosecuted, relates back to the time of trial; that is, it operates as a stay of proceedings within the meaning of the statute, and brings the cause within the principle of the cases which hold that the court below is without power to hear and determine questions involved in an appeal pending in the appellate court. Combes v. Adams, 150 N.C. 64, 63 S.E. 186 (1908); Sykes v. Everett, 167 N.C. 600, 83 S.E. 585 (1914).

Where a cause has been ordered to the appellate court, no subsequent action of the court below can affect it. Murry v. Smith, 8 N.C. 41 (1820).

The language of this section is clear. An appeal stays further proceedings in the lower court upon the judgment appealed and matters embraced within that judgment. Jenkins v. Wheeler, 72 N.C. App. 363, 325 S.E.2d 4 (1985).

As the stay imposed by this section would have taken effect when defendants filed notice of appeal in the Superior Court and subsequent perfection thereof in the appellate court, the filing of a voluntary dismissal by plaintiffs under G.S. 1A-1, Rule 41(a)(1) did not strip the appellate court of its authority to docket the appeal or consider the merits. Reid v. Town of Madison, 145 N.C. App. 146, 550 S.E.2d 826, 2001 N.C. App. LEXIS 554 (2001).

Preliminary Injunction. — The trial court had subject matter jurisdiction to enter a preliminary injunction, even though an appeal was pending in North Carolina, where a former employee sought to enjoin the former employer from proceeding with a New York action against him, and the propriety of the New York action was not an issue involved in the pending appeal. Cox v. Dine-A-Mate, Inc., 131 N.C. App. 542, 508 S.E.2d 6 (1998).

Stay on Appeal of Interlocutory Order. — An appeal from an interlocutory order stays all further proceedings in the lower court in regard to matters relating to the specific order appealed from, but the action remains in the lower court, and it may proceed upon any other matter included in the action upon which action was reserved or which was not affected by the judgment appealed from. Safie Mfg. Co. v. Arnold, 228 N.C. 375, 45 S.E.2d 577 (1947).

Upon appeal from an interlocutory order the lower court has no power to proceed further with the case, and a motion to set aside a restraining order because of newly discovered evidence cannot be entertained. Combes v. Adams, 150 N.C. 64, 63 S.E. 186 (1908).

Legal malpractice claims against attorney and his law firm were dismissed on their motion for judgment on the pleadings; the only act of negligence that was alleged was their failure to file an answer, but because they had filed a notice of appeal and perfected the appeal of the state court's finding of personal jurisdiction, the original action should have been stayed since the finding of personal jurisdiction was an interlocutory order that may be immediately appealed under G.S. 1-277(b). Shealy v. Lunsford, 355 F. Supp. 2d 820, 2005 U.S. Dist. LEXIS 2043 (M.D.N.C. 2005).

When Proceedings Not Stayed by Interlocutory Appeal. — When an appeal is taken to the appellate court from an interlocutory order of the superior court which is not subject to appeal, the superior court need not stay proceedings, but may disregard the appeal and proceed to try the action while the appeal on the interlocutory matter is in the appellate court. Veazey v. City of Durham, 231 N.C. 354, 57 S.E.2d 375 (1950).

An attempted appeal from a nonappealable interlocutory order is a nullity and does not divest the superior court of jurisdiction to proceed in the action. Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957).

When an appeal is taken from an interlocutory order from which no appeal is allowed by law, which is not upon any matter of law and which affects no substantial right of the parties, it is the duty of the judge to proceed as if no such appeal had been taken. All the inconveniences of unnecessary delay and expense attend the course of suspending proceedings and none attend the other course. Such an appeal is evidently frivolous and dilatory, and can have but one end, to increase the expense and procrastinate a final judgment. Carleton v. Byers, 71 N.C. 331 (1874).

Because an order issuing a preliminary injunction was interlocutory and no substantial right of the appellant was affected by denial of immediate appellate review, the trial court was not divested of jurisdiction and could hold appellant in contempt for violating the injunction. Onslow County v. Moore, 129 N.C. App. 376, 499 S.E.2d 780 (1998).

As a city's appeal from the denial of its motions to dismiss and for summary judgment with respect to counterclaims asserted in a tax foreclosure matter was improper because it was an interlocutory order pursuant to G.S. 1-294, the trial court retained jurisdiction to enter a final order during the pendency of the city's appeal. County of Durham v. Daye, — N.C. App. —, 673 S.E.2d 683, 2009 N.C. App. LEXIS 214 (2009).

An appeal carries the whole cause up to the appellate court, whether security is given to stay proceedings or for costs only. Bledsoe v. Nixon, 69 N.C. 81 (1873); Isler v. Brown, 69 N.C. 125 (1873).

Pending an appeal the trial judge is functus officio. Carpenter v. Carpenter, 25 N.C. App. 307, 212 S.E.2d 915 (1975).

Trial court does not have jurisdiction to conduct contempt proceedings while appeal is pending, because under this section all proceedings below are stayed; therefore any order finding a defendant in contempt is void, at least until appeal is perfected. Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

Where defendant appealed an order with respect to child visitation privileges, the trial court was without jurisdiction pending the appeal to entertain plaintiff's motion in the cause seeking to have defendant adjudged in contempt for failure to comply with the order appealed from and seeking to have the order modified. Webb v. Webb, 50 N.C. App. 677, 274 S.E.2d 888 (1981).

But Appeal Did Not Authorize Violation of Contempt Order. — While an appeal stayed contempt proceedings until the validity of the order was determined, taking the appeal did not authorize a violation of the order. Upton v. Upton, 14 N.C. App. 107, 187 S.E.2d 387 (1972).

Relation Back of Perfection of Appeal. — Where defendants appealed the order of the trial judge appointing operating receivers for a corporation, the corporate defendants' subsequent perfection of their appeal related back to the time of the giving of notice of appeal, and therefore all orders entered by the trial judge after defendants' notice of appeal were void for want of jurisdiction; thus, orders approving the payment of fees and expenses for attorneys, accountants and receivers would be vacated. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

While an appeal is not perfected until it is actually docketed in the appellate division, a proper perfection relates back to the time of the giving of the notice of appeal, rendering any later orders or proceedings upon the judgment appealed from void for want of jurisdiction. Swilling v. Swilling, 329 N.C. 219, 404 S.E.2d 837 (1991).

Appellate Courts Don't Create Jurisdiction for Trial Courts. — While the interests of judicial economy would clearly be better served by allowing the trial court to enter an order on attorney's fees and then having the matter come up to the appellate courts as a single appeal, the appellate court could not create jurisdiction for the trial court to enter an award of attorney's fees in violation of G.S. 1-294. In re Will of Harts, 191 N.C. App. 807, 664 S.E.2d 411, 2008 N.C. App. LEXIS 1491 (2008).

Authority to Allow Proceedings by Lower Court. — Ordinarily an appeal stops all proceedings in the lower court, including proceedings under an order from which, if considered alone, an appeal would be premature. But the appellate court may direct that certain matters should not be suspended. Pender v. Mallett, 123 N.C. 57, 31 S.E. 351 (1898).

Authority of Trial Court to Make Findings and Conclusions. — Pursuant to the provisions of G.S. 1A-1, Rule 58, after "entry" of judgment in open court, a trial court retains the authority to approve the judgment and direct its prompt preparation and filing. Such authority necessarily includes making appropriate findings of fact and entering appropriate conclusions of law, and the giving of notice of appeal in open court after "entry" of judgment does not divest the trial court of such authority. Hightower v. Hightower, 85 N.C. App. 333, 354 S.E.2d 743, cert. denied, 320 N.C. 792, 361 S.E.2d 76 (1987).

The stay under this section does not prevent the trial court from approving the form of its judgment and making those findings and conclusions necessary to prepare and file its judgment under G.S. 1A-1, Rule 58. Truesdale v. Truesdale, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

Order on Remand Noticing Matter Did

Not Constitute Exercise of Jurisdiction. — Although two courts cannot have jurisdiction over the same order at the same time, a district court's order on remand noticing a matter did not constitute the exercise of jurisdiction under N.C. R. App. P. 28(b)(6) when an appellate court filed its opinion, but before the judgment was certified, the district court set the case for hearing and sent notice of the hearing to a party. In re T.S., 178 N.C. App. 110, 631 S.E.2d 19, 2006 N.C. App. LEXIS 1299 (2006).

Power of Lower Court over Matters Not Affected by Judgment. — During the pendency of an appeal, the court below still retains jurisdiction to hear motions and grant orders not affected by the judgment appealed from. Herring v. Pugh, 126 N.C. 852, 36 S.E. 287 (1900).

Refusal of Lower Court to Dispose of Collateral Matter. — Pending an appeal, the lower court, in its discretion, may refuse to dispose of a collateral matter which the decision on the appeal may render unimportant. Penniman v. Daniel, 91 N.C. 431 (1884).

An appeal from a decree of distribution did not bring up the fund, the court below retaining charge of its safekeeping and investment pending the appeal. Hinson v. Adrian, 91 N.C. 372 (1884).

An appeal perfected pending a motion to set aside a verdict, the time for the hearing of which was extended by consent, did not divest the trial court of jurisdiction to determine the motion. Myers v. Stafford, 114 N.C. 231, 19 S.E. 232 (1894).

An appeal from an order refusing to discharge an attachment took the case out of the jurisdiction of the court whose order was appealed from, and an order could not subsequently be made by that court discharging the attachment. Pasour v. Lineberger, 90 N.C. 159 (1884).

Appointment of Receiver Pending Appeal of Order Allowing Amended Complaint. — The pendency of an appeal from an order allowing plaintiff to file an amended complaint did not deprive the superior court of jurisdiction to appoint a receiver based on allegations in the amended complaint. York v. Cole, 251 N.C. 344, 111 S.E.2d 334 (1959).

Second Trial Pending Appeal Held Unlawful. — Where a cause was tried at a previous term of the court, and the judge set aside the verdict under the appellant's exception, and pending his due prosecution of his appeal, without laches on his part, the judge forced him into another trial under his exception that the case was pending on appeal, resulting adversely to him, the action of the judge in overruling the exception and proceeding with the second trial was contrary to this section and a new trial would be ordered on appeal. Likas v. Lackey, 186 N.C. 398, 119 S.E. 763 (1923).

Confirmation of Referee's Report Stricken. — Where, after appeal from a formal judgment overruling a demurrer, the trial court proceeded to hear exceptions to the report of the referee, the appellate court, upon affirming the judgment overruling the demurrer, would order the judgment confirming the report of the referee stricken out, because the parties were entitled to have the appeal from the judgment overruling the demurrer heard and determined before the exceptions to the referee's report were passed upon. Griffin v. Bank of Coleridge, 205 N.C. 253, 171 S.E. 71 (1933).

Trial Court Has Jurisdiction to Enforce Alimony Order During Appeal. — Trial court did not lack authority to enter contempt order and initial show cause order against defendant where defendant had appealed original order for periodic alimony payments; appeal did not remove jurisdiction of trial court under this section since G.S. 50-16.7 dictates that trial court has jurisdiction to enforce alimony order during appeal. Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989).

Protective Order Filed with Trial Court After Filing of Appeal Properly Denied. — Although trial court's duty to protect child's welfare continued pending the outcome of appeal of its custody order, the appeal deprived the trial court of jurisdiction to determine defendant mother's motion for a protective order, which was directly related to and would have affected the custody order that was on appeal. Rosero v. Blake, 150 N.C. App. 250, 563 S.E.2d 248, 2002 N.C. App. LEXIS 509 (2002), cert. granted, 356 N.C. 166, 568 S.E.2d 610 (2002).

Court Without Authority to Modify Custody Pending Appeal of Visitation Order. — Under both statute and case law, the district court lost jurisdiction over all custody matters when defendant appealed its visitation order. Thus, while defendant's appeal was pending, the district court lacked the authority to modify its prior custody award, and also lacked the authority to find defendant in contempt for failing to comply with such order. Hackworth v. Hackworth, 87 N.C. App. 284, 360 S.E.2d 472 (1987).

No Authority to Award Attorney's Fees. — The trial court lacked jurisdiction to award attorney's fees is to the trust settlor's adopted grandchildren after the settlor's natural grandchildren filed an appeal of the judgment deciding that the adopted grandchildren were entitled to share in distribution of the trust. Gibbons v. Cole, 132 N.C. App. 777, 513 S.E.2d 834 (1999).

Pursuant to G.S. 1-294, a trial court did not have jurisdiction to decide the issue of attorney fees after a county and its board of commissioners had filed their notice of appeal from the judgment in favor of a chairman of a county airport authority who had been improperly removed from his position; an exception did not apply, as the award of attorney fees under G.S. 6-1, G.S. 6-20, G.S. 6-19.1, G.S. 7A-314, and G.S. 143-318.16B was based upon the chairman being the prevailing party. McClure v. County of Jackson, 185 N.C. App. 462, 648 S.E.2d 546, 2007 N.C. App. LEXIS 1814 (2007).

Applied in Cox v. Cox, 33 N.C. App. 73, 234 S.E.2d 189 (1977); In re Will of Worrell, 35 N.C. App. 278, 241 S.E.2d 343 (1978); State ex rel. Jacobs v. Sherard, 39 N.C. App. 464, 250 S.E.2d 923 (1979); Smith v. Barfield, 77 N.C. App. 217, 334 S.E.2d 487 (1985); Bullock v. Newman, 93 N.C. App. 545, 378 S.E.2d 562 (1989); Myers v. Barringer, 101 N.C. App. 168, 398 S.E.2d 615 (1990); Beau Rivage Plantation, Inc. v. Melex USA, Inc., 112 N.C. App. 446, 436 S.E.2d 152 (1993); Lewis v. Lewis, 128 N.C. App. 183, 493 S.E.2d 785 (1997); In re Will of Dunn, 129 N.C. App. 321, 500 S.E.2d 99 (1998); Velez v. Dick Keffer Pontiac-GMC Truck, Inc., 144 N.C. App. 465, 551 S.E.2d 858, 2001 N.C. App. LEXIS 532 (2001); McKyer v. McKyer, 179 N.C. App. 132, 632 S.E.2d 828, 2006 N.C. App. LEXIS 1829 (2006); Swink v. Weintraub, — N.C. App. —, 672 S.E.2d 53, 2009 N.C. App. LEXIS 111 (2009).

Cited in Bledsoe v. Nixon, 69 N.C. 82 (1873); Isler v. Brown, 69 N.C. 125 (1873); Skinner v. Bland, 87 N.C. 168 (1882); Allen v. Gooding, 174 N.C. 271, 93 S.E. 740 (1917); Bohannon v. Virginia Trust Co., 198 N.C. 702, 153 S.E. 263 (1930); Scott v. Jordan, 235 N.C. 244, 69 S.E.2d 557 (1952); Faught v. Faught, 50 N.C. App. 635, 274 S.E.2d 883 (1981); Oshita v. Hill, 65 N.C. App. 326, 308 S.E.2d 923 (1983); Corbett v. Corbett, 67 N.C. App. 754, 313 S.E.2d 888 (1984); Davidson v. Knauff Ins. Agency, Inc., 93 N.C. App. 20, 376 S.E.2d 488 (1989); Overcash v. Blue Cross & Blue Shield, 94 N.C. App. 602, 381 S.E.2d 330 (1989); Lowder v. All Star Mills, Inc., 100 N.C. App. 318, 396 S.E.2d 92 (1990); Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 110 N.C. App. 83, 428 S.E.2d 849 (1993); Wilson v. Wilson, 124 N.C. App. 371, 477 S.E.2d 254 (1996); Law Offices of Kirby v. Industrial Contractors, 130 N.C. App. 119, 501 S.E.2d 710 (1998); Guerrier v. Guerrier, 155 N.C. App. 154, 574 S.E.2d 69, 2002 N.C. App. LEXIS 1638 (2002); Ruth v. Ruth, 158 N.C. App. 123, 579 S.E.2d 909, 2003 N.C. App. LEXIS 948 (2003); Draughon v. Harnett County Bd. of Educ., 158 N.C. App. 705, 582 S.E.2d 343, 2003 N.C. App. LEXIS 1227 (2003); Fantasy World, Inc. v. Greensboro Bd. of Adjustment, 162 N.C. App. 603, 592 S.E.2d 205, 2004 N.C. App. LEXIS 267 (2004); Babb v. Graham, 190 N.C. App. 463, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

§ 1-295. Undertaking in one or more instruments; served on appellee.

The undertakings may be in one instrument or several, at the option of the appellant; and a copy, including the names and residences of the sureties, must be served on the adverse party, with the notice of appeal, unless the required deposit is made and notice thereof given. (C.C.P., s. 309; Code, s. 559; Rev., s. 603; C.S., s. 656.)

Cross References. — As to undertaking for costs, see G.S. 1-285. As to undertaking to stay executions, see G.S. 1-289 et seq.

CASE NOTES

Effect of Insolvence of One Surety. — Where the undertaking on appeal for the costs and the undertaking to stay execution are in one instrument, the appellee, upon filing the proper proofs of the insolvency of the surety, is entitled to have the appeal dismissed, but where the two undertakings are separate and distinct, the appellant has a right to have his appeal heard, even though the surety to the undertaking to stay execution is insolvent. Alderman v. Rivenbark, 96 N.C. 134, 1 S.E. 644 (1887).

Cited in State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934); Babb v. Graham, 190 N.C. App. 463, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

§ 1-296. Judgment not vacated by stay.

The stay of proceedings provided for in this Article shall not be construed to vacate the judgment appealed from, but in all cases such judgment remains in full force and effect, and its lien remains unimpaired, notwithstanding the giving of the undertaking or making the deposit required in this Chapter, until such judgment is reversed or modified by the appellate division. (1887, c. 192; Rev., s. 604; C.S., s. 657; 1969, c. 44, s. 9.)

Cross References. — As to effect of appeal on proceedings in lower court generally, see G.S. 1-294.

CASE NOTES

A judgment is not annulled by an appeal therefrom. State ex rel. Williams v. Mizell, 32 N.C. 279 (1849).

An appeal from an order to vacate a judgment leaves such judgment, and any execution issued under it, in full force. Murphy v. Merritt, 63 N.C. 502 (1869).

Lessees could proceed against subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessees, where the lessees had been granted a stay of execution and left in possession of the property, as by maintaining possession pursuant to the stay of execution order, lessees remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. Backer v. Gomez, 80 N.C. App. 228, 341 S.E.2d 90, cert. denied, 317 N.C. 700, 347 S.E.2d 35 (1986).

Cited in Dixon v. Smith, 204 N.C. 480, 168 S.E. 683 (1933); State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934); Abbott v. Town of Highlands, 62 N.C. App. 130, 302 S.E.2d 280 (1983); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998).

§ 1-297. Judgment on appeal and on undertakings; restitution.

Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the appellate division on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in all cases where judgment is rendered against the appellant or person prosecuting the writ. (1785, c. 233, s. 2, P.R.; 1810, c. 793, P.R.; 1831, c. 46, s. 2; R.C., c. 4, s. 10; C.C.P., s. 314; Code, s. 563; Rev., s. 605; C.S., s. 658; 1969, c. 44, s. 10.)

CASE NOTES

Whole Case Taken Up on Appeal. — Under this section, an appeal on the trial and determination of the cause in the inferior court carries the whole case to the appellate court for review, and such court has plenary jurisdiction to reverse, affirm or modify the judgment. Hudson v. Charleston, C. & C.R.R., 55 F. 248 (W.D.N.C. 1893).

What Relief Available on Appeal. — On appeal a case is heard on the facts alleged in the pleadings, and where the plaintiffs have set forth such facts as entitled them to relief, they will not be restricted to the relief demanded in their prayer for judgment, but may have any additional relief not inconsistent with the pleadings and the facts proved. Voorhees v. Porter, 134 N.C. 591, 47 S.E. 31 (1904).

The appellate court may affirm the judgment of the trial court. Wilson v. Jones, 176 N.C. 205, 97 S.E. 18 (1918); Selwyn Hotel Co. v. Griffin, 182 N.C. 539, 109 S.E. 371 (1921).

The appellate court has power to grant a new trial. Hall v. Hall, 131 N.C. 185, 42 S.E. 562 (1902); Hawk v. Pine Lumber Co., 149 N.C. 10, 62 S.E. 752 (1908).

The appellate court may order a new trial and direct further proceedings in lower court. Williams v. Kearney, 177 N.C. 531, 98 S.E. 705 (1919).

Where it appears that a necessary party is missing from the case, or that the issues are not determinative of the cause of action, the court, on its own motion, may remand the cause, with orders for a new trial. Vaughan v. Davenport, 159 N.C. 369, 74 S.E. 967 (1912).

When the judgment is not supported by the record, as where the record shows that there was no verdict, or is rendered upon an inconsistent or unsatisfactory verdict, a new trial must be awarded. McCanless v. Flinchum, 98 N.C. 358, 4 S.E. 359 (1887).

Grant of New Trial for Newly Discovered Evidence. — The appellate court may, in its discretion, order a new trial for newly discovered evidence, on motion in that court. Clark v. Riddle, 118 N.C. 692, 24 S.E. 492 (1896).

Discretion to Refuse New Trial for Newly Discovered Evidence. — The appellate court, in its discretion, may refuse to grant a new trial for newly discovered evidence. Brown v. Mitchell, 102 N.C. 347, 9 S.E. 702 (1889); Sledge v. Elliott, 116 N.C. 712, 21 S.E. 797 (1895).

New Trial on All Issues. — While the appellate court has power to grant either a general or partial new trial, when the court grants a new trial generally without further disposition, the new trial is upon all of the issues. Table Rock Lumber Co. v. Branch, 158 N.C. 251, 73 S.E. 164 (1911).

Restriction of New Trial to Certain Issues. — The court on appeal, upon ordering a new trial, may confine the issues to those which it deems necessary to a proper determination of the cause. Davis v. Southern Ry., 176 N.C. 186, 96 S.E. 945 (1918).

On appeal, it is within the discretion of the court whether to restrict a new trial to the issues affected by the error; whenever the error is confined to one or more issues that are separable from the others, and it appears to the court that no prejudice will result from such course, a new trial as restricted to such issues is usually granted. Huffman v. Ingold, 181 N.C. 426, 107 S.E. 453 (1921).

A new trial will not be awarded for mere technical error when it appears that the jury could not have been misled thereby. Burleson v. Helton, 258 N.C. 782, 129 S.E.2d 491 (1963).

The appellate court will not grant a new trial except to subserve the real ends of substantial justice, and unless there is a prospect of ultimate benefit to the appellant. Cauble v. Southern Express Co., 182 N.C. 448, 109 S.E. 267 (1921).

Setting Aside Part of Verdict. — Ordinarily, for error in the charge or the reception or rejection of evidence the verdict will be set aside entirely, but it may be set aside in part, and as to certain issues only, when it plainly appears that the erroneous ruling would not and did not affect the findings upon the other issues. Burton v. Wilmington & W.R.R., 84 N.C. 192 (1881).

Setting Aside Part of Judgment. — Where a judgment appealed from consists of independent matters, so that the erroneous part thereof can be segregated, the court will only set aside the erroneous part. Newberry v. Seaboard Air Line R.R., 160 N.C. 156, 76 S.E. 238 (1912).

Modification of Amount of Recovery. — Although on appeal an issue involving several items cannot be amended where one item is erroneous and appeal is on that item, the court can allow appellee to deduct that much or stand a new trial. Ragland v. Lassiter-Ragland, Inc., 174 N.C. 579, 94 S.E. 100 (1917).

Remand for Further Proceedings. — After appeal, a cause may be remanded to the court below, upon petition of the plaintiff, to enable him to take further proofs, upon terms. Springs v. Wilson, 17 N.C. 385 (1833).

Remand for Fuller Findings of Fact. — The appellate court has power to remand a cause so that there may be fuller finding of facts by the trial judge, in order that the appeal may be more intelligently considered. Gulf Ref. Co. v. McKernan, 178 N.C. 82, 100 S.E. 121 (1919).

Where the pleadings and affidavits in an injunction suit are conflicting, and there is no finding of facts, the case will be remanded, that the facts may be found by the trial court or by a jury upon proper issues submitted to it. Kitchen v. Troy, 72 N.C. 50 (1875).

On appeal, a cause may be remanded for a special finding as to the right to costs. Smith v. Smith, 108 N.C. 365, 12 S.E. 1045, 13 S.E. 113 (1891).

Judgment Not Reversed for Technical Errors. — Where appellant has had a fair submission of the real issues and the substantial benefit of all prayers for instructions, and determinative facts have been found against him, a reversal will not be granted for technical errors. Smith v. Hancock, 172 N.C. 150, 90 S.E. 127 (1916).

Nor in Absence of Prejudice. — Courts will not order reversals upon grounds which do not affect real merits and where no substantial prejudice will result. Ball-Thrash Co. v. McCormack, 172 N.C. 677, 90 S.E. 916 (1916).

Power to Direct Entry of Judgment on Verdict. — A party litigant has a substantial right in a verdict obtained in his favor; and where a verdict has been rendered on issues which are determinative, and is set aside as matter of law, and such ruling is held to be erroneous on appeal, the appellate court will direct that judgment be entered on the verdict as rendered. Wilson v. Rankin, 129 N.C. 447, 40 S.E. 310 (1901); Ferrall v. Ferrall, 153 N.C. 174, 69 S.E. 60 (1910).

Separate Judgments for Codefendants. — Under this section an action may be dismissed as to one defendant and affirmed as to the other. Kimbrough v. Hines, 182 N.C. 234, 109 S.E. 11 (1921).

Judgment on Compromise by Parties

Pending Appeal. — As the appellate court may enter final judgment if proper, a judgment so entered on a compromise by parties pending appeal will be treated as a final judgment by consent. Chavis v. Brown, 174 N.C. 122, 93 S.E. 471 (1917).

Remand to Carry out Agreement. — Where the parties' respective counsel on appeal agreed to modification and amendment of the judgment, the cause would be remanded to the trial court with directions to carry out the agreement. Stokes-Grimes Grocery Co. v. Hill, 176 N.C. 697, 97 S.E. 468 (1918).

Judgment Against Sureties on Undertaking. — Upon the affirmance by the appellate court of a judgment of the superior court in favor of the plaintiff, he is entitled, upon motion, to judgment against the sureties upon an undertaking to stay execution pending appeal, and such affirmance is conclusive of the liability of the sureties. Oakley v. Van Noppen, 100 N.C. 287, 5 S.E. 1 (1888).

The appellate court will not determine the rights of persons who do not appeal. Van Dyke v. Aetna Life Ins. Co., 173 N.C. 700, 91 S.E. 600 (1917).

Cited in Baxter v. Wilson, 95 N.C. 137 (1886); Everett v. Raby, 104 N.C. 479, 10 S.E. 526 (1889); Sedbury v. Southern Express Co., 164 N.C. 363, 79 S.E. 286 (1913); Johnson v. Whilden, 166 N.C. 104, 81 S.E. 1057 (1914); Geitner v. Jones, 173 N.C. 591, 92 S.E. 493 (1917); Holmes v. Bullock, 178 N.C. 376, 100 S.E. 530 (1919); Hodgin v. North Carolina Pub. Serv. Corp., 179 N.C. 449, 102 S.E. 748 (1920); Planters Stores Co. v. Bullock, 180 N.C. 656, 104 S.E. 65 (1920).

§ 1-298. Procedure after determination of appeal.

In civil cases, at the first session of the superior or district court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first session after the receipt of the certificate from the Appellate Division. (1887, c. 192, s. 2; Rev., s. 1526; C.S., s. 659; 1969, c. 44, s. 11; 1971, c. 268, s. 13.)

CASE NOTES

This section applies only to judgments of the superior court which have been affirmed or modified on appeal. D & W, Inc. v. City of Charlotte, 268 N.C. 720, 152 S.E.2d 199 (1966).

It has no application to a decision of the appellate court reversing a judgment of the lower court. D & W, Inc. v. City of Charlotte, 268 N.C. 720, 152 S.E.2d 199 (1966).

Appellate Court Without Jurisdiction After Remand. — The appellate court, having certified its opinion and remanded the case to the court below, is without jurisdiction to make any orders therein. Seaboard Air Line Ry. v. Horton, 176 N.C. 115, 96 S.E. 954 (1918); Davis v. Southern Ry., 176 N.C. 186, 96 S.E. 945 (1918).

The certified appellate decision is sent to the trial court which must then direct the execution thereof to proceed. Severance v. Ford Motor Co., 105 N.C. App. 98, 411 S.E.2d 618, cert. denied, 331 N.C. 286, 417 S.E.2d 255 (1992).

Mandate of the appellate court is binding on the trial court, which must strictly adhere to its holdings. Campbell v. First Baptist Church, 51 N.C. App. 393, 276 S.E.2d 712 (1981).

Power of Lower Court After Affirmance. — After a judgment of a subordinate court imposing a punishment for contempt for disobedience of its order has been affirmed by the appellate court, it becomes final, and the court below has no power to remit or modify it. In re Griffin, 98 N.C. 225, 3 S.E. 515 (1887).

Interpreting Decision of Appellate Court. — Expressions contained in an appellate court decision must be interpreted in the context of the factual situation under review or the framework of the particular case. Campbell v. First Baptist Church, 51 N.C. App. 393, 276 S.E.2d 712 (1981).

Where a judgment has been affirmed or reversed, but no final judgment has been entered by the appellate court, the case is a live one until judgment has been entered in the court below in conformity with the certificate from the appellate court. Lancaster v. Bland, 168 N.C. 377, 84 S.E. 529 (1915).

Trial court judge properly assumed jurisdiction pursuant to this section because another trial court judge's order, albeit modified by higher courts, was "still in effect." Hieb v. Lowery, 134 N.C. App. 1, 516 S.E.2d 621 (1999).

Docket Entry Held Sufficient. — When a judgment of the superior court was affirmed on appeal, an entry on the docket of the superior court, "Judgment as per transcript filed from the Supreme Court," was sufficient and a termination of the action. The former judgment having been merely suspended, and not vacated by the appeal, the affirmance by the Supreme Court ended the suspension, and the office of the last judgment was simply formal, to direct the execution to proceed and to carry the costs subsequently accrued. Bond v. Wool, 113 N.C. 20, 18 S.E. 77 (1893).

For case holding that defendants had no legal right to make a final assessment against plaintiff's property before the appellate court's opinion was certified to the superior court and while the questions presented on the appeal were yet in fieri, see Atlantic C.L.R.R. v. Sanford, 188 N.C. 218, 124 S.E. 308 (1924).

An order "That execution of said judgment do proceed" was pro forma under this section. North Carolina R.R. v. Story, 193 N.C. 362, 137 S.E. 166 (1927).

A judgment in appellant's favor taxing the costs of the action, at variance with the decision of the appellate court rendered on appeal, signed upon appellant's motion in the superior court after examination had been afforded to the appellee's attorney, was not irregular, and when not taken through mistake, inadvertence, surprise or excusable neglect, the procedure would be by exception and appeal, and not by motion in the cause at a subsequent term of the trial court. Phillips v. Ray, 190 N.C. 152, 129 S.E. 177 (1925).

Applied in Hamilton v. Southern Ry., 203 N.C. 136, 164 S.E. 834 (1932).

Cited in Bowers v. City of Thomasville, 143 N.C. App. 291, 547 S.E.2d 68, 2001 N.C. App. LEXIS 277 (2001).

§§ 1-299 through 1-301: Repealed by Session Laws 1971, c. 268, s. 34.

Cross References. — As to abolition of office of justice of the peace, see G.S. 7A-176.

ARTICLE 27A.

Appeals and Transfers from the Clerk.

§ 1-301.1. Appeal of clerk's decision in civil actions.

(a) Applicability. — This section applies to orders or judgments entered by the clerk of superior court in civil actions in which the clerk exercises the judicial powers of that office. If this section conflicts with a specific provision of the General Statutes, that specific provision of the General Statutes controls.

(b) Appeal of Clerk's Order or Judgment. — A party aggrieved by an order or judgment entered by the clerk may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a trial or hearing de novo. The order or judgment of the clerk remains in effect until it is modified or replaced by an order or judgment of a judge. Notice of appeal shall be filed with the clerk in writing. Notwithstanding the service requirement of G.S. 1A-1, Rule 58, orders of the clerk shall be served on other parties only if otherwise required by law. A judge of the court to which the appeal lies or the clerk may issue a stay of the order or judgment upon the appellant's posting of an appropriate bond set by the judge or clerk issuing the stay.

(c) Duty of Judge on Appeal. — Upon appeal, the judge may hear and determine all matters in controversy in the civil action, unless it appears to the judge that any of the following apply:

(1) The matter is one that involves an action that can be taken only by a clerk.

(2) Justice would be more efficiently administered by the judge's disposing of only the matter appealed.

When either subdivision (1) or subdivision (2) of this subsection applies, the judge shall dispose of the matter appealed and remand the action to the clerk. When subdivision (1) of this subsection applies, the judge may order the clerk to take the action.

(d) Judge's Concurrent Authority Not Affected. — If both the judge and the clerk are authorized by law to enter an order or judgment in a matter in controversy, a party may seek to have the judge determine the matter in controversy initially. (Rev. s. 529; C.S., s. 558; 1971, c. 381, s. 12; 1999-216, s. 1.)

Editor's Note. — Session Laws 1999-216, which added this Article, repealed former G.S. 1-174, 1-272, 1-273, 1-274, 1-275, 1-276, 1-399, and 36A-28 [see now G.S. 1-301.3]. The historical citation for former G.S. 1-174 has been carried under new G.S. 1-301.1 at the direction of the Revisor of Statutes. The case notes below include decisions under former G.S. 1-174 and former G.S. 1-272 to 1-276.

CASE NOTES

I. Appeal From Clerk to Judge.
II. Duty of Clerk on Appeal.
  A. In General.
  B. Issues of Fact Before Clerk.
III. Duty of Judge on Appeal.
IV. Judge May Determine All Matters in Controversy.
  A. In General.
  B. Scope of Court's Jurisdiction and Authority.
  C. Illustrative Cases.

I. APPEAL FROM CLERK TO JUDGE.

Editor's Note. — *Most of the case notes below were decided under former G.S. 1-174 and 1-272 to 1-276.*

Applicability. — Former G.S. 1-272 and former G.S. 1-274 and 1-275, regulating appeals from the clerk to the judge, are applicable to appeals from orders and judgments made or rendered by the clerk in the exercise of jurisdiction conferred upon him by statute prior to enactment of Public Laws 1921, Extraordinary Session, Chapter 92 (which act has now been repealed except for G.S. 1-281). These sections do not apply to orders and judgments made or entered by the clerk as authorized by the latter statute. Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925).

The provisions of former G.S. 1-272 applied only to appeals from the clerk in proceedings in which the clerk had original jurisdiction; taxation of costs is not a proceeding in which the clerk had original jurisdiction. Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985).

Former § 1-272 applied in special proceedings as well as in civil actions generally. Welfare v. Welfare, 108 N.C. 272, 12 S.E. 1025 (1891).

Section Inapplicable Where Judge and Clerk Have Concurrent Jurisdiction. — Former G.S. 1-272 and former G.S. 1-273 and 1-274, regulating appeals from the clerk of the superior court to the judge, had no application in regard to appeals from orders and decrees in proceedings over which the judge of the superior court has concurrent jurisdiction. Moody v. Howell, 229 N.C. 198, 49 S.E.2d 233 (1948).

Proceedings to Which Section Applies — Order to Sell Land for Debt. — Former G.S. 1-272 applied to an appeal from an order of the clerk to sell lands of decedent to pay debts. Perry v. Perry, 179 N.C. 445, 102 S.E. 772 (1920).

Same — Refusal to Issue Execution. — Where a clerk of the superior court refuses to issue an execution against the person of a judgment debtor, an appeal therefrom may properly be taken to the resident judge of the district. Huntley v. Hasty, 132 N.C. 279, 43 S.E. 844 (1903).

Same — Execution Sale. — An action in superior court to declare an execution sale and sheriff's deed void because defendants did not pay their bid in cash but merely cancelled judgments against the property owner constituted an impermissible collateral attack upon the order of confirmation of the execution sale by the clerk of court, plaintiffs' remedy being to proceed directly either by motion in the cause or appeal. Spalding Div. of Questor Corp. v. DuBose, 46 N.C. App. 612, 265 S.E.2d 501, cert. denied, 300 N.C. 375, 267 S.E.2d 678 (1980).

Same — Proceedings Supplemental to Execution. — Where, in proceedings supplemental to execution, the clerk held that the affidavit was sufficient and made the order demanded, an appeal lay at once to the judge as a matter of right, and the clerk could not allow or disallow it. Farmers Nat'l Bank v. Burns, 107 N.C. 465, 12 S.E. 252 (1890).

Same — Setting Aside Commissioner's Report. — An order of the clerk, setting aside the report of commissioners making partition of land, and directing a redivision, is appealable to the judge, and if no error in law is committed, the decision of the judge cannot be reversed. McMillan v. McMillan, 123 N.C. 577, 31 S.E. 729 (1898).

Same — Sufficiency of Bonds. — The power to revise and control the action of a clerk of the superior court in passing upon the sufficiency or insufficiency of bonds to be taken by him necessarily exists with the judge, whose minister and agent he is; and the proper mode of bringing the question before the judge is by an appeal from the ruling of the clerk. S. Marsh & Co. v. Cohen, 68 N.C. 283 (1873).

Same — Order Concerning Judgment Debtor. — An appeal lies from an order of the clerk requiring a judgment debtor to appear and answer concerning his property, where the affidavit for the order is objected to on the ground of its insufficiency. Farmers Nat'l Bank v. Burns, 107 N.C. 465, 12 S.E. 252 (1890).

Same — Removal of Executors. — An appeal will lie to the judge in proceedings for the removal of executors and administrators. Edwards v. Cobb, 95 N.C. 4 (1886).

Former G.S. 1-276, giving power to the superior court judge to determine all matters in controversy when a special proceeding is transferred for any ground from the clerk, must be construed in pari materia with this section. Journeys Int'l, Inc. v. Corbett, 53 N.C. App. 124, 280 S.E.2d 5 (1981).

Compliance with Section Required. — In order to entitle the judge of the superior court to review a ruling of the clerk in a matter in which the latter has original jurisdiction the procedure prescribed by former G.S. 1-272 must be followed. Muse v. Edwards, 223 N.C. 153, 25 S.E.2d 460 (1943).

There must be an appeal from the clerk's judgment to give the superior court jurisdiction. Spalding Div. of Questor Corp. v. DuBose, 46 N.C. App. 612, 265 S.E.2d 501, cert. denied, 300 N.C. 375, 267 S.E.2d 678 (1980).

The superior court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from the order of the clerk by a party aggrieved. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967); Spalding Div. of Questor Corp. v. DuBose, 46 N.C. App. 612, 265 S.E.2d 501, cert. denied, 300 N.C. 375, 267 S.E.2d 678 (1980).

Since former § 1-272 gave the superior court jurisdiction to review the clerk's order in taxing costs on appeal, the parties could not, through the terms of purported settlement agreement, deprive the court of that jurisdiction. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991); 331 N.C. 748, 417 S.E.2d 236 (1992).

Appeal of Probate Matters. — Jurisdiction in probate matters cannot be exercised by the judge of the superior court except upon appeal. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Under a strict construction of former G.S. 1-272 and former G.S. 1-273 as they affect G.S. 7A-251, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of G.S. 7A-241. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Upon an appeal from an order of the clerk in a probate proceeding to remove an executor or administrator, the jurisdiction of the judge of superior court is derivative. Jurisdiction in these matters cannot be exercised by the judge of superior court except upon appeal. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

The appeal must be taken within 10 days after the clerk's judgment to entitle the judge of the superior court to review the ruling. Spalding Div. of Questor Corp. v. DuBose, 46 N.C. App. 612, 265 S.E.2d 501, cert. denied, 300 N.C. 375, 267 S.E.2d 678 (1980).

Clerk's order denying motion to revoke letters testamentary was "entered" when the clerk announced after hearing on June 18, 1986, that he would deny the petition. The party aggrieved by the ruling, the petitioner, who was present and excepted to the order, had ten days thereafter to give notice of appeal pursuant to former G.S. 1-272. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

Dismissal on Ground of Laches. — An appeal from the clerk to the judge should be dismissed on the ground of inexcusable laches. Hicks v. Wooten, 175 N.C. 597, 96 S.E. 107 (1918).

Jurisdiction of Superior Court When Proceeding Before Clerk Is Brought Before Judge — In General. — The clerk is but a part of the superior court, and when a proceeding before the clerk is brought before the judge in any manner, the superior court's jurisdiction is not derivate; rather, the court has jurisdiction to hear and determine all matters in controversy as if the case was originally before him. However, the judge of the superior court may in his discretion remand the cause to the clerk for further proceedings. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Same — Erroneous Transfer to Superior Court. — Even when a proceeding is erroneously transferred to the superior court, and the judge takes jurisdiction, he may in his discretion make new parties, allow them to answer and hold the case for jury determination before further proceedings are held. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Although a proceeding to condemn property for urban renewal was erroneously transferred from the clerk to the superior court before the clerk had acted on the exceptions to the commissioners' report, the judge of superior court had full power to consider and determine all matters in controversy as if the cause was originally before him. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Where an equitable proceeding brought before the clerk, who has no equity powers, is pending on appeal in a court having equity jurisdiction, the appellate court will permit the latter to retain control of the case, and make all necessary orders as though the case were regularly pending. Smith v. Gudger, 133 N.C. 627, 45 S.E. 955 (1903).

Clerk Acts for Court. — The exercise of judicial powers by the "clerk of the court" is the exercise of them by the "court" through the clerk; and the action of the clerk stands as that of the court, if not excepted to and reversed or modified on appeal. Brittain v. Mull, 91 N.C. 498 (1884).

The clerk is not a "lower court" to the superior court with respect to appeals. While he has original jurisdiction in some matters and in the decision thereof may be considered a separate tribunal, nevertheless all his power is delegated by virtue of his office as clerk of the superior court. Windsor v. McVay, 206 N.C. 730, 175 S.E. 83 (1934).

And Clerk's Action Is Not Conclusive. — The action of the clerk is not final and conclusive. In a proper case, on appeal, it is the duty of the court to review the findings of fact by the clerk and correct his errors of law. He is no more than the servant of the court, and subject to its supervision. Turner v. Holden, 109 N.C. 182, 13 S.E. 731 (1891).

An appeal from a void order of the clerk of the superior court cannot be dismissed as frivolous. In re Sharpe, 230 N.C. 412, 53 S.E.2d 302 (1949).

Scope of Court's Review. — Where the clerk removes an administratrix upon his finding that she was not the widow of the deceased and therefore was not entitled to appointment as a matter of right, and an appeal is taken to the superior court from such order, the superior court, even though its jurisdiction is derivative, hears the matter de novo, and may review the finding of the clerk provided the appellant has properly challenged the finding by specific exception, and may hear evidence and even submit the controverted fact to the jury; but where there is no exception to the finding, the superior court may determine only whether the finding is supported by competent evidence, and if the order is so supported the superior court is without authority to vacate the clerk's judgment and order a jury trial upon the issue. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

To say that the superior court has jurisdiction to hear a probate matter only upon an appeal from a final judgment entered below does not mean that the judge can review the record only to ascertain whether there have been errors of law. He also reviews any findings of fact which the appellant has properly challenged by specific exceptions. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

Duty of Clerk to Transmit Record. — On appeal from the assessment of damages for lands taken by the State Highway Commission, the clerk is required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Where the clerk has failed to transmit the record the trial judge, within his supervisory power, may order that this be done. Sneed v. State Hwy. Comm'n, 194 N.C. 46, 138 S.E. 350 (1927).

Docketing Tax Not Applicable. — Where an appeal was taken from an order of the clerk of the superior court to the judge thereof under former G.S. 1-272, the judge had jurisdiction by mandate of former G.S. 1-276, and no "docketing" in a technical sense was involved; hence, former G.S. 105-93, requiring a tax of $2.00 for "docketing" and appeal from a lower court in the superior court, did not apply. Windsor v. McVay, 206 N.C. 730, 175 S.E. 83 (1934).

A party cannot be aggrieved by an order dismissing someone else's appeal. Poston v. Ragan, 14 N.C. App. 134, 187 S.E.2d 503 (1972).

Applied in Wilson v. Watson, 136 N.C. App. 500, 524 S.E.2d 812, 2000 N.C. App. LEXIS 51 (2000).

Cited in N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 599 S.E.2d 888, 2004 N.C. LEXIS 909 (2004); In re Foreclosure of Lien by Ridgeloch Homeowners Ass'n, 182 N.C. App. 464, 642 S.E.2d 532, 2007 N.C. App. LEXIS 653 (2007).

II. DUTY OF CLERK ON APPEAL.

A. In General.

Duty of Clerk to Prepare Statement. — Under proceedings for the partition of lands, when an appeal is taken from the decision of the clerk, upon issues of law or legal inference, it is the duty of the clerk to prepare and make a statement of the case and send it to the judge.

Little v. Duncan, 149 N.C. 84, 62 S.E. 770 (1908).

And to Transmit Record. — The clerk was required by former G.S. 1-274 to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Sneed v. State Hwy. Comm'n, 194 N.C. 46, 138 S.E. 350 (1927).

When Clerk Need Not Prepare and Transmit Statement. — In appeals from the clerk in that class of cases of which he has jurisdiction not as and for the court as in special proceedings, but in his capacity as clerk, such as auditing the accounts of executors and administrators, it is not necessary that he should prepare and transmit to the judge any statement of the case on appeal. Ex parte Spencer, 95 N.C. 271 (1886).

It is not necessary to make out a statement of the case on appeal when the record proper shows the grounds of appeal. Cape Fear & N.R.R. v. Stewart, 132 N.C. 248, 43 S.E. 638 (1903).

Court May Order Preparation of Statement. — The clerk has no authority to allow or disallow an appeal; and on his refusal to prepare a statement of the case as required by this section, the court in term, or a judge at chambers, may direct him to do so by simple order. Farmers Nat'l Bank v. Burns, 107 N.C. 465, 12 S.E. 252 (1890).

And Transmission of the Record. — Where the clerk has failed to transmit the record to the court upon notice of appeal given in proceedings under the provisions of this section, the trial judge within his supervisory power may order that this be done. Sneed v. State Hwy. Comm'n, 194 N.C. 46, 138 S.E. 350 (1927).

Unless Clerk Has Left Office. — Where a clerk has gone out of office, it is not proper to order him to file with the court, in writing, the evidence offered and admissions made in a proceeding pending before him while he was clerk. Ex parte Spencer, 95 N.C. 271 (1886).

No Appeal Lies from Order to Send Up Transcript. — No appeal lies from an order of the superior court directing the clerk to send up to the next term a transcript of proceedings supplemental to execution had before him. Farmers Nat'l Bank v. Burns, 107 N.C. 465, 12 S.E. 252 (1890).

What Statement Should Contain. — The statement should embrace the material facts and copies of necessary paper writings or such papers themselves, so that the judge may review the decision of the clerk appealed from upon its full merits. Brooks v. Austin, 94 N.C. 222 (1886); Carolina Power & Light Co. v. Merritt, 41 N.C. App. 438, 255 S.E.2d 225 (1979).

Clerk Should Give Reasons. — Where the clerk refuses to allow an amendment affecting the substance of an affidavit in attachment proceedings, he may and should state his reason for such refusal, even after appeal to the court in term. Cushing v. Styron, 104 N.C. 338, 10 S.E. 258 (1889).

Clerk Should Docket Case Without Court Order. — It is irregular for the judge in making his decision to order the clerk to place the proceeding on the docket of the regular term for trial, it being the duty of the clerk to do this without such order when an issue of fact is joined. Jones v. Desern, 94 N.C. 32 (1886).

Waiver. — Where an appeal from an order of the clerk was noted at the time and was heard without objection at the term of the superior court beginning two days thereafter, but upon failure of the judge to decide the appeal before leaving the district it was placed on the calendar and reached the second term following, at which time without objection the parties appeared and argued the matter before the presiding judge, any irregularity in procedure was waived, and defendant's contention that the appeal from the clerk should have been dismissed for failure to comply with this section was untenable. Cody v. Hovey, 219 N.C. 369, 14 S.E.2d 30 (1941).

B. Issues of Fact Before Clerk.

Preliminary questions of fact are to be decided by the clerk under this section. If he finds against the petitioner upon them, he will dismiss the proceeding, and if so advised, the petitioner may accept and appeal to the judge, who will hear and decide the appeal. Kaperonis v. North Carolina State Hwy. Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

Review of Clerk's Decisions. — The rulings or decisions of the clerks of the court must be transferred for trial to the next succeeding term of the superior court, if determinative issues arise on the pleadings in a procedure where the adversary rights of litigants are presented; and if there are issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken. In passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented. Mills v. McDaniel, 161 N.C. 112, 76 S.E. 551 (1912).

Issues of Fact in Partition Proceedings. — Although a partition proceeding is usually within the jurisdiction of the clerk of the superior court, when "issues of fact" are joined before the clerk, the cause must be transferred to the superior court for trial. Burke v. Harrington, 35 N.C. App. 558, 241 S.E.2d 715 (1978).

Denial of Good Faith in Condemnation Proceedings. — In proceedings by a railroad company to condemn lands, where the answer denied the intention of the petitioner in good faith to construct the proposed railroad, the pleadings, in this respect, did not raise an issue of fact to be transferred to and tried by the superior court in term, under the provisions of this section. Madison County Ry. v. Gahagan, 161 N.C. 190, 76 S.E. 696 (1912).

III. DUTY OF JUDGE ON APPEAL.

Full Jurisdiction of Case Vested on Appeal. — Under former G.S. 1-275, an appeal in a partition action from an order of the clerk overruling a demurrer carried the entire case into the superior court, and vested it with full jurisdiction of the cause. Thompson v. Rospigliosi, 162 N.C. 145, 77 S.E. 113 (1913).

Procedure When Issues of Fact Are Tried. — When issues of fact are tried, the court will remand the same and the pleadings or papers with the findings of the jury upon them, and the clerk will then proceed with the matter according to law. This provision has reference to issues of fact. Brittain v. Mull, 91 N.C. 498 (1884). But see § 1-276.

Issue of Law Joined in Special Proceedings. — When an issue of law is joined in a special proceeding, it is the duty of the judge to decide the question thus presented, and to transmit his decision in writing to the clerk, who will then proceed with the special proceeding according to law. Jones v. Desern, 94 N.C. 32 (1886). But see § 1-276.

In appeals in cases in which the clerk does not act for the court, it is the duty of the judge to determine the questions of fact and law raised, and for this purpose, if the evidence accompanying the papers is not satisfactory, he can require the production of other evidence. The judge can decide the questions of fact in such cases himself, or if he sees fit, he can submit issues for his better information to the jury. Ex parte Spencer, 95 N.C. 271 (1886).

Nature of Controversy in Partition Proceedings, Generally. — The controversy involved in a special proceeding for the partition in a special proceeding for the partition of land, as to whether there shall be an actual partition or a sale for the purpose, is not an issue of fact which should be sent to a jury, but a question of fact to be decided by the clerk, or by the judge on appeal. Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897).

Appeal from Clerk's Decision upon Commissioners' Report as to Allotment in Partition Proceedings. — In an ex parte proceeding for partition, an appeal by some of the parties from the decision of the clerk upon the report of commissioners, alleging inequality and unfairness in the allotment, involved questions of fact, properly determinable by the judge under former G.S. 1-275. Ex parte Beckwith, 124 N.C. 111, 32 S.E. 393 (1899).

A proceeding to sell lands to make assets to pay debts of the deceased is appealable from the clerk of the superior court, and is open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and may be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. Perry v. Perry, 179 N.C. 445, 102 S.E. 772 (1920).

Where clerk of superior court dismisses a proceeding for appointment of a trustee for want of jurisdiction, on appeal the judge of the superior court may make such appointment. Roseman v. Roseman, 127 N.C. 494, 37 S.E. 518 (1900).

Where Appeals May Be Heard. — Appeals from the clerk may be heard at chambers at any place in the district. Monroe v. Lewald, 107 N.E. 655, 12 S.E. 287 (1890).

Appeals from the clerk of the superior court and special proceedings to the judge residing or presiding in the district may be heard and judgment rendered outside of the county where the proceeding is pending, and within the district. Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897).

Motion Pending Appeal from Clerk. — A motion for a receiver to take possession of a debtor's property, in supplemental proceedings, may be made before a judge pending an appeal to him from the ruling of the clerk upon other questions. Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

What Evidence May Be Heard. — Upon an appeal from an order of the clerk to the judge, the latter may hear any evidence that would have been competent before the former, even though in fact it was not introduced. McAden v. Banister, 63 N.C. 478 (1869).

Notice Held Unreasonable. — Where notice of appeal from action by the clerk was served on the day before the hearing, the notice was not reasonable within this section. Byrd v. Nivens, 189 N.C. 621, 127 S.E. 673 (1925).

Presumption as to Propriety of Proceedings. — Where nothing in the record indicated that a judge who rendered a judgment on an appeal from the clerk of the superior court was requested in writing to fix a time for hearing and to give the parties notice, it would be presumed that the proceeding was rightly and regularly conducted. Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897).

IV. JUDGE MAY DETERMINE ALL MATTERS IN CONTROVERSY.

A. In General.

History. — By passing this section in 1887, the legislature considerably widened the power of judges on appeal. This section was enacted to remedy the inconvenience caused by the decision in Brittain v. Mull, 91 N.C. 498 (1884). In that case it was held that when the appeal was taken from the clerk the judge should hear the appeal and decide the questions of law presented, and then remand the matter, including his decision, to the clerk.

Liberal Construction. — Because of its beneficial results former G.S. 1-276 has always received a liberal interpretation. Williams v. Dunn, 158 N.C. 399, 74 S.E. 99 (1912).

Procedure Where Issue of Devisavit Vel Non Is Raised. — Under the statutes governing probate matters, the superior court, as a mere court of law and equity, has no jurisdiction to determine the issue of whether a disputed writing is the last will of a deceased person in an ordinary civil action. However, when an issue of devisavit vel non is raised, that necessitates the transfer of the cause to the civil issue docket for trial by jury, where the superior court in term has jurisdiction to determine the whole matter in controversy as well as the issue of devisavit vel non. Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

Appointment and Removal of Administrators. — The jurisdiction of the superior court on appeal from an order of the clerk in removing an administrator and appointing a successor is solely derivative. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

A proceeding to remove an executor or administrator is neither a civil action nor a special proceeding. Therefore, this section, which provides that "whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction," has no application to probate matters. In re Estate of Lowther, 271 N.C. 345, 156 S.E.2d 693 (1967).

For case holding that on appeal of clerk's order appointing an administrator the superior court could reverse the order but should then remand the case, see In re Styers, 202 N.C. 715, 164 S.E. 123 (1932).

For case holding that upon appeal of clerk's order removing certain executors and administrators, c.t.a., and appointing others in their place, the superior court judge, in the exercise of his discretional powers, could retain the cause, reverse the order of the clerk and appoint other administrators or a receiver to administrate the estate subject to the orders of the court, the entire matter being before the superior court on appeal, see Wright v. Ball, 200 N.C. 620, 158 S.E. 192 (1931).

A proceeding to remove an executor is not a civil action or a special proceeding. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

Appointment and Removal of Guardians. — In the appointment and removal of guardians, the appellate jurisdiction of the superior court is derivative, and appeals present for review only errors of law committed by the clerk. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

Civil actions and special proceedings, as contemplated by the terms of this section, which originate before the clerk of court are heard de novo when appealed to the Superior Court. In re Estate of Longest, 74 N.C. App. 386, 328 S.E.2d 804, cert. denied and appeal dismissed, 314 N.C. 330, 333 S.E.2d 488 (1985).

B. Scope of Court's Jurisdiction and Authority.

The superior court acquires jurisdiction of any special proceeding sent to it from the clerk on any ground whatever, with discretionary power to remand. Plemmons v. Cutshall, 230 N.C. 595, 55 S.E.2d 74 (1949).

Whenever a special proceeding begun before the clerk is, for any ground whatever, sent to the superior court, the judge has jurisdiction. Hudson v. Fox, 257 N.C. 789, 127 S.E.2d 556 (1962).

And Court's Jurisdiction Is Not Derivative. — Former G.S. 1-276 meant that the clerk was really an arm of the superior court. When a proceeding was brought before the court, the court's jurisdiction was not appellate or derivative; it was original. Hassell v. Wilson, 301 N.C. 307, 272 S.E.2d 77 (1980).

The clerk is but a part of the superior court, and when a proceeding before the clerk in any manner is brought before the judge, the superior court's jurisdiction is not derivative; rather, the court has jurisdiction to hear and determine all matters in controversy in the proceeding. Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365 (1941). See ex parte Wilson, 222 N.C. 99, 22 S.E.2d 262 (1942); Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966); Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Necessity of Appeal by a Party Aggrieved. — The superior court does not acquire jurisdiction of a special proceeding before the clerk when there is no appeal from the order of the clerk by a party aggrieved. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Judge May Determine Entire Controversy. — Under former G.S. 1-276, the judge now has final jurisdiction to determine the whole matter in controversy. Lictie v. Chappell, 111 N.C. 347, 16 S.E. 171 (1892); Faison v. Williams, 121 N.C. 152, 28 S.E. 188 (1897); Oldham v. Rieger, 145 N.C. 254, 58 S.E. 1091 (1907); Hall v. Artis, 186 N.C. 105, 118 S.E. 901 (1923); Sale v. State Hwy. & Pub. Works Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955).

When plaintiff appeals from the clerk's order to the judge, the judge is not limited to a review of the action of the clerk, but is vested with jurisdiction "to hear and determine all matters in controversy in such action," and he may render such judgment or order, within the limits provided by law, as he deems proper under the circumstances. Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971).

As If It Were Originally Before Him. — When a civil action or special proceeding instituted before the clerk is "for any ground whatever sent to the superior court before the judge," he has the authority to consider and determine the matter as if it were originally before him. Langley v. Langley, 236 N.C. 184, 72 S.E.2d 235 (1952).

In cases that originate before the clerk and which are properly called "civil actions" or "special proceedings" as contemplated by the terms of this section, and when there is an appeal to superior court, the hearing is de novo in superior court. In re Estate of Swinson, 62 N.C. App. 412, 303 S.E.2d 361 (1983).

Even Where Clerk Exceeded Authority. — Where the clerk of the superior court exceeds his authority or is without jurisdiction to make the decree, if the cause comes within the general jurisdiction of the superior court and invokes the proper exercise of its power, by virtue of this section the judge upon appeal may proceed to consider and determine the matter as if it were originally before him. McDaniel v. Leggett, 224 N.C. 806, 32 S.E.2d 602 (1945).

When the clerk of the superior court erroneously hears a proceeding over which he does not have jurisdiction, an appeal to the superior court confers jurisdiction upon it to hear and determine the whole matter. Bradshaw v. Warren, 216 N.C. 354, 4 S.E.2d 883 (1939).

Although an order by the clerk was a nullity, when the matter came before the judge of the superior court by appeal the judge had jurisdiction to proceed to hear and determine all matters in controversy. In re Foreclosure of Deed of Trust, 20 N.C. App. 610, 202 S.E.2d 318 (1974).

When defendants made a motion to set aside clerk's entry of default and default judgment, the trial court was not limited to a review of the action of the clerk, but was vested with jurisdiction to hear and determine all matters in controversy and render a judgment or order within the limits provided by law, including default judgment, and that principle would apply even though the order by the clerk was a nullity. Webb v. James, 46 N.C. App. 551, 265 S.E.2d 642 (1980).

Or Where Proceedings Were Improperly Brought Before Clerk. — When a case which is properly cognizable in the superior court but which is erroneously brought before a clerk gets in the superior court on any ground, the judge has jurisdiction to retain and hear the cause as if it were originally instituted in the superior court. Hall v. Artis, 186 N.C. 105, 118 S.E. 901 (1923). See also, Ryder v. Oates, 173 N.C. 569, 92 S.E. 508 (1917); Spence v. Granger, 207 N.C. 19, 175 S.E. 824 (1934).

Even when the proceeding originally had before the clerk is void for want of jurisdiction, the superior court may yet proceed in the matter. Hudson v. Fox, 257 N.C. 789, 127 S.E.2d 556 (1962).

Where a motion to quash an execution and sale of real estate was submitted to the clerk of the superior court who granted the relief, and an appeal was taken to the judge of the court, it was improper for the judge to refuse to hear the controversy on the ground that the clerk was without jurisdiction to entertain the motion. Williams v. Dunn, 158 N.C. 399, 74 S.E. 99 (1912).

Upon the failure or refusal of surviving partners to file the bond required by G.S. 59-74 or the inventory required by G.S. 59-76, the clerk of the superior court could not properly issue an order requiring the filing of bond and inventory, but upon appeal from such orders the superior court acquired jurisdiction of the entire proceeding and the appeal was erroneously dismissed in the superior court on the ground of want of jurisdiction. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Or Where Proceeding Was Erroneously Transferred. — Although a proceeding to condemn property for urban renewal is erroneously transferred from the clerk to the superior court before the clerk has acted on the exceptions to the Commissioners' report, the judge of superior court has full power to consider and determine all matters in controversy as if the cause was originally before him. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Where the clerk of the superior court erroneously transferred proceedings in condemnation to the superior court on issue joined between the parties, and an appeal therefrom was taken to the superior court, the judge thereof acquired jurisdiction for the hearing and determination of the controversy under the provisions of this section, and could order other proper or necessary parties to be made for the further determination of the cause. Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922).

A motion in the superior court to dismiss for want of jurisdiction on the ground that the proceeding was erroneously transferred to the civil issue docket is untenable. Plemmons v. Cutshall, 230 N.C. 595, 55 S.E.2d 74 (1949).

Judge Need Not Remand Case to Clerk for Determination of Motion. — After a motion is made before the clerk, the judge is not required to remand the cause to the clerk for the determination of the motion made before him. Wynne v. Conrad, 220 N.C. 355, 17 S.E.2d 514 (1941).

When a motion to retax a bill of costs in a case which originated before the clerk but was appealed to the superior court was made at the next term after judgment was entered, it was error for the judge to hold that he had no power to entertain it. In re Smith, 105 N.C. 167, 10 S.E. 982 (1890).

The court has the right in its discretion to remand the cause to the clerk for further proceedings. York v. McCall, 160 N.C. 276, 76 S.E. 84 (1912).

Remand of Partition Proceedings Held Improper. — Where special partition proceedings were begun before the clerk, and he transferred the case to the judge in term, the judge was required to dispose of such case on the merits, and he had no power to merely reverse the clerk's action and remand the case to him, even though there may have been irregularities in the proceedings before the clerk. Little v. Duncan, 149 N.C. 84, 62 S.E. 770 (1908).

Trial judge has full power to deny motion to enlarge the time to file complaint and dismiss the action as to defendant. This discretionary ruling as to enlargement of time to file complaint, in effect, ends the action. Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971).

Power to Permit Untimely Answer to Remain of Record. — Upon appeal from denial by the clerk of a motion to set aside a default judgment on the ground that at the time of its rendition a duly filed answer appeared of record, the superior court acquired jurisdiction of the entire cause, and he had the power to permit the answer to remain of record, even though it was filed after time for answering had expired. Bailey v. Davis, 231 N.C. 86, 55 S.E.2d 919 (1949).

The judge has power to make amendments to give jurisdiction. Elliott v. Tyson, 117 N.C. 114, 23 S.E. 102 (1895); Ewbank v. Turner, 134 N.C. 77, 46 S.E. 508 (1903).

And he may strike out an answer that is irrelevant. Commissioners of Yancey County v. Piercy, 72 N.C. 181 (1875).

Judge May Add Issues. — The number and form of issues is in the discretion of the court, and if every phase of the contention could have been and was presented under the issues submitted they will be sustained on appeal; and when the judge accordingly adds other issues tending to elucidate the case after it has been submitted, in addition to the usual issue, it is not error, but in the line of his duty. In re Herring, 152 N.C. 258, 67 S.E. 570 (1910).

Judge May Set Aside Clerk's Order and Substitute His Own. — The superior court acquires jurisdiction of the entire controversy upon appeal from the clerk, and has the power to hear and determine all matters involved therein; the judge may set aside a previous order of the clerk and substitute therefor an order of his own without finding that the clerk abused his discretion or committed an error of law in signing the order, the clerk being but a part of the superior court. Bynum v. Fidelity Bank, 219 N.C. 109, 12 S.E.2d 898 (1941).

Judge May Set Aside Judgment. — The judge has power to set aside a judgment for newly discovered testimony and to permit an amendment in the complaint. Faison v. Williams, 121 N.C. 152, 28 S.E. 188 (1897).

Court's Conflicting Ruling Held Null and Void. — Where the superior court ruled that a clerk had no authority under former G.S. 28-111 to appoint a referee to hear a claim against the estate of a deceased, a further ruling that the referee's report was binding on other grounds was a nullity, notwithstanding the broad jurisdiction of the superior court under this section. In re Shutt, 214 N.C. 684, 200 S.E. 372 (1939).

For discussion of reviewability on appeal of the exercise of the powers granted a clerk of superior court for revocation of letters of administration, see In re Estate of Swinson, 62 N.C. App. 412, 303 S.E.2d 361 (1983).

Authority Given District Court in Matter Relating to Exemptions. — Although no specific statute grants a district court authority, when a matter relating to exemptions is transferred, pursuant to G.S. 1C-1603(e)(7), from the clerk to the district court, the district court must be given the same general authority granted to a superior court pursuant to this section. Bromhal v. Stott, 119 N.C. App. 428, 458 S.E.2d 724 (1995).

C. Illustrative Cases.

Question of Price of Land Sold Under Mortgage. — The discretion vested in the superior court judge on appeal from the clerk cannot confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, wherein the clerk has no authority to further pass thereon in the absence of an increased bid. In re Mortgage Sale of Ware Property, 187 N.C. 693, 122 S.E. 660 (1924).

Resale on Foreclosure of Mortgage. — Where a commissioner appointed to hold a foreclosure sale advertised and sold the property in conformity with the order, but reported that the last and highest bid was less than the value of the property and recommended a resale, and the clerk ordered a resale, the judge of the superior court, upon the appeal of one of the trustees from the order of the clerk, had jurisdiction to hear and determine the matter and order a resale at chambers while holding a criminal term of court in the county. Harriss v. Hughes, 220 N.C. 473, 17 S.E.2d 679 (1941).

A proceeding to sell lands to make assets to pay the debts of the deceased is appealable from the clerk of the superior court, and is open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require; it may be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897); Perry v. Perry, 179 N.C. 445, 102 S.E. 772 (1920). See also, Harrington v. Hatton, 129 N.C. 146, 39 S.E. 780 (1901).

Partition Proceedings. — In a suit for partition of land, the jurisdiction acquired by appeal includes the right of the court to accept a private bid through its commissioner. When the bid is accepted, whether it was made at public or private sale, the court has jurisdiction over the purchaser for the purpose of enforcing compliance with it. Wooten v. Cunningham, 171 N.C. 123, 88 S.E. 1 (1916).

The clerk has authority and jurisdiction, initially to pass upon exceptions to the report of the commissioners in a special proceeding for partition. Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

Clerk of the superior court, having no equity jurisdiction, cannot issue a writ of assistance to enforce its order in proceedings to partition lands among tenants in common, nor can jurisdiction be conferred on the superior court on appeal, the latter having no concurrent or original jurisdiction. Southern State Bank v. Leverette, 187 N.C. 743, 123 S.E. 68 (1924).

Proceedings to Subject Lands to Dower. — An ex parte proceeding by a widow to subject land in the hands of heirs to the payment of dower charges thereon, prior to abolition of dower, could not be had before the clerk and on appeal could be dismissed by the judge for want of jurisdiction. In re Hybart's Estate, 129 N.C. 130, 39 S.E. 779 (1901).

Drainage Assessment Proceedings. — Under this section, giving the superior court jurisdiction to hear and determine all matters in controversy upon appeal from the clerk in special proceedings, and G.S. 156-29, providing that appeals from the clerk in drainage assessment proceedings should be the same as in special proceedings, an appeal may be taken from an order of the clerk to the superior court. Spence v. Granger, 207 N.C. 19, 175 S.E. 824 (1934).

Appointment of Receiver for Partnership. — While the clerk of the superior court had no jurisdiction to appoint a receiver for a partnership under G.S. 59-77 when the surviving partners failed or refused to file the inventory required by G.S. 59-76, the superior court on appeal from an order of the clerk in the proceeding acquired jurisdiction to appoint such receiver. In re Estate of Johnson, 232 N.C. 59, 59 S.E.2d 223 (1950).

Transfer of an action, seeking removal of a trustee, to civil issue docket by clerk of superior court was proper, where petitioner alleged breach of fiduciary duties by the trustee. Such an issue is a civil matter which is not "a part of" the administration of the estate, but rather "arises from" their administration. Freer v. Weinstein, 91 N.C. App. 138, 370 S.E.2d 860, cert. denied, 323 N.C. 476, 373 S.E.2d 863 (1988).

Default Set Aside. — Where counsel for defendant failed to file responsive pleadings within the allowable time limit and there was no evidence in the record that defendant was anything less than diligent in its pursuit of this matter, nor any allegations that plaintiff was prejudiced by the five-day delay between the expiration of the filing period and the date defendant filed its motion and proposed answer, justice would best be served by setting aside the entry of default. Automotive Equip. Distribs., Inc. v. Petroleum Equip. & Serv., Inc., 87 N.C. App. 606, 361 S.E.2d 895 (1987).

§ 1-301.2. Transfer or appeal of special proceedings; exceptions.

(a) Applicability. — This section applies to special proceedings heard by the clerk of superior court in the exercise of the judicial powers of that office. If this section conflicts with a specific provision of the General Statutes, that specific provision of the General Statutes controls.

(b) Transfer. — Except as provided in subsections (g) and (h) of this section, when an issue of fact, an equitable defense, or a request for equitable relief is raised in a pleading in a special proceeding or in a pleading or written motion in an adoption proceeding, the clerk shall transfer the proceeding to the appropriate court. In court, the proceeding is subject to the provisions in the

General Statutes and to the rules that apply to actions initially filed in that court.

(c) Duty of Judge on Transfer. — Whenever a special proceeding is transferred to a court pursuant to subsection (b) of this section, the judge may hear and determine all matters in controversy in the special proceeding, unless it appears to the judge that justice would be more efficiently administered by the judge's disposing of only the matter leading to the transfer and remanding the special proceeding to the clerk.

(d) Clerk to Decide All Issues. — If a special proceeding is not transferred or is remanded to the clerk after an appeal or transfer, the clerk shall decide all matters in controversy to dispose of the proceeding.

(e) Appeal of Clerk's Decisions. — Except as provided in G.S. 46-28.1(f), a party aggrieved by an order or judgment of a clerk that finally disposed of a special proceeding, may, within 10 days of entry of the order or judgment, appeal to the appropriate court for a hearing de novo. Notice of appeal shall be in writing and shall be filed with the clerk. The order or judgment of the clerk remains in effect until it is modified or replaced by an order or judgment of a judge. A judge of the court to which the appeal lies or the clerk may issue a stay of the order or judgment upon the appellant's posting of an appropriate bond set by the judge or clerk issuing the stay. Any matter previously transferred and determined by the court shall not be relitigated in a hearing de novo under this subsection.

(f) Service. — Notwithstanding the service requirement of G.S. 1A-1, Rule 58, orders of the clerk shall be served on other parties only if otherwise required by law.

(g) Exception for Incompetency and Foreclosure Proceedings and Proceedings to Permit Sterilization for Medical Necessity. —

(1) Proceedings for adjudication of incompetency or restoration of competency under Chapter 35A of the General Statutes, or proceedings to determine whether a guardian may consent to the sterilization of a mentally ill or mentally retarded ward under G.S. 35A-1245, shall not be transferred even if an issue of fact, an equitable defense, or a request for equitable relief is raised. Appeals from orders entered in these proceedings are governed by Chapter 35A to the extent that the provisions of that Chapter conflict with this section.

(2) Foreclosure proceedings under Article 2A of Chapter 45 of the General Statutes shall not be transferred even if an issue of fact, an equitable defense, or a request for equitable relief is raised. Equitable issues may be raised only as provided in G.S. 45-21.34. Appeals from orders entered in these proceedings are governed by Article 2A of Chapter 45 to the extent that the provisions of that Article conflict with this section.

(h) Exception for Partition Proceedings. — Notwithstanding the provisions of subsection (b) of this section, the issue whether to order the actual partition or the sale in lieu of partition of real property that is the subject of a partition proceeding shall not be transferred and shall be determined by the clerk. The clerk's order determining this issue, though not a final order, may be appealed pursuant to subsection (e) of this section. (C.C.P., c. 115; Code, s. 256; 1903, c. 566; Rev., ss. 588, 717; C.S., ss. 634, 758; 1971, c. 381, s. 12; 1995, c. 88, s. 2; 1999-216, s. 1; 2003-13, s. 2; 2009-362, s. 5.)

Cross References. — For case notes derived from cases decided under former G.S. 1-174 and former G.S. 1-272 to 1-276, see G.S. 1-301.1.

Editor's Note. — Session Laws 1999-216, which added this Article, repealed former G.S. 1-174, 1-272, 1-274, 1-275, 1-276, 1-399, and 36A-28 [see now G.S. 1-301.3]. The historical citations for former G.S. 1-273 and 1-399 have been carried under new G.S. 1-301.2 at the direction of the Revisor of Statutes. The case notes below include decisions under former G.S. 1-273 and 1-399.

Effect of Amendments. — Session Laws 2009-362, s. 5, effective October 1, 2009, inserted "Except as provided in G.S. 46-28.1(f)" at the beginning of the first sentence of subsection (e).

CASE NOTES

Editor's Note. — *Most of the case notes below were decided under former G.S. 1-273 and 1-399.*

Construction With Other Laws. — Husband had standing to appeal pursuant to G.S. 35A-1115 the clerk of the trial court's decision that the wife was incompetent. The husband was an interested party because the husband was entitled to notice of the competency proceeding and that statute applied to grant the husband standing because it was more specific than G.S. 1-301.2, which applied to appeals involved in special proceedings. In re Winstead, 189 N.C. App. 145, 657 S.E.2d 411, 2008 N.C. App. LEXIS 417 (2008).

Transfer of Case Where Issues of Fact Are Raised. — Where issues of fact are joined before the clerk in the exercise of his special jurisdictional powers as a distinct tribunal, the issues must be transferred to the superior court to be tried. Brittain v. Mull, 91 N.C. 498 (1884).

When an issue of fact is joined in a special proceeding, or issues of both fact and law, it is the duty of the clerk to place the proceeding on the docket of the trial term for trial. Jones v. Desern, 94 N.C. 32 (1886).

If issues of fact are raised in special proceedings before the clerk, the cause is transferred to the civil issue docket, to be tried as in an ordinary civil action. In re Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

Where an issue of fact is raised in a special proceeding, it must be determined by the court. The clerk is directed by former G.S. 1-273 and former G.S. 1-399 to transfer the action to the superior court docket for trial of the issues raised in the pleadings. In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985).

Probate Proceedings. — A clerk of the superior court may probate a will in solemn form, without the verdict of a jury, where interested parties are cited to appear or come in voluntarily and raise no issue of fact. But where an interested party intervenes in such proceeding and objects to the probate of the will, denying its validity, whether he files a formal caveat or not, it will raise the issue of devisavit vel non, which issue must be tried by a jury. Such procedure was required by former G.S. 1-273. In re Will of Ellis, 235 N.C. 27, 69 S.E.2d 25 (1952).

Under a strict construction of former G.S. 1-273 and former G.S. 1-272 as they affect G.S. 7A-251, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of G.S. 7A-241. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Proceedings for Partition. — In an ex parte proceeding for partition, an appeal by some of the parties from the decision of the clerk, upon the report of commissioners, alleging inequality and unfairness in the allotment, involves questions of fact, properly determinable by the judge, under former G.S. 1-273 section. Ex parte Beckwith, 124 N.C. 111, 32 S.E. 393 (1899).

Legitimation Proceedings. — The procedural statutes that apply to special proceedings are designed to fully protect the rights of all persons interested in special proceedings, including legitimation proceedings. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Dower Proceedings. — For case holding that former G.S. 1-273 rather than former G.S. 1-274 was applicable to an appeal from the judgment of the clerk in dower proceedings involving issues of law and of fact, prior to abolition of dower, see McLawhorn v. Smith, 211 N.C. 513, 191 S.E. 35 (1937).

Waiver. — In special proceedings, pending before clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the clerk and transmitted to the superior court in term for trial by jury, and where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts, they waive the right of trial by jury, even if it is conceded that the statute gives them the right to demand it. Chowan & S.R.R. v. Parker, 105 N.C. 246, 11 S.E. 328 (1890).

Clerk May Not Grant Affirmative Equitable Relief. — The clerk, in special proceedings, has no power to make any order granting affirmative equitable relief. Equitable defenses may be set up in the answer in such proceedings by way of avoidance, and when such equitable defenses exist they should be so pleaded; but when pleaded they amount to no more than defenses, and cannot be affirmatively administered. Vance v. Vance, 118 N.C. 864, 24 S.E. 768 (1896).

Clerk Must Transfer Case Where Equita-

ble Defense Is Pleaded. — When a party pleads any equitable or other defense, or asks for any equitable or other relief in the pleadings, it is required that the clerk shall transfer the cause to the civil issue docket, for trial during term, upon all issues raised by the pleadings, and the judge may allow amendments to the pleadings for the purpose of a hearing of the case upon its merits. Little v. Duncan, 149 N.C. 84, 62 S.E. 770 (1908).

Mutual Mistake. — For case holding that defendant could plead the equitable relief of mutual mistake and that when this plea was filed the clerk properly transferred the cause to the civil issue docket, see Smith v. Johnson, 209 N.C. 729, 184 S.E. 486 (1936).

How Questions of Fact Are Decided. — Questions of fact are first determined by the clerk and on appeal they are subject to review by the judge. Vanderbilt v. Roberts, 162 N.C. 273, 78 S.E. 156 (1913).

Right to Jury Trial on Fact Issues. — In special proceedings, pending before clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the clerk and transmitted to the superior court in term for trial by jury. Chowan & S.R.R. v. Porter, 105 N.C. 246, 11 S.E. 328 (1890).

Jury Trial in Proceeding for Alimony Without Divorce. — When in special proceedings for alimony without divorce the pleadings raised the issues of the validity of the marriage, or whether the husband had abandoned the wife, or whether the husband was a drunkard or spendthrift, the right of trial by jury arose and the case should have been transferred by the judge to the civil issue docket for the purpose. Crews v. Crews, 175 N.C. 168, 95 S.E. 149 (1918).

Waiver of Right to Jury Trial. — When the parties fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts, they waive the right of trial by jury. Chowan & S.R.R. v. Porter, 105 N.C. 246, 11 S.E. 328 (1890).

Boundary Disputes. — Where in a special proceeding under Chapter 38 to establish a boundary line, the defendant, by his answer, denies the petitioner's title and pleads 20 years' adverse possession under G.S. 1-40 as a defense, the proceeding is assimilated to an action to quiet title, and the clerk should transfer the cause to the civil issue docket for trial during term upon all issues raised by pleadings, in accordance with rules of practice applicable to such actions originally instituted in that court. Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949).

Where a special proceeding is begun to fix the location of the dividing line between two tracts of land, and defendant, by his answer, puts title to the disputed area in issue by alleging ownership, the proceeding in effect becomes an action to quiet. When the question of title is raised, the clerk should transfer the proceeding to the superior court in term. Bumgarner v. Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957).

Where, in a special proceeding under G.S. 38-1 to establish a boundary line, the defendant by his answer denies the petitioner's title and, as a defense, pleads seven years' adverse possession under color of title under G.S. 1-38 or 20 years' adverse possession under G.S. 1-40, the proceeding is assimilated to an action to quiet title. In such a case, the clerk shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings. Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961).

Partition. — While the clerk has original jurisdiction of special proceedings for the partition of land held by tenants in common, this jurisdiction is divested or suspended by a plea of non tenent insimul or of sole seizin. He is required to forthwith transfer the cause to the civil issue docket for trial as in case of other civil actions. Bailey v. Hayman, 222 N.C. 58, 22 S.E.2d 6 (1942).

When tenancy in common is denied and there is a plea of sole seizin, non tenent insimul, the proceeding in legal effect is converted into an action in ejectment and should be transferred to the civil issue docket for trial at term on issue of title, the burden being upon the petitioners to prove their title as in ejectment. Gibbs v. Higgins, 215 N.C. 201, 1 S.E.2d 554 (1939); Murphy v. Smith, 235 N.C. 455, 70 S.E.2d 697 (1952).

Effect of Judicial Admission Removing Defense as Issue. — Where defendants' answer to a petition for partition claimed sole seizin by virtue of an alleged contract under which the ancestor agreed upon a valid consideration to convey or devise the land to defendants, but upon the hearing defendants admitted that they had no writing to support the alleged agreement to convey or devise, but stated they intended suing for breach of the agreement, the judicial admission effectively removed the defense from the field of issuable matters, since the alleged agreement was void under the statute of frauds, and it was not required that the clerk transfer the issue to the civil docket. Clapp v. Clapp, 241 N.C. 281, 85 S.E.2d 153 (1954).

Rights of Putative Father in Adoption Proceeding. — When a termination of parental rights order, later held to be invalid for failure to use due diligence in ascertaining the putative father's address, is filed with an adoption petition in lieu of the affidavit required by G.S. 48-13, a subsequently filed affidavit may not relate back to the original filing date of the petition so as to cut off the rights of a putative father who filed a legitimation petition pursuant to G.S. 49-10 before the affidavit was filed.

In re Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

As to power of superior court judge to allow amendments on appeal, see Sudderth v. McCombs, 67 N.C. 353 (1872).

Evidence Considered upon Appeal. — If there are issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken; and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper dispositions of the question presented. Mills v. McDaniel, 161 N.C. 112, 76 S.E. 551 (1912).

Cited in Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002); Guerrier v. Guerrier, 155 N.C. App. 154, 574 S.E.2d 69, 2002 N.C. App. LEXIS 1638 (2002).

§ 1-301.3. Appeal of estate matters determined by clerk.

(a) Applicability. — This section applies to matters arising in the administration of testamentary trusts and of estates of decedents, incompetents, and minors. G.S. 1-301.2 applies in the conduct of a special proceeding when a special proceeding is required in a matter relating to the administration of an estate.

(b) Clerk to Decide Estate Matters. — In matters covered by this section, the clerk shall determine all issues of fact and law. The clerk shall enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment.

(c) Appeal to Superior Court. — A party aggrieved by an order or judgment of the clerk may appeal to the superior court by filing a written notice of the appeal with the clerk within 10 days of entry of the order or judgment. The notice of appeal shall specify the basis for the appeal. Unless otherwise provided by law, a judge of the superior court or the clerk may issue a stay of the order or judgment upon the appellant's posting an appropriate bond set by the judge or clerk issuing the stay. While the appeal is pending, the clerk retains authority to enter orders affecting the administration of the estate, subject to any order entered by a judge of the superior court limiting that authority.

(d) Duty of Judge on Appeal. — Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

(1) Whether the findings of fact are supported by the evidence.
(2) Whether the conclusions of law are supported by the findings of facts.
(3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

It is not necessary for a party to object to the admission or exclusion of evidence before the clerk in order to preserve the right to assign error on appeal to its admission or exclusion. If the judge finds prejudicial error in the admission or exclusion of evidence, the judge, in the judge's discretion, shall either remand the matter to the clerk for a subsequent hearing or resolve the matter on the basis of the record. If the record is insufficient, the judge may receive additional evidence on the evidentiary issue in question. The judge may continue the case if necessary to allow the parties time to prepare for a hearing to receive additional evidence.

(e) Remand After Disposition of Issue on Appeal. — The judge, upon determining the matter appealed from the clerk, shall remand the case to the clerk for such further action as is necessary to administer the estate.

(f) Recording of Estate Matters. — In the discretion of the clerk or upon request by a party, all hearings and other matters covered by this section shall be recorded by an electronic recording device. A transcript of the proceedings may be ordered by a party, by the clerk, or by the presiding judge. If a recordation is not made, the clerk shall submit to the superior court a summary of the evidence presented to the clerk. (1999-216, s. 1.)

Cross References. — For case notes derived from cases decided under former G.S. 1-174 and former G.S. 1-272 to 1-276, see G.S. 1-301.1. For case notes derived from cases decided under former G.S. 1-273 and 1-399, see G.S. 1-301.2.

CASE NOTES

"Aggrieved Party." — Husband did not have standing under G.S. 35A-1115 to appeal the decision of the assistance clerk of the trial court's decision appointing the daughter as the wife's general guardian, despite the husband filing an application for letters of general guardianship, because that statute applied only to competency proceedings. However, the husband had standing to appeal the decision pursuant to G.S. 1-301.3(c) as an aggrieved party since the husband had sought appointment as the general guardian and had not been selected. In re Winstead, 189 N.C. App. 145, 657 S.E.2d 411, 2008 N.C. App. LEXIS 417 (2008).

Standard of Review. — Superior court exceeded its statutorily proscribed standard of review under G.S. 1-301.3(d) because the superior court appeared to have ignored completely the findings of fact made by a clerk for a county that were challenged by a co-administrator, and the superior court substituted its own in their place. In re Estate of Severt, — N.C. App. —, 669 S.E.2d 886, 2008 N.C. App. LEXIS 2240 (2008).

Notice of Appeal Constituted Only a General Objection. — Petitioner's notice of appeal to the superior court from a decision of the clerk of superior court was properly characterized as a general objection; the appeal did not relate specifically to any of the clerk's 66 findings of fact, but constituted only a broadside attack on them. In re Estate of Whitaker, 179 N.C. App. 375, 633 S.E.2d 849, 2006 N.C. App. LEXIS 1902 (2006).

Order Setting Aside Prior Order Reopening Estate Was Proper. — Ultimate fact before the clerk was whether a testator's estate would remain closed, and the clerk's order, which made a specific finding on this ultimate fact by stating that a prior order reopening the subject estate was improvidently and inappropriately entered, that the same should have been and was therefore set aside, and that the estate was to remain closed, complied with the requirements of G.S. 1-301.3(b). In re Estate of Mullins, — N.C. App. —, 643 S.E.2d 599, 2007 N.C. App. LEXIS 798 (2007).

Cited in In re Testamentary Trust of Charnock, 158 N.C. App. 35, 579 S.E.2d 887, 2003 N.C. App. LEXIS 938 (2003).

SUBCHAPTER X. EXECUTION.

ARTICLE 28.

Execution.

§ 1-302. Judgment enforced by execution.

Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this Article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt. (C.C.P., s. 257; Code, s. 441; Rev., s. 615; C.S., s. 663.)

Cross References. — As to contempt generally, see Chapter 5A. As to enforcement of judgments, and exemptions, see G.S. 1C-1601 et seq.

CASE NOTES

Every execution presupposes a judgment, and the right to issue the one implies the existence of the other. Sheppard v. Bland, 87 N.C. 163 (1882).

Execution as Procedure for Enforcing Judgment. — A judgment creditor is entitled to have his judgment satisfied, if need be, by a sale of his debtor's property, except such parts thereof as may be exempt from execution. The ordinary process to enforce such a judgment is that of execution against the property of the debtor, and this process the creditor may have from time to time while the judgment continues in force, until it shall be discharged. Vegelahn v. Smith, 95 N.C. 254 (1886).

Execution as Procedure for Collection of Debts. — Court rejected an argument there was some sort of execution sale other than one for payment of debts. The meaning of "execution sale" was a forced sale pursuant to a writ of execution for the payment of debts. City of Charlotte v. BMJ of Charlotte. LLC, — N.C. App. —, 675 S.E.2d 59, 2009 N.C. App. LEXIS 647 (Apr. 7, 2009).

The issuance of an execution does not prolong the life of a lien, nor stop the running of the statute of limitation. Cheshire v. Drake, 223 N.C. 577, 27 S.E.2d 627 (1943).

No Execution Against Counties. — A plaintiff who has obtained a judgment against a county is not entitled to an execution against it. His remedy is by a writ of mandamus against the board of commissioners of the county to compel them to levy a tax for the satisfaction of the judgment. Gooch v. Gregory, 65 N.C. 142 (1871).

Remedy for Refusal of Clerk to Issue Execution. — Should the clerk refuse to issue the execution to which the plaintiff is entitled on his judgment, he has two remedies for enforcing his rights: (1) He may obtain a rule on the clerk as an officer of the court to compel him to perform his duty, or be subject to an attachment for a contempt; or (2) He may sue the clerk on his official bond. He is not entitled to a writ of mandamus against the clerk. Gooch v. Gregory, 65 N.C. 142 (1871); Post-Glover Elec. Co. v. McEntee-Peterson Eng'r Co., 128 N.C. 199, 38 S.E. 831 (1901).

An order taxing the costs of an action against a party is, in effect, a judgment, upon which an execution may be issued under this section. Sheppard v. Bland, 87 N.C. 163 (1882).

Where the land of a judgment debtor is subjected to a specific lien for its payment, the judgment creditor may proceed against the debtor in personam, may compel payment by proceeding in rem, or pursue both remedies at the same time. Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922).

Funds in Hands of Third Person. — Where it appears, in proceedings supplementary to execution, that a third person has funds of the defendant available for the judgment debt, etc., an order may be made by the court forbidding such third persons to dispose of the funds. Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922).

Applied in Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975).

Cited in Broyles v. Young, 81 N.C. 315 (1879); Sawyers v. Sawyers, 93 N.C. 321 (1885); Williams v. Weaver, 94 N.C. 34 (1886); Lupton v. Edmundson, 220 N.C. 188, 16 S.E.2d 840 (1941); Safeco Ins. Co. of America v. Nationwide Mut. Ins. Co., 264 N.C. 749, 142 S.E.2d 694 (1965).

§ 1-303. Kinds of; signed by clerk; when sealed.

There are three kinds of execution: one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, and shall be subscribed by the clerk, and when to run out of his county, must be sealed with the seal of his court. (C.C.P., s. 258; Code, s. 442; Rev., s. 616; C.S., s. 664.)

Cross References. — As to forms of executions, see G.S. 1-313. For execution against the person, see G.S. 1-311 and 1-313.

CASE NOTES

Construction. — Court rejected an argument there was some sort of execution sale other than one for payment of debts. The meaning of "execution sale" was a forced sale pursuant to a writ of execution for the payment of debts. City of Charlotte v. BMJ of Charlotte. LLC, — N.C. App. —, 675 S.E.2d 59, 2009 N.C. App. LEXIS 647 (Apr. 7, 2009).

Sealing of Execution Issued to Another County. — Sealing is necessary to the validity of all executions issuing to another county; and a sheriff, by acting under an unsealed writ, does not render it valid. Governor ex rel. Shackelford v. M'Rea, 10 N.C. 226 (1824); Shepherd v. Lane, 13 N.C. 148 (1828); Seawell v. Bank of Cape Fear, 14 N.C. 279 (1831); Finley v.

Smith, 15 N.C. 95 (1833); Freeman v. Lewis, 27 N.C. 91 (1844); Taylor v. Taylor, 83 N.C. 116 (1880).

§ 1-304. Against married woman.

An execution may issue against a married woman, and it must direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise. (C.C.P., s. 259; Code, s. 443; Rev., s. 617; C.S., s. 665.)

Cross References. — As to the property rights of married persons, see N.C. Const., Art. X, § 4 and G.S. 52-1.

CASE NOTES

Effect of Section. — Under this section execution can be levied on all the separate property owned by a married woman, with the same exceptions allowed to a man or an unmarried woman. Harvey v. Johnson, 133 N.C. 352, 45 S.E. 644 (1903).

As to effect of this section, see also McLeod v. Williams, 122 N.C. 451, 30 S.E. 129 (1898); Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914); Thrash v. Ould, 172 N.C. 728, 90 S.E. 915 (1916).

Applied in Dougherty v. Sprinkle, 88 N.C. 300 (1883); McLeod v. Williams, 122 N.C. 451, 30 S.E. 129 (1898); Harvey v. Johnson, 133 N.C. 352, 45 S.E. 644 (1903).

§ 1-305. Clerk to issue, in six weeks; penalty; limitations on issuance.

(a) Subject to the provisions of G.S. 1A-1 (Rule 62) and subsection (b) below, the clerk of superior court shall issue executions on all unsatisfied judgments rendered in his court, which are in full force and effect, upon the request of any party or person entitled thereto and upon payment of the necessary fees; provided, however, that the clerks of the superior court shall issue executions on all judgments rendered in their respective courts on forfeiture of bonds in criminal cases within six weeks of the rendition of the judgment, without any request or any advance payment of fees. Every clerk who fails to comply with the requirements of this section is liable to be amerced in the sum of one hundred dollars ($100.00) for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and is further liable to the party injured by suit upon his bond.

(b) The clerk may not issue an execution unless

(1) The judgment debtor's exemptions have been designated, or

(2) The judgment debtor has waived his exemptions as provided in G.S. 1C-1601(c), or

(3) The clerk determines that the exemptions are inapplicable to the particular claim as authorized by G.S. 1C-1603(a)(3). (1850, c. 17, ss. 1, 2, 3; R.C., c. 45, s. 29; Code, s. 470; Rev., s. 618; C.S., s. 666; 1953, c. 470; 1959, c. 1295; 1973, c. 1070, s. 1; 1981 (Reg. Sess., 1982), c. 1224, s. 15.)

Legal Periodicals. — For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

Duty of Clerk to Issue Execution. — It is the duty of the clerk, as a ministerial officer of the court, to issue execution. Gooch v. Gregory, 65 N.C. 142 (1871). See also, Spencer v. Hawkins, 39 N.C. 288 (1846).

The clerk of the superior court, not the judge, is the proper officer to issue execution. McKethan v. McNeill, 74 N.C. 663 (1876).

A deputy clerk has power to issue execution in the name of the clerk. Miller v. Miller, 89 N.C. 402 (1883).

The signature of the clerk is an absolute necessity to the validity of the writ, all the more so since the legislature has dispensed with the other indicium of the writ's authenticity, that is, a seal, when the writ is to be executed within the county in which it issued. Shepherd v. Lane, 13 N.C. 148 (1828).

A writ signed by an attorney under a verbal deputation of the clerk to all the members of the bar is a nullity, and the sheriff is not liable for not acting under it. Shepherd v. Lane, 13 N.C. 148 (1828).

As to endorsement on execution docket, see Bank of Cape Fear v. Stafford, 47 N.C. 98 (1854).

Delivery Necessary to Execution. — It is necessary for the issuance of an execution that it be actually or constructively delivered to the sheriff, and when it is made out, but not sent out of or issued from the clerk's office, and memorandum of "execution" is entered on the docket, it is not sufficient, under this section, and does not prevent the judgment from becoming dormant. McKeithen v. Blue, 149 N.C. 95, 62 S.E. 769 (1908).

A writ of execution is not issued, within the meaning of this section, until the clerk hands it to the sheriff, or to the party or his agent. The mere filing and retaining it, where it does not leave the office of the clerk, is not sufficient. State v. McLeod, 50 N.C. 318 (1858).

As to remedy for refusal of clerk to issue execution, see Gooch v. Gregory, 65 N.C. 142 (1871).

Payment of Fees as Condition of Clerk's Liability. — This section and G.S. 138-2, providing that the clerk shall not be compelled to perform any services unless his fees are paid or tendered, must be construed together. It follows that clerks of the superior court will not incur the penalty prescribed by this section for failure to issue execution within six weeks unless the plaintiff pays or tenders him his fees for that service. Bank of Oxford v. Bobbitt, 111 N.C. 194, 16 S.E. 169 (1892). See Board of Educ. v. Gallop, 227 N.C. 599, 44 S.E.2d 44 (1947).

Issuance to One of Two Counties. — An allegation that the clerk failed to issue an execution to one county when he had an option to issue to one of two counties would not justify an amercement under this section. Bank of Cape Fear v. Stafford, 47 N.C. 98 (1854).

This section gives the penalty to the party aggrieved; hence the plaintiff must show himself to be the party aggrieved by the default of the clerk. Simpson v. Simpson, 63 N.C. 534 (1869).

As to suspension of the statute by the Ordinance of 1866, see Badham v. Jones, 64 N.C. 655 (1870); McIntyre v. Merritt, 65 N.C. 558 (1871); Richardson v. Wicken, 80 N.C. 172 (1879); Williamson v. Kerr, 88 N.C. 10 (1883).

Applied in Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Cited in McIntyre v. Merritt, 65 N.C. 558 (1871).

§ 1-306. Enforcement as of course.

The party in whose favor judgment is given, and in case of his death, his personal representatives duly appointed, may at any time after the entry of judgment proceed to enforce it by execution, as provided in this Article; provided, however, that no execution upon any judgment which requires the payment of money or the recovery of personal property may be issued at any time after ten years from the date of the rendition thereof; but this proviso shall not apply to any execution issued solely for the purpose of enforcing the lien of a judgment upon any homestead, which has or shall hereafter be allotted within the ten years from the date of rendition of judgment, or any judgment directing the payment of alimony. (C.C.P., s. 255; Code, s. 437; Rev., s. 619; C.S., s. 667; 1927, c. 24; 1935, c. 98.)

CASE NOTES

Judgment Directing Payment of Alimony. — The statute of limitations does not apply to a judgment directing the payment of alimony. Morse v. Zatkiewiez, 5 N.C. App. 242, 168 S.E.2d 219 (1969).

A decree for periodic payments of alimony and support, in the absence of a provision in the decree itself which constitutes it a specific lien upon the property of the obligor, is not enforceable by execution until the arrears are reduced to judgment by a judicial determination of the amount then due. This is so because the decree for alimony and support may be modified as circumstances may justify. Lindsey v. Lindsey, 34 N.C. App. 201, 237 S.E.2d 561 (1977).

Enforcement of Certain Criminal Judgments by United States. — No limitation period, state or federal, bars the United States from enforcing a judgment on an unpaid criminal fine. United States v. Welborn, 495 F. Supp. 833 (M.D.N.C. 1980).

Sale Must Be Completed Within 10 Years. — This section and G.S. 1-234 clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. Hence, it follows that the lien upon lands of a docketed judgment is lost by the lapse of 10 years from the date of the docketing, and this notwithstanding execution was begun, but not completed, before the expiration of the 10 years. The only office of an execution is to enforce the lien of the judgment by a sale of the lands, and this must be done before the lien is lost. The execution adds nothing by way of prolongation to the life of the lien. McCullen v. Durham, 229 N.C. 418, 50 S.E.2d 511 (1948).

Expiration of Lien of Judgment When Docketed in Another County. — Where a judgment rendered in another county is docketed in the county in which the judgment debtor owns realty, the lien of the judgment expires at the end of 10 years from the date of rendition of the judgment and not the date of docketing. North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

Allotment of homestead suspends the running of the statute of limitations. Cleve v. Adams, 222 N.C. 211, 22 S.E.2d 567 (1942).

A party may not enjoin execution until the statute has run and then plead the bar of the statute against the judgment. Holden v. Totten, 228 N.C. 204, 44 S.E.2d 874 (1947).

Procedure for Obtaining New Judgment. — Under the proviso in this section no execution upon any judgment for money may be issued after 10 years of the date of the rendition thereof; the only procedure whereby the owner of a judgment may obtain a new judgment for the amount is by an independent action upon the judgment, commenced by the issuance of summons, filing of complaint, service thereof, etc., as with any other action to recover a judgment on a debt, which action must, under G.S. 1-47, be commenced within 10 years from the date of the rendition of the judgment. Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955).

The concept of a dormant judgment and scire facias for leave to issue execution thereon is now obsolete. Reid v. Bristol, 241 N.C. 699, 86 S.E.2d 417 (1955).

Cited in Williams v. Mullis, 87 N.C. 159 (1882); Exum v. Carolina R.R., 222 N.C. 222, 22 S.E.2d 424 (1942).

§ 1-307. Issued from and returned to court of rendition.

Executions and other process for the enforcement of judgments can issue only from the court in which the judgment for the enforcement of the execution or other final process was rendered; and the returns of executions or other final process shall be made to the court of the county from which it issued. In all cases prior to the first day of March, 1945, where a judgment has been rendered in the superior court of one county and the transcript thereof has been docketed in the office of the clerk of the superior court of some other county or counties, all executions heretofore issued on such docketed transcript of judgment and all homestead proceedings, execution sales, judicial sales and assignments related thereto and based thereon are hereby declared to be lawful, legal and binding upon all purchasers, judgment debtors, judgment creditors, assignors and assignees, and on all parties to the original action and on all parties to or affected by any proceedings related to or based upon such execution, and all such sales, purchases, proceedings and assignments are hereby validated. (1871-2, c. 74; 1881, c. 75; Code, s. 444; Rev., s. 623; C.S., s. 669; 1945, c. 773.)

CASE NOTES

This section and § 1-352 must be construed in pari materia with other statutes relating to the same matter. Essex Inv. Co. v. Pickelsimer, 210 N.C. 541, 187 S.E. 813 (1936).

Executions May Issue Only from Court Rendering Judgment. — Under the original

Code, executions might be issued from any county where the judgments had been docketed, and were returnable to the court from which they issued; but since the act of 1871-72, ch. 74, § 1, executions shall issue only from the court in which the judgment was rendered. Hasty v. Simpon, 77 N.C. 69 (1877); Daniels v. Yelverton, 239 N.C. 54, 79 S.E.2d 311 (1953).

Under this section, only the clerk of the superior court in the county where a judgment is rendered may issue execution, even though the judgment is docketed in other counties. Hickory White Trucks, Inc. v. Greene, 34 N.C. App. 279, 237 S.E.2d 862 (1977).

Return to Another County Not Authorized. — Since the passage of the Act of 1870-71, ch. 42, the clerk of the superior court of one county cannot issue a summons returnable in the superior court of another. Howerton v. Tate, 66 N.C. 431 (1872).

Venue of a proceeding in the nature of a creditor's supplemental proceeding under this section, in which in order to issue an execution on the defendant's interest under his father's will, the trial judge was required to find only that defendant possessed some interest under his father's will, was governed by this section, not G.S. 28A-3-1. North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987).

Execution on Tax Certificate. — Where the Commissioner (now the Secretary) of Revenue had the clerk of a superior court docket his certificate setting forth the tax due by a resident of the county pursuant to G.S. 105-242(c), execution on such judgment directed to the sheriff of the county had to be issued by the clerk of the superior court of the county, or in his name by a deputy or assistant clerk, and it could not be issued by the Commissioner. Daniels v. Yelverton, 239 N.C. 54, 79 S.E.2d 311 (1953).

Applied in North Carolina Nat'l Bank v. Sharpe, 49 N.C. App. 687, 272 S.E.2d 368 (1980).

§ 1-308. To what counties issued.

When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. No execution may issue from the superior court upon any judgment until such judgment shall be docketed in the county to which the execution is to be issued. When it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Execution may be issued at the same time to different counties. (C.C.P., s. 259; 1871-2, c. 74; 1881, c. 75; Code, s. 443; 1905, c. 412; Rev., s. 622; C.S., s. 670; 1953, c. 884.)

CASE NOTES

Where a writ was issued against three defendants, and two of them were in one county while the other was in another county, in which the judgment was rendered, in the absence of special instructions, the clerk might issue an execution to either county. Bank of Cape Fear v. Stafford, 47 N.C. 98 (1854).

Applied in North Carolina Nat'l Bank v. Sharpe, 49 N.C. App. 687, 272 S.E.2d 368 (1980).

§ 1-309. Sale of land under execution.

Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold. (C.C.P., s. 259; Code, s. 443; Rev., s. 622; C.S., s. 671.)

CASE NOTES

Section Not Applicable to Foreclosure Sales. — The provisions of this section relative to judicial sales are intended to apply to proceedings in the nature of execution sales of property in the hands of others charged with the payment of the judgment, and have no application to foreclosure proceedings, which are left to be governed by the old equity practice. Kidder v. McIlhenny, 81 N.C. 123 (1879).

Sale by Successor in Office. — Where a fieri facias was levied by one sheriff before his death, his successor had no authority to sell the property under a venditioni exponas, since an execution is an entire thing and must be completed by the hand which commenced it. Sanderson v. Rogers, 14 N.C. 38 (1831).

Where a sheriff has levied on lands and goods, and gone out of office, a general venditioni may issue to the new sheriff, where the goods have been delivered over to him. Tarkinton v. Alexander, 19 N.C. 87 (1836), explaining and reconciling the cases of Holliday v. Eastwood, 12 N.C. 157 (1827), and Sanderson v. Rogers, 14 N.C. 38 (1831), with those of Barden v. M'Kinne, 11 N.C. 279 (1826), and Seawell v. Bank of Cape Fear, 14 N.C. 279 (1831), and approving them all.

A writ directed to the sheriff for the sale of land levied on by a sheriff who had gone out of office will not authorize a sale of land by the late sheriff. Tarkinton v. Alexander, 19 N.C. 87 (1936).

Cited in Weir v. Weir, 196 N.C. 268, 145 S.E. 281 (1928).

§ 1-310. When dated and returnable.

Executions shall be dated as of the day on which they were issued, and shall be returnable to the court from which they were issued not more than 90 days from said date, and no executions against property shall issue until 10 days after entry of judgment. (1870-1, c. 42, s. 7; 1873-4, c. 7; Code, s. 449; 1903, c. 544; Rev., s. 624; C.S., s. 672; 1927, c. 110; 1931, c. 172; 1953, c. 697; 1971, c. 381, s. 12; 1973, c. 1070, s. 2; 1977, c. 74, s. 1.)

CASE NOTES

By this statute the legislature has fixed the life of an execution. And while failure to follow the statute makes an execution irregular, the life of it as fixed by the statute is not affected. Gardner v. McDonald, 223 N.C. 555, 27 S.E.2d 522 (1943).

The term "return" implies that the process is taken back, with such endorsements as the law requires, to the place from when it originated. Brogden Prod. Co. v. Stanley, 267 N.C. 608, 148 S.E.2d 689 (1966).

Computation of Time for Return. — In computing the number of days within which the writ of execution must be returned, the day of the issuance of execution must be included and the day of its return must be excluded. This is by analogy to the rule applied to the return of a process. Taylor v. Harris, 82 N.C. 25 (1880).

As to directory effect of former requirement of attestation of the execution, see Bryan v. Hubbs, 69 N.C. 423 (1873); Williams v. Weaver, 94 N.C. 134 (1886).

Applied in Board of Educ. v. Gallop, 227 N.C. 599, 44 S.E.2d 44 (1947); North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

Cited in Boyd v. Teague, 111 N.C. 246, 16 S.E. 338 (1892); HFC v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992); In re Pinner, 146 Bankr. 659 (Bankr. E.D.N.C. 1992).

§ 1-311. Against the person.

If the action is one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the State, after the return of an execution against his property wholly or partly unsatisfied. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in the Article Arrest and Bail, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement of facts is necessary to the cause of action or not. Provided, that where the facts are found by a jury, the verdict shall contain a finding of facts establishing the right to execution against the person; and where jury trial is waived and the court finds the facts, the court shall find facts establishing the right to execution against the person. Such findings of fact shall include a finding that the defendant either (i) is about to flee the jurisdiction to avoid paying his creditors, (ii) has concealed or diverted assets in fraud of his creditors, or (iii) will do so unless immediately detained. If defendant appears at the hearing on the debt and the judge has reason to believe that the defendant is indigent, he shall inform the defendant that if he is an indigent person he is entitled to services of counsel under G.S. 7A-451, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and provisional release, and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer. If defendant appears at the hearing on the debt and the judge provisionally concludes he is indigent, counsel should be appointed immediately pursuant to rules adopted by the Office of Indigent Defense Services. (C.C.P., s. 260; Code, s. 447; 1891, c. 541, s. 2; Rev., s. 625; C.S., s. 673; 1947, c. 781; 1977, c. 649, s. 1; 2000-144, s. 14.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Editor's Note. — The reference in this section to "the Article Arrest and Bail" was apparently meant to refer to Article 34 of this Chapter, entitled "Arrest and Bail." See G.S. 1-409 et seq.

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

CASE NOTES

Editor's Note. — *Most of the cases cited below were decided prior to the 1977 amendment to this section, which added the last three sentences.*

Constitutionality. — It is not irrational for the General Assembly to view execution against the body (which may issue only upon a judgment, an express finding of fraud and a writ of fieri facias returned nulla bona) as a step both necessary and reasonably calculated to compel disclosure of possibly hidden assets. Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977), aff'd, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

An equal protection attack against this section, as it read prior to the 1977 amendment thereto, was without merit because the thrust of this section is simply against all debtors who have defrauded or committed other torts under G.S. 1-410, some of whom may later prove to be indigent and some of whom are well off and are concealing substantial assets. Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977), aff'd, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

In order for defendant to invoke his privilege against self-incrimination, there must be a threat of execution against the person. MacClements v. LaFone, 104 N.C. App. 179, 408 S.E.2d 878 (1991), cert. denied, 330 N.C. 613, 412 S.E.2d 87 (1992).

When Execution Against Person of Judgment Debtor May Issue. — Where the complaint alleges a cause of arrest, whether the same is necessary to the cause of action or not, an execution against the person of the debtor may issue upon a finding of the cause, after an unsatisfied execution under a judgment against his property has been returned. Ledford v. Emerson, 143 N.C. 527, 55 S.E. 969 (1906); Turlington v. Aman, 163 N.C. 555, 79 S.E. 1102 (1913).

If a judgment is rendered against a defendant for a cause of action specified in G.S. 1-410(1), this section authorizes an execution against the person of the judgment debtor after the return of an execution against his property is wholly or partly unsatisfied. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964); Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

In 1977, the legislature amended this section, limiting execution against the person to cases where either the jury's verdict or the trial court's findings of fact include a finding that defendant is about to either (1) flee the jurisdiction to avoid paying creditors, or (2) has concealed or diverted assets in fraud of his creditors, or (3) will do so unless immediately detained. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

Limitations of Execution Against a Person. — Due to an amendment of this section in 1977, execution against a person under this statute is limited to cases where either the jury's verdict or the trial court's findings of fact include a finding that the defendant is about to either (1) flee the jurisdiction to avoid paying his creditors, or (2) has concealed or diverted assets in fraud of his creditors, or (3) will do so unless immediately detained. And where there was no such finding, defendant had no basis to exercise his privilege against self-incrimination because of the threat of a punitive damages award. MacClements v. LaFone, 104 N.C. App. 179, 408 S.E.2d 878 (1991), cert. denied, 330 N.C. 613, 412 S.E.2d 87 (1992).

Two Alternative Conditions Prerequisite. — There are two alternative essential conditions upon which depends the issuance of an execution against the person of the defendant. They are: (a) A lawful arrest before judgment; or (b) A complaint averring such facts as would have justified an order for an arrest. H.M. Houston & Co. v. Walsh, 79 N.C. 35 (1878).

Three Classes of Cases Contemplated — In General. — This section, taken in connection with G.S. 1-411, contemplates three classes of cases: (1) Where the cause of arrest is not set forth in the complaint; (2) Where the cause is set forth in the complaint, but only collateral and extrinsic to the plaintiff's cause of action; (3) Where the cause set forth in the complaint is essential to the plaintiff's claim. State ex rel. Peebles v. Foote, 83 N.C. 102 (1880).

This section contemplates three classes where execution may be had on the body: (1) Where the cause of arrest does not appear in the complaint, but appears by affidavit; (2) Where the cause of arrest is set forth in the complaint, but is based on facts which are collateral and extrinsic to plaintiff's cause of action; and (3) Where the facts showing the cause of arrest as set forth in the complaint are the same or essential to those on which plaintiff bases his cause of action. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Same — First Class. — In cases within the first class, the defendant can only be arrested by an order founded upon a sufficient affidavit setting forth the sources of information, when it is based upon information and belief. And in such cases no execution can be issued against the person without such order previously had and served. State ex rel. Peebles v. Foote, 83 N.C. 102 (1880).

Same — Second Class. — In cases of the second class, the statement of the cause of arrest in the complaint will answer in place of an affidavit, but the statement must be as explicit as if set forth in an affidavit and properly verified. In such cases there must be an order of arrest before execution against the person of the debtor. State ex rel. Peebles v. Foote, 83 N.C. 102 (1880).

Same — Third Class. — In the last class of cases, where the facts stated in the complaint as causes of arrest are essential to or constitute plaintiff's cause of action, no affidavit for the order of arrest is needed, and no such order is required before execution may be issued against the person of the defendant, provided the complaint has been duly verified. But a verification on information and belief will not answer, unless it gives the sources of information, etc. State ex rel. Peebles v. Foote, 83 N.C. 102 (1880).

As to an execution against the person upon a docketed judgment of a justice of the peace, see McAden v. Banister, 63 N.C. 478 (1869).

Necessity for Sufficient Allegations. — An essential prerequisite to plaintiff's right to body execution is that, where there has not already been a lawful arrest under G.S. 1-410, the complaint or affidavit must allege such facts as would have justified an order for such arrest. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

But an execution against the person cannot issue simply because of allegations in the complaint. The facts alleged entitling the plaintiff to such an execution must be passed upon and must enter into the judgment. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967). See also, Stewart v. Bryan, 121 N.C. 46, 28 S.E. 18 (1897).

Cause Must Be Pleaded and Proved and Issue Determined. — In order to issue an execution against the person of the defendant in cases where it is permissible, the cause of arrest must be pleaded and proved, the issue affirmatively determined by the jury and judgment rendered. Turlington v. Aman, 163 N.C. 555, 79 S.E. 1102 (1913).

Where there is no order of arrest before judgment nor any complaint filed averring such facts as would have justified such order, a defendant cannot be arrested after judgment under an execution against the person under this section. H.M. Houston & Co. v. Walsh, 79 N.C. 35 (1878).

Allegation of Malice in Malpractice Action. — In an action to recover for malpractice of defendant, execution against the person of defendant may not issue in the absence of allegation and evidence of actual malice. Olinger v. Camp, 215 N.C. 340, 1 S.E.2d 870 (1939).

Where plaintiff suggests fraud in defendant's affidavit of insolvency, he must sufficiently allege and prove fraud or the proceeding will be dismissed. Hayes v. Lancaster, 202 N.C. 515, 163 S.E. 602 (1932).

Facts Must Enter into Judgment. — An execution against the person can issue only when the facts alleged entitling the plaintiff thereto have been passed upon and entered into the judgment. Doyle v. Bush, 171 N.C. 10, 86 S.E. 165 (1915).

What Must Be Embraced in Findings of Fact. — As a matter of procedural due process, the statutorily prescribed "finding of facts establishing the right to execution against the person" under this section embraces not only findings with respect to the wrong of the debtor upon his creditor, but in addition a finding of probable cause to believe that he has committed or will commit further wrongs in order to cheat his creditors. Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977), aff'd, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

Before a capias of execution against the body of a person may issue there must be findings of fact sufficient to support a conclusion of probable cause to believe that the debtor is about to flee the jurisdiction or has concealed or diverted assets or that unless he is immediately detained he will probably do so. Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977), aff'd, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

Execution for Conversion. — Under this section and G.S. 1-410, providing that a defendant may be arrested when the action is for wrongfully taking, detaining or converting personal property, where the defendant, cotenant of a race horse, converted it by selling the horse while in his possession, such defendant was subject to execution against the person. Doyle v. Bush, 171 N.C. 10, 86 S.E. 165 (1915).

Under this section an affirmative answer to an issue establishing that defendant had retained and converted to his own use, in violation of the terms of the contract of assignment with plaintiff, property belonging to plaintiff, was sufficient to support a judgment that execution against the person of defendant issue upon application of plaintiff upon return of execution against the property unsatisfied, intent of defendant in doing the acts constituting a breach of trust being immaterial and a specific finding of fraud being unnecessary. East Coast Fertilizer Co. v. Hardee, 211 N.C. 653, 191 S.E. 725 (1937).

Execution for Injury Committed to Plaintiff's Person. — Where judgment was rendered by a court of competent jurisdiction against the defendant in a certain sum for an injury committed to the person of the plaintiff, who appealed without giving bond to stay execution, it was held that upon the return of execution against defendant's property unsatisfied an execution upon the person could issue, that filing an inventory of his property, etc., would not exempt the defendant from arrest, and that the execution could only be stayed by giving a bond securing the judgment. Howie v. Spittle, 156 N.C. 180, 72 S.E. 207 (1911).

Wilfully Inflicted Injury. — Where the pleadings, evidence and verdict were that an injury was wilfully inflicted, and order for execution against the person of the defendant upon the return of execution against his property unsatisfied was proper under this section and G.S. 1-410. Foster v. Hyman, 197 N.C. 189, 148 S.E. 36 (1929).

Allegations and evidence tending to show that defendant, while drunk, drove his automobile on the wrong side of a city street where traffic was heavy at a rate of 45 or 50 miles an hour, under circumstances which should have convinced him, as a man of ordinary prudence, that he incurred the risk of imminent peril to human life, and that the plaintiff was injured thereby, were sufficient to sustain the jury's verdict that the injury was inflicted wilfully and wantonly, and an order for execution against the person of defendant upon return of execution against his property unsatisfied was proper under such sections. Foster v. Hyman, 197 N.C. 189, 148 S.E. 36 (1929).

Discharge of Person Under Execution. — The person arrested may be discharged, after judgment and without payment, only by surrendering all of his property in excess of $50.00. Raisin Fertilizer Co. v. Grubbs, 114 N.C. 470, 19 S.E. 597 (1894).

When a person is taken by authority of an execution against his person by virtue of the provisions of this section, he can be discharged from imprisonment only by payment or by giving notice and surrendering all his property in excess of $50.00 as provided in G.S. 23-23 and G.S. 23-30 through 23-38. The effect of an execution against the person is therefore to deprive the defendant in the execution entirely of his homestead exemption and of any personal property exemption over and above $50.00. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Applicability of § 23-29. — The provisions of G.S. 23-29(2) are broad and strong, and plainly extend to and embrace every person who may be arrested by virtue of an order of arrest issued pursuant to the provisions of G.S. 1-410, and also extend to and embrace every person who has been seized by virtue of an execution against his person by authority of this section. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Duty of Clerk. — It is the duty of the clerk of the court, upon the application of the plaintiff, to issue the execution against the person of the defendant in proper cases. Kinney v. Laughenour, 97 N.C. 325, 2 S.E. 43 (1887).

Motion Before Clerk and Appeal to Superior Court. — Where a personal execution against a debtor is allowed by the statute, it must be by motion before the clerk after an unsatisfied return of the execution against his property, and from any adverse ruling his decision is subject to review on appeal to the superior court; and if a judgment in the superior court may permit an execution against the person of the debtor, should the execution against his property thereafter be returned unsatisfied, the court is not required to order in the judgment that execution issue against the person of the debtor in anticipation of such a return on the execution. Turlington v. Aman, 163 N.C. 555, 79 S.E. 1102 (1913).

Defendant's Privilege Against Self-Incrimination Inapplicable Where Plaintiff Relinquishes Remedy Under This Section. — In an action for malicious assault, if plaintiff seeks merely compensatory damages, and relinquishes all claim to punish defendants by punitive damages and to arrest them by virtue of the provisions of G.S. 1-410(1) and to issue an execution against their persons by virtue of the provisions of this section, defendants' claim of privilege against self-incrimination does not apply. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

In a wrongful death action, the defendant faced no peril being subject to execution against the person for not satisfying a judgment for punitive damages, as there was no allegation in the complaint that would support the required statutory findings under this section for execution against the person. Therefore, there was no basis for the defendant declining to answer interrogatories on the grounds of self-incrimination. Shaw v. Williamson, 75 N.C. App. 604, 331 S.E.2d 203, cert. denied, 314 N.C. 669, 335 S.E.2d 496 (1985).

Liability in Damages for Malicious Prosecution. — Where a trial court of competent jurisdiction regularly determined that the plaintiff in the action had the right to arrest the defendant on personal execution, and accordingly the defendant was taken into custody under this section, the plaintiff in said action would not be liable in damages in defendant's subsequent action for malicious prosecution, even if the verdict and finding of the jury or finding for plaintiff in the former suit was thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause. Overton v. Combs, 182 N.C. 4, 108 S.E. 357 (1921).

Award of Punitive Damages in Cause Under § 1-410 Not Sufficient. — Under the present language of this section, an award of punitive damages in a cause of action specified under G.S. 1-410, alone, does not give rise to an execution against the person. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

Applied in Windham Distrib. Co. v. Davis, 72 N.C. App. 179, 323 S.E.2d 506 (1984).

Cited in Rouse v. Wheeler, 17 N.C. App. 422, 194 S.E.2d 555 (1973).

§ 1-312. Rights against property of defendant dying in execution.

Parties at whose suit the body of a person is taken in execution for a judgment recovered, their executors or administrators, may after the death of the person so taken and dying in execution, have the same rights against the property of the person deceased, as they might have had if that person had never been in execution. (21 James I, s. 24; R.C., c. 45, s. 28; Code, s. 469; Rev., s. 626; C.S., s. 674.)

§ 1-313. Form of execution.

The execution must be directed to the sheriff, or to the coroner when the sheriff is a party to or interested in the action. In those counties where the office of coroner is abolished, or is vacant, and in which process is required to be executed on the sheriff, the authority to execute such process shall be vested in the clerk of court; however, the clerk of court is hereby empowered to designate and direct by appropriate order some person to act in his stead to execute the same. The execution must also be subscribed by the clerk of the court, and must refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

(1) Against Property — No Lien on Personal Property until Levy. — If it is against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of his personal property; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution against the property of a judgment debtor is a lien on his personal property, as against any bona fide purchaser from him for value, or as against any other execution, except from the levy thereof.

(2) Against Property in Hands of Personal Representative. — If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees it shall require the officer to satisfy the judgment out of such property.

(3) Against the Person. — If it is against the person of the judgment debtor, it shall require the officer to arrest him, and commit him to the jail of the county until he pays the judgment or is released or discharged according to law. The execution shall include a statement that if the defendant is an indigent person he is entitled to services of counsel, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and provisional release, and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer.

(4) For Delivery of Specific Property. — If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and in that respect is deemed an execution against property.

(5) For Purchase Money of Land. — If the answer in an action for recovery of a debt contracted for the purchase of land does not deny, or if the jury finds, that the debt was so contracted, it is the duty of the court to have embodied in the judgment that the debt sued on was contracted for the purchase money of the land, describing it briefly; and it is also the duty of the clerk to set forth in the execution that the said debt was contracted for the purchase of the land, the description of which must be set out briefly as in the complaint. (C.C.P., s. 261; 1868-9, c. 148; 1879, c. 217; Code, ss. 234-236, 448; Rev., s. 627; C.S., s. 675; 1971, c. 653, s. 2; 1977, c. 649, s. 2.)

Cross References. — As to subscription and sealing of the execution by the clerk, see G.S. 1-303.

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

Liens on Real Estate and Personalty Distinguished. — A judgment creditor acquires a lien on the judgment debtor's real estate by docketing; but he acquires no lien on the personalty until there has been a valid levy. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

There is no lien on personal property in North Carolina until levy. Wilmington Nursery Co. v. Burkert, 36 Bankr. 813 (Bankr. E.D.N.C. 1984).

To make a valid levy, the officer must be armed with judicial process and he must act in conformity with the direction given him in the execution or other judicial order. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

Forcible Entry to Execute Process on Personalty. — An officer cannot break open an outer door or window of a dwelling against the consent of the owner for the purpose of making a levy on the goods of the owner. Red House Furn. Co. v. Smith, 310 N.C. 617, 313 S.E.2d 569 (1984).

While it is true that G.S. 1-480 permits forcible entry where property subject to claim and delivery is concealed, no similar exception has been promulgated with respect to the execution of writs of possession pursuant to subdivision (4) of this section. Red House Furn. Co. v.

Smith, 310 N.C. 617, 313 S.E.2d 569 (1984).

Date of Lien Against Personalty. — Under this section the lien of execution against the personal property of the defendant, as against bona fide purchasers, does not date from the date of such execution, but from the time of levy thereunder. Weinsenfield v. McLean, 96 N.C. 248, 2 S.E. 56 (1887).

Duty to Report Levy on Automobile. — When a levy has been made on an automobile pursuant to an execution, it is now the duty of the officer to report the levy to the Department (now Division) of Motor Vehicles in a form prescribed by it. The levy so reported is subordinate to all liens theretofore noted on the certificate. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

Waiver of Right to Have Personalty Taken First. — The judgment debtor waives or forfeits his right to have his personal property taken in preference to his land for the satisfaction of a judgment by requesting the sheriff to levy upon the land in the first instance, or by failing to disclose his personal property when the sheriff is about to make a levy. North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

Refusal to Produce Personalty Warrants Sale of Realty. — The provision requiring that the officer satisfy the judgment first out of the personalty is solely for the debtor's benefit, and if the debtor refuses to produce his personalty, his lands may be sold. McCoy v. Beard, 9 N.C. 377 (1823).

Presumption as to Levy on Realty. — Where it was not made to appear that the judgment debtor possessed personalty, attack on a sale on the ground that the sheriff failed to satisfy the judgment out of the personalty was untenable, since it would be presumed that the sheriff levied on realty because he could not find any personalty. North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

Sale of Realty Without Levy. — A sale of real estate under an execution issued on a judgment, which is a lien thereon, is valid without a levy. All that is essential to a valid sale of real estate under execution is that the requirements of the law be observed and that it be made fully known at the sale what property is being sold. Farrior v. Houston, 100 N.C. 369, 6 S.E. 72 (1888).

Who May Object If Sheriff Sells Land First. — The provisions that the personal property of a judgment debtor is to be exhausted before recourse is had to his realty for the satisfaction of a judgment is intended solely for the benefit of the judgment debtor, and nobody else can object if the sheriff levies on and sells land without first exhausting the judgment debtor's personalty. North Carolina Joint Stock Land Bank v. Bland, 231 N.C. 26, 56 S.E.2d 30 (1949).

Form of Execution Against the Person. — An execution against the person is irregular if it does not run in the name of the State and convey its authority to the officers to arrest the defendant. H.M. Houston & Co. v. Walsh, 79 N.C. 35 (1878).

Execution against the person issued under this section should command the sheriff to arrest the defendant and commit him to the jail of the county from which it issued, until he should pay the judgment or be discharged according to law. Kinney v. Laughenour, 97 N.C. 325, 2 S.E. 43 (1887), decided prior to the 1977 amendment to subdivision (3).

Recital in Judgment as to Purpose of Debt Conclusive. — If the judgment of the court recites the fact that debt was contracted for the purchase of land, such recital is conclusive as between the parties to the record. Durham v. Wilson, 104 N.C. 595, 10 S.E. 683 (1889).

Reason for Recital as to Purpose of Debt. — The homestead interest of a defendant is subject to execution issued upon a judgment recovered for the purchase money of the land sold. Hence, the requirement that it shall be set forth in the judgment and execution that the debt sued on was contracted for the purchase money of land, so that the sheriff may sell the land without regard to the homestead. Toms v. Fite, 93 N.C. 274 (1885).

Validity of Execution Sale Absent Record Evidence of Purpose of Debt. — Land purchased but not yet paid for is not exempt from execution as a homestead under a judgment for the purchase money of such land. And the execution sale under which it is sold is valid even though there was no evidence of record that the judgment was for the purchase money of the land. Durham v. Bostick, 72 N.C. 353 (1875).

Action by Bankrupts Not Necessary. — An action by debtors to quiet whatever liability might arise from creditors' judgments under G.S. 1-234 which might survive their discharge in bankruptcy and eventually impair any exemptable interests in real property they might acquire in the future is not necessary, as the comprehensive relief afforded by a Chapter 7 discharge protects the debtors' interests in property they acquire after bankruptcy and assures them a "fresh start" in their financial affairs. Clowney v. North Carolina Nat'l Bank, 19 Bankr. 349 (Bankr. M.D.N.C. 1982).

Cited in Southern Dairies, Inc. v. Banks, 92 F.2d 282 (4th Cir. 1937); Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972); Halverson v. Halverson, 151 Bankr. 358 (M.D.N.C. 1993).

OPINIONS OF ATTORNEY GENERAL

As to manner of execution, see opinion of Attorney General to Mr. C.E. Drum, Jr., 42 N.C.A.G. 312 (1973).

§ 1-314. Variance between judgment and execution.

When property has been sold by an officer by virtue of an execution or other process commanding sale, no variance between the execution and the judgment whereon it was issued, in the sum due, in the manner in which it is due, or in the time when it is due, invalidates or affects the title of the purchaser of such property. (1848, c. 53; R.C., c. 44, s. 13; Code, s. 1347; Rev., s. 628; C.S., s. 676.)

CASE NOTES

This section is to be liberally construed. Wilson v. Taylor, 98 N.C. 275, 3 S.E. 492 (1887).

Execution for Lesser Amount Than Judgment. — The fact that an execution varied from the judgment in being for a lesser amount is expressly cured by this section. Maynard v. Moore, 76 N.C. 158 (1877).

Execution for Larger Amount Than Judgment. — Where the docket showed a judgment in favor of Hinton against Roach for $28.00, while the execution recited other judgments also and called for a larger sum than $28.00, the irregularity was cured by this section. Hinton v. Roach, 95 N.C. 106 (1886).

Variance Held Technical and Immaterial. — Where a judgment was rendered against H for $182.20 and against other defendants, separately mentioned, for various amounts, and an execution was issued reciting only the judgment against H for $182.20, commanding the sheriff to satisfy it out of H's property, it was held that the execution sufficiently conformed to the judgment and the variance was technical and immaterial. Marshburn v. Lashlie, 122 N.C. 237, 29 S.E. 371 (1898).

§ 1-315. Property liable to sale under execution; bill of sale.

(a) The following property of the judgment debtor, not exempted from sale under the Constitution and laws of this State, may be levied on and sold under execution:

(1) Goods, chattels, and real property belonging to him.

(2) Leasehold estates of three years duration or more owned by him.

(3) Equitable and legal rights of redemption in personal and real property pledged or mortgaged by him, or transferred to a trustee for security by him.

(4) Real property or goods and chattels of which any person is seized or possessed in trust for him.

(5) Choses in action represented by instruments which are indispensable to the chose in action.

(6) Choses in action represented by indispensable instruments, which are secured by any interest in property, together with the security interest in property.

(7) Interests as vendee under conditional sales contracts of personal property.

(b) Upon the sale under execution of any property or interest for which no provision is otherwise made under this article for the furnishing of a deed or other instrument of title, the officer holding the sale shall execute and deliver to the purchaser a bill of sale.

(c) No execution shall be levied on growing crops until they are matured. (5 Geo. II, c. 7, s. 4; 1777, c. 115, s. 29, P.R.; 1812, c. 830, ss. 1, 2, P.R.; 1822, c.

1172, P.R.; 1844, c. 35; R.C., c. 45, ss. 1-5, 11; Code, ss. 450, 453; Rev., ss. 629, 632; 1919, c. 30; C.S., s. 677; 1961, c. 81.)

Legal Periodicals. — For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

History. — As to the historical development of the legislation by which the lands of debtors became subject to execution, thus changing the common-law rule, see Jones v. Edmonds, 7 N.C. 43 (1819).

As to the common law, see Payne v. Hubbard, 4 N.C. 195 (1815); Rowland Hdwe. & Supply Co. v. Lewis, 173 N.C. 290, 92 S.E. 13 (1917).

Only property of the judgment debtor may be levied on and sold under execution. A levy made on property of a person other than the judgment debtor constitutes a trespass. Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Property Held by Resident Agent. — By authorizing resident to hold property as their agent, nonresident defendants, as principals, did not surrender their ownership interests in the property, and were thus subject to attachment against their ownership interest in the property. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

Property held for necessary public uses and purposes, such as courthouses, jails, schoolhouses, etc., cannot be sold under execution. Gooch v. Gregory, 65 N.C. 142 (1871); Vaughan v. Commissioners of Forsyth County, 118 N.C. 636, 24 S.E. 425 (1896); Morganton Hdwe. Co. v. Morganton Graded Schools, 151 N.C. 507, 66 S.E. 583 (1909).

An equitable estate but not a mere right is subject to execution under this section. Nelson v. Hughes, 55 N.C. 33 (1854). But see, Deaton v. Gaines, 4 N.C. 424 (1816).

A "right" to have one declared a trustee is not subject to execution. Nelson v. Hughes, 55 N.C. 33 (1854).

This section was not intended to change the nature of trusts, the relation between the trustee and the cestui que trust, or the rights of the latter against the former. Its sole purpose was to render the interest of the cestui que trust liable at law, as it was before in equity, for the debts of the cestui que trust in certain cases, by transferring by a sale on execution against the cestui que trust the legal estate of the trustee, as well as the trust estate of the debtor. Rowland Hdwe. & Supply Co. v. Lewis, 173 N.C. 290, 92 S.E. 13 (1917).

Nature of Trustee's Interest as Affecting Salability Under Execution. — When land is conveyed to a trustee upon a declaration of trust, and there is no clause of defeasance in the deed, to sell for the payment of a debt or to discharge any other duty, in which persons other than the judgment debtor have an interest, or when for any other reason the judgment debtor may not call for an immediate transfer of the legal title, then the interest, estate or right of the judgment debtor, although subject to the lien of the docketed judgment, cannot be sold under execution. The lien can be enforced only by judgment rendered in a civil action. Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905).

Where the trust is passive, the property is subject to sale under execution against the judgment debtor. Fishel & Taylor v. Grifton United Methodist Church, 22 N.C. App. 647, 207 S.E.2d 330 (1974).

But Not Where Trust Is Active. — The provisions of subsection (a)(4) of this section and G.S. 1-316 do not apply to an active trust. Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

Under this section an execution will not lie against the interest of a cestui que trust in real property held by trustee in active trust. Patrick v. Beatty, 202 N.C. 454, 163 S.E. 572 (1932).

This section does not apply when the trustee holds under a mixed trust, as where the instrument is existent and the debt it secures remains unpaid, but only where the naked title is outstanding, with the right of the cestui que trust to demand it as a matter of right under the Statute of Uses. It is a passive instead of an active trust, in which the trustee has nothing to do, or no duty to perform except to hold the legal title as already stated. It, therefore, excludes an equity of redemption, and a contract to convey land, where anything remains due upon the debt, because the trust is a mixed one in these cases, as a mortgagee in the one case and the vendor in the other holds in trust for the purpose of securing the money due, but when this is paid he holds nothing but the naked legal title. Rowland Hdwe. & Supply Co. v. Lewis, 173 N.C. 290, 92 S.E. 13 (1917).

Residue of Property Conveyed in Trust for Payment of Debts. — Where real estate is conveyed in trust for the payment of certain debts of the grantor, the interest of the grantor, after the payment of such debts, is subject to sale under execution against him. Harrison v.

Battle, 16 N.C. 537 (1830); Pool v. Glover, 24 N.C. 129 (1841).

Supplemental Pleading to Bring in Trustee. — The common-law rule that only property of which the judgment debtor has legal title is subject to sale under execution has been enlarged by statute to include property held for the benefit of the judgment debtor in a passive trust, but even so, the trustee must be brought in by supplemental proceeding under G.S. 1-360 et seq. Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

Liability of Equity of Redemption to Sale Under Execution. — An equity of redemption, whether created by a mortgage deed made to the creditor or to the third person, with or without power of sale, may be sold under execution. Whitesides v. Williams, 22 N.C. 153 (1838); Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905).

A sale of the equity of redemption under an execution at law, at the instance of the mortgagee, is not sanctioned by this section. The words of the section are general, but this exception arises necessarily out of the subject and the spirit of the section. Camp v. Coxe, 18 N.C. 52 (1834); McPeters v. English, 141 N.C. 491, 54 S.E. 417 (1906).

The interest of a vendee who holds a bond for the title to land cannot be subjected to sale under execution upon a judgment rendered for the purchase money. McPeters v. English, 141 N.C. 491, 54 S.E. 417 (1906).

Vested Remainders. — The vested remainder of a devisee in lands is subject to sale under execution during the term of the life tenant. Ellwood v. Plummer, 78 N.C. 392 (1878); Bristol v. Hallyburton, 93 N.C. 384 (1885).

Contingent Remainders. — Contingent remainders are not subject to execution while they remain contingent. Watson v. Dodd, 68 N.C. 528 (1873), aff'd on rehearing, 72 N.C. 240 (1875). See also, Watson v. Watson, 56 N.C. 400 (1857); Bristol v. Hallyburton, 93 N.C. 384 (1885).

Life Estate Held in Trust. — Where a life estate was devised to the testator's son and changed by codicil to appoint a trustee to hold the title and to give him the full rights of enjoyment of a life tenant in the event a creditor should bring action against him for a debt, it was held that the condition upon which the title was to be held in trust was void and his title as tenant for life would continue for the duration of his life, and under this section could be sold under execution on a judgment against him. Mizell v. Bazemore, 194 N.C. 324, 139 S.E. 453 (1927).

Reversions. — A reversion in fee is liable to be taken and sold under execution. Murrell v. Roberts, 33 N.C. 424 (1850).

Standing matured crops are subject to execution. Shannon v. Jones, 34 N.C. 206 (1851).

Prior to 1884 and at common law, growing crops were the subject of levy and sale under execution as personal property, but now under this section, they are not subject to levy till matured. Kesler v. Cornelison, 98 N.C. 383, 3 S.E. 839 (1887).

Applied in Grabenhofer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963).

Cited in Walker Mfg. Co. v. Dickerson, Inc., 510 F. Supp. 329 (W.D.N.C. 1980).

§ 1-316. Sale of trust estates; purchaser's title.

Upon the sale under execution of trust estates whereof the judgment debtor is beneficiary the sheriff shall execute a deed to the purchaser, and the purchaser thereof shall hold and enjoy the same freed and discharged from all encumbrances of the trustee. (1812, c. 830, P.R.; R.C., c. 45, s. 4; Code, s. 452; Rev., s. 630; C.S., s. 678.)

CASE NOTES

Application to Certain Trusts Only. — This section, as has been repeatedly decided, comprehends only those cases in which the whole beneficial estate is in the debtor and nothing remains in the trustee but a naked legal estate. Deaver v. Parker, 37 N.C. 40 (1841). See also, Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905); Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936); Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

§ 1-317. Sheriff's deed on sale of equity of redemption.

The sheriff selling equitable and legal rights of redemption shall set forth in the deed to the purchaser thereof that the said estates were under mortgage at the time of judgment, or levy in the case of personal property and sale. (1812,

c. 830, s. 2, P.R.; 1822, c. 1172, P.R.; R.C., c. 45, s. 5; Code, s. 451; Rev., s. 631; C.S., s. 679.)

CASE NOTES

The provisions of this section are not mandatory. Mayo v. Staton, 137 N.C. 670, 50 S.E. 331 (1905).

§ 1-318. Forthcoming bond for personal property.

If a sheriff or other officer who has levied an execution or other process upon personal property permits it to remain with the possessor, the officer may take a bond, attested by a credible witness, for the forthcoming thereof to answer the execution or process; but the officer remains, nevertheless, in all respects liable as heretofore to the plaintiff's claim. (1807, c. 731, s. 3, P.R.; 1828, c. 12, s. 2; R.C., c. 45, s. 21; Code, s. 463; Rev., s. 633; C.S., s. 680.)

CASE NOTES

The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be satisfied. Gray v. Bowls, 18 N.C. 437 (1836).

Duty of Obligors. — Where a forthcoming bond is given for the delivery of property levied on by a constable, it is the duty of the obligors to put the officer in the quiet and peaceable possession of the property at the time and place specified; otherwise their bond will be forfeited. Poteet v. Bryson, 29 N.C. 337 (1847).

§ 1-319. Procedure on giving bond; subsequent levies.

When the forthcoming bond is taken the officer must specify therein the property levied upon and furnished to the surety a list of the property in writing under his hand, attested by at least one credible witness, and stating therein the day of sale. The property levied upon is deemed in the custody of the surety, as the bailee of the officer. All other executions thereafter levied on this property create a lien on the same from and after the respective levies, and shall be satisfied accordingly out of the proceeds of the sale of the property; but the officer thereafter levying shall not take the property out of the custody of the surety. But in all such cases sales of chattels shall take place within thirty days after the first levy; and if sale is not made within that time any other officer who has levied upon the property may seize and sell it. (1844, c. 34; 1846, c. 50; R.C., c. 45, s. 22; Code, s. 464; Rev., s. 634; C.S., s. 682.)

§ 1-320. Summary remedy on forthcoming bond.

If the condition of such bond be broken, the sheriff or other officer, on giving 10 days' previous notice in writing to any obligor therein, may on motion have judgment against him in a summary manner, before the superior court or before the district court, as the case may be, of the county in which the officer resides, for all damages which the officer has sustained, or may be adjudged liable to sustain, not exceeding the penalty of the bond, to be ascertained by a jury, under the direction of the court. (1822, c. 1141, P.R.; R.C., c. 45, s. 23; Code, s. 465; Rev., s. 635; C.S., s. 681; 1971, c. 268, s. 14.)

§ 1-321. Entry of returns on judgment docket; penalty.

When an execution is returned, the return of the sheriff or other officer must be noted by the clerk on the judgment docket; and when it is returned wholly or partially satisfied, it is the duty of the clerk of the court to which it is returned to send a copy of such last-mentioned return, under his hand, to the clerk of the superior court of each county in which such judgment is docketed, who must note such copy in his judgment docket, opposite the judgment, and file the copy with the transcript of the docket of the judgment in his office. A clerk failing to send a copy of the payments on the execution or judgment to the clerks of the superior court of the counties wherein a transcript of the judgment has been docketed, and a clerk failing to note said payment on the judgment docket of his court, shall, on motion, be fined one hundred dollars ($100.00) nisi, and the judgment shall be made absolute upon notice to show cause at the succeeding session of the superior court of his county. (1871-2, c. 74, s. 2; 1881, c. 75; Code, s. 445; Rev., s. 636; C.S., s. 683; 1971, c. 381, s. 12.)

CASE NOTES

Returned Execution Becomes Part of Record. — An execution returned into court with an entry of satisfaction endorsed, in whole or in part, extinguishes so much of the debt and becomes a part of the record in the case. Walters v. Moore, 90 N.C. 41 (1884).

Applied in Board of Educ. v. Gallop, 227 N.C. 599, 44 S.E.2d 44 (1947).

§ 1-322. Cost of keeping livestock; officer's account.

The court shall make a reasonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property taken into their custody under legal process, the keeping of which is chargeable to them; and this allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold. The officer must make out his account and, if required, give the debtor or his agent a copy of it, signed by his own hand, and must return the account with the execution or other process, under which the property has been seized or sold, to the court to whom the execution or process is returnable, and shall swear to the correctness of the several items set forth; otherwise he shall not be permitted to retain the allowance. (1807, c. 731, P.R.; R.C., c. 45, ss. 25, 26; Code, ss. 466, 467; Rev., ss. 637, 638; C.S., s. 684; 1971, c. 268, s. 15.)

§ 1-323. Purchaser of defective title; remedy against defendant.

Where real or personal property is sold on any execution or decree, by any officer authorized to make the sale, and the sale is made legally and in good faith, and the property did not belong to the person against whose estate the execution or decree was issued, by reason of which the purchaser has been deprived of the property, or been compelled to pay damages in lieu thereof to the owner, the purchaser, his executors or administrators, may sue the person against whom such execution or decree was issued, or the person legally representing him, in a civil action, and recover such sum as he may have paid for the property, with interest from the time of payment; but the property, if personal, must be present at the sale and actually delivered to the purchaser. (1807, c. 723, P.R.; R.C., c. 45, s. 27; Code, s. 468; Rev., s. 639; C.S., s. 685.)

CASE NOTES

This section authorizes a remedy upon an implied warranty of title to property sold under execution as belonging to a debtor, whose debt has been thereby discharged or reduced against such debtor, and authorizes a recovery of an equal amount from him for the reimbursement of the purchaser for such sums as he may have paid. Holliday v. McMillan, 83 N.C. 270 (1880).

Nature of Purchaser's Claim. — The claim which a purchaser at a sheriff's sale has against the defendant in an execution, on account of lack of title, is but a simple contract debt. Laws v. Thompson, 49 N.C. 104 (1856).

When Remedy Under This Section Is Available. — The remedy provided by this section is available only in cases where the judgment debtor, whose property is sold under the execution, has no title at all to the property sold. If the judgment debtor has any title at all, even if it is bare legal title, the equitable title being in some other person, or a defective title, the purchaser at the execution sale acquires the title of the judgment debtor, and has no relief against such debtor in case he suffers loss by reason of a defect in the title. Lewis v. McDowell, 88 N.C. 261 (1883).

Remedy of Judgment Creditor After Purchase at Execution Sale. — The judgment of an execution creditor, purchasing at the execution sale property which did not belong to the judgment debtor and which is recovered from him by its own true owner, is nonetheless satisfied, and the remedy of the creditor is under this section, not upon the judgment, but against the judgment debtor for reimbursement. Halcombe v. Loudermilk, 48 N.C. 491 (1856); Wall v. Fairley, 77 N.C. 105 (1877).

As to substitution or subrogation to the rights of the execution creditor, see Laws v. Thompson, 49 N.C. 104 (1856); Pemberton v. McRae, 75 N.C. 497 (1876).

§ 1-324: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-324.1. Judgment against corporation; property subject to execution.

If a judgment is rendered against a corporation, the plaintiff may sue out such executions against its property as is provided by law to be issued against the property of natural persons, which executions may be levied as well on the current money as on the goods, chattels, lands and tenements of such corporation. (1901, c. 2, s. 66; Rev., s. 1212; C.S., s. 1201; 1955, c. 1371, s. 2.)

Editor's Note. — This section was formerly G.S. 55-140. It was transferred to its present position by Session Laws 1955, c. 1371, s. 2, effective July 1, 1957.

§ 1-324.2. Agent must furnish information as to corporate officers and property.

Every agent or person having charge or control of any property of the corporation, on request of a public officer having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, so far as he has knowledge of the same. (1901, c. 2, s. 67; Rev., s. 1213; C.S., s. 1202; 1955, c. 1371, s. 2.)

Editor's Note. — This section was formerly G.S. 55-141. It was transferred to its present position by Session Laws 1955, c. 1371, s. 2, effective July 1, 1957.

CASE NOTES

Compliance. — Corporate principal of a corporate debtor failed to comply with G.S. 1-324.2 and G.S. 1-324.4 because the principal did not complete documents designed to ascertain the property of the corporate debtor until more than five months after they were requested, and one month after a lawsuit was filed against him, and failed to proffer any reasonable excuse to the trial court for this neglect. Insulation Sys. v. Fisher, — N.C. App. —, 678 S.E.2d 357, 2009 N.C. App. LEXIS 699 (2009).

§ 1-324.3. Shares subject to execution; agent must furnish information.

Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this State, or incorporated or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution in the same manner as goods and chattels. The clerk, cashier, or other officer of such company who has at the time the custody of the books of the company shall, upon being shown the writ of execution, give to the officer having it a certificate of the number of shares or amount of the interest held by the defendant in the company; and if he neglects or refuses to do so, or if he willfully gives a false certificate, he shall be liable to the plaintiff for the amount due on the execution, with costs. (1901, c. 2, ss. 69, 70; Rev., ss. 1214, 1215; C.S., s. 1203; 1955, c. 1371, s. 2.)

Editor's Note. — This section was formerly G.S. 55-142. It was transferred to its present position by Session Laws 1955, c. 1371, s. 2, effective July 1, 1957.

§ 1-324.4. Debts due corporation subject to execution; duty, etc., of agent.

If an officer holding an execution is unable to find other property belonging to the corporation liable to execution, he or the judgment creditor may elect to satisfy such execution in whole or in part out of any debts due the corporation, and it is the duty of any agent or person having custody of any evidence of such debt to deliver it to the officer, for the use of the creditor and such delivery, with a transfer to the officer in writing, for the use of the creditor and notice to the debtor, shall be a valid assignment thereof, and the creditor may sue for and collect the same in the name of the corporation, subject to such equitable set-offs on the part of the debtor as in other assignments. Every agent or person who neglects or refuses to comply with the provisions of this section and G.S. 1-324.2 is liable to pay to the execution creditor the amount due on the execution, with costs. (1901, c. 2, s. 68; Rev., s. 1216; C.S., s. 1204; 1955, c. 1371, s. 2.)

Editor's Note. — This section was formerly G.S. 55-143. It was transferred to its present position by Session Laws 1955, c. 1371, s. 2, effective July 1, 1957.

CASE NOTES

Compliance. — Corporate principal of a corporate debtor failed to comply with G.S. 1-324.2 and G.S. 1-324.4 because the principal did not complete documents designed to ascertain the property of the corporate debtor until more than five months after they were requested, and one month after a lawsuit was filed against him, and failed to proffer any reasonable excuse to the trial court for this neglect. Insulation Sys. v. Fisher, — N.C. App. —, 678 S.E.2d 357, 2009 N.C. App. LEXIS 699 (2009).

The term "debts" is used in this section in a restricted sense. Any agent or person having custody must deliver any evidence of such debt to the officer with a transfer to the officer in writing, and notice to the creditor shall be a valid assignment thereof. Nothing in the statute gives authority to a creditor to maintain an action in the name of the corporation for the recovery of damages for tortious breach of trust by officers in their dealings with the corporation. Caldlaw, Inc. v. Caldwell, 248 N.C. 235, 102 S.E.2d 829 (1958), construing former § 55-143.

And Does Not Include Unliquidated Claim for Damages for Breach of Trust. — A judgment creditor of a corporation whose judgment is unsatisfied may bring suit in the name of the corporation only for the purpose of collecting a debt due the corporation for the satisfaction of his claim. An unliquidated claim against an officer of the corporation to recover damages for tortious breach of trust by such officer in his dealings with the corporation arises ex delicto and is an action in tort, and the statute does not authorize a judgment creditor to maintain such suit in the name of the corporation against such officer. Caldlaw, Inc. v. Caldwell, 248 N.C. 235, 102 S.E.2d 829 (1958), construing former § 55-143.

Cited in Walker Mfg. Co. v. Dickerson, Inc., 510 F. Supp. 329 (W.D.N.C. 1980); Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

§ 1-324.5. Violations of three preceding sections misdemeanor.

If any agent or person having charge or control of any property of a corporation, or any clerk, cashier, or other officer of a corporation, who has at the time the custody of the books of the company, or if any agent or person having custody of any evidence of debt due to a corporation, shall, on request of a public officer having in his hands for service an execution against the said corporation, willfully refuse to give to such officer the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, or shall willfully refuse to give to such officer a certificate of the number of shares, or amount of interest held by such corporation in any other corporation, or shall willfully refuse to deliver to such officer any evidence of indebtedness due or to become due to such corporation, he shall be guilty of a Class 1 misdemeanor. (1901, c. 2, ss. 67, 68, 70; Rev., s. 3690; C.S., s. 1205; 1955, c. 1371, s. 2; 1993, c. 539, s. 1; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — This section was formerly G.S. 55-144. It was transferred to its present position by Session Laws 1955, c. 1371, s. 2, effective July 1, 1957.

CASE NOTES

Cited in Insulation Sys. v. Fisher, — N.C. App. —, 678 S.E.2d 357, 2009 N.C. App. LEXIS 699 (2009).

§ 1-324.6. Proceedings when custodian of corporate books is a nonresident.

When the clerk, cashier, or other officer of any corporation incorporated under the laws of this State, who has the custody of the stock-registry books, is a nonresident of the State, it is the duty of the sheriff receiving a writ of execution issued out of any court of this State against the goods and chattels of a defendant in execution holding stock in such company to send by mail a notice in writing, directed to the nonresident clerk, cashier, or other officer at the post office nearest his reputed place of residence, stating in the notice that he, the sheriff, holds the writ of execution, and out of what court, at whose suit, for what amount, and against whose goods and chattels the writ has been issued, and that by virtue of such writ he seizes and levies upon all the shares of stock of the company held by the defendant in execution on the day of the date of such written notice. It is also the duty of the sheriff on the day of mailing the notice to affix and set upon any office or place of business of such company, within his county, a like notice in writing, and on the same day to serve like notice in writing upon the president and directors of the company, or upon such of them as reside in his county, either personally or by leaving the same at their respective places of abode. The sending, setting up, and serving of such notices in the manner aforesaid constitute a valid levy of the writ upon all shares of stock in such company held by the defendant in execution, which have not at the time of the receipt of the notice by the clerk, cashier, or other officer, who has custody of the stock-registry books, been actually transferred by the defendant, and thereafter any transfer or sale of such shares by the defendant in execution is void as against the plaintiff in the execution, or any purchaser of such stock at any sale thereunder. (1901, c. 2, s. 71; Rev., s. 1217; C.S., s. 1206; 1955, c. 1371, s. 2.)

Editor's Note. — This section was formerly G.S. 55-145. It was transferred to its present position by Session Laws 1955, c. 1371, s. 2, effective July 1, 1957.

§ 1-324.7. Duty and liability of nonresident custodian.

The nonresident clerk, cashier, or other officer in such corporation, to whom notice in writing is sent as prescribed in G.S. 1-324.6, shall send forthwith to the officer having the writ, a statement of the time when he received the notice and a certificate of the number of shares held by the defendant in the corporation at the time of the receipt, not actually transferred on the books of the corporation, and the sheriff, or other officer, on receipt by him of this certificate, shall insert the number of shares in the inventory attached to the writ. If the clerk, cashier, or other officer in such corporation neglects to send the certificate as aforesaid or willfully sends a false one, he is liable to the plaintiff for double the amount of damages occasioned by his neglect, or false certificate, to be recovered in an action against him, but the neglect to send, or miscarriage of the certificate, does not impair the validity of the levy upon the stock. (1901, c. 2, s. 72; Rev., s. 1218; C.S., s. 1207; 1955, c. 1371, s. 2.)

Editor's Note. — This section was formerly G.S. 55-146. It was transferred to its present position by Session Laws 1955, c. 1371, s. 2, effective July 1, 1957.

Article 29.

Execution and Judicial Sales.

§§ 1-325 through 1-328: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-329: Transferred to G.S. 1-339.72 by Session Laws 1949, c. 719, s. 3.

§ 1-330: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-331: Transferred to G.S. 1-339.73 by Session Laws 1949, c. 719, s. 3.

§ 1-332: Transferred to G.S. 1-339.74 by Session Laws 1949, c. 719, s. 3.

§§ 1-333, 1-334: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-335: Transferred to G.S. 1-339.75 by Session Laws 1949, c. 719, s. 3.

§ 1-336: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-337: Transferred to G.S. 1-339.49 by Session Laws 1949, c. 719, s. 2.

§ 1-338: Transferred to G.S. 1-339.50 by Session Laws 1949, c. 719, s. 2.

§ 1-339: Repealed by Session Laws 1949, c. 719, s. 2.

ARTICLE 29A.

Judicial Sales.

Part 1. General Provisions.

§ 1-339.1. Definitions.

(a) A judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior or district court, including a sale pursuant to an order made in an action in court to foreclose a mortgage or deed of trust, but is not

(1) A sale made pursuant to a power of sale
  a. Contained in a mortgage, deed of trust, or conditional sale contract, or
  b. Granted by statute with respect to a mortgage, deed of trust, or conditional sale contract, or
(2) A resale ordered with respect to any sale described in subsection (a)(1), where such original sale was not held under a court order, or
(3) An execution sale, or
(4) A sale ordered in a criminal action, or
(5) A tax foreclosure sale, or
(6) A sale made pursuant to Article 15 of Chapter 35A of the General Statutes, relating to sales of estates held by the entireties when one or both spouses are mentally incompetent, or
(7) A sale made in the course of liquidation of a bank pursuant to G.S. 53-20, or
(8) A sale made in the course of liquidation of an insurance company pursuant to Article 30 of Chapter 58 of the General Statutes, or
(8a) A lease, sale, or exchange made pursuant to G.S. 35A-1251(17) or G.S. 35A-1252(14), unless any order thereunder requires, or
(9) Any other sale the procedure for which is specially provided by any statute other than this Article.

(b) As hereafter used in this Article, "sale" means a judicial sale. (1949, c. 719, s. 1; 1971, c. 268, s. 16; 1987, c. 550, s. 12; 1989, c. 473, s. 10; 2003-221, s. 4.)

Cross References. — As to execution sales, see G.S. 1-339.41 through 1-339.71. As to sales under power of sale, see G.S. 45-21.1 through 45-21.33. As to enforcement of judgments, and exemptions, see G.S. 1C-1601 et seq.

Legal Periodicals. — For a brief discussion of this Article, see 27 N.C.L. Rev. 479 (1949).

For comment, "Attacking the 'Forfeiture as Liquidated Damages' Clause in North Carolina Installment Land Sales Contracts as an Equitable Mortgage, Penalty and Unfair and Deceptive Trade Practice," see 7 N.C. Cent. L.J. 370 (1976).

For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

This Article and § 45-21.1 et seq. Provide Exclusive Means of Foreclosure. — Foreclosure may be by judicial sale pursuant to this Article or, if expressly provided in the deed or mortgage, by power of sale under G.S. 45-21.1 et seq. These statutes provide the exclusive means for foreclosure in North Carolina and it was error for the trial court to provide for foreclosure in any other manner. Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 297 (1984).

Cited in Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965); In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976); United Carolina Bank v. Tucker, 99 N.C. App. 95, 392 S.E.2d 410 (1990).

§ 1-339.2. Application of Part 1.

The provisions of Part 1 of this Article apply to both public and private sales except where otherwise indicated. (1949, c. 719, s. 1.)

§ 1-339.3. Application of Article to sale ordered by clerk; by judge; authority to fix procedural details.

(a) The procedure prescribed by this Article applies to all sales ordered by a clerk of the superior court.

(b) The procedure prescribed by this Article applies to all sales ordered by a judge of the superior or district court, except that the judge having jurisdiction may, upon a finding and a recital in the order of sale of the necessity or advisability thereof, vary the procedure from that herein prescribed, but not inconsistently with G.S. 1-339.6 restricting the place of sale of real property.

(c) The judge or clerk of court having jurisdiction has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this Article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1; 1971, c. 268, ss. 17, 18; 2001-271, s. 1.)

CASE NOTES

No Power to Refuse to File Order of Confirmation. — The clerk is not authorized under this section or any other statute to refuse to file and maintain in her records a valid order of confirmation. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

§ 1-339.3A. Judge or clerk may order public or private sale.

The judge or clerk of court having jurisdiction has authority in his discretion to determine whether a sale of either real or personal property shall be a public or private sale and whether a public sale of timber shall be by auction or by sealed bid. Any private sale conducted under an order issued prior to July 1, 1955 by a judge or clerk of court having jurisdiction is hereby validated as to the order that the sale be a private sale. (1955, c. 74; 1971, c. 268, s. 18; 1997-83, s. 1.)

§ 1-339.4. Who may hold sale.

An order of sale may authorize the persons designated below to hold the sale:

(1) In any proceeding, a commissioner specially appointed therefor;

(2) In a proceeding to sell property of a decedent, the administrator, executor or collector of such decedent's estate;

(3) In a proceeding to sell property of a minor, the guardian of such minor's estate;

(4) In a proceeding to sell property of an incompetent, the guardian or trustee of such incompetent's estate;

(5) In a proceeding to sell property of an absent or missing person, the administrator, collector, conservator, or guardian of the estate of such absent or missing person;

(6) In a proceeding to foreclose a deed of trust, the trustee named in the deed of trust;

(7) In a receivership proceeding, the receiver;
(8) In a proceeding to sell property of a trust, the trustee.
(9) Repealed by Session Laws 1998-182, s. 13, effective December 1, 1998.
(1949, c. 719, s. 1; 1993, c. 377, s. 2; 1997-379, s. 1.8; 1998-182, s. 13.)

CASE NOTES

Sale as Official Act. — When an officer of the court, designated either by his official or individual name in the order, is commissioned to make a sale of real or personal estate, he acts in his official capacity, and his sureties undertake for the fidelity of his conduct. Kerr v. Brandon, 84 N.C. 128 (1881), decided under former statute relating to partition.

§ 1-339.5. Days on which sale may be held.

A sale may be held on any day except Sunday. (1949, c. 719, s. 1.)

§ 1-339.6. Place of public sale.

(a) Every public sale of real property shall be held in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A public sale of a single tract of real property situated in two or more counties may be held in any one of the counties in which any part of the tract is situated. For the purposes of this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons, or whether it may have been subdivided into separate units or lots or whether it is sold as a whole or in parts.

(c) A public sale of personal property may be held at any place in the State designated in the order. (1949, c. 719, s. 1.)

§ 1-339.7. Presence of personal property at public sale required.

The person holding a public sale of personal property shall have the property present at the place of sale unless the order of sale provides otherwise as authorized by G.S. 1-339.13(c). (1949, c. 719, s. 1.)

§ 1-339.8. Public sale of separate tracts in different counties.

(a) When an order of public sale directs the sales of separate tracts of real property situated in different counties, exclusive jurisdiction over the sale remains in the superior or district court of the county where the proceeding, in which the order of sale was issued, is pending, but there shall be a separate advertisement, sale and report of sale with respect to the property in each county. In any such sale proceeding, the clerk of the superior court of the county where the original order of sale was issued has jurisdiction with respect to upset bids submitted for separate tracts of property situated in other counties as well as in the clerk's own county. When the public sale is by auction an upset bid may be filed only with that clerk.

(b) The report of sale with respect to all sales of separate tracts situated in different counties shall be filed with the clerk of the superior court of the county in which the order of sale was issued, and is not required to be filed in any other county.

(c) When the public sale is by auction, the sale of each separate tract shall be subject to separate upset bids. To the extent deemed necessary by the judge or clerk of court of the county where the original order of sale was issued, the sale of each tract shall be treated as a separate sale.

(d) When real property is sold in a county other than the county where the proceeding, in which the sale was ordered, is pending, the person authorized to hold the sale shall cause a certified copy of the order of confirmation to be recorded in the office of the register of deeds of the county where such property is situated, and it shall not be necessary for the clerk of court to probate said certified copy of the order of confirmation. (1949, c. 719, s. 1; 1965, c. 805; 1971, c. 268, ss. 18, 19; 1997-83, ss. 2, 3; 2001-271, s. 2.)

§ 1-339.9. Sale as a whole or in parts.

(a) When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the judge or clerk of court having jurisdiction may direct specifically

(1) That it be sold as a whole, or
(2) That it be sold in designated parts, or
(3) That it be offered for sale by each method, and then sold by the method which produces the highest price.

(b) When real property to be sold has not been subdivided but is of such nature that it may be advantageously subdivided for sale, the judge or clerk having jurisdiction may authorize the subdivision thereof and the dedication to the public of such portions thereof as are necessary or advisable for public highways, streets, alleys, or other public purposes.

(c) When an order of sale of such real or personal property as is described in subsection (a) of this section makes no specific provision for the sale of the property as a whole or in parts, the person authorized to make the sale has authority in his discretion to sell the property by whichever method described in subsection (a) of this section he deems most advantageous. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.10. Bond of person holding sale.

(a) Whenever a commissioner specially appointed or a trustee in a deed of trust is ordered to sell property, the judge or clerk of court having jurisdiction

(1) May in any case require the commissioner or trustee, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, and
(2) Shall require the commissioner or trustee to furnish such bond when the commissioner or trustee is to hold the proceeds of the sale other than for immediate disbursement upon confirmation of the sale.

(b) Whenever any administrator or collector of a decedent's estate, or guardian or trustee of a minor's or incompetent's estate, or administrator, collector, conservator or guardian of an absent or missing person's estate, is ordered to sell property, the judge or clerk having jurisdiction shall require such fiduciary, before receiving the proceeds of the sale, to furnish bond or to increase his then existing bond, to cover such proceeds.

(c) Whenever an executor or trustee of a testamentary trust is ordered to sell real property, the judge or clerk having jurisdiction shall require such executor or trustee of a testamentary trust, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, unless the will provides otherwise, in which case the judge or clerk may require such bond.

(d) Whenever a receiver is ordered to sell real property, the judge having jurisdiction may, when he deems it advisable, require the receiver to furnish bond, or to increase his then existing bond, to cover such proceeds.

(e) The bond required by this section need not be furnished when the property is to be sold by a duly authorized trust company acting as commissioner or fiduciary.

(f) The bond shall be executed by one or more sureties and shall be subject to the approval of the judge or clerk having jurisdiction.

(g) If the bond is to be executed by personal sureties, the amount of the bond shall be double the amount of the proceeds of the sale to be received by the commissioner or fiduciary, if such amount can be determined in advance, and, if not, such amount as the judge or clerk may determine to be approximately double the amount of the proceeds to be received. If the bond is to be executed by a duly authorized surety company, the amount of the bond shall be one and one-fourth times the amount of the proceeds determined as set out in this subsection.

(h) The bonds shall be payable to the State of North Carolina for the use of the parties in interest. A bond furnished by a commissioner or by a trustee in a deed of trust shall be conditioned that the principal in the bond shall comply with the orders of the court made in the proceeding with respect to the funds received and shall properly account for the proceeds of the sale received by him. A bond furnished by any other fiduciary shall be conditioned as required by law for the original bond required, or which might have been required, of such fiduciary at the time of his qualification.

(i) The premium on any bond furnished pursuant to this section is a part of the costs of the proceeding, to be paid out of the proceeds of the sale. (1949, c. 719, s. 1; 1971, c. 268, s. 18; 1993, c. 377, s. 3.)

§ 1-339.11. Compensation of person holding sale.

(a) If the person holding a sale is a commissioner specially appointed or a trustee in a deed of trust, the judge or clerk of court having jurisdiction shall fix the amount of his compensation and order the payment thereof out of the proceeds of the sale.

(b) If the person holding a sale is any other person, the judge or clerk may, but is not required to, fix his compensation and order the payment thereof out of the proceeds of the sale; when compensation is not fixed in this manner, compensation may be fixed and paid in the usual manner provided with respect to such fiduciary for receiving and disbursing funds. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

CASE NOTES

Denial of Compensation. — Trial court did not err in denying compensation to attorneys appointed to be the commissioners in the sale of land in a partition action because of the attorneys' negligence in failing to mail notice of the sale to all co-tenants who owned the land. Goodson v. Goodson, 145 N.C. App. 356, 551 S.E.2d 200, 2001 N.C. App. LEXIS 656 (2001).

§ 1-339.12. Clerk's authority to compel report or accounting; contempt proceeding.

Whenever any person fails to file any report or account, as provided by this Article, or files an incorrect or incomplete report or account, the clerk of the superior court, having jurisdiction, on his own motion or on motion of any interested party, may issue an order directing such person to file a correct and complete report or account within twenty days after service of the order on him. If such person fails to comply with the order, the clerk may issue an attachment against him for contempt, and may commit him to jail until he files such correct and complete report or account. (1949, c. 719, s. 1.)

Part 2. Procedure for Public Sales of Real and Personal Property.

§ 1-339.13. Public sale; order of sale.

(a) Whenever a public sale is ordered, the order of sale shall

(1) Designate the person authorized to hold the sale;

(2) Direct that the property be sold at public auction to the highest bidder or, in the case of a sale of timber, direct that the timber be sold to the highest bidder and specify whether the sale is to be by public auction or by sealed bid;

(3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;

(4) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity;

(5) Designate, consistently with G.S. 1-339.6, the county and the place therein at which the sale is to be held;

(6) Prescribe the terms of sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale; and

(7) If the sale is to be a sale of timber by sealed bid, specify:

a. The minimum number of bids that must be submitted, which shall not be less than three, and

b. The time at which any cash deposit required of the highest bidder must be made, which shall not be more than three business days after the date on which the sealed bids are opened.

(b) The order of public sale may also, but is not required to

(1) State the method by which the property shall be sold, pursuant to G.S. 1-339.9;

(2) Direct any posting of the notice of sale or any advertisement of the sale, in addition to that required by G.S. 1-339.17 in the case of real property or G.S. 1-339.18 in the case of personal property, which the judge or clerk of the superior court deems advantageous; and

(3) Specify the number of appraisals to be obtained pursuant to G.S. 1-339.13A.

(c) The order of public sale may provide that personal property need not be present at the place of sale when the nature, condition or use of the property is such that the judge or clerk ordering the sale deems it impractical or inadvisable to require the presence of the property at the sale. In such event, the order shall provide that reasonable opportunity be afforded prospective bidders to inspect the property prior to the sale, and that notice as to the time and place for inspection shall be set out in the notice of sale. (1949, c. 719, s. 1; 1997-83, ss. 4, 5.)

§ 1-339.13A. Public sale of timber by sealed bid; appraisal; bid procedure.

(a) When a sale of timber by sealed bid is ordered, the person holding the sale, before giving notice of the sale, shall:

(1) Obtain one or more appraisals of the timber to be sold;

(2) Determine the place at which and the manner and form in which sealed bids should be submitted;

(3) Determine the first date on which sealed bids will be accepted, which shall not be less than five days after the date on which the notice of sale is first published pursuant to G.S. 1-339.17; and

(4) Determine the date, time, and place at which sealed bids will be opened.

(b) Each appraisal obtained pursuant to subsection (a) of this section shall be made by a registered professional forester or other person qualified by training and experience to appraise the timber to be sold. Copies of all appraisals obtained pursuant to this section shall be included in the report required under G.S. 1-339.24. A person conducting an appraisal pursuant to this section, including a partnership, corporation, company, or other business of the appraiser, may not submit a bid on the timber which is the subject of the appraisal. An appraisal conducted pursuant to this section shall remain confidential until the appraisal is filed with the report of sale pursuant to G.S. 1-339.24. The contents of the appraisal shall not be divulged by the appraiser to any person other than the person holding the sale nor may the appraiser conduct an appraisal of the timber for any other person until after the sale is confirmed.

(c) All sealed bids received on or after the first date set for submitting bids and, at or before the time set for opening the bids, shall be opened publicly at that time at the place set for doing so. If the minimum number of bids is received and there is only one highest bid, that bid shall be announced at that time; the highest bidder is the purchaser, and all bidders shall immediately be notified of that fact. If the minimum number of bids is not received, or if two or more bids in the same amount are the highest bids, that fact shall be announced at that time, and all bidders shall immediately be notified of that fact; the person holding the sale shall then obtain a new order of sale. (1997-83, s. 6.)

§ 1-339.14. Public sale; judge's approval of clerk's order of sale.

An order of public sale of personal property in which a minor or incompetent has an interest, which is made by a clerk of the superior court, shall not be effective, except in the case of perishable property as provided by G.S. 1-339.19, unless and until such order is approved by the resident judge or the judge regularly holding the courts of the district. (1949, c. 719, s. 1.)

CASE NOTES

Cited in In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975).

§ 1-339.15. Public sale; contents of notice of sale.

The notice of public sale shall:

(1) Refer to the order authorizing the sale;

(2) If the sale is to be by public auction, designate the date, hour and place of sale;

(2a) If the sale is to be a sale of timber by sealed bid, specify:
  a. The date on which sealed bids will first be accepted;
  b. The place or address at which sealed bids are to be submitted;
  c. The manner and form in which sealed bids are to be submitted;
  d. The time and place at which any sealed bids received will be opened; and
  e. The minimum number of bids required, as determined pursuant to G.S. 1-339.13(a)(7);

(3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add any further description as will acquaint bidders with the nature and location of the property;

(4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add any further description as will acquaint bidders with the nature of the property;

(5) State the terms of the sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale and, in the case of a sale by sealed bid, the date by which any deposit shall be made, as determined pursuant to G.S. 1-339.13(a)(7); and

(6) Include any other provisions required by the order of sale to be included therein. (1949, c. 719, s. 1; 1997-83, s. 7.)

CASE NOTES

Cited in Gibson v. Lambeth, 86 N.C. App. 264, 357 S.E.2d 404 (1987).

§ 1-339.16. Public sale; time for beginning advertisement.

An order of sale may provide for the beginning of the advertisement of sale at any time after the order is issued. If the order does not specify such time, the advertisement may be begun at any time after the order is issued. (1949, c. 719, s. 1.)

§ 1-339.17. Public sale; posting and publishing notice of sale of real property.

(a) Subject to subsection (d) of this section, notice of public sale of real property shall:

(1) Be posted, in the area designated by the clerk of superior court for the posting of notices in the county in which the property is situated, for at least 20 days immediately preceding the sale; and

(2) Be published once a week for at least two successive weeks:

  a. In a newspaper qualified for legal advertising published in the county; or

  b. If no newspaper qualified for legal advertising is published in the county, in a newspaper having general circulation in the county.

(b) When the notice of public sale is published in a newspaper:

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than seven days, including Sundays; and

(2) The date of the last publication shall be not more than 10 days preceding the date of the sale in a sale by auction or the date on which sealed bids are opened in a sale by sealed bid.

(c) When the real property to be sold is situated in more than one county, the provisions of subsections (a) and (b) of this section shall be complied with in each county in which any part of the property is situated.

(c1) When the public sale is a sale of timber by sealed bid, the notice shall also be given in writing, not less than 21 days before the date on which bids are opened, to a reasonable number of prospective timber buyers, which in all cases shall include the timber buyers listed in the office of the Division of Forest Resources for the county or counties in which the timber to be sold is located.

(d) In addition to the other requirements of this section, the notice of public sale shall be posted or the sale shall be advertised as may be required by the judge or clerk pursuant to the provisions of G.S. 1-339.13(b)(2).

(e) If the sale is a sale of timber by sealed bid, the person holding the sale shall include in the report required by G.S. 1-339.24 an affidavit showing that the requirements of this section have been complied with and listing all the persons notified pursuant to subsection (c1) of this section. (1949, c. 719, s. 1; 1965, c. 41; 1967, c. 979, s. 1; 1997-83, s. 8; 2001-271, s. 3.)

Editor's Note. — Session Laws 1967, c. 979, which substituted "be not more than 10" for "not be more than seven" in subdivision (b)(2), provided in s. 4: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes."

CASE NOTES

As to the mandatory or directory character of advertising requirements, see Hogan v. Utter, 175 N.C. 332, 95 S.E. 565 (1918), decided under former provision relating to advertisement of judicial and execution sales.

Cited in Yates ex rel. City of Durham v. Keen, 40 N.C. App. 652, 253 S.E.2d 585 (1979); Yates ex rel. Henderson v. J.W. Campbell Elec. Corp., 95 N.C. App. 354, 382 S.E.2d 860 (1989).

§ 1-339.18. Public sale; posting notice of sale of personal property.

(a) The notice of public sale of personal property, except in the case of perishable property as provided by G.S. 1-339.19, shall be posted, in the area designated by the clerk of superior court for the posting of notices, in the county in which the sale is to be held, for ten days immediately preceding the date of sale.

(b) In addition to the foregoing, the notice of public sale shall be otherwise advertised as may be required by the judge or clerk of court pursuant to the provisions of G.S. 1-339.13(b)(2). (1949, c. 719, s. 1; 1971, c. 268, s. 18; 1997-83, s. 9.)

§ 1-339.19. Public sale; exception; perishable property.

If personal property to be sold at public sale is determined by the judge or clerk of court having jurisdiction to be perishable property because subject to rapid deterioration, he may order the sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. The order of sale of such perishable property of a minor or incompetent when made by the clerk need not be approved by the judge. Confirmation of any sale of such perishable property is not necessary unless required by the order of sale. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.20. Public sale; postponement of sale.

(a) A person authorized to hold a public sale by auction may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale, and a person authorized to hold a public sale of timber by sealed bid may postpone the time for submitting and opening bids to a date, time, and place certain not later than six days, exclusive of Sunday, after the original date for the opening of bids:

(1) When there are no bidders, or
(2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
(3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or

(4) When he is unable to hold the sale because of illness or for other good reason, or

(5) When other good cause exists.

(b) Upon postponement of public sale the person authorized to hold the sale shall personally, or through his agent or attorney

(1) At the time and place advertised for the sale or for the opening of sealed bids, publicly announce the postponement thereof;

(2) On the same day, attach to or enter on the original notice of sale or a copy thereof posted, as provided in G.S. 1-339.17 in the case of real property or G.S. 1-339.18 in the case of personal property, a notice of the postponement; and

(3) In the case of a public sale of timber by sealed bid, give notice of postponement to each person who submitted a bid.

(c) The notice of postponement shall:

(1) State that the sale is postponed,

(2) In the case of a sale by public auction, state the hour and date to which the sale is postponed,

(2a) In the case of a sale of timber by sealed bid, state the date, time, and place to which the opening of bids is postponed,

(3) State the reason for the postponement, and

(4) Be signed by the person authorized to hold the sale, or by his agent or attorney.

(d) If a public sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to make the sale shall report the facts with respect thereto to the judge or clerk of court having jurisdiction, who shall thereupon make an order for the public sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1; 1971, c. 268, s. 18; 1997-83, ss. 10-12.)

§ 1-339.21. Public sale by auction; time of sale.

(a) A public sale by auction shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No public sale by auction shall commence before 10:00 o'clock A.M. or after 4:00 o'clock P.M.

(c) No public sale by auction shall continue after 4:00 o'clock P.M., except that in cities or towns of more than 5,000 inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P.M. (1949, c. 719, s. 1; 1997-83, s. 13.)

§ 1-339.22. Public sale by auction; continuance of uncompleted sale.

A public sale by auction commenced but not completed within the time allowed by G.S. 1-339.21 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than Sunday. In case a continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued. (1949, c. 719, s. 1; 1997-83, s. 14.)

§ 1-339.23. Public sale; when confirmation of sale of personal property necessary; delivery of property; bill of sale.

(a) When any person interested as a creditor, legatee, distributee, or otherwise, in the proceeds of a public sale of personal property, objects at the sale to the completion of the sale of any article of property on account of the insufficiency of the amount bid, title to such property shall not pass and possession of the property shall not be delivered until the sale of such property is reported and is confirmed by the judge or clerk of court having jurisdiction; but such objection to the completion of the sale of any article of property shall not prevent the completion of the sales of articles of property to which no objection is made where the same have been separately sold. When a judge or clerk having jurisdiction fails or refuses to confirm a sale of property which has thus been objected to, the procedure for a new sale of such property, including a new order of sale, shall be the same as if no such attempted sale has been held. This subsection shall not apply to perishable property sold pursuant to G.S. 1-339.19.

(b) Except as provided in subsection (a), the person holding a public sale of personal property shall deliver the property to the purchaser immediately upon compliance by the purchaser with the terms of the sale.

(c) The person holding a public sale may execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the judge or clerk of court having jurisdiction. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.24. Public sale; report of sale; when final as to personal property.

(a) The person holding a public sale shall, within five days after the date of the sale if the sale was by auction, or within five days after the date on which bids were opened if the sale was a sale of timber by sealed bid, file a report thereof with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed by the person authorized to hold the sale, or by his agent or attorney and shall show

(1) The title of the action or proceeding;
(2) The authority under which the person making the sale acted;
(3) If the sale was by public auction, the date, hour and place of the sale;
(3a) If the sale was a sale of timber by sealed bid, the date, time, and place at which the sealed bids were opened, the number of bids received, and the amount of each bid;
(4) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold; and
(5) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;
(6) The names of the purchasers;
(7) The price at which the property, or each part thereof, was sold and that this price was the highest bid therefor; and
(8) The date of the report.

(c) The report of sale of personal property, when confirmation of the sale is not required, may include such additional information as is required by G.S. 1-339.31 or G.S. 1-339.32, whichever is applicable, and when such additional information is included, the report shall constitute the final report of sale of personal property. If the report does not include the additional information required by G.S. 1-339.31 or G.S. 1-339.32, the final report required by those sections shall be subsequently filed.

(d) The report of a sale of timber by sealed bid shall include the information required by G.S. 1-339.13A(b) and G.S. 1-339.17(c1). (1949, c. 719, s. 1; 1997-83, ss. 15-17.)

§ 1-339.25. Public sale; upset bid on real property; compliance bond.

(a) An upset bid is an advanced, increased, or raised bid in a public sale by auction whereby a person offers to purchase real property theretofore sold for an amount exceeding the reported sale price or the last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of seven hundred fifty dollars ($750.00). Subject to the provisions of subsection (b) of this section, an upset bid shall be made by delivering to the clerk of superior court, with whom the report of the sale or the last notice of upset bid was filed, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%) of the amount of the upset bid but in no event less than seven hundred fifty dollars ($750.00). The deposit required by this section shall be filed with the clerk of the superior court with whom the report of sale or the last notice of upset bid was filed, by the close of normal business hours on the tenth day after the filing of the report of sale or the last notice of upset bid, and if the tenth day falls upon a Sunday or legal holiday when the courthouse is closed for transactions, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made and the notice of upset bid may be filed on the day following when the office is open for the regular dispatch of its business. Except as provided in G.S. 1-339.27A and G.S. 1-339.30, there shall be no resales; however, there may be successive upset bids, each of which shall be followed by a period of 10 days for a further upset bid. If a timely motion for resale is filed under G.S. 1-339.27A, no upset bids may be filed while the motion is pending.

(b) The clerk of the superior court may require an upset bidder or the highest bidder at a resale held under G.S. 1-339.30 also to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The compliance bond shall be in the amount the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond, less the amount of any required deposit. The compliance bond shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with the bid.

(c) Repealed by Session Laws 2001-271, s. 4, effective January 1, 2002. See editor's note for applicability.

(d) Repealed by Session Laws 2001-271, s. 4, effective January 1, 2002. See editor's note for applicability.

(d1) At the time that an upset bid on real property is submitted to the court as provided in subsection (a) of this section, together with a compliance bond if one is required, the upset bidder shall file with the clerk a notice of upset bid. The notice of upset bid shall:

(1) State the name, address, and telephone number of the upset bidder;
(2) Specify the amount of the upset bid;
(3) Provide that the sale shall remain open for a period of 10 days after the date on which the notice of upset bid is filed for the filing of additional upset bids as permitted by law; and
(4) Be signed by the upset bidder or the attorney or the agent of the upset bidder.

(d2) When an upset bid is made as provided in this section, the clerk shall notify the person holding the sale who shall thereafter mail a written notice of upset bid by first-class mail to the last known address of the last prior bidder and the current record owners of the property.

(d3) When an upset bid is made as provided in this section, the last prior bidder, regardless of how the bid was made, is released from any further obligation on account of the bid, and any deposit or bond provided by the last prior bidder shall be released.

(d4) Any person offering to purchase real property by upset bid as permitted in this Article is subject to and bound by the terms of the original notice of sale except as modified by court order or the provisions of this Article.

(d5) The clerk of superior court shall make all orders as may be just and necessary to safeguard the interests of all parties and may fix and determine all necessary procedural details with respect to upset bids in all instances in which this Article fails to make definite provisions as to that procedure.

(e) The provisions of this section do not apply to public sales of timber by sealed bid. (1949, c. 719, s. 1; 1963, c. 858; 1967, c. 979, s. 1; 1997-83, ss. 18, 19; 1997-119, s. 1; 1997-456, s. 28; 2001-271, s. 4; 2002-28, s. 1; 2003-337, s. 8.)

Editor's Note. — Session Laws 1967, c. 979, which inserted "or by certified check or cashier's check satisfactory to the said clerk" in the first sentence of subsection (a), provided in s. 4: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes."

CASE NOTES

Upset Bid to Be in Amount Specified. — An upset bid in a private sale of real property shall be submitted to the court within 10 days after the filing of the report of sale, and shall be in an amount specified by this section. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Advance Bid Held Not to Meet Requirements of Section. — An advance bid entered by the owners of a minority interest in the land, and not supported by a cash deposit or bond, but only by the interest of the advance bidders in the land, which interests were subject to deeds of trust, judgments and tax liens in an undisclosed amount, did not meet, at least technically, the requirements of this section for an advance bid. Galloway v. Hester, 249 N.C. 275, 106 S.E.2d 241 (1958).

Superior court did not err in confirming the private sale to earlier bidder, and it properly exercised its discretion by not considering the later bid; neither later bidder's deposit with estate attorney nor estate attorney's telephone notice to the clerk amounted to an upset bid because it was not a timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it was applicable. In re Estate of Kessinger, 94 N.C. App. 191, 379 S.E.2d 662 (1989).

Requiring Cash Bond in Full Amount of Bid Inhibits Maximum Bid Policy. — The general policy of the law favors maximum bidding at judicial sales; and requiring a cash bond in the full amount of the bid, rather than the 5% or so usually deposited under subsection (a) of this section, obviously tends to inhibit bidding when a substantial amount has already been bid. Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

Discretion to Accept Cash Bid. — Whether to accept a cash bid or order another sale, thus releasing the cash bidder, calls for the exercise of judicial discretion. Galloway v. Hester, 249 N.C. 275, 106 S.E.2d 241 (1958).

Discretionary Power of Clerk to Require Cash Bond of Highest Bidder. — Implicit in the authority that subsection (c) of this section gives clerks of the superior court to require the highest bidder at a resale of property to deposit a cash bond is the requirement that there be some justifiable basis for such an order; otherwise, the discretionary power that the statute gives clerks in such matters would be unbridled and subject to neither legal review nor remedy. Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

Refusal of court to order another sale upon an upset bid of owners of the minority interest in the land, secured not by cash or bond, but only by their interest in the land, which was subject to liens in an undisclosed amount, would be affirmed as a proper exercise of judicial discretion by the court. Galloway v. Hester, 249 N.C. 275, 106 S.E.2d 241 (1958).

After the time provided by this section for the placing of an upset bid has expired and after the order of confirmation has been signed by the clerk and approved by a superior court judge, the clerk has no authority to accept an upset bid, and in the absence of findings of fraud, mistake or collusion a superior court judge has no authority to set aside the order of confirmation and to order a resale of the property. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

Applied in Masters v. Cole, 49 N.C. App. 322, 271 S.E.2d 590 (1980).

Cited in Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

§ 1-339.26. Public sale by auction; separate upset bids when real property sold in parts; subsequent procedure.

When real property is sold at public sale by auction in parts, as provided by G.S. 1-339.9, the sale of any part shall be subject to a separate upset bid; and, to the extent the judge or clerk of court having jurisdiction deems advisable, the sale of each part shall thereafter be treated as a separate sale for the purpose of determining the applicable procedure. (1949, c. 719, s. 1; 1971, c. 268, s. 18; 1997-83, s. 20; 2001-271, s. 5.)

§ 1-339.27: Repealed by Session Laws 2001-271, s. 6, effective January 1, 2002.

Cross References. — As to ordering resale of real property after sale or upset bid, see now G.S. 1-339.27A.

§ 1-339.27A. Ordering resale of real property after sale or upset bid.

Upon motion of an interested person filed within 10 days after a sale or upset bid and for good cause, the judge or clerk having jurisdiction may order a resale of real property. If the motion is granted based on the inadequacy of the last bid, the procedure for the resale is the same in every respect as is provided by this Article in the case of an original public sale, and the last bidder is released from the bidder's obligations under the bid. If the motion is granted for any other reason, the last bid becomes the opening bid at resale, and if there is no bid at resale other than the last bid, the person who made the last bid is the highest bidder at resale. If the motion is denied, the 10-day period for subsequent upset bids begins upon the entry of the order. (2001-271, s. 7.)

CASE NOTES

Editor's Note. — The cases cited below were decided under prior similar provisions.

Upon the filing of an upset bid under § 1-339.36(a), former § 1-339.27 applied, and to all intents and purposes the sale thereafter became a public sale and was subject to the statutory requirements of resale. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

When an upset bid in a private sale is submitted to the court, a resale shall be ordered; a notice of the resale shall be posted at the courthouse door for 15 days immediately preceding the sale and published in a newspaper once a week for two successive weeks. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

As to authority of court to order resale under former law relating to partition sales, see Ex parte Post, 56 N.C. 482 (1857); Tayloe v. Carrow, 156 N.C. 6, 72 S.E. 76 (1911); Thompson v. Rospigliosi, 162 N.C. 145, 77 S.E. 113 (1913).

§ 1-339.28. Public sale; confirmation of sale.

(a) No public sale of real property may be consummated until confirmed as follows:

(1) If a public sale is ordered by a judge of the Superior Court Division, it may thereafter be confirmed by a resident superior court judge of the district or a superior court judge regularly holding the courts of the district.

(2) If a public sale is ordered by a judge of the District Court Division, it may thereafter be confirmed by the judge so ordering, the chief district judge, or any district judge authorized by the chief judge to hear motions and enter interlocutory orders.

(3) If a public sale is ordered by a clerk of court, it may thereafter be confirmed by the clerk of court so ordering.

(b) No public sale of real property of a minor or incompetent originally ordered by a clerk may be consummated until confirmed both by the clerk and by a resident superior court judge of, or a judge regularly holding the courts of, the district or set of districts as defined in G.S. 7A-41.1(a).

(c) No public sale of real property sold at public auction may be confirmed until the time for submitting an upset bid, pursuant to G.S. 1-339.25, has expired.

(d) Confirmation of the public sale of personal property is necessary only in the case set out in G.S. 1-339.23(a), or when the order of sale provides for such confirmation.

(e) No public sale of timber sold by sealed bid shall be confirmed until the court determines that the highest bid is an adequate price for the timber sold and that sale to the highest bidder is in the best interest of the person or estate for whom the timber is being sold. In so doing, the court may consider any of the following factors:

(1) The appraisals obtained by the person who conducted the sale;

(2) The number and amounts of the other bids received;

(3) Comparable sales of similar timber within the relevant time period;

(4) Short-term market factors that depressed the price at the time of the sale;

(5) The likelihood of significantly increasing the price through another sale;

(6) The additional cost of conducting another sale;

(7) The effect on the person or estate for whom the timber is being sold of the delay that would result from conducting another sale; and

(8) Any other factors in evidence that the court considers relevant. (1949, c. 719, s. 1; 1971, c. 268, s. 20; 1997-83, ss. 26-28.)

CASE NOTES

Power of Court to Reject Bid. — The court in exercising its sound discretion may reject a bid at any time before confirmation. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

Before confirmation, the prospective purchaser has no vested interest in the property. His bid is but an offer subject to the approval of the court. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

Upon confirmation, the sale becomes final, and the vested interest of the purchaser is not lightly to be put aside. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

When Sale May Be Set Aside After Confirmation. — After confirmation of a judicial sale, the purchaser becomes the equitable owner of the property, and the sale may then be set aside only for mistake, fraud or collusion. In re Green, 27 N.C. App. 555, 219 S.E.2d 552 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

The power of a guardian to make disposition of his ward's estate is very carefully regulated, and the sale is not allowed except by order of court, which order must have the supervision, approval and confirmation of the resident judge of the district or the judge regularly holding the courts of the district. Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

When a guardian of an incompetent person sells real property under order of court, he is merely an agent of the court, and the sale is not consummated until it is confirmed by the resident judge or the judge regularly holding courts in the district. When the sale is originally ordered by the clerk, his confirmation is also required. This confirmation represents the consent of the court and is granted or refused in the discretion of the court. Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

Subdivision (a)(3) gives the clerk of court original jurisdiction over public sales ordered by such clerk. Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983), cert. denied and appeal dismissed, 310 N.C. 476, 312 S.E.2d 882 (1984).

As to confirmation under former statutes, see Thompson v. Cox, 53 N.C. 311 (1860); Evans v. Singletary, 63 N.C. 205 (1869); Shearin v. Hunter, 72 N.C. 493 (1875); Foushee v. Durham, 84 N.C. 56 (1881); Trull v. Rice, 92 N.C. 572 (1885); McLaurin v. McLaurin, 106 N.C. 331, 10 S.E. 1056 (1890); Coffin v. Cook, 106 N.C. 376, 11 S.E. 371 (1890); Smith v. Gray, 116 N.C. 311, 21 S.E. 200 (1895); Joyner v. Futrell, 136 N.C. 301, 48 S.E. 649 (1904); Harrell v. Blythe, 140 N.C. 415, 53 S.E. 232 (1906); Hargrove v. Wilson, 148 N.C. 439, 62 S.E. 520 (1908); Glisson v. Glisson, 153 N.C. 185, 69 S.E. 55 (1910); Patillo v. Lytle, 158 N.C. 92, 73 S.E. 200 (1911); Upchurch v. Upchurch, 173 N.C. 88, 91 S.E. 702 (1917); Ex parte Garrett, 174 N.C. 343, 93 S.E. 838 (1917); McCormick v. Patterson, 194 N.C. 216, 139 S.E. 225 (1927).

Cited in North Carolina State Hwy. Comm'n v. Moore, 3 N.C. App. 207, 164 S.E.2d 385 (1968); In re Estate of Kessinger, 94 N.C. App. 191, 379 S.E.2d 662 (1989); United Carolina Bank v. Tucker, 99 N.C. App. 95, 392 S.E.2d 410 (1990).

§ 1-339.29. Public sale; real property; deed; order for possession.

(a) Upon confirmation of a public sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of sale, shall deliver the deed to the purchaser.

(b) A person executing a deed to real property being conveyed pursuant to a public sale may recite in the deed, in addition to the usual provisions, substantially as follows

(1) The authority for making the sale,
(2) The title of the action or proceeding in which the sale was had,
(3) The name of the person authorized to make the sale,
(4) The fact that the sale was duly advertised,
(5) The date of the sale,
(6) The name of the highest bidder and the price bid,
(7) That the sale has been confirmed,
(8) That the terms of the sale have been complied with, and
(9) That the person executing the deed has been authorized to execute it.

(c) The judge or clerk of court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding.

(d) An order for possession granted pursuant to the preceding subsection shall be directed to the sheriff, shall authorize him to remove the party or parties in possession, and their personal property, from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. (1949, c. 719, s. 1; 1971, c. 268, s. 18; 1987, c. 627, s. 1.)

CASE NOTES

For cases decided under former statutes relating to partition sales and sales of lands of decedents' estates, see Latta v. Vickers, 82 N.C. 501 (1880); Coffin v. Cook, 106 N.C. 376, 11 S.E. 371 (1890); Marcom v. Wyatt, 117 N.C. 129, 23 S.E. 169 (1895); Herbin v. Wagoner, 118 N.C. 656, 24 S.E. 490 (1896); Hargrove v. Wilson, 148 N.C. 439, 62 S.E. 520 (1908); In re Wilson, 161 N.C. 211, 75 S.E. 1086 (1912); Jordan v. Faulkner, 168 N.C. 466, 84 S.E. 764 (1915); Holley v. White, 172 N.C. 77, 89 S.E. 1061 (1916); Crocker v. Vann, 192 N.C. 422, 135 S.E. 127 (1926).

Cited in City of Durham v. Keen, 40 N.C. App. 652, 253 S.E.2d 585 (1979).

§ 1-339.30. Public sale; failure of bidder to make cash deposit or to comply with bid; resale.

(a) If an order of public sale by auction requires the highest bidder to make a cash deposit at the sale, and the highest bidder fails to make the required deposit, the person holding the sale shall at the same time and place again offer the property for sale.

(a1) If an order of public sale of timber by sealed bid requires the highest bidder to make a cash deposit and the bidder fails to make the required deposit within the time specified in the order, the judge or clerk having jurisdiction may direct that the timber be sold to the person who submitted the next highest bid or may order a resale. The procedure for a resale is the same in every respect as is provided by this Article in the case of an original public sale.

(b) When the highest bidder at a public sale of personal property not required to be confirmed fails to make the cash payment, if any, required by the terms of the sale, the person holding the sale shall at the same time and place again offer the property for sale. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this Article for an original sale.

(c) When the highest bidder at a public sale of personal property required to be confirmed fails to comply with his bid within 10 days after notice given by the person holding the sale or after a bona fide attempt to give such notice that the sale has been confirmed, the judge or clerk having jurisdiction may order a resale. The procedure for the resale is the same in every respect as is provided by this Article in the case of an original public sale of personal property.

(d) When the highest bidder at a public sale or resale of real property by auction or any upset bidder fails to comply with the bid within 10 days after the tender to the bidder of a deed for the property or after a bona fide attempt to tender the deed, the judge or clerk having jurisdiction may order a resale. The procedure for a resale of real property is the same in every respect as is provided by this Article in the case of an original public sale of real property.

(d1) When the highest bidder at a public sale or resale of timber by sealed bid fails to comply with the bid within 10 days after the tender to the bidder of a deed for the timber or after a bona fide attempt to tender a timber deed, the judge or clerk having jurisdiction may direct that the timber be sold to the person who submitted the next highest bid or may order a resale. The procedure for a resale is the same in every respect as is provided by this Article in the case of an original public sale.

(e) A defaulting bidder at any sale or resale or any defaulting upset bidder is liable on the bid, and in case a resale is had because of the default, the defaulting bidder remains liable to the extent that the final sale price is less than the bid, and for all costs of the resale or resales. Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, if any, for which the defaulting bidder remains liable under this section.

(f) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 719, s. 1; 1997-83, ss. 29-33; 2001-271, s. 8.)

CASE NOTES

The doctrine of caveat emptor applies to a judicial sale, and while the court has equity jurisdiction to protect a purchaser from imposition because of fraud or mistake, where the evidence disclosed that the parties had equal opportunity to discover the facts, that the description set out in the petition for sale was of record for more than a year prior to the bid, and that the purchaser was familiar with the property and did not ask for a survey, such purchaser could not seek relief from his bid on the ground of shortage in acreage or lack of access to the property. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

The commissioner is required by this section to tender a deed for the property or to make a bona fide attempt to tender such deed. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Tender Held Sufficient. — Where the highest bidder was served with notice on 27 June 1966 that the commissioner would move on 12 July 1966 that the highest bidder comply with the terms of sale, this indicated that the commissioner, who was under order of court to convey upon receipt of the purchase price, stood ready, willing and able to comply with the terms of the order. No further tender was necessary when the bidder failed to comply, since the law does not require the doing of a vain thing. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Order Held Not a Void Conditional Judgment. — Order issued in a judicial sale proceeding, to the effect that upon refusal of the last and highest bidder to comply with his bid the land would be resold and that the defaulting bidder would be held liable for the costs and for any difference between the final sale price and his bid, was not a void conditional judgment, since it was unequivocal and the determination of the liability was a simple matter of arithmetic and an administrative duty; such order was a final judgment deciding the matter on its merits without need for further direction of the court. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

Prejudgment Interest on Bid. — Executor, after a series of resales arising from defendant's failure to comply with his bid at a judicial sale under this section, was entitled to prejudgment interest on defendant's full $125,000.00 bid. Parker v. Lippard, 87 N.C. App. 487, 361 S.E.2d 395 (1987).

Award of Attorneys' Fees Held Improper. — Given the statute's apparent purpose to assess a defaulting bidder with resale "expenses," defendant's liability for "costs of resale" under subsection (e) did not entitle the court to award the executor attorneys' fees incurred after defendant's default. Parker v. Lippard, 87 N.C. App. 43, 359 S.E.2d 492, modified and aff'd on rehearing, 87 N.C. App. 487, 361 S.E.2d 395 (1987).

For cases decided under former statutes relating to partition sales and sales of lands of decedents' estates, see Burgin v. Burgin, 82 N.C. 196 (1880); Hudson v. Coble, 97 N.C. 260, 1 S.E. 688 (1887); Wooten v. Cunningham, 171 N.C. 123, 88 S.E. 1 (1916); Lyman v. Southern Coal Co., 183 N.C. 581, 112 S.E. 242 (1922).

§ 1-339.31. Public sale; report of commissioner or trustee in deed of trust.

(a) A commissioner or a trustee in a deed of trust, authorized pursuant to G.S. 1-339.4 to hold a public sale of property, shall, in addition to all other reports required by this Article, file with the clerk of the superior court an account of his receipts and disbursements as follows:

(1) When the sale is for cash, a final report shall be filed within thirty days after receipt of the proceeds of the sale;

(2) When the sale is wholly or partly on time and the commissioner or trustee is not required to collect deferred payments, a final report shall be filed within thirty days after receipt of the cash payment, if any is required, and the receipt of all securities for the purchase price;

(3) When the commissioner or trustee is required to collect deferred payments,

  a. He shall file a preliminary report within thirty days after receipt of the cash payment, if any is required, and the receipt of all securities for the purchase price, and

  b. If the period of time during which he is required to collect deferred payments extends over more than one year, he shall file an annual report of his receipts and disbursements, and

c. After collecting all deferred payments, he shall file a final report.

(b) The clerk shall audit and record the reports and accounts required to be filed pursuant to this section. (1949, c. 719, s. 1.)

CASE NOTES

As to effect of failure of commissioner to file a report under former statute relating to partition sales, see Peal v. Martin, 207 N.C. 106, 176 S.E. 282 (1934).

§ 1-339.32. Public sale; final report of person, other than commissioner or trustee in deed of trust.

An administrator, executor or collector of a decedent's estate, or a receiver, or a guardian or trustee of a minor's or incompetent's estate, or an administrator, collector, conservator or guardian of an absent or missing person's estate, is not required to file a special account of his receipts and disbursements for property sold at public sale pursuant to this Article unless so directed by the judge or clerk of court having jurisdiction of the sale proceeding, but shall include in his next following account or report, either annual or final, an account of such receipts and disbursements. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

Part 3. Procedure for Private Sales of Real and Personal Property.

§ 1-339.33. Private sale; order of sale.

Whenever a private sale is ordered, the order of sale shall

(1) Designate the person authorized to make the sale;

(2) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;

(3) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity; and

(4) Prescribe such terms of sale as the judge or clerk of court ordering the sale deems advisable. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

CASE NOTES

This section does not specify conditions under which a private sale may be ordered. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Court May Lay Down Guidelines and Give Directions. — There is nothing in this section which restricts the court in laying down guidelines and giving directions for the making of a private sale in the first instance. Indeed, it is the duty of the court to give directions to the commissioner. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Discretion of Court Where Minors Are Interested. — Under the former statute, the court having jurisdiction might, in the exercise of its discretion, order a sale of land where minors were interested and represented by guardian ad litem, either at public or private sale. The court has similar discretion under this section. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Private Sale of Timber. — In the sale of large bodies of timber, a commissioner, if permitted to sell privately, has freedom to canvass prospective buyers, give time for viewing and estimating the timber, and negotiate directly with prospects, without being restricted by the formal requirements of a public sale. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

As to discretion of court under former statute governing partition sales, see Thompson v. Rospigliosi, 162 N.C. 145, 77 S.E. 113 (1913); Wooten v. Cunningham, 171 N.C. 123, 88 S.E. 1 (1916); Ryder v. Oates, 173 N.C. 569, 92 S.E. 508 (1917).

§ 1-339.34. Private sale; exception; certain personal property.

(a) Notwithstanding any provisions of this Article, property described below may be sold at private sale at the current market price after first obtaining an order of sale:

(1) Property consisting of stocks, bonds or other securities the current market value of which is established by sales on any stock or securities exchange supervised or regulated by the United States government or any other of its agencies or departments, or

(2) Property consisting of stocks, bonds or other securities which are not sold on any stock or securities exchange supervised or regulated by the United States government or any other of its agencies or departments, but which are found by the judge or clerk having jurisdiction to have a known or readily ascertainable market value, or

(3) Property consisting of cattle, hogs, or other livestock, or cotton, corn, tobacco, peanuts or other farm commodities or produce, found by the judge or clerk having jurisdiction to have a known or readily ascertainable market value.

(b) Property determined by the judge or clerk having jurisdiction to be perishable property because subject to rapid deterioration may be sold at private sale after first obtaining an order of sale.

(c) Any sale made pursuant to this section is not subject to an upset bid, and is not required to be confirmed, but such sale is final. (1949, c. 719, s. 1.)

§ 1-339.35. Private sale; report of sale.

(a) The person holding a private sale shall, within five days after the date of the sale, file a report with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed and shall show

(1) The title of the action or proceeding;

(2) The authority under which the person making the sale acted;

(3) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;

(4) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;

(5) The name or names of the person or persons to whom the property was sold;

(6) The price at which the property, or each part thereof, was sold, and the terms of the sale; and

(7) The date of the report. (1947, c. 719, s. 1.)

CASE NOTES

Purpose for Report of Sale of Incompetent's Property. — The report of sale of an incompetent's property required by this section was intended not just to give record notice of the fact of sale but also to operate with G.S. 1-339.25 and 1-339.36 to ensure that the price received should be greater by facilitating the practice of upset bidding by providing a clear-cut starting point for the time period during which upset bids might be filed. Masters v. Cole, 49 N.C. App. 322, 271 S.E.2d 590 (1980).

Legal Test in Determining If Guardian's Letter Was Report of Sale. — In determining whether a guardian's letter to the clerk of court constituted a report of sale of an incompetent's property within the meaning of this section, even though it did not comply with all the technical requirements thereof, the proper legal test was whether its partial compliance had fully attained the objective of the statute. Masters v. Cole, 49 N.C. App. 322, 271 S.E.2d 590 (1980).

Guardian's Letter Held Insufficient. — A guardian's letter to the clerk of court did not constitute a valid report of sale of an incompetent's property where it failed to set out the title of the action and failed to specify the terms of sale as required by subdivisions (b)(1) and (b)(6) of this section, since a potential upset bidder could not look at the letter and know with certainty whether it was a report of sale. Masters v. Cole, 49 N.C. App. 322, 271 S.E.2d 590 (1980).

§ 1-339.36. Private sale; upset bid; subsequent procedure.

(a) Every private sale of real or personal property, except a sale of personal property as provided by G.S. 1-339.34, is subject to an upset bid on the same conditions and in the same manner as is provided by G.S. 1-339.25.

(b) When an upset bid is made for property sold at private sale, subsequent procedure with respect to the upset bid is the same as for upset bids submitted in connection with real property sold at public sale, except that the notice of any resale of personal property held pursuant to an order granted under G.S. 1-339.27A need not be published in a newspaper but shall be posted as provided by G.S. 1-339.17. (1949, c. 719, s. 1; 2001-271, s. 9.)

CASE NOTES

Every Private Sale Is Subject to Upset Bids. — Every private sale of real property under order of the court is subject to upset bids. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Applicability of § 1-339.25. — An upset bid in a private sale of real property shall be submitted to the court within ten days after the filing of the report of sale, and shall be in an amount specified by G.S. 1-339.25. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Applicability of § 1-339.27. — Upon the filing of an upset bid under subsection (a) of this section, G.S. 1-339.27 (a) applies, and to all intents and purposes the sale thereafter becomes a public sale and is subject to the statutory requirements of resale. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

When an upset bid in a private sale is submitted to the court, a resale shall be ordered, a notice of which resale shall be posted at the courthouse door for 15 days immediately preceding the sale and published in a newspaper once a week for two successive weeks. Wadsworth v. Wadsworth, 260 N.C. 702, 133 S.E.2d 681 (1963).

Applied in Masters v. Cole, 49 N.C. App. 322, 271 S.E.2d 590 (1980).

§ 1-339.37. Private sale; confirmation.

If no upset bid for property sold at private sale is submitted within 10 days after the report of sale or the last notice of upset bid is filed, the sale may then be confirmed, and the provisions of G.S. 1-339.28(a) and (b) are applicable to such confirmation whether the property sold is real or personal. Unless otherwise provided in the order of sale, no confirmation is required of any sale held as provided by G.S. 1-339.34. (1949, c. 719, s. 1; 2001-271, s. 10.)

CASE NOTES

As to superior court's jurisdiction in a partition action under former statute to confirm a private sale, see McAfee v. Green, 143 N.C. 411, 55 S.E. 828 (1906); Thompson v. Rospigliosi, 162 N.C. 145, 77 S.E. 113 (1913).

Applied in Masters v. Cole, 49 N.C. App. 322, 271 S.E.2d 590 (1980).

§ 1-339.38. Private sale; real property; deed; order for possession.

(a) Upon confirmation of a private sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) The judge or clerk of court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.39. Private sale; personal property; delivery; bill of sale.

Upon compliance by the purchaser with the terms of a private sale of personal property, and upon confirmation of the sale when confirmation is required by G.S. 1-339.37, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of court having jurisdiction, shall deliver the property to the purchaser, and may execute and deliver a bill of sale or other muniment of title, and, upon application of the purchaser, shall do so when required by the judge or clerk having jurisdiction. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

§ 1-339.40. Private sale; final report.

(a) A commissioner or a trustee in a deed of trust authorized pursuant to G.S. 1-339.4 to hold a private sale of property shall make such a final report as is specified in G.S. 1-339.31.

(b) Any other person authorized pursuant to G.S. 1-339.4 to hold a private sale of property shall make such a final report as is specified in G.S. 1-339.32. (1949, c. 719, s. 1.)

CASE NOTES

Cited in Wright v. Wright, 305 N.C. 345, 289 S.E.2d 347 (1982).

ARTICLE 29B.

Execution Sales.

Part 1. General Provisions.

§ 1-339.41. Definitions.

(a) An execution sale is a sale of property by a sheriff or other officer made pursuant to an execution.

(b) As used in this article,

(1) "Sale" means an execution sale;

(2) "Sheriff" means a sheriff or any officer authorized to hold an execution sale. (1949, c. 719, s. 1.)

Cross References. — As to judicial sales, see G.S. 1-339.1 through 1-339.40. As to sales under power of sale, see G.S. 45-21.1 through 45-21.33. As to enforcement of judgments, and exemptions, see G.S. 1C-1601 et seq.

Legal Periodicals. — For a brief discussion of this article, see 27 N.C.L. Rev. 479 (1949).

CASE NOTES

Execution sale authorized by § 105-375 is analogous to an execution sale conducted under the authority of this section. Henderson County v. Osteen, 28 N.C. App. 542, 221 S.E.2d 903, rev'd on other grounds, 292 N.C. 692, 235 S.E.2d 166 (1977).

Cited in Kindred of N.C., Inc. v. Bond, 160 N.C. App. 90, 584 S.E.2d 846, 2003 N.C. App. LEXIS 1765 (2003).

§ 1-339.42. Clerk's authority to fix procedural details.

The clerk of the superior court who issues an execution has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this Article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1.)

§ 1-339.43. Days on which sale may be held.

A sale may be held on any day except Sunday. (1949, c. 719, s. 1.)

Cross References. — For validation of certain sales, see G.S. 1-339.72 et seq.

CASE NOTES

As to validity under former statutes of sales not made at the time and place provided, see Mordecai v. Speight, 14 N.C. 428 (1832); State v. Rives, 27 N.C. 297 (1844); Brooks v. Ratcliff, 33 N.C. 321 (1850); Wade v. Saunders, 70 N.C. 270 (1874); Mayers v. Carter, 87 N.C. 146 (1882); Bladen County v. Breece, 214 N.C. 544, 200 S.E. 13 (1938); Caswell County v. Scott, 215 N.C. 185, 1 S.E.2d 364 (1939).

As to validation of sale by assent of debtor under former statutes, see Kader Biggs & Co. v. Brickell, 68 N.C. 239 (1873); Mayers v. Carter, 87 N.C. 146 (1882).

§ 1-339.44. Place of sale.

(a) Every sale of real property shall be held at the courthouse door in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A sale of a single tract of real property situated in two or more counties may be held at the courthouse door in any one of the counties in which any part of the tract is situated, but no sheriff shall hold any sale outside his own county. As used in this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons or whether it may have been subdivided into other units or lots, or whether it is sold as a whole or in parts.

(c) A sale of personal property may be held at any place in his county designated by the sheriff in the notice of sale. (1949, c. 719, s. 1.)

CASE NOTES

Specificity of Notice Regarding Place Where Property Will be Sold. — Notice that a county would conduct a tax sale at a "storage location" to collect taxes due on a mobile home did not provide specificity required by G.S. 1-339.51, and the trial court properly invalidated the sale of a mobile home that was valued at $50,000, but was sold for $5,000. Oakwood Acceptance Corp., LLC v. Massengill, 162 N.C. App. 199, 590 S.E.2d 412, 2004 N.C. App. LEXIS 118 (2004).

§ 1-339.45. Presence of personal property at sale required.

A sheriff holding a sale of personal property shall have the property present at the place of sale. (1949, c. 719, s. 1.)

§ 1-339.46. Sale as a whole or in parts.

When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the sheriff may sell such real or personal property as a whole or in designated parts, or may offer the property for sale by each method, and then sell the property by the method which produces the highest price; but regardless of which method is followed, the sheriff shall not sell more property than is reasonably necessary to satisfy the judgment together with the costs of the execution and the sale. (1949, c. 719, s. 1.)

§ 1-339.47. Sale to be made for cash.

Every sale shall be made for cash. (1949, c. 719, s. 1.)

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1048 (1981).

§ 1-339.48. Life of execution.

If an execution is issued on a judgment, within the time provided by G.S. 1-306, and a sale, by authority of that execution, is commenced within the time provided by G.S. 1-310, the sale, including any resale, may be had and completed even though such sales, resales or other procedure are had after the time when the execution is required to be returned by G.S. 1-310, or after the time within which an execution could be issued with respect to such judgment pursuant to the provisions of G.S. 1-306. For the purpose of this section, a sale is commenced when the notice of sale is first published in the case of real property as required by G.S. 1-339.52, or first posted in the case of personal property as required by G.S. 1-339.53. (1949, c. 719, s. 1.)

§ 1-339.49. Penalty for selling contrary to law.

A sheriff or other officer who makes any sale contrary to the true intent and meaning of this Article shall forfeit two hundred dollars to any person suing for it, one half for his own use and the other half to the use of the county where the offense is committed. (1820, c. 1066, s. 2, P.R.; 1822, c. 1153, s. 3, P.R.; R.C., c. 45, s. 18; Code, s. 461; Rev., s. 649; C.S., s. 696; 1949, c. 719, s. 2.)

Cross References. — As to liability on sheriff's bond, see G.S. 162-8 and 162-18.

§ 1-339.50. Officer's return of no sale for want of bidders; penalty.

When a sheriff or other officer returns upon an execution that he has made no sale for want of bidders, he must state in his return the several places he has advertised and offered for sale the property levied on; and an officer failing to make such statement is on motion subject to a fine of forty dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which, or by justice to whom, the execution shall be returned. Nothing in, nor any recovery under, this section is a bar to any action for a false return against the sheriff or other officer. (1815, c. 887, P.R.; R.C., c. 45, s. 19; Code, s. 462; Rev., s. 650; C.S., s. 697; 1949, c. 719, s. 2; 1995, c. 379, s. 14(a).)

Part 2. Procedure for Sale.

§ 1-339.51. Contents of notice of sale.

The notice of sale shall

(1) Refer to the execution authorizing the sale;
(2) Designate the date, hour and place of sale;
(3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add such further description as will acquaint bidders with the nature and location of the property;
(4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add such further description as will acquaint bidders with the nature of the property; and
(5) State that the sale will be made to the highest bidder for cash. (1949, c. 719, s. 1.)

CASE NOTES

Statutes Contemplate Sale at Fair Value. — The statutes regulating execution sales contemplate a sale at which the thing sold will bring its fair value. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

Notice of Place Where Property Will Be Sold. — Notice that a county would conduct a tax sale at a "storage location" to collect taxes due on a mobile home did not provide specificity required by G.S. 1-339.51, and the trial court properly invalidated the sale of a mobile home that was valued at $50,000, but was sold for $5,000. Oakwood Acceptance Corp., LLC v. Massengill, 162 N.C. App. 199, 590 S.E.2d 412, 2004 N.C. App. LEXIS 118 (2004).

Cited in Myers v. H. McBride Realty, Inc., 93 N.C. App. 689, 379 S.E.2d 70 (1989).

§ 1-339.52. Posting and publishing notice of sale of real property.

(a) The notice of sale of real property shall:

(1) Be posted, in the area designated by the clerk of superior court for the posting of notices in the county in which the property is situated, for at least 20 days immediately preceding the sale; and
(2) Be published once a week for at least two successive weeks:
   a. In a newspaper qualified for legal advertising published in the county; or
   b. If no newspaper qualified for legal advertising is published in the county, in a newspaper having general circulation in the county.

(b) When the notice of sale is published in a newspaper:

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than seven days, including Sundays; and
(2) The date of the last publication shall be not more than 10 days preceding the date of the sale.

(c) When the real property to be sold is situated in more than one county, the provisions of subsections (a) and (b) shall be complied with in each county in which any part of the property is situated. (1949, c. 719, s. 1; 1967, c. 979, s. 2; 2001-271, s. 11.)

Editor's Note. — Session Laws 1967, c. 979, which rewrote paragraph (a)(2)b and substituted "be not more than 10" for "not be more than seven" in subdivision (b)(2), provided in s. 4: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes."

CASE NOTES

As to the directory nature of the requirements of the former statute, see Mordecai v. Speight, 14 N.C. 428 (1832); McEntire v. Durham, 29 N.C. 151 (1846).

As to setting aside sale where person with notice of irregularity purchases, under former statutes, see Burton v. Spiers, 92 N.C. 503 (1885); Myers v. H. McBride Realty, Inc., 93 N.C. App. 689, 379 S.E.2d 70 (1989).

Cited in Annas v. Davis, 40 N.C. App. 51, 252 S.E.2d 28 (1979); Myers v. H. McBride Realty, Inc., 93 N.C. App. 689, 379 S.E.2d 70 (1989); St. Regis of Onslow County, N.C. Owners Ass'n v. Johnson, 191 N.C. App. 516, 663 S.E.2d 908, 2008 N.C. App. LEXIS 1468 (2008).

§ 1-339.53. Posting notice of sale of personal property.

The notice of sale of personal property, except in the case of perishable property as specified in G.S. 1-339.56, shall be posted, in the area designated by the clerk of superior court for the posting of notices in the county in which the sale is to be held, for 10 days immediately preceding the date of sale. (1949, c. 719, s. 1; 2001-271, s. 12.)

CASE NOTES

Purchaser with Notice of Lack of Advertisement. — A purchaser at an execution sale of personalty, who had full knowledge of such irregularities as absence of advertisement, etc., as required by former G.S. 1-336, was not an innocent purchaser, and the rule that a purchaser at a sheriff's sale is not bound to look further than to see that he is an officer who sells, empowered to do so by a valid execution, was not applicable, for the rule presupposes that the purchaser is a bona fide purchaser. Phillips v. Hyatt, 167 N.C. 570, 83 S.E. 804 (1914).

§ 1-339.54. Notice to judgment debtor of sale of real property.

In addition to complying with G.S. 1-339.52, relating to posting and publishing the notice of sale, the sheriff shall, at least ten days before the sale of real property,

(1) If the judgment debtor is found in the county, serve a copy of the notice of sale on him personally, or

(2) If the judgment debtor is not found in the county,
  a. Send a copy of the notice of sale by registered mail to the judgment debtor at his last address known to the sheriff, and
  b. Serve a copy of the notice of sale on the judgment debtor's agent, if there is in the county a person known to the sheriff to be an agent who has custody or management of, or who exercises control over, any property in the county belonging to the judgment debtor. (1949, c. 719, s. 1.)

CASE NOTES

Statutory requirements for notice of an execution sale were met where the deputy sheriff attempted to locate the plaintiff by running his name through the computer of the Department of Motor Vehicles (DMV) (see now Division of Motor Vehicles), where the phone book was checked and no one with plaintiff's name was listed, where the deputy went to the address listed on the execution notice and to an address where plaintiff owned real property and the deputy could not locate plaintiff, and where plaintiff was served by certified mail at his last known address. Myers v. H. McBride Realty, Inc., 93 N.C. App. 689, 379 S.E.2d 70 (1989).

Trial court properly denied a condominium owner's motion to set aside an execution sale, the order confirming the sale, and the sheriff's deed pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b) because the sheriff complied with G.S. 1-339.54(2)a by sending the notice of the sale via registered mail more than 30 days prior to the sale of the property to the owner's last known address; because the owner was not located in the county, he was not entitled to have a copy of the notice served on him personally pursuant to G.S. 1-339.54(1). St. Regis of Onslow County, N.C. Owners Ass'n v. Johnson, 191 N.C. App. 516, 663 S.E.2d 908, 2008 N.C. App. LEXIS 1468 (2008).

Effect of Noncompliance with This Section. — A failure to comply with this section, which is directory, will not render the sale void as against a stranger without notice of the irregularity, nor can such sale be assailed collaterally, but in such a case the defendant may, on motion or by direct proceeding, have the sale vacated. Walston v. W.H. Applewhite & Co., 237 N.C. 419, 75 S.E.2d 138 (1953).

As to effect of noncompliance with former §§ 1-325 and 1-330, see Williams v. Dunn, 163 N.C. 206, 79 S.E. 512 (1913).

As to notice requirements for resale under former § 1-330, see Bank of Pinehurst v. Gardner, 218 N.C. 584, 11 S.E.2d 872 (1940).

As to liability of sheriff for failure to give notice under former § 1-330, see Williams v. Johnson, 112 N.C. 424, 17 S.E. 496 (1893).

Cited in Henderson County v. Osteen, 292 N.C. 692, 235 S.E.2d 166 (1977); Henderson County v. Osteen, 297 N.C. 113, 254 S.E.2d 160 (1979).

§ 1-339.55. Notification of Governor and Attorney General.

When the State is a stockholder in any corporation whose property is to be sold under execution, notice in writing shall be given by the sheriff by registered mail to the Governor and the Attorney General at least thirty days before the sale, stating the time and place of the sale and including a copy of the process under the authority of which such sale is to be made. Any sale held without complying with the provisions of this section is invalid with respect to the State. (1949, c. 719, s. 1.)

§ 1-339.56. Exception; perishable property.

If, in the opinion of the sheriff, any personal property levied on under execution is perishable because subject to rapid deterioration, he shall forthwith report such levy, together with a description of the property, to the clerk of the superior court, and request instructions as to the sale of such property. If the clerk then determines that the property is such perishable property, he shall thereupon order a sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. If the clerk determines that the property is not perishable, he shall order it to be sold in the same manner as other nonperishable property. (1949, c. 719, s. 1.)

§ 1-339.57. Satisfaction of judgment before sale completed.

If, prior to the time fixed for a sale, or prior to the expiration of the time allowed for submitting any upset bid, payment is made or tendered to the sheriff of the judgment and costs with respect to which the execution was issued, and the sheriff's fees, commissions and expenses which have accrued, together with any expenses incurred on account of the sale or proposed sale including costs incurred in caring for the property levied on, then any right to effect a sale pursuant to the execution ceases. (1949, c. 719, s. 1.)

§ 1-339.58. Postponement of sale.

(a) The sheriff may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale:

(1) When there are no bidders,

(2) When, in the sheriff's judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty,

(3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in the sheriff's judgment, to hold the sale on that day,

(4) When the sheriff is unable to hold the sale because of illness or for other good reason, or

(5) When other good cause exists.

(b) Upon postponement of a sale, the sheriff shall:

(1) At the time and place advertised for the sale, publicly announce the postponement of the sale; and

(2) On the same day, attach to or enter on the original notice of sale or a copy of the notice, posted as provided by G.S. 1-339.52 in the case of real property or G.S. 1-339.53 in the case of personal property, a notice of the postponement.

(c) The posted notice of postponement shall:

(1) State that the sale is postponed,

(2) State the hour and date to which the sale is postponed,

(3) State the reason for the postponement, and

(4) Be signed by the sheriff.

(d) If a sale is not held at the time fixed for the sale and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed for the sale, the sheriff shall report the facts with respect thereto to the clerk of the superior court, who shall thereupon make an order for the sale of the property to be held at such time and place and upon such notice to be given in the manner and for the length of time as the clerk of the superior court deems advisable, but nothing in this section relieves the sheriff of liability for the nonperformance of the sheriff's official duty. (1949, c. 719, s. 1; 2001-271, s. 13.)

§ 1-339.59. Procedure upon dissolution of order restraining or enjoining sale.

(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provide by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1.)

§ 1-339.60. Time of sale.

(a) A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No sale shall commence before 10:00 o'clock A.M. or after 4:00 o'clock P.M.

(c) No sale shall continue after 4:00 o'clock P.M., except that in cities or towns of more than 5,000 inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P.M. (1949, c. 719, s. 1.)

§ 1-339.61. Continuance of uncompleted sale.

A sale commenced but not completed within the time allowed by G.S. 1-339.60 shall be continued by the sheriff to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than Sunday. In case such continuance becomes necessary, the sheriff shall publicly announce the time to which the sale is continued. (1949, c. 719, s. 1.)

§ 1-339.62. Delivery of personal property; bill of sale.

A sheriff holding a sale of personal property shall deliver the property to the purchaser immediately upon receipt of the purchase price. The sheriff may also execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the clerk of the superior court of the county where the property is sold. (1949, c. 719, s. 1.)

§ 1-339.63. Report of sale.

(a) The sheriff shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court.

(b) The report shall be signed and shall show

(1) The title of the action or proceeding;
(2) The authority under which the sheriff acted;
(3) The date, hour and place of the sale;
(4) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;
(5) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;
(6) The name or names of the person or persons to whom the property was sold;
(7) The price at which the property, or each part thereof, was sold and that such price was the highest bid therefor; and
(8) The date of the report. (1949, c. 719, s. 1.)

CASE NOTES

Applied in North Carolina Nat'l Bank v. Sharpe, 49 N.C. App. 687, 272 S.E.2d 368 (1980).

§ 1-339.64. Upset bid on real property; compliance bond.

(a) An upset bid is an advanced, increased, or raised bid whereby a person offers to purchase real property theretofore sold for an amount exceeding the reported sale price or last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of seven hundred fifty dollars ($750.00). Subject to the provisions of subsection (b) of this section, an upset bid shall be made by delivering to the clerk of superior court, with whom the report of sale or the last notice of upset bid was filed, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%) of the amount of the upset bid but in no event less than seven hundred fifty dollars ($750.00). The deposit required by this section shall be filed with the clerk of the superior court, with whom the report of sale or the last notice of upset bid was filed, by the close of normal business hours on the tenth day after the filing of the report of sale or the last notice of upset bid and if the tenth day falls upon a Sunday or legal holiday when the courthouse is closed for transactions, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made and the notice of upset bid may be filed on the day following when the office is open for the regular dispatch of its business. Except as provided in G.S. 1-339.66A and G.S. 1-339.69, there shall be no resales; however, there may be successive upset bids, each of which shall be followed by a period of 10 days for a further upset bid. If a timely motion for resale is filed under G.S. 1-339.66A, no upset bids may be filed while the motion is pending.

(b) The clerk of the superior court may require an upset bidder or the highest bidder at a resale held under G.S. 1-339.69 also to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The compliance bond shall be in the amount the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond, less the amount of any required deposit. The compliance bond shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with the bid.

(c) Repealed by Session Laws 2001-271, s. 14, effective January 1, 2002. See editor's note for applicability.

(d) Repealed by Session Laws 2001-271, s. 14, effective January 1, 2002. See editor's note for applicability.

(e) At the time that an upset bid on real property is submitted to the court as provided in subsection (a) of this section, together with a compliance bond if one is required, the upset bidder shall file with the clerk a notice of upset bid. The notice of upset bid shall:

(1) State the name, address, and telephone number of the upset bidder;
(2) Specify the amount of the upset bid;
(3) Provide that the sale shall remain open for a period of 10 days after the date on which the notice of upset bid is filed for the filing of additional upset bids as permitted by law; and
(4) Be signed by the upset bidder or the attorney or the agent of the upset bidder.

(f) When an upset bid is made as provided in this section, the clerk shall notify the person holding the sale who shall thereafter mail a written notice of upset bid by first-class mail to the last known address of the last prior bidder and the current record owners of the property.

(g) When an upset bid is made as provided in this section, the last prior bidder, regardless of how the bid was made, is released from any further obligation on account of the bid, and any deposit or bond provided by the last prior bidder shall be released.

(h) Any person offering to purchase real property by upset bid as permitted in this Article is subject to and bound by the terms of the original notice of sale except as modified by a court order or the provisions of this Article.

(i) The clerk of superior court shall make all orders as may be just and necessary to safeguard the interests of all parties and may fix and determine all necessary procedural details with respect to upset bids in all instances in which this Article fails to make definite provisions as to that procedure. (1949, c. 719, s. 1; 1967, c. 979, s. 2; 1997-119, s. 2; 2001-271, s. 14; 2002-28, s. 2; 2003-337, s. 7.)

Editor's Note. — Session Laws 1967, c. 979, which inserted "or by certified check or cashier's check satisfactory to the said clerk" in the first sentence in subsection (a) and added at the end of that sentence the language following the semicolon, provided in s. 4: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes."

§ 1-339.65. Separate upset bids when real property sold in parts; subsequent procedure.

When real property is sold in parts, as provided by G.S. 1-339.46, the sale of any part shall be subject to a separate upset bid; and to the extent the clerk of the superior court having jurisdiction deems advisable, the sale of each part shall thereafter be treated as a separate sale for the purpose of determining the applicable procedure. (1949, c. 719, s. 1; 2001-271, s. 15.)

§ 1-339.66: Repealed by Session Laws 2001-271, s. 16, effective January 1, 2002.

Cross References. — As to ordering resale of real property after upset bid, see now G.S. 1-339.66A.

§ 1-339.66A. Ordering resale of real property after upset bid.

Upon motion of an interested person filed within 10 days after a sale or upset bid and for good cause, the clerk of superior court may order a resale of real property when an upset bid is submitted as provided in G.S. 1-339.64. If the motion is granted based on the inadequacy of the last bid, the procedure for the resale is the same in every respect as is provided by this Article in the case of an original public sale, and the last bidder is released from the bidder's obligations under the bid. If the motion is granted for any other reason, the last bid becomes the opening bid at resale, and if there is no bid at resale other than the last bid, the person who made the last bid is the highest bidder at resale. If the motion is denied, the 10-day period for subsequent upset bids begins upon the entry of the order. (2001-271, s. 17.)

CASE NOTES

For case holding that successive orders for resale did not prolong statutory life of judgment lien, decided under former statute, see Cheshire v. Drake, 223 N.C. 577, 27 S.E.2d 627 (1943).

§ 1-339.67. Confirmation of sale of real property.

No sale of real property may be consummated until the sale is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting an upset bid, pursuant to G.S. 1-339.64, has expired. (1949, c. 719, s. 1; 1967, c. 979, s. 2.)

Editor's Note. — Session Laws 1967, c. 979, which substituted "G.S. 1-339.64" for "G.S. 1-339.65," provided in s. 4: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes."

CASE NOTES

Application of Doctrine of Caveat Emptor. — While the doctrine of caveat emptor applies to purchasers at execution sales, it does not tie the hands of the court to prevent a manifest injustice not due to the fault or neglect of the purchaser. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

When Clerk May Decline to Confirm Sale. — If competitive bidding is stifled, resulting in a bid less than the fair value of the property sold, the clerk may decline to confirm the sale. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

The high bidder acquires no right until his bid is accepted and the sale is confirmed. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

Material irregularity was present in the sale of certain real estate at an execution sale because the clerk of the superior court did not confirm the sale, as was mandatory under G.S. 1-339.67, and the fact that a district court judge confirmed the sale did not require a different result. Beneficial Mortg. Co. v. Peterson, 163 N.C. App. 73, 592 S.E.2d 724, 2004 N.C. App. LEXIS 292 (2004).

Applied in Priddy v. Kernersville Lumber Co., 258 N.C. 653, 129 S.E.2d 256 (1963); North Carolina Nat'l Bank v. Sharpe, 49 N.C. App. 687, 272 S.E.2d 368 (1980).

Cited in Spalding Div. of Questor Corp. v. DuBose, 46 N.C. App. 612, 265 S.E.2d 501 (1980).

§ 1-339.68. Deed for real property sold; property subject to liens; orders for possession.

(a) Upon confirmation of a sale of real property, the sheriff, upon order of the clerk of the superior court, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) Any real property sold under execution remains subject to all liens which became effective prior to the lien of the judgment pursuant to which the sale is held, in the same manner and to the same extent as if no such sale had been held.

(c) Orders for possession of real property sold pursuant to this Article, in favor of the purchaser and against any party or parties in possession at the time of the sale who remain in possession at the time of application therefor, may be issued by the clerk of the superior court of the county in which such property is sold, when:

(1) The purchaser is entitled to possession, and
(2) The purchase price has been paid, and
(3) The sale or resale has been confirmed, and
(4) Ten days' notice has been given to the party or parties in possession at the time of the sale or resale who remain in possession at the time application is made, and
(5) Application is made to such clerk by the purchaser of the property.

(d) An order for possession issued pursuant to the preceding subsection shall be directed to the sheriff, shall authorize him to remove the party or parties in possession, and their personal property, from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. (1949, c. 719, s. 1; 1967, c. 979, s. 2; 1987, c. 627, s. 2.)

Editor's Note. — Session Laws 1967, c. 979, which added subsection (c), provided in s. 4: "This act does not amend the Uniform Commercial Code as enacted in this State. The application of statutes herein included or amended insofar as they relate to transactions subject to the Uniform Commercial Code as enacted in this State shall be in accordance with Article 10 of Chapter 25, of the General Statutes."

CASE NOTES

What Rights and Estate May Be Sold. — A sheriff, acting pursuant to an execution, can only sell the rights and estate of the judgment debtor as they existed when the lien pursuant to which he acts became effective. Pittsburgh Plate Glass Co. v. Forbes, 258 N.C. 426, 128 S.E.2d 875 (1963).

Compelling Sheriff to Make Title. — A motion in the cause, and not a distinct action, is the proper means of compelling the sheriff to make title to the purchaser at the execution sale. Fox v. Kline, 85 N.C. 173 (1881), decided under former statute relating to execution sales.

Effect of Recitals in Sheriff's Deed. — Recitals in a sheriff's deed are prima facie evidence of an execution sale, notwithstanding the fact that the return upon the execution may be imperfect. The fact that there was a sale may also be proved by parol. Miller v. Miller, 89 N.C. 402 (1883), decided under former statute relating to execution sales.

The recital of execution and sale in a sheriff's deed is prima facie evidence thereof. Wainwright v. Bobbitt, 127 N.C. 274, 37 S.E. 336 (1900), rehearing denied, 129 N.C. 46, 39 S.E. 725 (1901), decided under former statute relating to deeds in execution sales.

Necessity of Seal. — A deed of a sheriff without a seal attached is not competent evidence in ejectment to show title, and a sheriff will not be allowed to affix his seal to a deed, having omitted it by mistake, unless such equity is set up in the complaint. Fisher v. Owens, 132 N.C. 686, 44 S.E. 369 (1903), decided under former statute relating to execution sales.

Applied in Priddy v. Kernersville Lumber Co., 258 N.C. 653, 129 S.E.2d 256 (1963).

§ 1-339.69. Failure of bidder to comply with bid; resale.

(a) When the highest bidder at a sale of personal property fails to pay the amount of the bid, the sheriff shall at the same time and place immediately resell the property. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this Article for an original sale.

(b) When the highest bidder at a sale or resale of real property or any upset bidder fails to comply with the bid within 10 days after the tender to the bidder of a deed for the property or after a bona fide attempt to tender such deed, the clerk of the superior court who issued the execution may order a resale. The procedure for such resale is the same in every respect as is provided by this Article in the case of an original sale of real property.

(c) A defaulting bidder at any sale or resale or any defaulting upset bidder is liable on the bid, and in case a resale is had because of the default, the defaulting bidder remains liable to the extent that the final sale price is less than the bid plus all costs of the resale or resales. Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, if any, for which the defaulting bidder remains liable under this section.

(d) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 719, s. 1; 2001-271, s. 18.)

CASE NOTES

An action in superior court to declare an execution sale and sheriff's deed void because defendants did not pay their bid in cash but merely cancelled judgments against the property owner constituted an impermissible collateral attack upon the order of confirmation of the execution sale by the clerk of court; plaintiffs' remedy was to proceed directly either by motion in the cause or appeal. Spalding Div. of Questor Corp. v. DuBose, 46 N.C. App. 612, 265 S.E.2d 501, cert. denied, 300 N.C. 375, 267 S.E.2d 678 (1980).

When Action by Execution Debtor against Defaulting Bidder Is Not Authorized. — If the amount bid is less than the amount of the debt, so that the execution debtor is entitled to no part of the price, the execution debtor is not entitled to bring an action to enforce the bid against a defaulting bidder, notwithstanding subsection (d) of this section, and the action is properly brought by the sheriff. Daniels v. Yelverton, 239 N.C. 54, 79 S.E.2d 311 (1953).

For case holding that the sheriff was not obliged to resell immediately, but might give the purchaser time in which to pay the purchase money, if neither party to the execution objected or complained, decided under former law, see Maynard v. Moore, 76 N.C. 158 (1877). See also, McKee v. Lineberger, 69 N.C. 217 (1873).

§ 1-339.70. Disposition of proceeds of sale.

(a) After deducting all sums due him on account of the sale, including the expenses incurred in caring for the property so long as his responsibility for such care continued, the sheriff shall pay the proceeds of the sale to the clerk of the superior court who issued the execution, and the clerk shall furnish the sheriff a receipt therefor.

(b) The clerk shall apply the proceeds of the sale so received to the payment of the judgment upon which the execution was issued.

(c) Any surplus shall be paid by the clerk to the person legally entitled thereto if the clerk knows who such person is. If the clerk is in doubt as to who is entitled to the surplus, or if adverse claims are asserted thereto, the clerk shall hold such surplus until rights thereto are established in a special proceeding pursuant to G.S. 1-339.71. (1949, c. 719, s. 1.)

§ 1-339.71. Special proceeding to determine ownership of surplus.

(a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G.S. 1-339.70 or G.S. 105-374(q)(6), to determine who is entitled thereto.

(b) All other persons who have filed with the clerk notice of their claim to the money or any part thereof, or who, as far as the petitioner or petitioners know, assert any claim to the money or any part thereof, shall be made defendants in the proceeding.

(c) If any answer is filed raising issues of fact as to the ownership of the money, the proceedings shall be transferred to the civil issue docket of the superior court for trial. When a proceeding is so transferred, the clerk may require any party to the proceeding who asserts a claim to the fund by petition or answer to furnish a bond for costs in the amount of $200.00, or otherwise comply with the provisions of G.S. 1-109.

(d) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who asserted a claim to the fund by petition or answer. (1949, c. 719, s. 1; 1967, c. 705, s. 2; 1973, c. 1446, s. 19.)

CASE NOTES

Cited in Kindred of N.C., Inc. v. Bond, 160 N.C. App. 90, 584 S.E.2d 846, 2003 N.C. App. LEXIS 1765 (2003).

ARTICLE 29C.

Validating Sections.

§ 1-339.72. Validation of certain sales.

All sales of real property under execution, deed of trust, mortgage or other contracts made since February 21, 1929, where notice of the original sale was published for four successive weeks, and notice of any resale was published for two successive weeks, shall be and the same are in all respects validated as to publication of notice. (1933, c. 96, s. 3; 1949, c. 719, s. 3; 1955, c. 1286; 1965, c. 786.)

Local Modification. — Nash: 1955, c. 1075.

§ 1-339.73. Ratification of certain sales held on days other than the day required by statute.

All sales made prior to March 2, 1939, under execution or by order of court on any day other than the first Monday in any month, or the first three days of a term of the superior court of said county are hereby validated, ratified and confirmed.

All sales or resales of real property made prior to March 30, 1939, under order of court on the premises or at the courthouse door in the county in which all, or any part of the property, is situated, on any day other than Monday in any month, are hereby validated, ratified and confirmed. (1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2; Code, s. 454; Rev., s. 643; C.S., s. 690; 1931, c. 23; 1937, c. 26; 1939, cc. 71, 256; 1949, c. 719, s. 3.)

§ 1-339.74. Sales on other days validated.

All sales of real or personal property made prior to February 27, 1933, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law are hereby validated.

All sales of real and personal property made prior to February 14, 1939, by a sheriff under execution, or by commissioner under order of court, in the manner provided by law for sale of real or personal property, on any day other than the days now provided by law are hereby validated.

All sales of real or personal property made prior to March 10, 1939, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law, are hereby validated. (1933, c. 79; 1939, cc. 24, 94; 1949, c. 719, s. 3.)

§ 1-339.75. Certain sales validated.

All sales of realty made under executions issued prior to March the fifteenth, one thousand nine hundred and one, on judgments regularly obtained in courts of competent jurisdiction, are hereby validated, whether such sales were continued from day to day or for a longer period, not exceeding ten days: Provided, that such executions and sales are in all other respects regular: Provided further, that purchasers and their assigns shall have held continuous and adverse possession under a sheriff's deed for three years: Provided further, that the rights of minors and married women shall in nowise be prejudiced hereby. (1901, c. 742; Rev., s. 646; C.S., s. 693; 1949, c. 719, s. 3.)

§ 1-339.76. Validation of sales when payment deferred more than two years.

All sales of land conducted prior to February 10, 1927, under authority of G.S. 28-93, in which the deferred payments were extended over a period longer than two years, are hereby validated. (1917, c. 127, s. 2; C.S., s. 86; 1927, c. 16; 1949, c. 719, s. 3.)

Editor's Note. — Section 28-93, referred to in this section, was repealed by Session Laws 1973, c. 1329, s. 1.

§ 1-339.77. Validation of certain sales confirmed prior to time prescribed by law.

From and after June 1, 1953 no action shall be brought to contest the validity of a decree filed on or before December 31, 1950, confirming the sale of real or personal property in any special proceeding on the grounds that the decree of confirmation was entered prior to the expiration of the period of time as required by law following the report of sale. (1953, c. 1089.)

ARTICLE 30.

Betterments.

§ 1-340. Petition by claimant; execution suspended; issues found.

A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises under a color of title believed to be good, have made permanent improvements thereon, and praying that he may be allowed for the improvements, over and above the value of the use and occupation of the land. The court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for the improvements. In any such action this inquiry and assessment may be made upon the trial of the cause. (1871-2, c. 147; Code, s. 473; Rev., s. 652; C.S., s. 699.)

Cross References. — As to registration of conveyances, contracts to convey, and leases of land, see G.S. 47-18.

Legal Periodicals. — For article on trespass to land in North Carolina, see 47 N.C.L. Rev. 31 (1968).

For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

For survey of 1976 case law on property, see 55 N.C.L. Rev. 1069 (1977).

For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

For article, "Mistaken Improvers of Real Estate," see 64 N.C.L. Rev. 37 (1985).

CASE NOTES

Effect of Article. — This Article permits those who in good faith and under colorable title enter into possession of land under a mistaken belief that their title is good and who are subsequently ejected by the true owners to petition the court for compensation for the improvements they placed on the land. Jenkins v. Richmond County, 99 N.C. App. 717, 394 S.E.2d 258 (1990), cert. denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

Constitutionality. — This section contravenes no part of the organic law, federal or State. Barker v. Owen, 93 N.C. 198 (1885).

The right of recovery, where the occupant in good faith believes himself to be the owner, is declared to stand upon a principle of natural justice and equity, and such laws are held not to be unconstitutional as impairing vested rights, since they adjust the equities of the parties as nearly as possible according to natural justice. Searl v. School Dist. No. 2, 133 U.S. 553, 10 S. Ct. 374, 33 L. Ed. 740 (1890).

Basis of Right to Betterments. — The right to betterments is a doctrine that gradually grew up in the courts of equity. It was recognized that the owner of land, who recovers it, had no just and equitable claim to anything but the land itself, and a fair compensation for being kept out of possession. If the land was enhanced in value by improvements, made under the belief that one was the owner, the true owner ought not to take the increased value. It is now an established equitable principle that whenever a plaintiff seeks aid in a court of equity, against such a person, aid will be given him, only upon the terms that he shall make due compensation to such innocent person, being based upon the principle that he who seeks equity must do equity. As there are now no separate courts in which the rule can be enforced, all relief must be sought in one tribunal. The legislature has embodied the principle in the form of law, and made it operative when land is sought to be recovered by action without regard to former distinction. Wharton v. Moore, 84 N.C. 479 (1881); Barker v. Owen, 93 N.C. 198 (1885).

The right to betterments is based upon the obvious principle of justice that the owner of land has no just claim to anything but the land itself, and fair compensation for damage and loss of rent. If the claimant, acting under an erroneous but honest and reasonable belief that he is the owner, makes valuable and permanent improvements, the true owner should not take them without compensation. This section undertakes to declare and establish the equities between them. Sweeten v. King, 29 N.C. App. 672, 225 S.E.2d 598, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976).

Betterments claim is not a claim of title to land. It is, instead, a claim demanding payment for permanent improvements to the land over and above the value of the use and occupation of the land. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

Betterments Statutes Do Not Create Right Against State. — Sovereign immunity is a common law doctrine to which the existing exceptions or waivers have been mandated by the legislature, and statutes which waive the benefits of the doctrine of sovereign immunity are to be strictly construed. Thus, the phrase "claim of title to land" contained in G.S. 41-10.1 cannot be broadened to include a claim for betterments under this section. The betterments statutes do not, by its terms, create a right against the State. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601, cert. denied, 322 N.C. 838, 371 S.E.2d 284 (1988).

Dismissal of a suit brought by a group of beachfront landowners against the State of North Carolina, the State of North Carolina Department of Environment and Natural Resources, the Coastal Resources Commission, the Division of Coastal Management, and its director, was upheld on appeal because the landowners failed to allege in their complaint sufficient allegations to establish that the State of North Carolina asserted any claim of title to their land under G.S. 41-10.1 to have constituted a waiver of the state's sovereign immunity with regard to the landowners' suit to prevent the general public from interfering with their use of certain beach property, which the landowners claimed was deeded to them. Fabrikant v. Currituck County, 174 N.C. App. 30, 621 S.E.2d 19, 2005 N.C. App. LEXIS 2219 (2005).

State May Not Be Sued for Betterments. — Construing G.S. 41-10.1 strictly, a claim for betterments is not a claim of title to land. The State therefore has not consented to be sued for betterments and is entitled to the full protection of its sovereign immunity. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

Right to Compensation for Improvements. — One who, in good faith under colorable title, enters into possession of land under a mistaken belief that his title is good, and who is subsequently ejected by the true owner, is entitled to compensation for the enhanced value of the land due to improvements placed on the land by him. Rogers v. Timberlake, 223 N.C. 59, 25 S.E.2d 167 (1943).

Under this section, one making permanent improvements on lands he holds under color of title, reasonably believed by him, in good faith, to be good, though with knowledge of an adverse claim, is entitled to recover for betterments in an action by the true owner to recover the lands. Pritchard v. Williams, 176 N.C. 108, 96 S.E. 733 (1918), rehearing denied, 178 N.C. 444, 101 S.E. 85 (1919).

A defendant in possession of land under the belief that he has a good title has the right to show in evidence in an action to recover the land that he has in good faith made permanent improvements after his estate had expired and their value to the extent of the rents and profits claimed by the plaintiff. Merritt v. Scott, 81 N.C. 385 (1879).

Plaintiff is not confined to a common-law action for improvements, if indeed such right may be enforced by independent action. Rhyne v. Sheppard, 224 N.C. 734, 32 S.E.2d 316 (1944).

An action under this section is not the same as an action for unjust enrichment. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

This section creates no independent cause of action. It merely declares that the owner of land who recovers it has no just claim to anything but the land itself and a fair compensation for being kept out of possession, and if it has been enhanced in value by improvements made by another, under the belief that he was the owner, the true owner ought not to take the increased value without some compensation to the other. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

The right under this section is a defensive right. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

This section does not create an independent cause of action. Rather, it embodies only a defensive right, declaring that an owner of land who seeks and obtains the aid of the court to enforce his right to possession has no just claim to anything but the land itself and a fair compensation for being kept out of possession. Clontz v. Clontz, 44 N.C. App. 573, 261 S.E.2d 695, cert. denied, 300 N.C. 195, 269 S.E.2d 622 (1980).

It Accrues When Owner Seeks to Enforce Right to Possession. — The right under this section accrues when an owner of the land seeks and obtains the aid of the court to enforce his right to possession. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

The claim accrues when the owner seeks and obtains the aid of the court to enforce his right of possession. The law awards to the owner the land and his rents and to the occupant the value of his improvements. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Owner Must Have Obtained Judgment Entitling Him to Eject Occupant. — The wording of this section clearly limits its application to possessory actions or actions in which the final judgment may be enforced by execution in the nature of a writ of possession or writ of assistance. And the right to claim compensation does not arise until the owner of a superior title asserts his right of possession and obtains a judgment which entitles him to eject the occupant, though the last sentence of this section would seem to permit the defendant to assert his claim in his answer and have an issue directed thereto submitted to the jury on the trial of the main issue. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

A claim for betterments, under this section, cannot be set up on the trial to resist the plaintiff's recovery, but by petition filed after a judgment declaring the plaintiff the owner of the land. Wood v. Tinsley, 138 N.C. 507, 51 S.E. 59 (1905). See also, Rumbough v. Young, 119 N.C. 567, 26 S.E. 143 (1896); Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

No Claim Against Remainderman Until Falling in of Life Estate. — Where remainderman had a tax foreclosure set aside to the extent that the tax deed purported to convey the remainder, but the conveyance of the life estate by the tax foreclosure was not affected, persons in possession under the tax foreclosure were not entitled to file claim for betterments against the remainderman until the falling in of the life estate and the assertion of the right to immediate possession by the remainderman. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

What Claimant Must Show. — This section has been interpreted to impose on claimant the burden of establishing: (1) That he made permanent improvements; (2) Bona fide belief of good title when the improvements were made; and (3) Reasonable grounds for such belief. Pamlico County v. Davis, 249 N.C. 648, 107 S.E.2d 306 (1959).

To be entitled to compensation for betterments under this section, defendant must show that he made permanent improvements on the property under a bona fide, reasonable belief of good title. Hackett v. Hackett, 31 N.C. App. 217, 228 S.E.2d 758, cert. denied, 291 N.C. 448, 230 S.E.2d 765 (1976).

Necessity of Color of Title. — This section applies only where the improvement was constructed by one who was in possession of the land under color of title and who, in good faith, reasonably believed he had good title to the land. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966).

The good faith which will entitle a claimant to compensation for betterments means simply an honest belief of the occupant in his right or title, and the fact that diligence might have shown him that he had no title does not necessarily negative good faith in his occupancy. Sweeten v. King, 29 N.C. App. 672, 225 S.E.2d 598, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976).

Reasonable Belief in Validity of Title. — The petitioner must show not only an honest and bona fide belief in his title, but he must satisfy the jury, also, that he had reasonable grounds for such belief. Pritchard v. Williams, 176 N.C. 108, 96 S.E. 733 (1918), rehearing denied, 178 N.C. 444, 101 S.E. 85 (1919); Rogers v. Timberlake, 223 N.C. 59, 25 S.E.2d 167 (1943).

The basis upon which betterments may be claimed is the finding by the jury that the person in possession, or those under whom he claims, believed at the time of making the improvements and had reason to believe the title good under which he and they were holding the premises. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

There must be shown not only an honest and bona fide belief in petitioner's title, but he must satisfy the jury, also, that he had good reason for such belief; and it is for the jury to judge of the reasonableness of such belief, based upon the entire evidence. Sweeten v. King, 29 N.C. App. 672, 225 S.E.2d 598, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976).

Where a former officer of a corporation caused the corporation to transfer real property to the officer in exchange for amounts allegedly due to the officer from the corporation, the officer's direct financial interest in the transaction constituted a breach of fiduciary duty, and thus the officer did not have a bona fide belief in good title to the property when the officer improved the property and was not entitled to a deduction for the improvements from the amount the officer held in constructive trust.

Anderson v. Brokers, Inc. (In re Brokers, Inc.), 396 B.R. 146, 2008 Bankr. LEXIS 3119 (Bankr. M.D.N.C. 2008).

A deed issued at a tax foreclosure is color of title for the purpose of asserting betterments. Jenkins v. Richmond County, 99 N.C. App. 717, 394 S.E.2d 258 (1990), cert. denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

What Notice Will Bar Compensation. — Notice sufficient to bar the right to compensation is not a constructive notice, or such a notice as the petitioner might have acquired by a diligent scrutiny of the title, but such facts and circumstances as might reasonably suggest to the ordinary citizen serious defects in his own title. Carolina Cent. R.R. v. McCaskill, 98 N.C. 526, 4 S.E. 468 (1887).

Constructive notice from the record of the existence of a paramount title or interest does not deprive an occupying claimant of the right to be reimbursed for his improvements on being ejected from the premises. Sweeten v. King, 29 N.C. App. 672, 225 S.E.2d 598, cert. denied, 290 N.C. 667, 228 S.E.2d 458 (1976).

Evidence Held Sufficient to Show "Permanent Improvements". — Evidence that the land in question was farmland which had been abandoned and had become a piece of wasteland, and that claimant, by ditching, clearing, building roads and similar work, made it again susceptible of profitable cultivation, was sufficient to show "permanent improvements" within the purview of this section. Pamlico County v. Davis, 249 N.C. 648, 107 S.E.2d 306 (1959).

Liability of Vendor Under Parol Contract for Value of Improvements. — A vendor in possession, who repudiates a parol contract to convey land, is liable to the vendee for the value of the improvements. Albea v. Griffin, 22 N.C. 9 (1838); Hedgepeth v. Rose, 95 N.C. 41 (1886); Luton v. Badham, 127 N.C. 96, 37 S.E. 143 (1900).

The vendor in a parol contract to convey land will not be permitted to evict a vendee who has entered and made improvements, until the latter has been repaid the purchase money and compensated for betterments. Vann v. Newsom, 110 N.C. 122, 14 S.E. 519 (1892).

One who was induced to enter on and improve land by a parol promise that it would be settled on him as an advancement or gratuity will not be evicted until compensation has been made for improvements which he has erected on the property. Hedgepeth v. Rose, 95 N.C. 41 (1886).

Recovery After Rescission for Fraudulent Misrepresentations. — Where, by fraudulent misrepresentations as to area by the vendor, a vendee is induced to purchase land, on a rescission of the contract he is entitled to reimbursements for improvements put on the land. Hill v. Brower, 76 N.C. 124 (1877).

One holding under a tenant for life, who makes substantial and permanent improvements on the lands, under facts and circumstances affording him a well grounded and reasonable belief that he had by his deed acquired the fee, is entitled to recover for the betterments he has thus made. Harriett v. Harriett, 181 N.C. 75, 106 S.E. 221 (1921).

Where grantee knows that his grantor has only a life estate in the lands and nevertheless accepts a deed in form sufficient to convey fee simple title, and makes improvements upon the land, he may not recover for such betterments as against a remainderman, since they were not made under the belief that his color of title to the interest of the remainderman was good. Lovett v. Stone, 239 N.C. 206, 79 S.E.2d 479 (1954).

Agreement to Hold in Trust and Reconvey. — Where defendant acquired the legal title to certain lands, originally belonging to plaintiff, at a foreclosure sale and subject to an agreement to hold the land in trust for the plaintiff and to reconvey to plaintiff upon the payment of a sum certain on or before a given date, defendant was not entitled to the value of improvements placed upon the land by him while holding same upon such trust. Rogers v. Timberlake, 223 N.C. 59, 25 S.E.2d 167 (1943).

An individual who purchased land at a sale by his own assignee in bankruptcy, with fraudulent purpose of defeating the rights of his wife and children under a prior deed which he had made to them with intent to defraud his creditors, was not a bona fide holder of the premises under a color of title believed by him to be good, and was therefore not entitled to the value of improvements placed thereon by him. Hallyburton v. Slagle, 132 N.C. 957, 44 S.E. 659 (1903).

Recovery for Betterments Not Available to Tenant. — Trial court properly granted summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c), to a railway in a summary ejectment action; an oil company's sublease of property from an advertising company terminated when the lease between the railway and the advertising company terminated, and the oil company's claim for betterments under G.S. 1-340 failed based on the company's status as a tenant. Atl. & E. Carolina Ry. Co. v. Wheatly Oil Co., 163 N.C. App. 748, 594 S.E.2d 425, 2004 N.C. App. LEXIS 579 (2004), cert. denied, 358 N.C. 542, 599 S.E.2d 38 (2004).

This section does not apply to tenants in common. Pope v. Whitehead, 68 N.C. 191 (1873).

Allotment of Improved Part to Cotenant on Partition. — While this and the following sections of this Article do not apply to tenants in common or mortgagors and mortgagees, yet upon equitable principles a tenant in common placing improvements upon the property is entitled to have the part so improved allotted to him in partition and its value assessed as if no improvements had been made, if this can be done without prejudice to the interests of his cotentants; but this equitable principle does not apply as between mortgagor and mortgagee. Layton v. Byrd, 198 N.C. 466, 152 S.E. 161 (1930). See also, Jenkins v. Strickland, 214 N.C. 441, 199 S.E. 612 (1938).

Priority of Grantor's Judgment Creditors over Grantee Under Unregistered Deed. — One who has improved land held by him under an unregistered deed is not entitled to the value of the betterments as against judgment creditors of his grantor. Eaton v. Dorib, 190 N.C. 14, 128 S.E. 494 (1925).

Filing of Separate Claims by Each Group of Interveners. — This Article requires that a claim for betterments be filed in the action in which judgment for land has been rendered. Proper pleading would require each group of interveners to file a separate and distinct claim uncomplicated by reference to the claim of the other. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Court Must Be Satisfied of Probable Truth. — The trial court must be satisfied of the probable truth of the allegations in a petition for betterments before it is required to impanel a jury to ascertain the value of the betterments. Hallyburton v. Slagle, 132 N.C. 957, 44 S.E. 659 (1903).

Either Party Entitled to Jury Assessment. — Either party is entitled to have the issue as to the value of betterments assessed by the jury, if he so desires. Fortesque v. Crawford, 105 N.C. 29, 10 S.E. 910 (1890).

Sheriff's Return of Writ as Execution of Judgment. — The sheriff's return of a writ of possession with the endorsement thereon is an execution of the judgment as contemplated by the section, notwithstanding the fact that the judgment is not satisfied. Boyer v. Garner, 116 N.C. 125, 21 S.E. 180 (1895).

Writ of Ouster Not to Issue Until Judgment for Betterments Is Satisfied. — The plaintiff who establishes a superior title is entitled to judgment for the land, but no writ of ouster should issue until defendant's judgment for betterments is satisfied. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

Cited in Scott v. Battle, 85 N.C. 184 (1881); Justice v. Baxter, 93 N.C. 405 (1885); Greenleaf v. Bartlett, 146 N.C. 495, 60 S.E. 419 (1908); Gann v. Spencer, 167 N.C. 429, 83 S.E. 620 (1914); Harris v. Ashley, 38 N.C. App. 494, 248 S.E.2d 393 (1978); McCoy v. Peach, 40 N.C. App. 6, 251 S.E.2d 881 (1979); Etheridge v. Etheridge, 41 N.C. App. 44, 255 S.E.2d 729 (1979); Britt v. Britt, 82 N.C. App. 303, 346 S.E.2d 259 (1986).

§ 1-341. Annual value of land and waste charged against defendant.

The jury, in assessing the damages, shall estimate against the defendant the clear annual value of the premises during the time he was in possession, exclusive of the use of the improvements thereon made by himself or those under whom he claims, and also the damages for waste or other injury to the premises committed by the defendant. The defendant is not liable for the annual value or for damages for waste or other injury for any longer time than three years before the suit, unless he claims for improvements. (1871-2, c. 147, ss. 2-3; Code, ss. 474, 475; Rev., ss. 653, 654; C.S., s. 700.)

Legal Periodicals. — For comment, "Taking Without Compensation: Measure of Permanent Damages Modified by Application of Limitation of Actions for Trespass," see 20 Wake Forest L. Rev. 671 (1984).

CASE NOTES

Generally the owner of the land at the time of its recovery also owns the rents, and as the law gives to each what belongs to him, it awards to the owner the land and his rents, and to the occupant the value of his improvements. Harriett v. Harriett, 181 N.C. 75, 106 S.E. 221 (1921).

When Remaindermen May Not Recover Rents. — When one holding under a tenant for life by deed apparently conveying the lands in fee after her death is entitled to betterments, and he or the life tenant has received the rents and profits until that time, the remaindermen, after the death of the tenant for life, are not entitled to and may not recover such rents and profits, or have them credited on the value of the betterments, the ordinary rule to the contrary being inapplicable. Harriett v. Harriett, 181 N.C. 75, 106 S.E. 221 (1921).

Rents and rental values of the lands,

which were obtained by defendants solely by reason of improvements put on the lands by themselves, could not be used to offset compensation to defendants for these improvements. Harrison v. Darden, 223 N.C. 364, 26 S.E.2d 860 (1943).

Where defendants disclaim all right and title to a part of the locus in an action of ejectment, plaintiffs are entitled to recover the reasonable rental value of that part for the three years next preceding the institution of the action. Hughes v. Oliver, 228 N.C. 680, 47 S.E.2d 6 (1948).

When Three-Year Limitation Inapplicable. — Where one in possession of lands is entitled to recover against the true owner for betterments he has placed thereon, he will be charged with the use and occupation of the land, without regard to the three-year statute of limitation. Whitfield v. Boyd, 158 N.C. 451, 74 S.E. 452 (1912); Pritchard v. Williams, 176 N.C. 108, 96 S.E. 733 (1918), rehearing denied, 178 N.C. 444, 101 S.E. 85 (1919).

Options of Rightful Owners. — Rightful owners of lot must compensate defendants who purchased said property by quitclaim deed at a foreclosure sale for improvements. However, as this alternative may be impractical, rightful owners may opt to relinquish their estate to defendants, who in turn must pay rightful owners the value of the property in its unimproved condition; rightful owners are also entitled to the rents and profits from the property in its unimproved condition for the period of defendants' possession. If rightful owners fail to exercise one of these options, the value of the improvements becomes a lien, and if not paid, a sale of the premises will be ordered. Jenkins v. Richmond County, 99 N.C. App. 717, 394 S.E.2d 258 (1990), cert. denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

Erroneous Instruction. — Under this section, it is error for the court to give a charge which fails to instruct the jury that in making the assessment the use of the improvements made on the premises by the defendant should be excluded. Edwards v. Edwards, 235 N.C. 93, 68 S.E.2d 822 (1952).

Cited in Anderson v. Moore, 233 N.C. 299, 63 S.E.2d 641 (1951).

§ 1-342. Value of improvements estimated.

If the jury is satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the premises, permanent and valuable improvements, they shall estimate in his favor the value of the improvements made before notice, in writing, of the title under which the plaintiff claims, not exceeding the amount actually expended in making them and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment. (1871-2, c. 147, s. 4; Code, s. 476; Rev., s. 655; C.S., s. 701.)

CASE NOTES

"Permanent" Defined. — The statute does not permit a recovery except for improvements that are permanent and valuable. The word "permanent" is defined in the Century Dictionary as "lasting, or intended to last indefinitely," "fixed or enduring," "abiding," and the like. Pritchard v. Williams, 181 N.C. 46, 106 S.E. 144 (1921).

Value of Property Permanently Enhanced as Sole Matter for Consideration. — The sole matter for consideration is embraced in one proposition: How much was the value of the property permanently enhanced, estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the bona fide holder of the same? Pritchard v. Williams, 181 N.C. 46, 106 S.E. 144 (1921).

Measure of Value of Betterments. — The measure of the value of the betterments is not the actual cost of their erection, but the enhanced value they impart to the land, without reference to the fact that they were not desired by the true owner, or could profitably be used by him in the prosecution of his business. Carolina Cent. R.R. v. McCaskill, 98 N.C. 526, 4 S.E. 468 (1887).

If unsuitable improvements are put upon the premises, no matter what the cost, the jury can find that there was no enhancement to the property thereby, so if the improvements were unnecessary or injudiciously made, the jury would consider the same. But it is not essential that they be useful to the plaintiff. Pritchard v. Williams, 181 N.C. 46, 106 S.E. 144 (1921).

Question for the Jury. — It is a matter of fact for the jury, rather than one of law, to estimate upon the evidence whether improvements have added permanent enhanced value to the realty. Pritchard v. Williams, 181 N.C. 46, 106 S.E. 144 (1921).

Recovery by Trustee in Bankruptcy. — The trustee of one who has been adjudged a bankrupt and has theretofore paid money for improvements put upon the lands of another by his consent, in fraud of the rights of his creditors, may recover as for betterments the value of the improvements to the land, but not a greater amount so expended. Garland v. Arrowood, 179 N.C. 697, 103 S.E. 2 (1920).

Cited in Wetherell v. German, 74 N.C. 603 (1876); Daniel v. Crumpler, 75 N.C. 184 (1876); Barrett v. Williams, 220 N.C. 32, 16 S.E.2d 405 (1941).

§ 1-343. Improvements to balance rents.

If the sum estimated for the improvements exceeds the damages estimated against the defendant as aforesaid, the jury shall then estimate against him for any time before the said three years the rents and profits accrued against or damages for waste or other injury done by him, or those under whom he claims, so far as is necessary to balance his claim for improvements; but the defendant in such case shall not be liable for the excess, if any, of such rents, profits, or damages beyond the value of improvements. (1871-2, c. 147, s. 5; Code, s. 477; Rev., s. 656; C.S., s. 702.)

CASE NOTES

If the betterments exceed in value the rental and damages for waste, the rents and profits accruing prior to the three years may be assessed so far as to balance the improvements, but no further. Barker v. Owen, 93 N.C. 198 (1885); Whitfield v. Boyd, 158 N.C. 451, 74 S.E. 452 (1912).

§ 1-344. Verdict, judgment, and lien.

After offsetting the damages assessed for the plaintiff, and the allowances to the defendant for any improvements, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment shall be entered therefor according to the verdict. Any such balance due to the defendant is a lien upon the land recovered by the plaintiff until it is paid. (1871-2, c. 147, ss. 6, 7; Code, ss. 478, 479; Rev., ss. 657, 658; C.S., s. 703.)

CASE NOTES

The sum adjudged the defendant constitutes a lien upon the land, and this can only be made effectual and enforced, if not paid, by a sale of the premises. Barker v. Owen, 93 N.C. 198 (1885).

In ejectment a writ of ouster should not issue until judgment for betterments has been paid. Bond v. Wilson, 129 N.C. 325, 40 S.E. 179 (1901).

Cited in Edwards v. Edwards, 235 N.C. 93, 68 S.E.2d 822 (1952).

§ 1-345. Life tenant recovers from remainderman.

If the plaintiff claims only an estate for life in the land recovered and pays any sum allowed to the defendant for improvements, he or his personal representative may recover at the determination of his estate from the remainderman or reversioner, the value of the said improvements as they then exist, not exceeding the amount as paid by him, and he has a lien therefor on the premises as if they had been mortgaged for the payment thereof, and may keep possession of said premises until it is paid. (1871-2, c. 147, s. 8; Code, s. 480; Rev., s. 659; C.S., s. 704.)

CASE NOTES

It is the general rule that a life tenant is not entitled to compensation from the remainderman for the enhancement of the property by reason of his improvements. Harriett v. Harriett, 181 N.C. 75, 106 S.E. 221 (1921).

A devise of lands for life with limitation over does not entitle the life tenant to compensation for betterments he has placed on the land during his tenancy. Northcott v. Northcott, 175 N.C. 148, 95 S.E. 104 (1918).

Mistaken Belief as to Rights Under Contract. — The section did not apply to a situation where the tenant made improvements upon land during his occupation, as lessee, where he believed he was entitled to the possession for the lessor's life, when under the contract he was not; nor did the fact that the lessor silently acquiesced in the putting up of the improvements change the situation. Dunn v. Bagby, 88 N.C. 91 (1883).

§ 1-346. Value of premises without improvements.

When the defendant claims allowance for improvements, the plaintiff may by entry on the record require that the value of his estate in the premises without the improvements shall also be ascertained. The value of the premises in such cases shall be estimated as it would have been at the time of the inquiry, if no such improvements had been made by the tenant or any person under whom he claims, and shall be ascertained in the manner hereinbefore provided for estimating the value of improvements. (1871-2, c. 147, ss. 10-11; Code, ss. 482, 483; Rev., ss. 661, 662; C.S., s. 705.)

CASE NOTES

Betterments Ignored in Assessing Rents. — The rents should be assessed upon the basis of the property without the betterments. Barker v. Owen, 93 N.C. 198 (1885); Whitfield v. Boyd, 158 N.C. 451, 74 S.E. 452 (1912).

The sole question is: How much was the value of the property permanently enhanced, estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the bona fide holder of the same. Board of Comm'rs v. Bumpass, 237 N.C. 143, 74 S.E.2d 436 (1953).

§ 1-347. Plaintiff's election that defendant take premises.

The plaintiff in such case, if judgment is rendered for him, may, at any time during the same term, or before judgment is rendered on the assessment of the value of the improvements, in person or by his attorney in the cause, enter on the record his election to relinquish his estate in the premises to the defendant at the value as ascertained, and the defendant shall thenceforth hold all the estate that the plaintiff had therein at the commencement of the suit, if he pays therefor the said value with interest in the manner ordered by the court. (1871-2, c. 147, s. 12; Code, s. 484; Rev., s. 663; C.S., s. 706.)

Legal Periodicals. — For article, "Mistaken Improvers of Real Estate," see 64 N.C.L. Rev. 37 (1985).

CASE NOTES

If the enhanced value is greatly disproportionate to the value of the land unimproved, so that it might almost be said that the owner is "improved out of his property," he has an election to let the land go, relinquishing his estate, upon payment by the defendant of its value as unimproved. Barker v. Owen, 93 N.C. 198 (1885).

Options of Rightful Owners. — Rightful owners of lot must compensate defendants who purchased said property by quitclaim deed at a foreclosure sale for improvements. However, as this alternative may be impractical, rightful owners may opt to relinquish their estate to defendants, who in turn must pay rightful owners the value of the property in its unimproved condition; rightful owners are also entitled to the rents and profits from the property in its unimproved condition for the period of defendants' possession. If rightful owners fail to exercise one of these options, the value of the improvements becomes a lien, and if not paid, a sale of the premises will be ordered. Jenkins v. Richmond County, 99 N.C. App. 717, 394 S.E.2d 258 (1990), cert. denied, 328 N.C. 572, 403 S.E.2d 512 (1991).

§ 1-348. Payment made to court; land sold on default.

The payment must be made to the plaintiff, or into court for his use, and the land is bound therefor, and if the defendant fails to make the payment within or at the times limited therefor, the court may order the land sold and the proceeds applied to the payment of said value and interest, and any surplus to be paid to the defendant; but if the net proceeds are insufficient to satisfy the said value and interest, the defendant is not bound for the deficiency. (1871-2, c. 147, s. 13; Code, s. 485; Rev., s. 664; C.S., s. 707.)

Legal Periodicals. — For article, "Mistaken Improvers of Real Estate," see 64 N.C.L. Rev. 37 (1985).

CASE NOTES

If payment is not made to the plaintiff or into court for his use within a time to be fixed by the court, a sale may be ordered, and therefrom the sum due the plaintiff taken, and the residue, if any, paid to defendant. Barker v. Owen, 93 N.C. 198 (1885).

§ 1-349. Procedure where plaintiff is under disability.

If the party by or for whom the land is claimed in the suit is a minor or insane person, such value is deemed to be real estate, and shall be disposed of as the court considers proper for the benefit of the persons interested therein. (1871-2, c. 147, s. 14; Code, s. 486; Rev., s. 665; C.S., s. 708; 1995 (Reg. Sess., 1996), c. 742, s. 2.)

§ 1-350. Defendant evicted, may recover from plaintiff.

If the defendant, his heirs or assigns, after the premises are so relinquished to him, is evicted by force of a better title than that of the original plaintiff, the person so evicted may recover from the plaintiff or his representatives the amount paid for the premises, as so much money had and received by the plaintiff in his lifetime for the use of such person, with lawful interest thereon from the time of the payment. (1871-2, c. 147, s. 15; Code, s. 487; Rev., s. 666; C.S., s. 709.)

§ 1-351. Not applicable to suit by mortgagee.

Nothing in this Article applies to any suit brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged premises. (1871-2, c. 147, s. 9; Code, s. 481; Rev., s. 660; C.S., s. 710.)

CASE NOTES

As to legislative intent, see Wharton v. Moore, 84 N.C. 479 (1881).

Where the relationship of mortgagor and mortgagee is terminated by foreclosure prior to claimant's possession under mesne conveyances from the mortgagor, this section does not apply. Metropolitan Life Ins. Co. v. Allen, 208 N.C. 13, 179 S.E. 15 (1935).

ARTICLE 31.

Supplemental Proceedings.

§ 1-352. Execution unsatisfied, debtor ordered to answer.

When an execution against property of a judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the State, to the sheriff of the county where a judgment roll or a transcript of a judgment is filed, is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, within the county to which the execution was issued. (C.C.P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 1; Rev., s. 667; C.S., s. 711; 1971, c. 268, s. 21.)

Legal Periodicals. — For note on supplemental proceedings or creditor's bill in North Carolina, see 35 N.C.L. Rev. 414 (1957).

CASE NOTES

Supplemental Proceedings as Substitute for Creditor's Bill. — Supplemental proceedings were intended to supply the place of proceedings in equity, where relief was given after a creditor had ascertained his debt by a judgment at law, and was unable to obtain satisfaction by process of law. Such proceedings are held to be a substitute for the former creditor's bill, and are governed by the principles established under the former practice in administering this species of relief in behalf of judgment creditors. Rand v. Rand, 78 N.C. 12 (1878). See also, Carson v. Oates, 64 N.C. 115 (1870); Dillard v. Walker, 204 N.C. 67, 167 S.E. 632 (1933).

The proceeding is intended to perfect the creditors' remedy in the same action and to supersede that which in a divided jurisdiction was attainable before by a bill of equity. Bronson v. Wilmington N.C. Life Ins. Co., 85 N.C. 411 (1881).

Supplemental proceedings differ from the old creditor's bill, however, in that the latter operated for the benefit of all creditors who chose to come in, while the former are only beneficial to the particular creditors who institute them. Righton v. Pruden, 73 N.C. 61 (1875).

Proceedings supplementary to execution are but a prolongation of the action necessary to the final discharge of the judgment, the purpose being that all matters affecting the complete satisfaction and determination of the action shall be settled in the same action, instead of by a multiplicity of suits. Rand v. Rand, 78 N.C. 12 (1878).

Such proceedings are in the nature of an equitable execution, and are intended to discover and reach the property of the debtor, of every nature and kind, and apply the same according to law, to the payment of the judgment. Coates Bros. v. Wilkes, 92 N.C. 376 (1885); Vegelahn v. Smith, 95 N.C. 254 (1886).

The proceedings under this section are in the nature of equitable proceedings. Johnson Cotton Co. v. Reaves, 225 N.C. 436, 35 S.E.2d 408 (1945).

And Are in the Nature of a Final Process. — Supplemental proceedings under this section are in the nature of a final process, when viewed either as a substitute for a creditor's bill to enforce the payment of a judgment at law or as a proceeding having the essential qualities of an equitable fieri facias. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

Finality of Judgment. — A judgment, whether just or unjust, if regularly taken in a court of competent jurisdiction, may be enforced by proceedings supplementary thereto, and the judgment cannot be attacked by any member of the defendant corporation, or its creditors, except for fraud or collusion. Heggie v. People's Bldg. & Loan Ass'n, 107 N.C. 581, 12 S.E. 275 (1890).

Supreme Court Not Empowered to Act. — The provisions respecting supplemental proceedings are not applicable to the Supreme Court, and no power has been given it to issue an attachment in such case. Phillips v. Trezevant, 70 N.C. 176 (1874).

When Proceedings Authorized. — To authorize the grant of an order of examination, these three facts must be made to appear, by affidavit or otherwise: (1) The want of known property liable to execution, which is provided by the sheriff's return of "unsatisfied"; (2) The nonexistence of any equitable estates in land within the lien of the judgment; and (3) The existence of property, choses in action and things of value unaffected by any lien and incapable of levy. A.A. McKeithan & Sons v. Walker, 66 N.C. 95 (1872); Hutchison v. Symons, 67 N.C. 156 (1872); Hinsdale v. Sinclair, 83 N.C. 338 (1880).

Federal Proceedings. — The requirement of this section that discovery take place before a court official is unsubstantial surplusage, not necessary to be replicated in a federal proceeding. Travelers Indem. Co. v. Hash Mgt., Inc., 173 F.R.D. 150 (M.D.N.C. 1997).

Execution Must Have Been Issued Within Past Three Years. — Supplemental proceedings are based upon an execution and may not be instituted against a defendant when there has been no execution issued within three years from the institution of such supplemental proceedings. International Harvester Co. of Am. v. Brockwell, 202 N.C. 805, 164 S.E. 322 (1932).

Where the ordinary execution is returned unsatisfied in whole or part, the judgment creditor, at any time after such return, within three years from the time the execution is issued, is entitled to an order of the court, requiring the debtor to appear and answer respecting his property. Vegelahn v. Smith, 95 N.C. 254 (1886).

Personal Demand on Debtor Unnecessary. — A personal demand on the debtor that he apply his property to the satisfaction of the creditor's claim, is not necessary to authorize supplemental proceedings. The prosecution of the suit to judgment and execution is a sufficient demand. Weiller & Co. v. Lawrence, 81 N.C. 65 (1879).

Who Are Entitled to Benefits. — Only those creditors who bring themselves within the provisions of the statute by instituting supplementary proceedings are entitled to the benefit thereof. Righton v. Pruden, 73 N.C. 61 (1875).

Interpleader Held Improper. — The owner of orders for the payment of shares of stock in a corporation could not be allowed to interplead in supplementary proceedings by plaintiff judgment creditor who had obtained his judgment. Heggie v. People's Bldg. & Loan Ass'n, 107 N.C. 581, 12 S.E. 275 (1890).

As to the availability of supplemental proceedings against mentally incompetent defendants, see Blake v. Respass, 77 N.C. 193 (1877).

Proceedings Lie Against Private Corporations. — Proceedings supplemental to execution lie against a private corporation created by a special act of the legislature and organized for the purposes of private gain for its shareholders. La'Fountain v. Southern Underwriters' Ass'n, 79 N.C. 514 (1878).

The court has the power to order production of proper papers pertinent to the issue to be tried, and in possession of the opposite party. Johnson Cotton Co. v. Reaves, 225 N.C. 436, 35 S.E.2d 408 (1945).

Where the examination of the debtor in supplementary proceedings shows that his books of accounts contain evidence material to the investigation, he should be required to produce them. Johnson Cotton Co. v. Reaves, 225 N.C. 436, 35 S.E.2d 408 (1945).

Accounting of Partnership Affairs. — In order to ascertain if there are any assets of the partnership remaining, a full accounting of the partnership affairs is appropriate, and should be had. Johnson Cotton Co. v. Reaves, 225 N.C. 436, 35 S.E.2d 408 (1945).

Authority of Clerk. — This section confers upon the clerk of the superior court, acting for and in the place of the court, authority to hear and allow or disallow the motion of the plaintiffs for an order requiring the defendants to "appear and answer" concerning their property as therein allowed. Farmers Nat'l Bank v. Burns, 107 N.C. 465, 12 S.E. 252 (1890).

Where the defendant was ordered to appear before the clerk to be examined in a supplementary proceeding, and the clerk was properly informed that a similar proceeding was then pending before the judge, the clerk should have refused to proceed, and when he failed to do so, the judge had the power to order that he desist from further action. Ledford v. Emerson, 143 N.C. 527, 55 S.E. 969 (1906).

Appeal from Clerk's Order. — From an order requiring the debtor to appear, made by the clerk, an appeal lay at once to the judge as a matter of right, and the clerk could not allow or disallow it. Farmers Nat'l Bank v. Burns, 107 N.C. 465, 12 S.E. 252 (1890).

Choses in Action. — In proceedings supplemental to execution, notes owned and held by the judgment debtor, or hypothecated as collateral to his own notes made to a bank, are choses in action, and the bank may apply them to the payment of its own claims against the judgment debtor, in accordance with the terms of hypothecation, when the same have matured, and when not matured it has an equitable right of setoff when the debtor is insolvent, to the extent necessary to protect its own interest, and, also, the right of application according to any contract it may hold, which specifically affects the property. McIntosh Grocery Co. v.

Newman, 184 N.C. 370, 114 S.E. 535 (1922).

Choses in action cannot be reached by execution. They are subjected to the satisfaction of a judgment under the practice prevailing in this State by supplemental proceedings under this section which are in the nature of an equitable fieri facias or creditor's bill. Newberry v. Davison Chem. Co., 65 F.2d 724 (4th Cir. 1933), cert. denied, 290 U.S. 660, 54 S. Ct. 75, 78 L. Ed. 571 (1933).

Bank Deposits. — A bank may apply the deposits of its customer to the payment of his note after maturity, by way of setoff, unless some other creditor has in the meantime acquired a superior right thereof in some way recognized by the law; and a mere notice to the bank in proceedings supplemental to execution is insufficient to deprive the bank of this right. McIntosh Grocery Co. v. Newman, 184 N.C. 370, 114 S.E. 535 (1922).

No Right to Attach Part of Judgment Owned by Person Other Than Defendant. — Where at the time of the rendition of a judgment another person was the equitable owner of a stipulated part thereof, defendant had no legal or equitable interest in such part, and plaintiff was not entitled to attach such part in the supplemental proceedings instituted by it against defendant. Armour Fertilizer Works v. Newbern, 210 N.C. 9, 185 S.E. 471 (1936).

Property held by the entirety is not subject to execution to satisfy judgments against one spouse. Hodge v. Hodge, 12 N.C. App. 574, 183 S.E.2d 800, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (1971).

But Proceeds of Entirety Property May Be Applied Against Debts of One Spouse. — Proceeds of entirety property were the property of the husband as against the wife, and such proceeds could be applied against debts of the husband alone. Hodge v. Hodge, 12 N.C. App. 574, 183 S.E.2d 800, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (1971).

The income from rental property held by the entirety was not protected from attachment to satisfy the debts of the husband merely because it was derived from entirety property. Hodge v. Hodge, 12 N.C. App. 574, 183 S.E.2d 800, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (1971).

Notice Required. — If jurisdiction has never been acquired over the principal defendant, so that a personal judgment can be rendered against him, notice, either actual or constructive, must be given him of any proceedings to reach his property, or by which his rights are to be determined, whether the suit be by garnishment or otherwise, for the reason that no one's rights may be concluded by any proceeding until he has had his day in court. But in all cases in which he has been personally served with process, or has appeared, so that jurisdiction is acquired by the court to render a personal judgment against him, no notice need be given him of any proceedings by garnishment, instituted in aid of such action, or to collect the judgment rendered therein, unless such notice is required by some provision of the statute under which the garnishment suit is conducted. Wright v. Railroad, 141 N.C. 164, 53 S.E. 831 (1906).

Time and Place of Examination in Discretion of Court. — The requirement of 10 days' notice of motions generally has no reference to the examination of judgment debtors under supplementary proceedings, but such cases are governed by this section, which refers the time and place of examination to the discretion of the court or judge. Weiller & Co. v. Lawrence, 81 N.C. 65 (1879).

Suit Held New and Independent. — Where a judgment creditor of a corporation caused an execution to issue, which was returned unsatisfied, and then brought a suit for himself and all other creditors against the corporation and its stockholders, demanding an accounting to ascertain the amount due upon unpaid stock, to pay the debt of the corporation, such suit was a new and independent action, and was not demurrable on the ground that his remedy was by proceeding supplementary to execution. Bronson v. Wilmington N.C. Life Ins. Co., 85 N.C. 411 (1881).

Order Held Sufficient to Bring Board Before Court. — Order of the court in the supplemental proceeding, directing the chairman of the board of trustees of the judgment-debtor church to appear and answer, was sufficient to being the board of trustees before the court and make the board of trustees subject to its jurisdiction. Fishel & Taylor v. Grifton United Methodist Church, 22 N.C. App. 647, 207 S.E.2d 330 (1974).

Existence of Alternative Remedies Did Not Preclude Action. — While, in order to recover on a judgment that certain buyers had obtained against a corporation, the buyers might have had enforcement of the judgment by proceeding on an execution under G.S. 1-352, the existence of those possible alternative remedies did not preclude the buyers from bringing an action, as they did, against the corporation's owners, and the action should not have been dismissed. Blair v. Robinson, 178 N.C. App. 357, 631 S.E.2d 217, 2006 N.C. App. LEXIS 1394 (2006).

Applied in Underwood v. Stafford, 270 N.C. 700, 155 S.E.2d 211 (1967); Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 101 F.R.D. 779 (W.D.N.C. 1984).

Cited in A.A. McKeithan & Sons v. Walker, 66 N.C. 95 (1872); Hutchison v. Symons, 67 N.C. 156 (1872); Rand v. Rand, 78 N.C. 12 (1878); Grabenhofer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963); Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 171 S.E.2d 873 (1970);

FDIC v. British-American Corp., 726 F. Supp. 622 (E.D.N.C. 1989); Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 134, 377 S.E.2d 88 (1989).

§ 1-352.1. Interrogatories to discover assets.

As an additional method of discovering assets of a judgment debtor, the judgment creditor may prepare and serve on the judgment debtor written interrogatories concerning his property, at any time the judgment remains unsatisfied, and within three years from the time of issuing an execution. Such written interrogatories shall be fully answered under oath by the judgment debtor within 30 days of service on the judgment debtor, and the answer shall be filed by the judgment debtor with the clerk of the superior court wherein the original judgment is docketed. Copy of said answer shall be served upon the party submitting said written interrogatories, in the manner provided by the Rules of Civil Procedure.

Interrogatories may relate to any matters which can be inquired into under G.S. 1-352, and the debtor may object to any interrogatories that are deemed improper, but the making of objections shall not delay the answering of interrogatories to which objection is not made. If the objections are overruled, the court shall fix the time for answering the interrogatories. The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment or oppression.

Upon failure of the judgment debtor to answer fully the written interrogatories, the judgment creditor may petition the court for an order requiring the judgment debtor to answer fully, which order shall be served upon the judgment debtor in the same manner as a summons is served pursuant to the Rules of Civil Procedure, fixing the time within which the judgment debtor can answer the interrogatives. In addition, the order shall provide, as an alternative, that the judgment debtor may mail the judgment creditor, by certified mail, within five days of the date of service of the order, a specific request for a hearing before a court or judge to answer oral questions concerning his property rather than answering the written interrogatories. Upon timely receipt of this request, the judgment creditor shall request the court to calendar the hearing.

Any person who disobeys an order of the court may be punished by the judge as for a contempt under the provisions of G.S. 1-368. (1971, c. 529, s. 1; 1979, c. 648.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

CASE NOTES

Refusal to Answer Not Justified. — The mere fact that an amendment to defendant's tax returns was selected for examination by the IRS was insufficient to justify defendant's refusal to answer interrogatories under this section, as there was insufficient evidence that his answers to the interrogatories could be used against defendant in a subsequent criminal action so as to create a real danger of self-incrimination. J.M. Heinike Assocs. v. Vesce, 86 N.C. App. 376, 357 S.E.2d 409, appeal dismissed, 320 N.C. 793, 361 S.E.2d 77 (1987).

Applied in Composite Tech., Inc. v. Advanced Composite Structures, Inc., 150 N.C. App. 386, 563 S.E.2d 84, 2002 N.C. App. LEXIS 494 (2002).

§ 1-352.2. Additional method of discovering assets.

In addition to the other provisions of this Article and as an additional method of discovering assets of a judgment debtor the clerk of the court or a judge of the court in the county wherein the original judgment is docketed, at any time the judgment remains unsatisfied, and within three years from the time of issuing an execution, upon motion of the judgment creditor showing good cause therefor, may:

(1) Order the judgment debtor, his agent or anyone having possession or control of property or records of or pertaining to the judgment debtor, to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, all tax records, letters, objects or tangible things, not privileged, constituting property, or being evidence of property, of the judgment debtor and which are in his possession and custody, or subject to his control; or

(2) Order the judgment debtor or anyone acting for or on his behalf to permit entry upon designated land or other property, real or personal, in his possession or control or subject to his control for the purpose of inspecting, measuring, surveying, appraising, copying, or photographing the property of the judgment debtor.

(3) Prior notice of the motion, together with a copy thereof, shall be served on the judgment debtor as provided by the Rules of Civil Procedure. Upon the hearing, the order entered shall specify the time, place, and manner for compliance therewith and may prescribe such terms and conditions as are just.

(4) Any person who shall fail to comply with an order entered pursuant to this section may be punished as for a contempt under the provisions of G.S. 1-368. (1971, c. 711, s. 1.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

CASE NOTES

Applied in Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 101 F.R.D. 779 (W.D.N.C. 1984).

§ 1-353. Property withheld from execution; proceedings.

After the issuing of an execution against property, and upon proof by affidavit of a party, his agent or attorney, to the satisfaction of the court or a judge thereof, that any judgment debtor residing in the district court district as defined in G.S. 7A-133 or superior court district as defined in G.S. 7A-41.1, as the case may be, where such judge or sheriff resides has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as provided upon the return of an execution, and the judgment creditor is entitled to the order of examination under this section and G.S. 1-352 although the judgment debtor has an equitable estate in land subject to the lien of the judgment, or choses in action, or other things of value unaffected by the lien of the judgment and incapable of levy. (C.C.P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 2; Rev., s. 688; C.S., s. 712; 1987 (Reg. Sess., 1988), c. 1037, s. 39.)

CASE NOTES

Affidavit Required. — Extraordinary proceedings will not be ordered unless necessity therefor is made to appear by an affidavit that the debtor has no property which can be reached by the execution, and that he has property or choses in action or things of value "which he unjustly refuses to apply to the satisfaction of the judgment." Hutchison v. Symons, 67 N.C. 156 (1872). See also, First & Citizens Nat'l Bank v. Hinton, 213 N.C. 162, 195 S.E. 359 (1938).

Affidavit Must Negative Existence of Property Liable to Execution. — An affidavit is insufficient to warrant examination of the judgment debtor if it does not negative property in the defendant liable to execution and the existence of equitable interests which may be subjected by sale in the nature of an execution; but the omission of such negative averments may be remedied by amendment at the hearing. Weiller & Co. v. Lawrence, 81 N.C. 65 (1879); Hackney v. Arrington, 99 N.C. 110, 5 S.E. 747 (1888).

Affidavit Held Sufficient. — An affidavit by a judgment creditor, his agent or attorney, that an execution had been issued upon his judgment, though it had not been returned, and that the defendant had not sufficient property "subject to execution" to satisfy the judgment, but has property "not exempted from execution" which he unjustly refused to apply to its satisfaction, was sufficient to support an order for the examination of the debtor and persons alleged to be indebted to him. Farmers & Mechanics Nat'l Bank v. Burns, 109 N.C. 105, 13 S.E. 871 (1891).

Clerk's Finding of Fact Held Sufficient. — Where, upon the plaintiff's affidavit, the clerk found as a fact that execution under the judgment had been issued, in proceedings supplementary to execution, this was sufficient to sustain his order in that respect for the examination of the defendant and others, etc., which the lack of the return of execution did not affect. Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922).

The fact that the sheriff has an alias execution in his hands unreturned, which was issued on the same judgment on which supplemental proceedings have been taken, it no bar to such proceedings, and no ground on which they can be dismissed. Vegelahn v. Smith, 95 N.C. 254 (1886).

Sufficient Service of Order to Appear. — Leaving a copy of an order on a judgment debtor to appear and answer in supplemental proceedings with the debtor's wife was a sufficient notice. Turner v. Holden, 109 N.C. 182, 13 S.E. 731 (1891).

Court to Apply Property to Judgment. — The section intends that when the debtor refuses to apply property to the satisfaction of the judgment, he must, when duly required, answer concerning the same, to the end that the court, in a proper way, may so apply the property to which the debtor may direct attention. Farmers & Mechanics Nat'l Bank v. Burns, 109 N.C. 105, 13 S.E. 871 (1891).

Plaintiff need not proceed under this section before he can apply for a receiver under G.S. 1-363. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

Applied in Richard Couture, Inc. v. Rowe, 263 N.C. 234, 139 S.E.2d 241 (1964).

Cited in Farmers & Mechanics Nat'l Bank v. Burns, 109 N.C. 105, 13 S.E. 871 (1891); Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922).

§ 1-354. Proceedings against joint debtors.

Proceedings supplemental to execution may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which the action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in like manner and to the like effect. These provisions apply to all proceedings and actions pending and to those terminated by final decree or judgment. (C.C.P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245; Code, s. 490; Rev., s. 669; C.S., s. 713.)

CASE NOTES

Joint as well as single debtors may be examined after the issuance of an execution, and before its return. Weiller & Co. v. Lawrence, 81 N.C. 65 (1879).

§ 1-355. Debtor leaving State, or concealing himself, arrested; bond.

Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise to his satisfaction that there is danger of the debtor leaving the State or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the judgment, issue a warrant requiring the sheriff of any county where such debtor is to arrest him and bring him before the court or judge. Upon being brought before the court or judge, the debtor may be examined on oath, and, if it appears that there is danger of his leaving the State, and that he has property which he has unjustly refused to apply to the judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as directed, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for contempt. (1868-9, c. 148, s. 4; c. 277, s. 8; Code, s. 488, subsec. 4; Rev., s. 671; C.S., s. 714.)

CASE NOTES

Applied in Stackhouse v. Paycheck, 66 N.C. App. 713, 311 S.E.2d 705 (1984).

§ 1-356. Examination of parties and witnesses.

On examination under this Article either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness; and the party or witnesses may be required to appear before the court or judge, or a referee appointed by either, and testify on any proceedings under this Article in the same manner as upon the trial of an issue. If before a referee, the examination shall be taken by the referee, and certified to the court or judge. All examinations and answers before a court or judge or referee under this Article must be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof. (C.C.P., ss. 264, 267, 268; 1868-9, c. 95, s. 2; 1871-2, c. 245; Code, ss. 488 [subsec. 2], 491, 492; Rev., ss. 670, 676; C.S., s. 715.)

CASE NOTES

Cross-Examination. — Where the judgment debtor is examined, the creditor does not make him his witness, but may cross-examine and contradict him. Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

Evidence to Be Taken Down in Writing. — In supplemental proceedings the evidence should be taken down in writing. Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

Production of Documents. — Where, on examination of a debtor, it appears that his account books are material to the investigation, the court may require him to produce them. Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

§ 1-357. Incriminating answers not privileged; not used in criminal proceedings.

No person, on examination pursuant to this Article, is excused from answering any question on the ground that it will tend to convict him of the commission of a crime or that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. (C.C.P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 5; Rev., s. 672; C.S., s. 716.)

CASE NOTES

Witness Must Answer Questions. — A witness must answer the questions, and he cannot shield himself behind his declaration that they involve self-incrimination. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

When called to testify as to his dealings in behalf of a defunct corporation, of which he was an officer, a witness could not excuse himself on the ground that the evidence thus elicited might be used on the trial of indictments pending against him and others for conspiring to cheat and defraud others in the management of the affairs of such corporation. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

Facts Divulged Are Not Available for Criminal Proceedings. — Facts developed on the examination of the defendants in supplemental proceedings are forbidden to be used in evidence against them in any criminal proceeding or prosecution. State v. Mallett, 125 N.C. 718, 34 S.E. 651 (1899), aff'd, 181 U.S. 589, 21 S. Ct. 730, 45 L. Ed. 1015 (1901).

§ 1-358. Disposition of property forbidden.

The court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution. (C.C.P., s. 264; 1868-9, c. 95, s. 2; Code, ss. 488 [subsec. 6], 494; Rev., s. 673; C.S., s. 717.)

CASE NOTES

What Property Is Covered by This Section. — When this section and G.S. 1-360 are read either singly or as a component part of this Article, it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to the judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. Motor Fin. Co. v. Putnam, 229 N.C. 555, 50 S.E.2d 670 (1948).

Prospective Earnings Are Neither Property Nor Debt. — Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. Motor Fin. Co. v. Putnam, 229 N.C. 555, 50 S.E.2d 670 (1948).

Only Parties May Be Restrained. — In supplemental proceedings, the court cannot restrain the transfer of property owned by one who is not a party to the action. Farmers & Mechanics Nat'l Bank v. Burns, 109 N.C. 105, 13 S.E. 871 (1891).

Where it is alleged that a third person has property of the judgment debtor, it is error to restrain such third person from disposing of such property until the receiver can bring an action for its recovery, unless such person has been made a party in some way to the proceeding. Coates Bros. v. Wilkes, 94 N.C. 174 (1886).

Cited in North Carolina Nat'l Bank v. C.P. Robinson Co., 80 N.C. App. 160, 341 S.E.2d 362 (1986).

§ 1-359. Debtors of judgment debtor may satisfy execution.

After the issuing of an execution against property, all persons indebted to the judgment debtor, or to any one of several debtors in the same judgment, may pay to the sheriff the amount of their debt, or as much thereof as is necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount paid. (C.C.P., s. 265; Code, s. 489; Rev., s. 674; C.S., s. 718.)

CASE NOTES

Protection Furnished to Debtors of Judgment Debtor. — The section furnishes an easily secured and safe protection to the debtors of the judgment debtor, who are called upon to satisfy the execution. Parks v. Adams, 113 N.C. 473, 18 S.E. 665 (1893).

Authority of Sheriff. — A sheriff is authorized by this section to receive from debtors of the defendant in the execution in his hands the debts due him, but he is not thereby invested with the power to apply the proceeds of one execution in satisfaction of another. Smith v. McMillan, 84 N.C. 593 (1881).

Payment by Bank of Amount in Debtor's Account. — Under this section, if it chooses, a bank may voluntarily pay to the sheriff the amount in a judgment debtor's bank account when it is notified that there is an outstanding writ of execution against its depositor. Faught v. Branch Banking & Trust Co., 53 N.C. App. 132, 280 S.E.2d 26 (1981).

§ 1-360. Debtors of judgment debtor may be summoned.

Upon the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon affidavit that any person or corporation has property of said judgment debtor, or is indebted to him in an amount exceeding ten dollars ($10.00), the court or judge may, by order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same; provided, however, that such inquiries may, in the discretion of the court, be answered by such person or corporation, or any officers or members thereof, by verified answers to interrogatories. The court or judge may also, in its or his discretion, require notice of the proceeding to be given to any party to the action, in such manner as seems proper. (C.C.P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245; Code, s. 490; Rev., s. 675; C.S., s. 719; 1989, c. 683; 1991, c. 426, s. 1; 1995, c. 257, s. 1.)

CASE NOTES

Purpose of Supplemental Proceeding Against Third Persons. — When this section and G.S. 1-362 are read singly or as an integral part of this Article, it is manifest that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person at the time of the issuance and service of the order for the examination of the third person, which could not be reached by an execution at law. Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

Procedure When Third Person Claims Property. — The section expressly prescribes that persons having property of the judgment debtor may be examined in respect to the same, and mere notice is sufficient to bring them before the courts and make them subject to its jurisdiction for the purpose of securing the debtor's property, but not for the purpose of contesting any right of such persons having the same. If they claim an interest in the property, or that the same belongs to them, they may properly suggest so. Farmers & Mechanics Nat'l Bank v. Burns, 109 N.C. 105, 13 S.E. 871 (1891); Boseman v. McGill, 184 N.C. 215, 114 S.E. 10 (1922); Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956).

Where one who is charged in supplemental proceedings as holding property belonging to a judgment debtor claims such property as his own, the question cannot be decided in the course of such proceedings, but must be settled by an independent action. Carson v. Oates, 64 N.C. 115 (1870).

To What Property and Debts Section Applies. — When this section and G.S. 1-358 are read either singly or as a component part of this Article, it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to the judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. Motor Fin. Co. v. Putnam, 229 N.C. 555, 50 S.E.2d 670 (1948).

Prospective Earnings Are Neither Property Nor Debt. — Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. Motor Fin. Co. v. Putnam, 229 N.C. 555, 50 S.E.2d 670 (1948).

When Proceedings May Commence. — Proceedings under this section may be commenced before the sale of the property levied on, at the presentation of an affidavit or other proof of its insufficient value. A.A. McKeithan & Sons v. Walker, 66 N.C. 95 (1872).

Purpose of Appearance and Answer. — The purpose of the appearance and answer is to determine whether the sum alleged, or any part thereof, is due the judgment debtor. Rice v. Jones, 103 N.C. 226, 9 S.E. 571 (1889).

Assignee May Be Examined. — An order for examination may issue against the defendant's assignee. Bruce v. Crabtree, 116 N.C. 528, 21 S.E. 194 (1895).

Notice to Defendant. — Notice to the defendant is not required, though the court may, in its discretion, order notice to be given. City of Wilmington v. Sprunt, 114 N.C. 310, 19 S.E. 348 (1894); Wright v. Railroad, 141 N.C. 164, 53 S.E. 831 (1906).

Applied in Marx v. Maddrey, 106 F. Supp. 535 (E.D.N.C. 1952).

Cited in Grabenhofer v. Garrett, 260 N.C. 118, 131 S.E.2d 675 (1963); FDIC v. British-American Corp., 726 F. Supp. 622 (E.D.N.C. 1989).

§ 1-360.1. Execution on the property of debtors of judgment debtor.

After the clerk of superior court determines to the clerk's satisfaction that the debtor of the judgment debtor acknowledged at a proceeding conducted pursuant to G.S. 1-360 that he is in possession of unencumbered property of such judgment debtor or is indebted to him in an amount exceeding ten dollars ($10.00), an execution shall issue against the property or debt of the judgment debtor that the debtor of the judgment debtor acknowledged he holds. (1991, c. 426, s. 2; 1995, c. 257, s. 2.)

§ 1-361. Where proceedings instituted and defendant examined.

Proceedings supplemental to execution must be instituted in the county in which the judgment was rendered; but the place designated where the defendant must appear and answer must be within the county where he resides. (Rev., s. 677; C.S., s. 720.)

CASE NOTES

History. — This section is a substantial enactment of the rule laid down Hasty v. Simpson, 77 N.C. 69 (1877). In In Hutchinson v. Symons, 67 N.C. 156 (1872), it was held that proceedings supplementary should be instituted in the county in which the action was pending; that is, where the judgment was rendered. Hasty v. Simpson, above, quoted and approved this holding, but in addition, held that the place designated for the appearance and answer of the defendant should be in the county of his residence.

Property Subject to Sale. — The court may order any property of the judgment debtor that is not exempt from execution, in the hands either of the judgment debtor or any other person, or due to the judgment debtor, to be applied to the satisfaction of the judgment. Rand v. Rand, 78 N.C. 12 (1878).

If it appears that a third person is indebted to the judgment debtor, the court may order such indebtedness, or so much thereof as may be necessary, to be applied to the satisfaction of the judgment against the judgment debtor. Rice v. Jones, 103 N.C. 226, 9 S.E. 571 (1889).

Gratuitous Services. — While creditors may subject, in a supplementary proceeding, the debtor's choses in action, including a claim for compensation due for service rendered under an express or implied contract, they have no lien on his skill or attainments, and cannot compel him to exact compensation for managing his wife's property, or for services rendered to any person with the understanding that it was gratuitous. Osborne v. Wilkes, 108 N.C. 651, 13 S.E. 285 (1891).

Salaries of Public Officers and Employees. — For reasons of public policy, the salaries of officers and the pay of employees of the State cannot be reached by creditors by proceedings supplementary to execution. Swepson v. Turner, 76 N.C. 115 (1877).

Sale Required. — Where it appeared from an examination under supplementary proceedings that the judgment debtor held a claim against a third party, to be discharged by the delivery of corn at a stipulated price per bushel, it was error for the court to order such third person to deliver to the creditor a sufficient quantity of the corn, at the agreed price, to satisfy the debt. The proper order was to sell the corn and apply the proceeds to the debt. In re Davis, 81 N.C. 72 (1879).

Order for Condemnation of Debtor's Property. — In proceedings supplemental to execution, an order for the condemnation made by the clerk against land was within the scope of this section. Boseman v. McGill, 184 N.C.

215, 114 S.E. 10 (1922).

When Final Order May Be Made. — No final order may be made appropriating to the creditor any property discovered under G.S. 1-360 until the property previously levied on is exhausted, for until that is done it cannot be known whether anything is still owing. A.A. McKeithan & Sons v. Walker, 66 N.C. 95 (1872).

Where supplemental proceedings were instituted upon return of execution unsatisfied on a judgment against a husband and wife, and it appeared that the husband was totally and permanently disabled and had no property upon which execution could be levied, but was receiving the sum of $300.00 a month under disability insurance, the judgment debtor was entitled, under his personal property exemption, to the $300.00 each month if such amount was necessary for the support of himself and his wife. Commissioner of Banks ex rel. Goldsboro Sav. & Trust Co. v. Yelverton, 204 N.C. 441, 168 S.E. 505 (1933).

§ 1-362. Debtor's property ordered sold.

The court or judge may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within 60 days next preceding the order, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor. (C.C.P., s. 269; 1870-1, c. 245; Code, s. 493; Rev., s. 678; C.S., s. 721.)

Legal Periodicals. — For note on protection of debtor's rights, see 48 N.C.L. Rev. 164 (1969).

For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

Construction of Section. — The language of this section is explicit and is to be given a liberal construction favorable to the exemption. Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978).

The general rule is that North Carolina's exemption laws are to be liberally construed in favor of the exemption. In re Laues, 90 Bankr. 158 (Bankr. E.D.N.C. 1988).

Single debtor, who had no dependents, was not a "family" for purposes of G.S. 1-362 and, thus, could not claim the benefit of that state exemption in the debtor's Chapter 11 bankruptcy case. In re Connelly, 276 Bankr. 421, 2002 Bankr. LEXIS 562 (Bankr. W.D.N.C. 2002).

G.S. 1-362 does not incorporate the exemptions of G.S. 1C-1601 by reference. Kroh v. Kroh, 154 N.C. App. 198, 571 S.E.2d 643, 2002 N.C. App. LEXIS 1404 (2002).

Construction in Context of Limited Liability Company Membership Interest. — Because the forced sale of a membership interest in a limited liability company to satisfy a debt would necessarily entail the transfer of a member's ownership interest to another, thus permitting the purchaser to become a member, forced sales of the type permitted in G.S. 1-362 are prohibited pursuant to G.S. 57C-3-03. Herring v. Keasler, 150 N.C. App. 598, 563 S.E.2d 614, 2002 N.C. App. LEXIS 585 (2002), review denied, 356 N.C. 435, 572 S.E.2d 431 (2002).

Applicability of Earnings Exemption. — The exemption of earnings for 60 days allowed to a judgment debtor under the section applies only as to proceedings on judgments for private debts and not for taxes due. City of Wilmington v. Sprunt, 114 N.C. 310, 19 S.E. 348 (1894).

Debtors properly claimed $3,691.92 as wages under G.S. 1-362 from store receipts that remained after they closed their business, and the court rejected the Chapter 7 Trustee's contention that the amount was excess proceeds from the liquidation of the business. The debtors' furniture business was not incorporated, the debtors managed and worked in the store on a regular basis, and the amount was consistent with the debtors' past wages and was in line with or lower than typical salaries received for this type of work. In re Howell, — Bankr. —, 2007 Bankr. LEXIS 4668 (Bankr. E.D.N.C. Nov. 29, 2007).

Under G.S. 1-362, debtors could exempt income earned during the 60-day period prior to petition in the amount of approximately $35,629.53 where the debtors presented credible evidence that the wages at issue were necessary for the debtors and their family. In re Williams, — Bankr. —, 2009 Bankr. LEXIS 30 (Bankr. E.D.N.C. Jan. 5, 2009).

The earnings of a nonresident for personal services for the 60 days next preceding are exempt from seizure in garnishment. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904); Wierse v. Thomas, 145 N.C. 261, 59 S.E. 58 (1907).

As to garnishment of military retirement pay, see Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978). As to garnishment for enforcement of child support, see § 110-136.

Disability Insurance Payments Were Not Exempt Earnings. — Where North Carolina, pursuant to G.S. 1C-1601(f), opted out of 11 U.S.C.S. § 522, any bankruptcy property exemptions were controlled by state law; thus, a North Carolina debtor could not use § 522 to exempt disability insurance policy payments from his bankruptcy estate and the payments were not exempt under G.S. 1-362 because such payments were not earnings for performance of personal services but resulted from nonperformance. In re Dillon, — Bankr. —, 2005 Bankr. LEXIS 1314 (Bankr. M.D.N.C. July 8, 2005).

Protection of Wage-Earner's Second Family Against Alimony Claims of First Family. — While it would seem reasonable to suppose that what the legislature of 1870-71 had in mind, in enacting this exemption, was to protect the wage-earner's family from want as against claims of his other creditors, and that it was not contemplated that the needs of a wage-earner's second family should be supplied at the expense of the legitimate alimony claims of his first family, defendant's accumulated unpaid military retirement pay was exempt under this section from garnishment to enforce an alimony order where it plainly appeared from the defendant's affidavit that his retirement pay was necessary for the support of his second family, since this section is to be given a liberal construction favorable to the exemption. Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978). As to garnishment to enforce child support, see § 110-136.

The State assumes the status of judgment lien creditor against the assets of an indigent defendant who has accepted court-appointed counsel and been found guilty of the offense. The lien is not valid unless the indigent defendant was given both notice of the State claim and the opportunity to resist its perfection in a hearing before the trial court. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

North Carolina is not barred from structuring a program to collect the amount it is owed from a financially able defendant through reasonable and fairly administered procedures. The State's initiatives in this area naturally must be narrowly drawn to avoid either chilling the indigent's exercise of the right to counsel, or creating discriminating terms of repayment based solely on the defendant's poverty. Beyond these threshold requirements, however, the State has wide latitude to shape its attorneys' fees recoupment or restitution program along the lines it deems most appropriate for achieving lawful State objectives. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

The developing jurisprudence does not require the state to absorb the expenses of providing court-appointed counsel when the defendant has acquired the financial ability to pay. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

An indigent receiving court-appointed counsel will never be required to repay the State unless he becomes financially able. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

The statutes and court decisions that regulate North Carolina's ability to recover costs of court-appointed counsel meet constitutional requirements. The indigent defendant's fundamental right to counsel is preserved under the system; he is given ample opportunity to challenge the decision to require repayment at all critical stages; and he is protected against heightened civil or criminal penalties based solely on his inability to pay. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

The North Carolina statutes relating to the repayment of attorneys' fees by restitution embody all the required features of a constitutionally acceptable approach. The indigent defendant's fundamental right to counsel is preserved under the North Carolina statute and no preconditions are placed on the exercise of that right beyond a reasonable and minimally intrusive procedure designed to establish the fact of indigency. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

North Carolina's procedures for imposing the reimbursement of court-appointed counsel fees as a condition of parole are narrowly drawn to avoid unfairness and discriminatory effects. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

This statute has been expanded by the state courts to preclude execution on any future earnings to satisfy a judgment. Harris v. Hinson, 87 N.C. App. 148, 360 S.E.2d 118 (1987).

Future Rental Payments. — Since North Carolina has exempted future earnings from the definition of property due a judgment debtor for purposes of this section, future rental payments should be exempt as well. Jacobi-Lewis Co. v. Charco Enters., Inc., 121 N.C. App. 500, 466 S.E.2d 338 (1996).

Future interest in 401(K). — Former husband was allowed pursuant to G.S. 1-362 to satisfy a tort judgment against his former wife by executing on her future interest in an equitable distribution award of his 401(k) retirement accounts, as the exemption for individual retirement plans in G.S. 1C-1601(a)(9) did not shield from execution the wife's mere expectancy in an equitable distribution claim against the husband's retirement accounts. Kroh v. Kroh, 154 N.C. App. 198, 571 S.E.2d 643, 2002 N.C. App. LEXIS 1404 (2002).

The courts in this State cannot, through supplemental proceedings on execution, order a receiver to receive a person's wages in order to satisfy a judgment rendered in this State. Harris v. Hinson, 87 N.C. App. 148, 360 S.E.2d 118 (1987).

Judgment Debtor Is Free to Dispose of His Earnings. — Under the law as it now stands in this State, a judgment debtor can receive his salary and dispose of it in any manner he chooses, regardless of whether it contains an amount of funds in excess of what is required to satisfy his and his family's reasonable living expenses. If the debtor elects to accumulate no property other than that which is exempt from execution, even if he squanders his excess funds with the express intent of avoiding paying a judgment that by all the laws of principle and fairness he should be made to satisfy, the judgment creditor is, in this State, helpless to collect his judgment. Harris v. Hinson, 87 N.C. App. 148, 360 S.E.2d 118 (1987).

Claimed Expenses Not Necessary for Support. — Where a bankruptcy debtor claimed that monthly expenses exceeded the debtor's income and thus recently earned cash was necessary for the support of the debtor, the debtor failed to show that the cash was necessary for the debtor's support; the debtor, who had no dependents and regular income, had the financial capacity to support the debtor without resort to the additional cash since certain of the debtor's claimed expenses involved voluntary car payments for the debtor's siblings and contributions to a savings program, which were not expenses necessary for the support of the debtor. In re Young, — Bankr. —, 2001 Bankr. LEXIS 2184 (Bankr. M.D.N.C. July 12, 2001).

Broad Language in Loan Documents No Waiver of Debtor's Right to Exemption. — Where a credit union contended that it had a valid security interest in the debtor's account by virtue of broad language in loan documents by which the debtors pledged to the credit union all deposits in their checking account with the credit union as security for an automobile loan, and the debtors filed a Chapter 7 bankruptcy action, the language of the loan documents did not constitute a waiver of debtors' right to exempt the account balance under either G.S. 1C-1601 or this section. In re Laues, 90 Bankr. 158 (Bankr. E.D.N.C. 1988).

Cited in Cornelius v. Albertson, 244 N.C. 265, 93 S.E.2d 147 (1956); Sturgill v. Sturgill, 49 N.C. App. 580, 272 S.E.2d 423 (1980); In re Russell, 44 Bankr. 452 (Bankr. E.D.N.C. 1984); North Carolina Nat'l Bank v. C.P. Robinson Co., 80 N.C. App. 160, 341 S.E.2d 362 (1986); North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987); HFC v. Ellis, 107 N.C. App. 262, 419 S.E.2d 592 (1992), cert. granted, 333 N.C. 167, 424 S.E.2d 909 (1992); Livingston v. Naylor, 173 Md. App. 488, 920 A.2d 34, 2007 Md. App. LEXIS 46 (2007).

§ 1-363. Receiver appointed.

The court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver in proceedings under this Article of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions. But before the appointment of the receiver, the court or judge shall ascertain if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if so, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to the receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The title of the receiver relates back to the service of the restraining order, herein provided for. (C.C.P., s. 270; 1870-1, c. 245; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 494; Rev., s. 679; C.S., s. 722.)

Cross References. — As to duties of receiver generally, see G.S. 1-501 through 1-504.

CASE NOTES

Plaintiff need not proceed under § 1-353 before he can apply for a receiver under this section. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

In a race of diligence between creditors under supplementary proceedings, the earliest applicant is presumed to be entitled to the earliest appointment. Parks v. Sprinkle, 64 N.C. 637 (1870).

This section prescribes that there shall be only one receiver of the property of a judgment debtor, to prevent a conflict of authority between the courts having a concurrent jurisdiction over the subject. Corbin v. Berry & McGowan, 83 N.C. 27 (1880).

Consolidation of Several Proceedings. — Where several supplemental proceedings are pending, and the same property is sought to be subjected, or where, in either of such proceedings, a receiver is appointed of property which is the subject of the other proceedings, the court should, in proper cases, order that the same be consolidated, preserving the priorities acquired by the superior diligence of the various litigants. Monroe Bros. v. Lewald, 107 N.C. 655, 12 S.E. 287 (1890).

Motion Pending Appeal. — The motion for appointment of a receiver may be made before the judge, pending an appeal to him from the ruling of the clerk upon other questions. Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

Supporting Evidence and Affidavits. — The application for a receiver shall be made as in other cases, that is, the motion shall be supported by affidavits and other written or documentary evidence. Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

Verified pleadings essentially operate as affidavits under this section and should be construed accordingly. Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975).

Grounds for Appointing Receiver. — A receiver is appointed almost as a matter of course where it appears that the judgment debtor has, or probably has, property that ought to be subjected to the satisfaction of the judgment, after the return of the execution unsatisfied. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

To warrant the appointment of a receiver, it need not appear, certainly or conclusively, that the defendant has property that he ought to apply to the judgment. If there is evidence tending in a reasonable degree to show that he probably has such property, or if it appears probable that he has made a fraudulent conveyance of his property as to his creditors, this is sufficient. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

It is sufficient for the appointment of a receiver if there is reasonable ground to believe that the judgment debtor has property which ought to be applied to the payment of the judgment. Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

Judge's Action Subject to Review. — The appointment of a receiver in these proceedings does not rest solely in the discretion of the judge, and his action in appointing or refusing to appoint is subject to review. Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

Effect of Judge's Failure to Ascertain If Other Proceedings Are Pending. — While it is the duty of a judge appointing a receiver under this section to ascertain if other supplemental proceedings are pending against the judgment debtor, and if so, to notify the plaintiffs therein of all proceedings before him, yet a failure to do so does not require the reversal of an order appointing a receiver, where some of the creditors actually appear and make themselves parties, and all have an opportunity to interpose before the final distribution of the fund. Corbin v. Berry & McGowan, 83 N.C. 27 (1880).

Appointment of Receiver Held Erroneous. — Where supplemental proceedings had discovered that the defendant held a specific fund which had been adjudged to belong to the plaintiff, and the clerk directed the defendant to pay over the same to the plaintiff, it was error in the judge on appeal to appoint a receiver to take charge of the fund until the plaintiff should institute an action to recover the specific fund. Ross v. Ross, 119 N.C. 109, 25 S.E. 792 (1896).

The receivership operates and reaches out in every direction as an equitable execution, and it is the business of the receiver, under the superintendence of the court, to make it effectual by all proper means. Massey v. Cates, 2 N.C. App. 162, 162 S.E.2d 589 (1968).

Applied in Lone Star Indus., Inc. v. Ready Mixed Concrete of Wilmington, Inc., 68 N.C. App. 308, 314 S.E.2d 302 (1984).

Cited in Nobles v. Roberson, 212 N.C. 334, 193 S.E. 420 (1937); North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987).

§ 1-364. Filing and record of appointment; property vests in receiver.

When the court or a judge grants an order for the appointment of a receiver of the property of the judgment debtor, it shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript of judgment, upon which the proceedings are taken, is filed; and the clerk shall record the order in a book to be kept for that purpose in his office, to be called Book of Orders Appointing Receivers of Judgment Debtors, and shall note the time of its filing therein. A certified copy of the order shall be delivered to the receiver named therein, and he is vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order has been made, and if not, from the time of the filing and recording of the order for the appointment of a receiver. The receiver of the judgment debtor is subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded. (C.C.P., s. 270; 1870-1, c. 245; Code, s. 495; Rev., s. 680; C.S., s. 723; 1971, c. 268, s. 22.)

CASE NOTES

The general principles of law applicable to receivers apply to those appointed in supplemental proceedings. It is the duty of such receivers to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons. Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

Authority of Receiver. — While the court may exercise very great control over the receiver, and may direct, in appropriate cases, that he shall or shall not do particular things, yet, ordinarily, when he is invested with full power as a receiver, he will have authority to bring appropriate, necessary actions without special leave or direction of the court. Weill v. First Nat'l Bank, 106 N.C. 1, 11 S.E. 277 (1890).

A receiver may be appointed who is invested with all the property and effects of the debtor, and he may collect, preserve and pay out the property and estate of the debtor, or their proceeds, under the direction of the court. Rand v. Rand, 78 N.C. 12 (1878).

A receiver, in supplemental proceedings, may bring actions to recover the judgment debtor's property, without special leave or direction of the court. Weill v. First Nat'l Bank, 106 N.C. 1, 11 S.E. 277 (1890). See also, Coates Bros. v. Wilkes, 92 N.C. 376 (1885).

When Property Vests in Receiver. — The receiver, by virtue of his appointment, becomes the legal assignee of the judgment, and is vested with the property therein. Turner v. Holden, 94 N.C. 70 (1886).

In proceedings supplementary to execution, if the debtor dies before the appointment of a receiver, or before the order of such appointment is filed in the office of the clerk of the superior court, the property and effects of such judgment debtor do not vest in the receiver. Rankin v. Minor, 72 N.C. 424 (1875).

Remedy of Debtor When Receiver Is Negligent. — If the receiver is negligent in the performance of his duty, the remedy of the judgment debtor might be in the removal of the receiver and appointment of a successor, or in seeking compensation in damages for the losses due to such negligence, and, if necessary, upon his bond to secure a faithful discharge of duty; but he cannot interfere with the receiver's collection and control of the property. Turner v. Holden, 94 N.C. 70 (1886).

§ 1-365. Where order of appointment recorded.

Before the receiver is vested with any real property of the judgment debtor, a certified copy of the order of appointment must be filed and recorded on the execution docket, in the office of the clerk of the superior court of the county in which any real estate of the judgment debtor is situated, and also in the office of the clerk of the superior court of the county in which the debtor resides. (C.C.P., s. 270; Code, s. 496; Rev., s. 681; C.S., s. 724.)

CASE NOTES

Death of Judgment Debtor Before Order of Appointment Is Filed. — When the judgment debtor dies before the filing in the clerk's office of an order appointing a receiver, the judgment creditor has no lien on his property as against the administrator of the debtor. Rankin v. Minor, 72 N.C. 424 (1875).

Cited in Nobles v. Roberson, 212 N.C. 334, 193 S.E. 420 (1937).

§ 1-366. Receiver to sue debtors of judgment debtor.

If it appears that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person or corporation by the receiver; but the court or judge may, by order, forbid a transfer or other disposition of such property or interest till a sufficient opportunity is given to the receiver to commence and prosecute the action to judgment and execution, but such order may at any time be modified or dissolved by the court or judge having jurisdiction on such security as he directs. (C.C.P., s. 271; 1870-1, c. 245; Code, s. 497; Rev., s. 682; C.S., s. 725.)

CASE NOTES

Court May Restrain Transfer of Property. — Under this section, when it is found that a third person, not a party to the action, claims an interest in the property or denies the debt which is sought by the plaintiff to be applied to his judgment as belonging to the judgment debtor, the court may, by an order in the cause, restrain the transfer of such property till the receiver can bring an action to recover it, but such is brought by the receiver as the agent of the court. Ross v. Ross, 119 N.C. 109, 25 S.E. 792 (1896).

Notice of Order Restraining Transfer. — This section cannot be construed as implying that the order forbidding "the transfer or other disposition of such property or interest" may be made without notice to the party to be affected by it. Such an interpretation would produce an effect that would contravene natural justice, as well as fundamental right. Coates Bros. v. Wilkes, 94 N.C. 174 (1886).

Interpleader by Claimants to Fund. — Where in supplemental proceedings it was adjudged that the fund in question belonged to the judgment debtor, and an order was made that the fund should be paid into court, and afterwards, upon claim made by another, the clerk refused to pay the money to him, and appointed a receiver, who brought an action against the judgment debtor to try the question of title to the fund, it was held that defendants, claimants to the fund, should have been allowed to interplead in the supplementary proceedings. Wilson v. Chichester, 107 N.C. 386, 12 S.E. 139 (1890).

Power of Receiver to Sue to Set Aside Fraudulent Transactions of Debtor. — A receiver is not the representative of the debtor alone, and can maintain an action to set aside fraudulent transactions of such debtor. Pender v. Mallett, 123 N.C. 57, 31 S.E. 351 (1898).

§ 1-367. Reference.

The court or judge may, in his discretion, order a reference to the referee agreed upon by the parties, or appointed by him, to report the evidence or the facts. The appointment of the referee may be made in the first order or at any time. (C.C.P., s. 272; Code, s. 498; Rev., s. 683; C.S., s. 726.)

Cross References. — As to examination before referee, see G.S. 1-356. As to disobedience of orders of referee, see G.S. 1-368.

CASE NOTES

The evidence taken before a referee must accompany his report if there are any exceptions to which it is applicable, or perhaps any adverse rulings made in the progress of the inquiry which the evidence would tend to elucidate or explain. Vestal v. Sloan, 83 N.C. 555 (1880).

§ 1-368. Disobedience of orders punished as for contempt.

Any person, party or witness, who disobeys an order of the court or judge or referee, duly served, may be punished by the judge as for a contempt. In all cases of commitment under this Article the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the judge committing him, or the judge having jurisdiction, on such terms as are just. (C.C.P., s. 274; 1869-70, c. 79, s. 3; Code, s. 500; Rev., s. 684; C.S., s. 727.)

Cross References. — As to contempt generally, see Chapter 5A, G.S. 5A-1 et seq.

Legal Periodicals. — As to whether the violation of a void order of a court constitutes contempt, see note in 12 N.C.L. Rev. 260 (1934).

CASE NOTES

Power of Court to Enforce Its Lawful Orders. — It is an essential attribute of a court to enforce by proper process its lawful orders; without this its essential functions would be paralyzed or destroyed. Pain v. Pain, 80 N.C. 322 (1879); LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

Duty of Judge to Pass on Inability to Comply. — Where a party to an action, having been directed to perform an order of the court or otherwise to be in contempt, applied, after notice, to have the order discharged, and offered to produce affidavits showing his inability to comply with the order, it was the duty of the judge to hear and pass on the affidavits. Childs v. Wiseman, 119 N.C. 497, 26 S.E. 126 (1896).

Contempt of Witness Being Examined by Referee. — When, in the course of proceedings supplementary to the execution, a witness is examined by a referee, a contempt, in refusing to answer the questions, must be punished by the court making the reference. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

Paying Salary Accruing After Issuance of Order. — An employer cannot be held in contempt for paying salary accruing to a judgment debtor after issuance and service on the employer of an order in proceedings supplemental to execution, since the order, properly construed, speaks as of the date of its issuance, and since in law the order could not apply to prospective earnings of the judgment debtor. Motor Fin. Co. v. Putnam, 229 N.C. 555, 50 S.E.2d 670 (1948).

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

ARTICLE 32.

Property Exempt from Execution.

§§ 1-369 through 1-392: Repealed by Session Laws 1981, c. 490.

Cross References. — As to exempt property, see now G.S. 1C-1601 et seq.

Editor's Note. — These sections were repealed by Session Laws 1981, c. 490, which enacted Chapter 1C, Article 16, G.S. 1C-1601 et seq., covering the same subject matter. The repeal and the new Article were originally made effective Oct. 1, 1981. Session Laws 1981, c. 1001, ratified Oct. 9, 1981, and effective on ratification, postponed the effective date of Session Laws 1981, c. 490, to Jan. 1, 1982. The repeal and the new Article were therefore in effect from Oct. 1, 1981, through Oct. 8, 1981, and became permanently effective Jan. 1, 1982.

Session Laws 1981, c. 1001, s. 1, provided in part: "G.S. 1-369 through G.S. 1-392, as repealed by Chapter 490 of the 1981 Session Laws, are revived effective upon ratification of this act. This act does not affect exemptions that have been set aside by a court order entered on and after October 1, 1981, but before the effective date of this act. This act does not affect bankruptcy petitions filed on and after October 1, 1981, but before the effective date of this act."

Session Laws 1981, c. 490, s. 3, as amended by Session Laws 1981, c. 1001, s. 1, provides: "Sec. 3. This act shall become effective January 1, 1982, and applies to all actions and proceedings initiated before and after that date. If a proceeding has been initiated prior to that date the court may enter appropriate transitional orders."

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

ARTICLE 33.

Special Proceedings.

§ 1-393. Chapter and Rules of Civil Procedure applicable to special proceedings.

The Rules of Civil Procedure and the provisions of this Chapter on civil procedure are applicable to special proceedings, except as otherwise provided. (Code, s. 278; Rev., s. 710; C.S., s. 752; 1967, c. 954, s. 3.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

CASE NOTES

Special Proceedings. — Even where an action is a special proceeding, the Rules of Civil Procedure are made applicable by this section, which provides that the Rules of Civil Procedure and the provisions of this chapter are applicable to special proceedings, except as otherwise provided. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Trustee removal proceedings are held in an estate matter and not in a special proceeding or in a civil action, and clerks of court are not required to also make decisions regarding discovery and other issues of law arising during estate matters; instead, the clerks of superior courts hear the matters before them summarily, and are responsible for determining questions of fact rather than providing judgment in favor of one party or the other. In re Estate of Newton, 173 N.C. App. 530, 619 S.E.2d 571, 2005 N.C. App. LEXIS 2120 (2005), cert. denied, — N.C. —, 625 S.E.2d 786 (2005).

Private Condemnation Proceedings. — Section 40A-12, together with this section, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by Chapter 40A. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Legitimation Proceedings. — The procedural statutes that apply to special proceedings are designed to fully protect the rights of all persons interested in special proceedings, including legitimation proceedings. In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985).

Adoption Proceedings. — The Rules of Civil Procedure and the provisions of this Article apply to adoption proceedings. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Termination Proceedings. — Trial court erred in denying the father's motion to set aside the order entered against him that terminated his parental rights in his minor daughter; the record showed that the summons that was issued in his case was not served upon him within the time limit for service of process under the civil procedure rule then in effect and since that rule applied to civil actions or special proceedings such as a termination of parental rights case, the order was entered without the trial court having acquired personal jurisdiction over the father, and thus was void. In re A.B.D., 173 N.C. App. 77, 617 S.E.2d 707, 2005 N.C. App. LEXIS 1925 (2005).

Administrative Proceedings Under G.S. 105-258 Governed by Rules of Civil Procedure. — Because G.S. 105-258 is a civil action, the statute is subject to the rules of civil procedure, except to the extent the statute prescribes a different procedure. In re Summons Issued to Ernst & Young, LLP, 191 N.C. App. 668, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (2008).

A judgment may be either interlocutory or final in a special proceeding as well as in a civil action. Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

Applied in Wyatt v. Wyatt, 69 N.C. App. 747, 318 S.E.2d 251 (1984); In re McKinney, 158 N.C. App. 441, 581 S.E.2d 793, 2003 N.C. App. LEXIS 1191 (2003); Greene v. Garner, 163 N.C. App. 142, 592 S.E.2d 589, 2004 N.C. App. LEXIS 294 (2004).

Cited in Nantahala Power & Light Co. v. Whiting Mfg. Co., 209 N.C. 560, 184 S.E. 48 (1936); Seawell v. Purvis, 232 N.C. 194, 59 S.E.2d 572 (1950); Collins v. North Carolina State Hwy. & Pub. Works Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953); Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978); Macon v. Edinger, 49 N.C. App. 624, 272 S.E.2d 411

(1980); In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); United States v. Mauney, 642 F. Supp. 1097 (W.D.N.C. 1986); Charns v. Brown, 129 N.C. App. 635, 502 S.E.2d 7, 1998 N.C. App. 668 (1998); In re Brooks, 143 N.C. App. 601, 548 S.E.2d 748, 2001 N.C. App. LEXIS 344 (2001); In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

§ 1-394. Contested special proceedings; commencement; summons.

Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall notify the defendant or defendants to appear and answer the complaint, or petition, of the plaintiff within 10 days after its service upon the defendant or defendants, and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint, or petition, within the time specified, plaintiff will apply to the court for the relief demanded in the complaint, or petition. The summons must run in the name of the State, and be dated and signed by the clerk, assistant clerk or deputy clerk of the superior court having jurisdiction in the special proceeding, and be directed to the defendant or defendants, and be delivered for service to some proper person, as defined by Rule 4(a) of the Rules of Civil Procedure. The clerk shall indicate on the summons by appropriate words that the summons is issued in a special proceeding and not in a civil action. The manner of service shall be as is prescribed for summons in civil actions by Rule 4 of the Rules of Civil Procedure: Provided, in partition proceedings under Chapter 46 of the General Statutes or where the defendant is an agency of the federal government, or an agency of the State, or a local government, or an agency of a local government, the time for filing answer or other plea shall be within 30 days after the date of service of summons or after the final determination of any motion required to be made prior to the filing of an answer. (1868-9, c. 93, s. 4; Code, ss. 279, 287; Rev., ss. 711, 712; C.S., s. 753; 1927, c. 66, s. 5; 1929, c. 50; c. 237, s. 3; 1939, c. 49, s. 2; c. 143; 1951, c. 783; 1961, c. 363; 1967, c. 954, s. 3; 1971, c. 1093, s. 17; 2009-362, s. 2.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

Effect of Amendments. — Session Laws 2009-362, s. 2, effective October 1, 2009, inserted "in partition proceedings under Chapter 46 of the General Statutes or" near the middle of the last sentence.

CASE NOTES

Some form of action or special proceeding is essential to the rendition of a judgment and in this State it must always be commenced by summons or attachment. Morris v. House, 125 N.C. 550, 34 S.E. 712 (1899).

Where a summons in a special proceeding was improperly made returnable to the superior court in term, it was proper for the judge to remand the proceeding, with directions that the summons be amended so as to make it returnable before the clerk on a day certain. Simmons v. Norfolk & Baltimore Steamboat Co., 113 N.C. 147, 18 S.E. 117 (1893).

A judgment under a service of less than 10 days, although irregular, is valid until reversed or vacated by a direct action, and cannot be collaterally attacked. Nall v. McConnell, 211 N.C. 258, 190 S.E. 210 (1937).

Allowance of Additional Time for Defendant to Appear. — When the time between service and return day of the summons is less than the time allowed by statute, the clerk is not bound to dismiss the action, but should allow further time to the defendant for an appearance. Stafford v. Gallops, 123 N.C. 19, 31 S.E. 265 (1898).

Cited in Kinney v. Laughenour, 97 N.C. 325, 2 S.E. 43 (1887); Carolina & N.W.R.R. v. Pennearden Lumber & Mfg. Co., 132 N.C. 644, 44 S.E. 358 (1903); Hartsfield v. Bryan, 177 N.C. 166, 98 S.E. 379 (1919); Green v. Chrismon, 223 N.C. 724, 28 S.E.2d 215 (1943); Burlington City Bd. of Educ. v. Allen, 243 N.C. 520, 91 S.E.2d 180 (1956); Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969); Housing Auth. v. Farabee, 284 N.C. 242, 200 S.E.2d 12 (1973); In re Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977); In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d

818 (1979); In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985); In re Brooks, 143 N.C. App. 601, 548 S.E.2d 748, 2001 N.C. App. LEXIS 344 (2001); In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

§ 1-394.1. Special proceedings to determine authority to transfer structured settlement payment rights.

When a special proceeding is commenced to obtain authorization for the transfer of structured settlement payment rights pursuant to Article 44B of this Chapter, the provisions of this Article apply except that the interested parties shall have 30 days to appear and answer the petition, and all hearings on such petitions must be conducted before a superior court judge and all final orders on such petitions must be entered by a superior court judge. (1999-367, s. 2.)

Editor's Note. — Session Laws 1999-367, s. 3, made this section effective October 1, 1999, and applicable to any transfer of structured settlement payment rights under a transfer agreement entered into on or after that date, provided that this act shall not apply to any transfer of structured settlement payment rights under a structured settlement agreement entered into or effective prior to that date where the transfer does not contravene the terms of the structured settlement. Further, s. 3 states that nothing contained herein shall imply that any transfer under a transfer agreement reached prior to October 1, 1999, is effective.

§ 1-395. Return of summons.

The person to whom the summons is delivered for service shall note on it the day of its delivery to him, and, if required by the plaintiff, shall execute it immediately. When executed, he shall immediately return the summons with the date and manner of its execution, by mail or otherwise, to the clerk of the court issuing it. (C.C.P., s. 75; Code, s. 280; Rev., s. 713; C.S., s. 754; 1967, c. 954, s. 3.)

CASE NOTES

Before Whom Summons Is Returnable. — The summons in special proceedings is returnable before the clerk. Tate v. Powe, 64 N.C. 644 (1870).

The failure of the clerk to note the summons the day it was received is irregular but does not render the summons void. Strayhorn v. Blalock, 92 N.C. 292 (1885).

Sheriff's Return Prima Facie Sufficient. — When the sheriff returns that he has "served" the summons, this is prima facie sufficient and implies that he has served it as the statute directs, until the contrary is made to appear in some proper way. Strayhorn v. Blalock, 92 N.C. 292 (1885).

Failure of Sheriff to Make Return. — While a sheriff is not required to execute process until his fees are paid or tendered by the person at whose instance the service is to be rendered, this does not excuse him for failure to make a return of the process. A writ of summons is a mandate of the court and must be obeyed by its officer, and if he has any valid excuse for not executing the writ, he must state it in his return. Jones v. Gupton, 65 N.C. 48 (1871); Johnson v. Kenneday, 70 N.C. 435 (1874).

§ 1-396. When complaint filed.

The complaint or petition of the plaintiff must be filed in the clerk's office at or before the time of the issuance of the summons, unless time for filing said complaint or petition is extended as provided by G.S. 1-398. (C.C.P., s. 76; 1876-7, c. 241, s. 4; Code, s. 281; Rev., s. 714; C.S., s. 755; 1943, c. 543.)

§ 1-397: Repealed by Session Laws 1943, c. 543.

§ 1-398. Filing time enlarged.

The time for filing the complaint, petition, or any pleading may be enlarged by the court for good cause shown by affidavit, but may not be enlarged by more than 10 additional days, nor more than once, unless the default was occasioned by accident over which the party applying had no control, or by the fraud of the opposing party. (C.C.P., s. 79; Code, s. 283; Rev., s. 716; C.S., s. 757.)

CASE NOTES

Power of Clerk After Remand. — Where an application was filed to remove an administrator, and no answer had been filed, the clerk refused the motion, and when on appeal the judge reversed the order and remanded the case, the clerk had the power to allow an answer to be filed. Patterson v. Wadsworth, 94 N.C. 538 (1886).

Cited in Pipkin v. Lassiter, 37 N.C. App. 36, 245 S.E.2d 105 (1978).

§ 1-399: Repealed by Session Laws 1999-216, s. 2, effective January 1, 2000.

Cross References. — As to appeals and transfers from the clerk of superior court to the trial courts, see G.S. 1-301.1 et seq.

§ 1-400. Ex parte; commenced by petition.

If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceedings shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded. (1868-9, c. 93; Code, s. 284; Rev., s. 718, C.S., s. 759.)

CASE NOTES

Judgment Creditors May Become Parties. — Where executor filed a proper petition for the sale of realty to pay debts, the judgment creditors interested in the surplus, desiring to contest one of the debts set out in the petition for fraud, if not made parties, could make themselves parties and proceed therein accordingly, the procedure being ex parte on the part of the executor, and an independent action by them would not lie for fraud until after final judgment in the proceedings. Wadford v. Davis, 192 N.C. 484, 135 S.E. 353 (1926).

Petition Need Not Be Verified. — It is not necessary for a petition in an ex parte proceeding to be verified. Gillikin v. Gillikin, 252 N.C. 1, 113 S.E.2d 38 (1960).

§ 1-401. Clerk acts summarily; signing by petitioners; authorization to attorney.

In cases under G.S. 1-400, if all persons to be affected by the decree or their attorney have signed the petition and are of full age, the clerk of the superior court has power to hear and decide the petition summarily. All of the petitioners must sign the petition, or must sign written application to clerk of court to be made petitioners and file same with the clerk or must sign a written authorization to the attorney which authorization must be filed with the clerk before he may make any order or decree to prejudice their rights. (1868-9, c. 93, s. 2; Code, s. 285; Rev., s. 719; C.S., s. 760; 1953, c. 246.)

CASE NOTES

All Persons Affected Must Present Ex Parte Proceeding to Clerk. — This section applies only when all persons to be affected present an ex parte proceeding to the clerk and he acts summarily. In that event, all parties must sign the petition or must sign and file with the clerk a written application to be made petitioners or a written authorization to the attorney, before the clerk may make any order or decree prejudicing their rights. In re Johnson, 9 N.C. App. 102, 176 S.E.2d 31 (1970), aff'd, 277 N.C. 688, 178 S.E.2d 470 (1971).

Effect of Failure To Join All Interested Parties. — When, in a special proceeding under which certain timber interests were sold by a commissioner, it appeared upon the face of the record that certain persons of age were not made parties or had not appeared as such in person or by attorney, and they had in no way waived their rights, they were not bound by a judgment rendered therein, and as to them the entire proceeding was void upon its face. Moore v. Rowland Lumber Co., 150 N.C. 261, 63 S.E. 953 (1909).

Written Authorization Required Only When Attorney Signs for Petitioner. — This section only requires written authorization when the attorney signs for a petitioner in the original petition. It does not apply where the original petition is signed by the parties themselves. In re Johnson, 277 N.C. 688, 178 S.E.2d 470 (1971).

§ 1-402. Judge approves when petitioner is infant.

If any petitioner is an infant, or the guardian of an infant, acting for him, no final order or judgment of the clerk, affecting the merits of the case and capable of being prejudicial to the infant, is valid, unless submitted to and approved by the judge resident or holding court in the district. (C.C.P., s. 420; 1868-9, c. 93, s. 3; Code, s. 286; 1887, c. 61; Rev., s. 720; C.S., s. 761.)

CASE NOTES

In an ex parte proceeding to sell land for assets, infant heirs are represented by a guardian or next friend, and the order must be approved by the judge. Harris v. Brown, 123 N.C. 419, 31 S.E. 877 (1897).

Administrator Acting as Guardian. — While it is irregular for the administrator to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation or elsewhere in the proceeding, such irregularity will not vitiate the title of purchaser. Harris v. Brown, 123 N.C. 419, 31 S.E. 877 (1898).

One who joins as infant in a petition is bound by the judgment, even though it is not approved by the judge of the court. Lindsay v. Beaman, 128 N.C. 189, 38 S.E. 811 (1901).

Court Presumed to Have Protected Interests of Infants. — Where the lands of infants are sold under an order of the superior court upon an ex parte petition, and the infants have been represented by next friends, it will be presumed that the court protected their interests and was careful to see that they suffered no prejudice. Tyson v. Belcher, 102 N.C. 112, 9 S.E. 634 (1889).

Effect of Irregularities on Judgment. — A judgment rendered in an ex parte proceeding approving the compromise and settlement of claims for personal injuries suffered by an infant is not void but only voidable, regardless of how irregular the proceedings may have been. It is binding until set aside by motion in the cause and is not subject to collateral attack. Gillikin v. Gillikin, 252 N.C. 1, 113 S.E.2d 38 (1960).

Cited in Ward v. Agrillo, 194 N.C. 321, 139 S.E. 451 (1927).

§ 1-403. Orders signed by judge.

Every order or judgment in a special proceeding required to be made by a judge of the superior court, in or out of session, must be authenticated by his signature. (1868-9, c. 93, s. 5; 1872-3, c. 100; Code, s. 288; Rev., s. 722; C.S., s. 762; 1971, c. 381, s. 12.)

CASE NOTES

Effect of Judgment Not Signed by Judge. — There is a plain provision in North Carolina statute law requiring every judgment granted by a judge to be signed by him. But while this statute, apparently mandatory, should always be observed, still it is held to be only directory, and a judgment passed in open court and filed with the papers as a part of the judgment roll is a valid judgment, though not signed by the judge. Rollins v. Henry, 78 N.C. 342 (1878); Matthews v. Joyce, 85 N.C. 258 (1881); Keener v. Goodson, 89 N.C. 273 (1883); Spencer v. Credle, 102 N.C. 68, 8 S.E. 901 (1889); Bond v. Wool, 113 N.C. 20, 18 S.E. 77 (1893); Wrought Iron Range Co. v. Carver, 118 N.C. 328, 24 S.E. 352 (1896).

§ 1-404. Reports of commissioners and jurors.

Every order or judgment in a special proceeding imposing a duty on commissioners or jurors must prescribe the time within which the duty must be performed, except in cases where the time is prescribed by statute. The commissioners or jurors shall within 20 days after the performance of the duty file their report with the clerk of the superior court, and if no exception is filed to it within 10 days, the court may proceed to confirm the same on motion of any party and without special notice to the other parties. (1893, c. 209; Rev., s. 723; C.S., s. 763; 1945, c. 778.)

CASE NOTES

The provisions of this section are not applicable to a condemnation proceeding, because the statutes bearing directly upon such proceeding prescribe different periods of time for the performance of the several acts enumerated. Collins v. North Carolina State Hwy. & Pub. Works Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953).

The notice provision of this section does not apply to the commissioners' report, but to the clerk's confirmation order, which should be confirmed as a matter of law if exceptions are not filed in apt time. Macon v. Edinger, 49 N.C. App. 624, 272 S.E.2d 411 (1980), rev'd on other grounds, 303 N.C. 274, 278 S.E.2d 256 (1981).

Confirmation Ordinarily Discretionary with Court. — The confirmation by the court, if no timely exception is filed to the report, lies within the discretion of the court. Ex parte Garrett, 174 N.C. 343, 93 S.E. 838 (1917).

But in partition proceedings it is obligatory for the court to confirm the same. Ex parte Garrett, 174 N.C. 343, 93 S.E. 838 (1917).

Appealability of Proceedings to Sell Land to Pay Debts of Decedent. — A proceeding to sell lands to make assets to pay the debts of the deceased, under this section, is appealable from the clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and is to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. Perry v. Perry, 179 N.C. 445, 102 S.E. 772 (1920).

Jurisdiction of Judge on Appeal. — The fact that the commissioner appointed to sell lands to make assets to pay the debts of a deceased person sold them several times under resales ordered by the clerk of the superior court, and that the clerk granted the purchaser's motion to confirm the sale after the lapse of more than 20 days from the last sale, without an advance bid until after the expiration of that time, did not affect the jurisdiction of the judge on appeal to examine into the matter and order resale upon being satisfied that justice and the rights of the parties required it. Perry v. Perry, 179 N.C. 445, 102 S.W. 772 (1920).

Power of Clerk. — The clerk has no power to confirm a sale reported by a commissioner until the expiration of 20 (now 10) days from the date on which the report was filed. Vance v. Vance, 203 N.C. 667, 166 S.E. 901 (1932).

Applied in County of Buncombe v. Arbogast, 205 N.C. 745, 172 S.E. 364 (1934).

§ 1-405. No report set aside for trivial defect.

No report or return made by any commissioners may be set aside and sent back to them or others for a new report because of any defect or omission not affecting the substantial rights of the parties, but the defect or omission may be amended by the court, or by the commissioners with permission of the court. (1868-9, c. 93, s. 7; Code, s. 289; Rev., s. 724; C.S., s. 764.)

CASE NOTES

Report Conclusive Until Set Aside. — The report of commissioners appointed to condemn lands and assess damages for the purpose of drainage is, like the verdict of a jury, conclusive of the facts therein ascertained, until set aside. Norfolk S.R.R. v. Ely, 101 N.C. 8, 7 S.E. 476 (1888).

Description of Land Unnecessary. — A report of the commissioners is not invalid because it does not contain a description. Hanes v. North Carolina R.R., 109 N.C. 490, 13 S.E. 896 (1891).

Nor is it mandatory that such report be under seal. Hanes v. North Carolina R.R., 109 N.C. 490, 13 S.E. 896 (1891).

Partition Report Set Aside. — Where commissioners' report in a partition proceeding failed to state affirmatively that the allotments in their opinion were equal in value, this omission affected the substantial rights of the parties, and the clerk or judge could set aside the report with directions, either that the commissioners make a reallotment or that others be appointed to do so. Skinner v. Carter, 108 N.C. 106, 12 S.E. 908 (1891).

§ 1-406. Commissioner of sale to account in sixty days.

In all actions or special proceedings when a person is appointed commissioner to sell real or personal property, he shall, within 60 days after the maturity of the note or bond for the balance of the purchase money of said property, or the payment of the amount of the bid when the sale is for cash, file with the clerk of the superior court a final account of his receipts and disbursements on account of the sale; and the clerk must audit the account and record it in the book in which the final settlements of executors and administrators are recorded. If any commissioner appointed in any action or special proceedings before the clerk fails, refuses or omits to file a final account as prescribed in this section, or renders an insufficient or unsatisfactory account, the clerk of the superior court shall forthwith order such commissioner to render a full and true account, as required by law, within 20 days after service of the order. Upon return of the order, duly served, if such commissioner shall fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against said commissioner for a contempt and commit him till he exhibits such account, or files a bond for the amount held or unaccounted for as is prescribed by law for administrators, the premium for which is to be deducted from the commissioner's fee, earned by said commissioner in said action or special proceeding. (1901, c. 614, ss. 1, 2; Rev., s. 725; C.S., s. 765; 1933, c. 98.)

CASE NOTES

Applied in Peal v. Martin, 207 N.C. 106, 176 S.E. 282 (1934).

§ 1-407. Commissioner holding proceeds of land sold for reinvestment to give bond.

Whenever in any cause of special proceeding there is a sale of real estate for the purpose of a reinvestment of the money arising from such sale, and the proceeds of such sale are held by a commissioner or other officer designated by the court to receive such money for purposes of reinvestment, the commissioner or officer so receiving same shall execute a good and sufficient bond, to be approved by the court, in an amount at least equal to the corpus of the fund, and payable to the State of North Carolina for the protection of the fund and the parties interested therein, and conditioned that such custodian of the money shall faithfully comply with all the orders of the court made or to be thereafter made concerning the handling and reinvestment of said funds and for the faithful and final accounting of the same to the parties interested. (1919, c. 259; C.S., s. 766; 1935, c. 45; 1957, c. 80.)

Local Modification. — Duplin: 1935, c. 45.

CASE NOTES

Where the court decrees a sale of trust property for reinvestment, the trustee should be required to give bond, or other legal provision should be made to assure the safety of the funds arising from the sale, notwithstanding that the will provides that the trustee should not be required to give bond in administering the trust, since in acting under the decree of the court the trustees act as commissioners of the court and not necessarily as trustees under the will. Blades v. Spitzer, 252 N.C. 207, 113 S.E.2d 315 (1960).

Where an order is made for the sale of timber growing upon lands affected with contingent interests, the court should also require its commissioner appointed for the sale to give bond for the preservation and proper application of the proceeds of sale, etc.; but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree. Midyette v. Lycoming Timber & Lumber Co., 185 N.C. 423, 117 S.E. 386 (1923). See also, Poole & Blue, Inc. v. Thompson, 183 N.C. 588, 112 S.E. 323 (1922).

Applied in Wachovia Bank & Trust Co. v. Johnson, 269 N.C. 701, 153 S.E.2d 449 (1967).

§ 1-407.1. Bond required to protect interest of infant or incompetent.

In the case of any sale of real estate, the court may, in its discretion, require a good and sufficient bond to protect the interests of any infant or incompetent. (1957, c. 80.)

§ 1-407.2. When court may waive bond; premium paid from fund protected.

The court, in its discretion, may waive the requirement of such bond in those cases in which the court requires the funds or proceeds from such sale to be paid by the purchaser or purchasers directly to the court. The premium for any such bond shall be paid from the corpus of the fund intended to be thereby protected. (1957, c. 80.)

§ 1-408. Action in which clerk may allow fees of commissioners; fees taxed as costs.

In a civil action or special proceeding commenced in the superior court in which a commissioner or commissioners are appointed under an order or judgment entered by the clerk of the superior court, the clerk may fix a reasonable fee for the services of the commissioner or commissioners performed under the order or judgment. The fee shall be taxed as part of the costs in the action or proceeding. Any aggrieved party has the right to appeal as provided in Article 27A of Chapter 1 of the General Statutes. (1923, c. 66; s. 1; C.S., s. 766(a); 1999-216, s. 4.)

CASE NOTES

This section sets out the proper procedure for determination of fees to be allowed court-appointed commissioners. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

In What Matters Commissioner or Receiver May Seek Redress. — A special commissioner in a chancery cause or a receiver of the court is simply an officer of the court, and as such he has no right to intermeddle in questions affecting the rights of the parties or the disposition of the property in his hands. He cannot interfere in the litigation or ask for the revision of any order or decree affecting the rights of the parties. But when his own accounts or his personal rights are affected, he has the same means of redress that any other party so affected would have. Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19 (1967).

Right of Commissioner to Review of Order Fixing Compensation. — Since the commissioner is an agent of the court and is accountable to it for his actions in connection with the discharge of his duties as commissioner, and since he is entitled to have his compensation fixed as provided by law and taxed as a part of the costs of the proceeding, he is entitled to have an order reviewed which in his opinion has fixed his compensation at less than he in good faith believes his services to be worth. Welch v. Kearns, 259 N.C. 367, 130 S.E.2d 634 (1963).

Effect of Former § 28-170. — Former G.S. 28-170 did not divest the clerk of the superior court of the powers and duties expressly committed to him by this section with respect to the fees of commissioners appointed for the sale of land as provided therein. Welch v. Kearns, 259 N.C. 367, 130 S.E.2d 634 (1963).

Applied in Welch v. Kearns, 261 N.C. 171, 134 S.E.2d 155 (1964).

OPINIONS OF ATTORNEY GENERAL

As to allowance of commissioners' fee by clerk of superior court, see opinion of Attorney General to Mr. Jacob C. Taylor, Clerk of Superior Court, Halifax, N.C., January 6, 1970.

§ 1-408.1. Clerk may order surveys in civil actions and special proceedings involving sale of land.

In civil actions and special proceedings commenced in the superior court before the clerk where real property is to be sold to make assets to pay debts, or to be sold for division, or to be partitioned, the clerk may, if all parties to the action or proceedings will benefit by a survey, order a survey of the land involved, appoint a surveyor for this purpose, and fix a reasonable fee for the services of the surveyor. The fee and other costs of the survey shall be taxed as a part of the costs in the action or proceedings. Any aggrieved party has the right to appeal as provided in Article 27A of Chapter 1 of the General Statutes. (1955, c. 373; 1999-216, s. 5.)

CASE NOTES

Definition of Boundaries in Judicial Sale of Land. — The commissioner appointed by the court to conduct a judicial sale is empowered only to sell the land and distribute the proceeds and has only such powers as may be necessary to execute the decree of the court. He therefore is not under a duty to show the boundaries of the land or the means of ingress and egress to the property, the remedy of a prospective purchaser if he wishes a survey being by motion under this section. Walton v. Cagle, 269 N.C. 177, 152 S.E.2d 312 (1967).

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

Article 34.

Arrest and Bail.

§ 1-409. Arrest only as herein prescribed.

No person may be arrested in a civil action except as prescribed by this Article, but this provision shall not apply to proceedings for contempt. (C.C.P., s. 148; Code, s. 290; Rev., s. 726; C.S., s. 767.)

Cross References. — For constitutional provision prohibiting imprisonment for debt, except in cases of fraud, see N.C. Const., Art. I, § 28. As to execution against the person, see G.S. 1-311. As to arrest in criminal actions, see G.S. 15A-401 et seq. As to persons taken in arrest and bail proceedings being entitled to insolvent debtor's oath, see G.S. 23-29.

CASE NOTES

The constitutional provision prohibiting imprisonment for debt in this State except for fraud (see now N.C. Const., Art. I, § 28) has no application to actions of tort but is confined to actions arising ex contractu. Long v. McLean, 88 N.C. 3 (1883).

The words "except in cases of fraud" are very broad, and they comprehend not only fraud in attempting to delay and defeat the collection of a debt by concealing property or other fraudulent devices, but also fraud in making the contract, such as false representations, and fraud in increasing the liabilities, such as when an administrator applies the funds of the estate of his own use, paying his own debts, and the like. Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888). See also, Melvin v. Melvin, 72 N.C. 384 (1875).

Purpose of Section. — In order to avoid a violation of the section of the Constitution prohibiting imprisonment for debt except for fraud (see now N.C. Const., Art. I, § 28) and at the same time to protect debtors, it devolved upon the legislature, in cases of fraud, to enact such laws as were necessary, in its discretion, for arrest and imprisonment in proper cases, and to provide for all necessary proceedings in relation thereto. This was done in this and the following sections. Preiss v. Cohen, 117 N.C. 54, 23 S.E. 162 (1895).

Applicability of § 23-13. — Parties arrested and in custody pursuant to the provisions contained in this and the following sections, if the order of arrest is not vacated "on motion," must seek their discharge in the mode prescribed in G.S. 23-13. Wingo v. Watson, 98 N.C. 482, 4 S.E. 463 (1887); Preiss v. Cohen, 117 N.C. 54, 23 S.E. 162 (1895).

Where a partnership has terminated and all debts have been paid and the partnership affairs have been otherwise adjusted, or where the partnership was for a single venture or special purpose which has been closed, and nothing remains but to pay over the amount due, in either case an action will lie in favor of one partner against the other, and if the facts bring the claim within the provisions of this Article on arrest and bail, the plaintiff is entitled to this ancillary remedy. Ledford v. Emerson, 140 N.C. 288, 52 S.E. 641 (1905).

Renewal of Motion Where Judgment of Nonsuit Reversed. — Where there was a motion for an order of arrest and bail under this section, and a judgment of nonsuit was reversed, the motion could be renewed. Hensley v. Helvenston, 189 N.C. 636, 127 S.E. 625 (1925).

For definition of arrest, see Journey v. Sharpe, 49 N.C. 165 (1856); State ex rel. Lawrence v. Buxton, 102 N.C. 129, 8 S.E. 774 (1889); Hadley v. Tinnin, 170 N.C. 84, 86 S.E. 1017 (1915).

Cited in Ledford v. Smith, 212 N.C. 447, 193 S.E. 722 (1937); Brannon v. Wood, 239 N.C. 112, 79 S.E.2d 256 (1953); Reverie Lingerie, Inc. v. McCain, 258 N.C. 353, 128 S.E.2d 835 (1963); Earnhardt v. Earnhardt, 9 N.C. App. 213, 175 S.E.2d 744 (1970); Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977); State v. Hewson, 88 N.C. App. 128, 362 S.E.2d 574 (1987).

§ 1-410. In what cases arrest allowed.

The defendant may be arrested, as hereinafter prescribed, in the following cases:

(1) In an action for the recovery of damages on a cause of action not arising out of contract where the action is for willful, wanton, or malicious injury to person or character or for willfully, wantonly or maliciously injuring, taking, detaining, or converting real or personal property.

(2) In an action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

(3) In an action to recover the possession of personal property, unjustly detained, where all or any part of the property has been concealed, removed, or disposed of, so that it cannot be found or taken by the

sheriff and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

(4) When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

(5) When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors. The term "creditors" shall include, but not by way of limitation, a dependent spouse who claims alimony. The term "creditors" shall include, but not by way of limitation, a minor child entitled to an order for support. (1777, c. 118, s. 6, P.R.; R.C., c. 31, s. 54; C.C.P., s. 149; 1869-70, c. 79; Code, s. 291; 1891, c. 541; Rev., s. 737; C.S., s. 768; 1943, c. 543; 1961, c. 82; 1967, c. 1153, ss. 4, 6.)

Cross References. — For constitutional provision prohibiting imprisonment for debt, except in cases of fraud, see N.C. Const., Art. I, § 28. As to execution against the person, see G.S. 1-311.

Legal Periodicals. — For survey of 1980 tort law, see 59 N.C.L. Rev. 1239 (1981).

CASE NOTES

Purpose of Section. — This section is plain and very comprehensive in its terms and purpose. It is intended to embrace all cases where the relation of trust and confidence in respect to money received by or personal property in the possession of one party for the benefit of another is raised and exists between such parties by reason of their mutual contract, express or implied. The purpose is to give the more efficient remedy where the cause of action involves a breach of trust on the part of the defendant sustaining a fiduciary relation to the plaintiff. Chemical Co. v. Johnson, 98 N.C. 123, 3 S.E. 723 (1887); Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888); Travers v. Deaton, 107 N.C. 500, 12 S.E. 373 (1890); Boykin, Carmer & Co. v. W.J. Maddrey & Son, 114 N.C. 89, 19 S.E. 106 (1894).

Remedy of Arrest and Bail. — The section gives to a plaintiff whose money or property has been put beyond his reach by his agent or trustee by an act in violation of his duty the remedy of arrest and bail, so that he may the better compel his unfaithful agent or trustee to make amends for his unfaithfulness. And it "turns a deaf ear" to one who would excuse himself by asserting that he did not mean to do wrong when consciously doing that which was breach of the trust reposed in him, or by alleging that he honestly believed that he would be able to replace the misapplied funds, so that no loss would eventually come to the plaintiff. Boykin, Carmer & Co. v. W.J. Maddrey & Son, 114 N.C. 89, 19 S.E. 106 (1894).

Effect on Right to Execution Against Person. — An essential prerequisite to plaintiff's right to body execution is that, where there has not already been a lawful arrest under this section, the complaint or affidavit must allege such facts as would have justified an order for such arrest. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Execution Against Person for Cause Specified in Subdivision (1). — Where a judgment is rendered against a defendant for a cause of action specified in subdivision (1) of this section, G.S. 1-311 authorizes an execution against the person of the judgment debtor after the return of an execution against his property wholly or partly unsatisfied. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964); Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

Applicability of § 23-29. — The provisions of G.S. 23-29(2) are broad and strong, and plainly extend to and embrace every person who may be arrested by virtue of an order of arrest issued pursuant to the provisions of this section, and also extend to and embrace every person who has been seized by virtue of an execution against his person by authority of the provisions of G.S. 1-311. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Punitive Damages. — For acts under subdivision (1) of this section when a cause of action is properly alleged and proved and at least nominal damages are recovered by the plaintiff, a jury in its discretion can award punitive damages. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Award of Punitive Damages Not Sufficient. — Under the present language of G.S.

1-311, an award of punitive damages in a cause of action specified under this section, alone, does not give rise to execution against the person. Leonard v. Williams, 100 N.C. App. 512, 397 S.E.2d 321 (1990).

When Actual Intent Unnecessary for Arrest for "Willful Injury". — For the arrest of a woman under the provisions of this section for "willful injury," etc., an actual intent is not necessary if the defendant's negligence is so gross as to manifest a reckless indifference to the rights of others. Weathers v. Baldwin, 183 N.C. 276, 183 N.C. 279, 111 S.E. 183, 111 S.E. 183 (1922).

Mere Negligence Insufficient to Authorize Execution Against Person. — A judgment that execution issue against the person of the defendant cannot be sustained upon the mere finding that the defendant negligently injured the plaintiff's property; in order to justify such execution under this section and G.S. 1-311, the injury must have been intentionally or maliciously inflicted, i.e., with some element of violence, fraud or criminality. Oakley v. Lasater, 172 N.C. 96, 89 S.E. 1063 (1916).

Necessity of Allegation of Actual Malice in Malpractice Action. — In an action to recover for malpractice of defendant, execution against the person of defendant may not issue in the absence of allegation and evidence of actual malice. Olinger v. Camp, 215 N.C. 340, 1 S.E.2d 870 (1939).

Fraud Necessary for Arrest Under This Section. — A defendant cannot be arrested under this section unless he has been guilty of fraud in contracting the debt for which the action is brought. McNeely v. Haynes, 76 N.C. 122 (1877).

Application of Section to Subsequent Fraud. — A person may be arrested and held to bail for a fraud committed after the contracting of the debt, e.g., by concealing property or other devices for the purpose of defeating his creditor. Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888).

Act Held to Constitute Fraud. — A party's activities in adding "payment in full" language to a check after it had been cashed by another party, and then attempting to use the check to defeat the other party's claim, constituted fraud within the intent of subdivision (4) of this section and within N.C. Const. Art. I, § 28, the North Carolina constitutional exception permitting imprisonment in case of fraud. Koury v. Meyer, 44 N.C. App. 392, 261 S.E.2d 217, cert. denied, 299 N.C. 736, 267 S.E.2d 662 (1980).

Allegation in Complaint of Facts Necessary to Support Provisional Remedy. — In an action for assault and battery, in which the provisional remedy of arrest and bail was invoked, it was appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. Long v. Love, 230 N.C. 535, 53 S.E.2d 661 (1949).

One who fraudulently conveys property held by him as trustee can be legally arrested under this section. Durham Fertilizer Co. v. L.M. Little & Co., 118 N.C. 808, 24 S.E. 664 (1896).

An agent in an action for money received or property fraudulently misapplied, may be arrested under the provisions of this section. Gossler v. Wood, 120 N.C. 69, 27 S.E. 33 (1897).

Wrongful Conversion by Cotenant. — Where a cotenant wrongfully converted a race horse, by selling it while in his possession, he was liable to arrest under this section. Doyle v. Bush, 171 N.C. 10, 86 S.E. 165 (1915).

Fraudulent Misapplication of Funds. — An insolvent defendant may be arrested in a civil action for money received and fraudulently misapplied. Carroll v. Montgomery, 128 N.C. 278, 38 S.E. 874 (1901).

Where a firm of merchants gave to manufacturers of fertilizer its note for a consignment of goods, agreeing to hold such goods or the proceeds of the sale thereof or the notes of farmers given therefor in trust for the manufacturers, a fiduciary relation was established, and a violation of the contract was a breach of trust for which, upon proper affidavits and the required undertaking, an order of arrest could be obtained. Boykin, Carmer & Co. v. W.J. Maddrey & Son, 114 N.C. 89, 19 S.E. 106 (1894).

One who fraudulently conveys his real estate with intent to defeat his creditors can be legally arrested under this section. Durham Fertilizer, Co. v. L.M. Little & Co., 118 N.C. 808, 24 S.E. 664 (1896).

Libel. — An arrest in an action for libel is not within the provisions of the Constitution prohibiting imprisonment for debt. Moore v. Green, 73 N.C. 394 (1875).

Seduction. — The seduction of a daughter, being an infringement of the father's relative rights of persons, is an injury to his person within the meaning of this section, and a sufficient ground for the arrest of the defendant in an action for such tort. Hoover v. Palmer, 80 N.C. 313 (1879). See also, Kinney v. Laughenour, 97 N.C. 325, 2 S.E. 43 (1887); Hood v. Sudderth, 111 N.C. 215, 16 S.E. 397 (1892).

An action for seduction may be brought under this section by the woman seduced, and an order for the arrest of the defendant may be granted in such action. Hood v. Sudderth, 111 N.C. 215, 16 S.E. 397 (1892).

Alienation of Affections. — This section applies to arrest for alienating the affections of a wife. Edwards v. Sorrell, 150 N.C. 712, 64 S.E. 898 (1909).

Liability for Acts of Partner. — Where members of a firm assume a fiduciary relation as to property committed to them, and a misappropriation is made by one partner with the knowledge, connivance or assent of the other, the intent of the latter to commit a breach of trust is conclusively presumed, from such knowledge and acts for all the purposes of arrest and bail. Boykin, Carmer & Co. v. W.J. Maddrey & Son, 114 N.C. 89, 19 S.E. 106 (1894).

One partner cannot be arrested for the fraud of his copartner of which he had no knowledge and in which he in nowise connived. McNeely v. Haynes, 76 N.C. 122 (1877); Boykin, Carmer & Co. v. W.J. Maddrey & Son, 114 N.C. 89, 19 S.E. 106 (1894).

Fraud Committed in Another State. — The fact that the fraud for which the defendant was arrested was committed in another state is no ground for immunity from arrest under this section. Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888).

Liability of Nonresident. — A nonresident of this State may be arrested and held to bail for fraud under this section. Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888).

As to applicability to real estate of the words "removed, or disposed of," see Durham Fertilizer Co. v. L.M. Little & Co., 118 N.C. 808, 24 S.E. 664 (1896).

Arrest Held Impermissible Where No Action Was Pending. — Where plaintiff brought an action against defendant, setting out two causes of action, one on a note and the other for embezzlement, and judgment was rendered on the note by default but no judgment was entered upon the other cause, and it was removed from the docket, no order of arrest was permissible under this section, since there was no action pending wherein the allegations of fraud in the complaint, used as an affidavit, could authorize a warrant of arrest. Stewart v. Bryant, 121 N.C. 46, 28 S.E. 18 (1897).

Nature of Contract Action Not Affected. — Where, in an action on contract, the plaintiff alleges fraud and deceit on the part of the defendant and sues out the ancillary process of arrest and bail, this does not change the nature of the contract action. Copeland v. Fowler, 151 N.C. 353, 66 S.E. 215 (1909).

Arrest on Sunday. — For case holding that there can be no arrest on Sunday, see White v. Morris, 107 N.C. 92, 12 S.E. 80 (1890).

Privilege Against Self-Incrimination Inapplicable Where Remedy Under This Section Is Relinquished. — In an action for malicious assault, if plaintiff seeks merely compensatory damages, and relinquishes all claim to punish defendants by punitive damages and to arrest them by virtue of subdivision (1) of this section and to issue an execution against their persons by virtue of the provisions of G.S. 1-311, defendants' claim of privilege against self-incrimination does not apply. Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964).

Applied in Edwards v. Jenkins, 247 N.C. 565, 101 S.E.2d 410 (1958); Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702 (1975); Windham Distrib. Co. v. Davis, 72 N.C. App. 179, 323 S.E.2d 506 (1984).

Cited in Sneeden v. Harris, 109 N.C. 349, 13 S.E. 920 (1891); Howie v. Spittle, 156 N.C. 180, 72 S.E. 207 (1911); Michael v. Leach, 166 N.C. 223, 81 S.E. 760 (1914); In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968); Rouse v. Wheeler, 17 N.C. App. 422, 194 S.E.2d 555 (1973); Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C. 1977); Gunn v. Hess, 90 N.C. App. 131, 367 S.E.2d 399 (1988).

§ 1-411. Order and affidavit.

An order for the arrest of the defendant must be obtained from the court in which the action is brought or a judge thereof, and may be made where it appears to the court or judge, by affidavit of the plaintiff or of any other person, that a sufficient cause of action exists and that the case is one of those provided for in this Article. (C.C.P., ss. 150, 151; Code, ss. 292, 293; Rev., ss. 728, 729; C.S., s. 769.)

CASE NOTES

An order of arrest under this section is a judicial and not ministerial proceeding, in the issuance of which the judge and the clerk have concurrent jurisdiction. Bryan v. Stewart, 123 N.C. 92, 31 S.E. 286 (1898).

From What Court Order of Arrest Must Proceed. — The order of arrest must proceed from the court in which the action is brought or from a judge thereof. H.M. Houston & Co. v. Walsh, 79 N.C. 35 (1878).

An order of arrest granted by a court having jurisdiction is not void. It may be erroneous if issued upon an insufficient affidavit. Tucker v. Davis, 77 N.C. 330 (1877).

The grounds for arrest are usually set forth in an affidavit by the plaintiff, or any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in G.S. 1-410. Roulhac v. Brown, 87 N.C. 1 (1882).

But the cause of arrest may be stated in the complaint; however, the statement must be as explicit as if set forth in an affidavit and properly verified. Peebles v. Foote, 83 N.C. 102 (1880).

Positive Statement of Facts Desirable. — The affidavit should state the facts positively, when this can be done. Peebles v. Foote, 83 N.C. 102 (1880); Harriss v. Sneeden, 101 N.C. 273, 7 S.E. 801 (1888).

Grounds of Belief Should Be Stated. — If the affidavit states certain things which the party believes are about to be done, then the grounds of belief must be stated in order that the court may judge of the reasonableness thereof. Peebles v. Foote, 83 N.C. 102 (1880).

General Rumor Not Enough. — Mere general rumor that a person indebted has removed to another state is not sufficient to justify his creditor in suing out a warrant for his arrest. There should be such evidence as would induce a reasonable man to believe that the facts existed upon which he based his application. Tucker v. Wilkins, 105 N.C. 272, 11 S.E. 575 (1890).

Court Must Be Convinced. — It is not sufficient that the cause of action may exist; this must not be left to conjecture or bare probability. The court must be satisfied from the evidence before it that a cause does exist. Harriss v. Sneeden, 101 N.C. 273, 7 S.E. 801 (1888).

Sufficiency of Affidavit as Question of Law. — The question of the sufficiency of the affidavit is one of law, addressed to the court alone. Wood v. Harrell, 74 N.C. 338 (1876).

Affidavit Held Sufficient. — In an action for arrest and bail, where the affidavit of the plaintiff alleged the existence of a cause of action and the fraud committed by defendants in contracting the debt, and, upon information and belief, that they had fraudulently removed and disposed of their property, this was sufficient to justify the order of arrest. Paige v. Price, 78 N.C. 10 (1878).

Where the affidavit upon which an order of arrest and attachment was obtained was as follows: "That the said P. has disposed of and secreted his property with intent to defraud his creditors," this was held to be sufficient. Hughes v. Person, 63 N.C. 548 (1869).

Insufficient Affidavit. — An affidavit for arrest of an administrator who has been charged with assets to a certain amount is not sufficient if it does not show fraud in the misapplication of the funds by an administrator. Melvin v. Melvin, 72 N.C. 384 (1875).

Refusal to allow a second affidavit to be filed is an exercise of discretion, which cannot be reviewed upon appeal; the plaintiff might have filed a second sufficient affidavit immediately, and obtained a second warrant of arrest. Wilson v. Barnhill, 64 N.C. 121 (1870).

§ 1-412. Undertaking before order.

Before making the order the court or judge shall require a written undertaking on the part of the plaintiff of at least one hundred dollars ($100.00), with sufficient surety, payable to the defendant, to the effect that if the defendant recovers judgment the plaintiff will pay all damages which he sustains by reason of the arrest, not exceeding the sum specified in the undertaking. (C.C.P., s. 152; 1868-9, c. 277, s. 7; Code, s. 294; Rev., s. 730; C.S., s. 770.)

Cross References. — As to giving the bond of a surety company as surety, see G.S. 58-73-5.

CASE NOTES

Application to Suits in Forma Pauperis. — A plaintiff who is allowed to sue in forma pauperis has no right to an order of arrest, without first filing the undertaking required by this section. Rowark v. Homesley, 68 N.C. 91 (1873).

Power to Increase or Diminish Bond. — The trial court has the power to increase or diminish the bond, and an order increasing the bond cannot be questioned unless an abuse of discretion is shown. Fayetteville Light & Power Co. v. Lessem Co., 174 N.C. 358, 93 S.E. 836 (1917).

Amount of Bond Not Subject to Review. — The discretion of the court in fixing the amount of the bond is not subject to review. Fayetteville Light & Power Co. v. Lessem Co., 174 N.C. 358, 93 S.E. 836 (1917).

Cited in Edwards v. Jenkins, 247 N.C. 565, 101 S.E.2d 410 (1958).

§ 1-413. Issuance and form of order.

The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a place and time therein mentioned to the clerk of the court in which the action is brought. Notice of the return must be served on the plaintiff or his attorney as prescribed by law for the service of other notices. The order shall include a statement that if the person arrested is an indigent person he is entitled to services of counsel under G.S. 7A-451, that he may petition for preliminary release on the basis of his indigency, that if he does so he will have an opportunity within 72 hours to suggest to a judge his indigency for purposes of appointment of counsel and preliminary release, and that the judge will thereupon immediately appoint counsel for him if it is adjudged that he is unable to pay a lawyer. Appointment of counsel shall be in accordance with rules adopted by the Office of Indigent Defense Services. (C.C.P., s. 153; Code, s. 295; Rev., s. 731; C.S., s. 771; 1977, c. 649, s. 3; 2000-144, s. 15.)

Cross References. — As to execution against the person of a debtor after judgment, see G.S. 1-311. For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

CASE NOTES

The words "before judgment," as used in this section, mean "final judgment" upon the matters put in issue by the pleadings. Hence, the judgment rendered for the debt simply, in an action in which there are allegations of fraud, does not interfere with the rights of the parties in the matters in dispute on the question of fraud, if properly prosecuted. H.M. Houston & Co. v. Walsh, 79 N.C. 35 (1878); Preiss v. Cohen, 117 N.C. 54, 23 S.E. 162 (1895).

Exemption of Suitor Attending Court. — The principle of the common law that a suitor, while going to, remaining at and returning home from court, is exempted from arrest is in force in this State. Hammerskold v. Rose, 52 N.C. 629 (1860).

Exemption of Nonresident Attending as Witness. — A citizen of another state, while voluntarily attending court as a witness, is privileged from arrest in a civil case. Ballinger v. Elliott, 72 N.C. 596 (1875).

No Exemption of Defendant Under Criminal Process. — A defendant who has been brought into court on criminal process and discharged from arrest under the same on bail is not privileged from being arrested on civil process immediately afterwards, during the sitting of the court and before he leaves the courtroom. Moore v. Green, 73 N.C. 394 (1875).

The exemption of witnesses and jurors from civil arrest and of nonresident parties and witnesses voluntarily attending court here, on grounds of public policy, does not apply to parties arrested in criminal proceeding. White v. Underwood, 125 N.C. 25, 34 S.E. 104 (1899).

Service of Process on Prisoner in Jail. — The sheriff can serve process anywhere in his county. The jail possesses no "privilege of sanctuary" and service of process under a prisoner there is valid. White v. Underwood, 125 N.C. 25, 34 S.E. 104 (1899).

Written Warrant Necessary. — For the benefit of the citizen, that he may at all times be able to call upon the officers to produce authority, and to see precisely what it was, the law established the necessity of a written warrant. Lutterloh v. Powell, 2 N.C. 395 (1796).

Cited in Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888).

§ 1-414. Copies of affidavit and order to defendant.

The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy thereof. (C.C.P., s. 154; Code, s. 296; Rev., s. 732; C.S., s. 772.)

§ 1-415. Execution of order.

The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law. The sheriff may call the power of the county to his aid in the execution of the arrest. (C.C.P., s. 155; Code, s. 297; Rev., s. 733; C.S., s. 773.)

§ 1-416. Vacation of order for failure to serve.

The order of arrest is of no avail, and shall be vacated or set aside on motion, unless it is served upon the defendant, as provided by law, before the docketing of any judgment in the action. (C.C.P., s. 153; Code, s. 295; Rev., s. 734; C.S., s. 774.)

CASE NOTES

An order of arrest issued after final judgment is illegal and void. H.M. Houston & Co. v. Walsh, 79 N.C. 35 (1878).

§ 1-417. Motion to vacate order; jury trial.

A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. He may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the plaintiff's affidavit and the defendant's denial be submitted to the jury and tried in the same manner as other issues. If the issues are found by the jury in favor of the defendant, judgment shall be rendered discharging him from arrest and vacating the order of arrest, and he shall recover of the plaintiff all costs of the proceeding in such arrest incurred by him in defending the action. (C.C.P., s. 174; Code, s. 316; 1889, c. 497; Rev., s. 735; C.S., s. 775.)

CASE NOTES

Construction of Sections Together. — This section and G.S. 1-419 and 23-29 et seq., prescribing the methods by which a prisoner may be discharged in certain instances before final judgment, should be construed together; and, when so construed, the remedies given in G.S. 23-29 et seq. are in addition to those given in this section and G.S. 1-419. Edward v. Sorrell, 150 N.C. 712, 64 S.E. 898 (1909).

Surety on bail has no standing to object to the arrest or summary judgment against the defendant. Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

Motion to Vacate Must Be Made Before Judgment. — A motion to vacate the order of arrest can only be made before judgment. And where such a motion has been once refused, and no appeal is taken, the matter is res adjudicata and a similar motion will not be entertained. Roulhac v. Brown, 87 N.C. 1 (1882).

Where Motion May Be Heard. — A motion to vacate an order of arrest may be heard by a judge out of court anywhere within the district that his duties require him to be during the time in which he is assigned to the district. Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893). See also, Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897).

Clerk May Hear Motion. — It is perfectly regular to move to vacate before the clerk and appeal from his ruling to the judge. Roulhac v. Brown, 87 N.C. 1 (1882).

But Party May Elect to Apply to Judge. — As the clerk might be dilatory in acting, the party has his election to proceed more summarily by applying in the first instance to the judge. Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893).

New Matter Not to Be Considered. — The validity of an order of arrest and warrant of attachment is determined upon facts alleged in the original affidavit and existing at the time when the proceeding was instituted, and not upon new matter which may have afterwards transpired. Wm. Devries & Co. v. Summit, 86 N.C. 126 (1882).

A party under arrest in a civil action, moving to vacate the order upon affidavits submitted to the court, is not entitled to a trial by jury upon the questions of fact raised. Wingo v. Watson, 98 N.C. 482, 4 S.E. 463 (1887).

Remand for Jury Trial. — If the defendant demanded the jury trial permitted by this section, the judge would have been compelled to remand the motion to vacate to the county where the action was pending, that the issues so arising might be tried at the first term of court. Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893).

Irregular or False Order Will Be Vacated. — An order of arrest will be vacated by a judge without any undertaking by the defendant if on its face it appears to have been issued irregularly or for a cause insufficient in law or false in fact. Bear v. Cohen, 65 N.C. 511 (1871).

Vacation of Order Held Erroneous. — Where an order of arrest was made upon an invalid affidavit, and a counter affidavit was filed by the defendant, and a supplemental affidavit was filed by the plaintiff, which was duly verified, it was held that the judge below erred in vacating the order. Benedict, Hall & Co. v. Hall, 76 N.C. 113 (1877).

Rendition of judgment prior to hearing is not reversible error. Allison v. Maddrey, 114 N.C. 421, 19 S.E. 646 (1894).

Effect of Prior Acquittal in Another State. — It is no ground for vacating an order of arrest that the defendant had been indicted, tried and acquitted by the courts of another state upon the same charge. Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888).

Right to Appeal Order Vacating Order of Arrest. — An order vacating an order of arrest "affect a substantial right claimed," and hence an appeal from such order lies. Raisin Fertilizer Co. v. Grubbs, 114 N.C. 470, 19 S.E. 597 (1894).

Effect of Pending Appeal on Order of Arrest. — An appeal from the judgment of a justice of the peace discharging one who has been arrested in a civil action vacates the judgment, and the order of arrest continues in force pending the appeal. Patton v. Gash, 99 N.C. 280, 6 S.E. 193 (1888).

Finality of Lower Court's Findings of Fact. — In arrest and bail proceedings, where a motion is made by the defendant to vacate the order of arrest and the court finds that the facts are sufficient to sustain the order, the findings of fact by the court below are final, and will not be reviewed unless it is objected properly that there was no evidence to support them. Harriss v. Sneeden, 101 N.C. 273, 7 S.E. 801 (1888); Travers v. Deaton, 107 N.C. 500, 12 S.E. 373 (1890); Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893).

Where, in the hearing of a motion to vacate an order of arrest, the judge finds as a fact that the act upon which it was based was not committed, the finding is final and cannot be reviewed. Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893).

Procuring Reduction of Bail Held to Constitute General Appearance. — When a consent order authorizing the reduction of bail, as authorized in this section, was signed, defendants invoked the power of the court in their behalf and for their benefit, which constituted a general appearance and waived any defect in connection with the service of process. Reverie Lingerie, Inc. v. McCain, 258 N.C. 353, 128 S.E.2d 835 (1963).

§ 1-418. Counter affidavits by plaintiff.

If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proof, in addition to those on which the order of arrest was made. (C.C.P., s. 175; Code, s. 317; Rev., s. 736; C.S., s. 776.)

CASE NOTES

Simple Denial Insufficient. — If the order was properly granted, it ought not to be vacated upon simple denial of the alleged cause of action; but where the answer or counter affidavits meet the allegations of the plaintiff fully and in detail, and furnish convincing evidence of their truth, the order should be vacated. Harriss v. Sneeden, 101 N.C. 273, 7 S.E. 801 (1888).

Facts Must Be Fully Controverted. — When one who has been arrested moves to vacate the order of arrest upon counter affidavits, purporting to meet the facts alleged against him, he should do so fully and clearly; otherwise, the order of arrest will be continued. Powers v. Davenport, 101 N.C. 286, 7 S.E. 747 (1888).

Additional Evidence. — Where the defendant moves to vacate the order upon the ground that it was irregularly or improvidently granted, the plaintiff will not be allowed to offer additional evidence in support of his application; but if the defendant moves to vacate upon counter proofs, the plaintiff may produce further evidence. Harriss v. Sneeden, 101 N.C. 273, 7 S.E. 801 (1888).

§ 1-419. How defendant discharged.

The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this article. (C.C.P., s. 156; Code, s. 298; Rev., s. 737; C.S., s. 777.)

CASE NOTES

Applicability of §§ 23-29 Through 23-42 to Nonresidents. — Where nonresidents are arrested under the provisions of this Article, they are entitled to the benefit of G.S. 23-29 through 23-42, relating to insolvent debtors, in securing their discharge. Burgwyn v. Hall, 108 N.C. 489, 13 S.E. 222 (1891).

Applied in Fryar v. Gauldin, 259 N.C. 391, 130 S.E.2d 689 (1963).

§ 1-420. Defendant's undertaking.

The defendant may give bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety to the effect that the defendant shall at all times render himself amendable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he is arrested in an action to recover the possession of personal property unjustly claimed, an undertaking to the same effect as that provided by law to be given by defendant for the retention of property, under the Article entitled Claim and Delivery. (C.C.P., s. 157; Code, s. 299; Rev., s. 738; C.S., s. 778.)

Editor's Note. — The reference in this section to "the Article entitled Claim and Delivery" was apparently meant to refer to Article 36 of this Chapter. See G.S. 1-472 et seq.

CASE NOTES

The word "amenable," as used in this section, means "answerable" or "responsive" to the process of the court having jurisdiction; hence, when execution is issued against the person of the debtor, it is his duty to surrender himself, or of the obligors on the bond to do so, and a failure constitutes a breach of the obligation. Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

Voluntary Appearance. — The condition of the undertaking that the defendant shall, at all times during the pendency of the action, render himself amenable to the process of the court is met when the defendant voluntarily appears in court upon the hearing of the motion against his surety. Stepp v. Robinson, 203 N.C. 803, 167 S.E. 147 (1933).

Applied in Fryar v. Gauldin, 259 N.C. 391, 130 S.E.2d 689 (1963).

Cited in Capune v. Robbins, 273 N.C. 581, 160 S.E.2d 881 (1968).

§ 1-421. Defendant's undertaking delivered to clerk; exception.

Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the clerk of the court in which the suit is brought, with his return endorsed, and a certified copy of the undertaking of the bail, and notify the plaintiff or his attorney thereof. The plaintiff, within 10 days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted it and the sheriff is exonerated from the liability. (C.C.P., s. 162; Code, s. 304; Rev., s. 739; C.S., s. 779.)

§ 1-422. Notice of justification; new bail.

On the receipt of notice of exception to the bail, the sheriff or defendant may, within 10 days thereafter, give to the plaintiff or his attorney notice of the justification of the same or other bondsmen (specifying the places of residence and occupation of the latter) before the court or judge, at a specified time and place; the time to be not less than five nor more than 10 days thereafter. In case other bondsmen are given, there must be a new bond, in the form hereinbefore prescribed. (C.C.P., s. 163; Code, s. 305; Rev., s. 741; C.S., s. 780; 1971, c. 268, s. 26.)

§ 1-423. Qualifications of bail.

The qualifications of bail must be as follows:

(1) Each of them must be a resident and freeholder within the State

(2) They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification is equivalent to that of two sufficient bail. (C.C.P., s. 164; Code, s. 306; Rev., s. 740; C.S., s. 781.)

CASE NOTES

Establishment of Facts. — A bail bond should show on its face that the surety is a resident and freeholder within the State, or his justification should establish these facts. Howell v. Jones, 113 N.C. 429, 18 S.E. 672 (1893).

§ 1-424. Justification of bail.

For the purpose of justification, each of the bail shall attend before the court or judge, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the court, or judge, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff. (C.C.P., s. 165; Code, s. 307; Rev., s. 742; C.S., s. 782; 1971, c. 268, s. 27.)

§ 1-425. Allowance of bail.

If the court or judge finds the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is then exonerated from liability. (C.C.P., s. 166; Code, s. 308; Rev., s. 743; C.S., s. 783; 1971, c. 268, s. 28.)

CASE NOTES

Purpose of Bail. — The main object of a bail bond taken to release the prisoner from custody in arrest and bail is to secure his presence to answer the process of the court, and for this purpose, to keep him within its jurisdiction, and not merely to obtain money upon his default. Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

§ 1-426. Deposit in lieu of bail.

The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall then give a certificate of the deposit to the defendant, who shall be discharged from custody. (C.C.P., s. 167; Code, s. 309; Rev., s. 744; C.S., s. 784.)

§ 1-427. Deposit paid into court; liability on sheriff's bond.

Within four days after the deposit the sheriff must pay it into court, and take from the officer receiving it two certificates of such payment, one of which he must deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency. (C.C.P., s. 168; Code, s. 310; Rev., s. 745; C.S., s. 785.)

Cross References. — As to payment by sheriff of money collected on execution, see G.S. 162-18.

§ 1-428. Bail substituted for deposit.

If money is deposited, as provided in G.S. 1-426 and 1-427, bail may be given and justified upon notice according to law at any time before judgment. Thereupon the court or judge shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly. (C.C.P., s. 169; Code, s. 311; Rev., s. 746; C.S., s. 786; 1971, c. 268, s. 29.)

§ 1-429. Deposit applied to plaintiff's judgment.

When money has been deposited, and remains on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk or other officer shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment shall refund any surplus to the defendant. If the judgment is in favor of the defendant the clerk or other officer shall refund to him the whole sum deposited and remaining unapplied. (C.C.P., s. 170; Code, s. 312; Rev., s. 747; C.S., s. 787.)

§ 1-430. Defendant in jail, sheriff may take bail.

If a person for want of bail is lawfully committed to jail, at any time before final judgment, the sheriff, or other officer having him in custody, may take bail and discharge him; and the bail bond shall be regarded in every respect as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken. (R.C., c. 11; s. 8; Code, s. 318; Rev., s. 748; C.S., s. 788.)

§ 1-431. When sheriff liable as bail.

If, after arrest, the defendant escapes, or is rescued, or bail is not given or justified, or a deposit is not made instead thereof, the sheriff is himself liable as bail. But he may discharge himself from such liability by the giving and justification of bail at any time before process against the person of the defendant to enforce an order or judgment in the action. (C.C.P., s. 171; Code, s. 313; Rev., s. 749; C.S., s. 789.)

CASE NOTES

Liability of Sheriff as Special Bail. — A sheriff who accepts an insufficient undertaking in arrest and bail proceedings, or who, after exceptions filed thereto by the plaintiff, fails to give notice of the time when and the place where the bail will justify, is liable as special bail to the plaintiff, and he will not be exonerated from liability by the fact that he acted in good faith in taking the insufficient bond, or by the fact that the plaintiff was nearby and knew what was going on when an alleged justification was being made by the surety. Howell v. Jones, 113 N.C. 429, 18 S.E. 672 (1893).

Liability for Escape of Prisoner. — A sheriff who permitted one arrested by him upon mesne process in a civil action to go into an adjoining room, from which he escaped, subjected himself to the liability as bail. Winborne & Bro. v. Mitchell, 111 N.C. 13, 15 S.E. 882 (1892).

Defendant's Insolvency Immaterial. — When the sheriff is sued as bail, he cannot give in evidence, in mitigation of damages, the defendant's insolvency. Winborne & Bro. v. Mitchell, 111 N.C. 13, 15 S.E. 882 (1892).

Defective Bond Does Not Satisfy Section. — A paper intended as a bail bond, which is so defective and imperfect as to be adjudged not to be such, cannot be regarded as the taking of bail. Adams v. Jones, 60 N.C. 198 (1864).

No Right to Rearrest on Finding Bail Insufficient. — After once taking the bail, the sheriff, on finding the bail to be insufficient, has no right to rearrest the defendant, and the defendant in such a case is justified in resisting the arrest. State v. Brittain, 25 N.C. 17 (1842); State v. Queen, 66 N.C. 615 (1872).

Notice and Exceptions Unnecessary. — If the sheriff fails to take bail, the plaintiff need not file exceptions nor give notice to fix him as bail. Adams v. Jones, 60 N.C. 198 (1864).

§ 1-432. Action on sheriff's bond.

If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency. (C.C.P., s. 172; Code, s. 314; Rev., s. 750; C.S., s. 790.)

§ 1-433. Bail exonerated.

At any time before final judgment against them, the bail may be exonerated, either by the death of the defendant or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution of the judgment. (C.C.P., s. 161; Code, s. 303; Rev., s. 751; C.S., s. 791.)

CASE NOTES

Defendant may be legally discharged in several ways, including an order under G.S. 1-417 to vacate the arrest or a decision on the merits, and such discharge exonerates the bail. Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

Meaning of "State Prison". — The term "State prison," as used in this section, applies to either the penitentiary or the county jail. Sedberry v. Carver, 77 N.C. 319 (1877).

Where the imprisonment of a defendant under this section expired before judgment was obtained, either against the principal in the original action or against the bail upon his undertaking, such imprisonment did not exonerate the bail. Adrian v. Scanlin, 77 N.C. 317 (1877); Sedberry v. Carver, 77 N.C. 319 (1877).

As to exoneration of bail during defendant's detention on other charges, see State v. Eller, 218 N.C. 365, 11 S.E.2d 295 (1940). See also, State v. Welborn, 205 N.C. 601, 172 S.E. 174 (1934).

Exoneration by Surrender of Principal. — The obligors on the bond, at any time before final judgment against them, may be released by the defendant's voluntary surrender of his person, or his production by the obligors in accordance with the terms of the bond, etc., whereupon the liability of the latter ceases. Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

§ 1-434. Surrender of defendant.

At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

(1) A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and acknowledge the surrender by a certificate in writing.

(2) Upon the production of a copy of the undertaking and sheriff's certificate, the court or judge may, upon a notice to the plaintiff of ten days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and papers used on said application they shall be exonerated accordingly. But this section does not apply to an arrest in an action to recover the possession of personal property unjustly detained, so as to discharge the bail from an undertaking given to the effect provided by law to be given by defendant for the retention of property, under the Article entitled Claim and Delivery. (C.C.P., s. 158; Code, s. 300; Rev., s. 752; C.S., s. 792.)

Cross References. — As to claim and delivery, see G.S. 1-472 through 1-484.1.

CASE NOTES

Cited in Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

§ 1-435. Bail may arrest defendant.

For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority endorsed on a certified copy of the undertaking may empower any person over 21 years of age to do so. (C.C.P., s. 159; Code, s. 301; Rev., s. 753; C.S., s. 793.)

CASE NOTES

Right of Sureties to Arrest Principal. — Where a prisoner in arrest and bail is released from custody of the law upon bail, the principal is regarded as delivered to the custody of his sureties under the original process, who may thereafter seize and deliver him in discharge of their liability, or imprison him temporarily when necessary until this can be done, exercising this right in person or by agent in this or another state, upon the Sabbath or otherwise, and if necessary, they may break and enter his house for that purpose. Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

Cited in Hightower v. Thompson, 231 N.C. 491, 57 S.E.2d 763 (1950).

§ 1-436. Proceedings against bail by motion.

In case of failure to comply with the undertaking the bail may be proceeded against by motion in the cause on 10 days' notice to them. (C.C.P., s. 160; Code, s. 302; Rev., s. 754; C.S., s. 794.)

CASE NOTES

The surety is liable for any breach of bail bond obligations. Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

Grounds for Defense by Surety on Bail. — Surety on bail has no right other than to defend an action on the bond on grounds of legal discharge, death, surrender or imprisonment of the principal. Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

Insolvency of the principal is no defense to an action against the bail. Winborne & Bro. v. Mitchell, 111 N.C. 13, 15 S.E. 882 (1892).

When Action Against Bail Lies. — Where the debtor is released upon bail, the creditor may proceed to judgment and issue execution against the debtor's property, and afterwards against his person, if returned "nulla bona"; should the latter writ be returned "non est inventus," the plaintiff may move on 10 days' notice for judgment against the bail, making available to the latter all defenses he may have as to the surrender of his principal; a judgment rendered against him at an intermediate stage of the proceedings is reversible error. Pickelsimer v. Glazener, 173 N.C. 630, 92 S.E. 700 (1917).

Motion Must Be Brought Within Three Years. — Proceedings against bail, in civil actions, are barred unless commenced within three years after judgment against the principal, notwithstanding the fact that the principal may have left the State in the meantime. Albemarle Steam Nav. Co. v. Williams, 111 N.C. 35, 15 S.E. 877 (1892).

Where the defendant appeared in open court in response to notice served upon his surety or bail, he was then "amenable to the process of the court," notwithstanding his refusal to surrender himself, and the court should have ordered execution against the person of the defendant, rather than hold the surety or bail for failure to surrender him. Stepp v. Robinson, 203 N.C. 803, 167 S.E. 147 (1933).

Surety on bail has no standing to object to arrest or summary judgment against defendant. Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702, cert. denied, 287 N.C. 466, 215 S.E.2d 625 (1975).

Applied in Fryar v. Gauldin, 259 N.C. 391, 130 S.E.2d 689 (1963).

§ 1-437. Liability of bail to sheriff.

The bail taken upon the arrest are, unless they justify, or other bail are given or justified, liable to the sheriff by action for damages which he may sustain by reason of such omission. (C.C.P., s. 173; Code, s. 315; Rev., s. 755; C.S., s. 795.)

§ 1-438. When bail to pay costs.

When a notice issues against a person, as the bail of another, and the bail, at or before the term of the court at which he is bound to appear, or ought to plead, is not discharged from his liability by the death or surrender of his principal or otherwise, he is liable for all costs which accrue on said notice, notwithstanding he may be afterwards discharged, by the death or surrender of the principal, or otherwise. (R.C., c. 11, s. 10; Code, s. 319; Rev., s. 756; C.S., s. 796.)

CASE NOTES

Certain Costs Not Allowed. — The costs allowed against bail, notwithstanding a surrender, etc., do not include such as are incurred on account of an improper and ineffectual appeal. Clark v. Latham, 53 N.C. 1 (1860).

§ 1-439. Bail not discharged by amendment.

No amendment of process or pleading discharges the bail of the party arrested thereon, unless it enlarges the sum demanded beyond the sum expressed in the bail bond. (R.C., c. 11, s. 11; Code, s. 320; Rev., s. 757; C.S., s. 797.)

Article 35.

Attachment.

Part 1. General Provisions.

§ 1-440: Superseded by Session Laws 1947, c. 693, codified as G.S. 1-440.1 et seq.

§ 1-440.1. Nature of attachment.

(a) Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring property of a defendant within the legal custody of the court in order that it may subsequently be applied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action.

(b) No personal judgment, even for costs, may be rendered against a defendant unless personal jurisdiction has been acquired as provided in G.S. 1-75.3.

(c) Although there is no personal service on the defendant, or on an agent for him, and although he does not make a general appearance, judgment may be rendered in an action in which property of the defendant has been attached which judgment shall provide for the application of the attached property, by the method set out in G.S. 1-440.46, to the satisfaction of the plaintiff's claim as established in the principal action. If plaintiff's claim is not thereby satisfied in full, subsequent actions for the unsatisfied balance are not barred. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

Cross References. — As to affidavit for attachment, see G.S. 1-440.11.

Legal Periodicals. — For survey of 1976 case law on constitutional law, see 55 N.C.L. Rev. 965 (1977).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For comment on jurisdiction based upon attachment, see 16 Wake Forest L. Rev. 377 (1980).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under prior similar provisions.*

Purpose of Article. — This Article protects legitimate interests of creditors in narrowly defined situations where the absence of such a remedy would have substantial, deleterious effects on the creditor himself and the commercial credit system as a whole. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

This Article affords the debtor the most extensive safeguards possible and minimizes both the possibility of a wrongful or arbitrary deprivation of the debtor's property interest and the harm to the debtor as a result of the ex parte issuance of the writ of attachment. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Narrow nature of attachment statute ensures that the creditor's interests advanced or protected by this procedure are legitimate. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

A bond in lieu of an attachment is not an independent measure of damages in the principal action. Collins v. Talley, 146 N.C. App. 600, 553 S.E.2d 101, 2001 N.C. App. LEXIS 987 (2001).

Origin of Writ. — Attachment, other than the common-law writ which issued out of the common pleas upon the nonappearance of the defendant at the return of the original writ, had its origin in the civil law, and afterwards was adopted in England in the form of a custom of the London merchants, and out of this, as modified and extended by statute, has grown the modern law in respect to this remedy. It was resorted to in order to compel the attendance of the debtor as well as to afford a security to the creditor. Grocery Co. v. Bag Co., 142 N.C. 174, 55 S.E. 90 (1906). See also, Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936).

Nature of Writ. — An attachment is not the foundation of an independent action, but is an ancillary and auxiliary remedy collateral to the action. Marsh v. Williams, 63 N.C. 371 (1869); Toms v. Warson, 66 N.C. 417 (1872).

Function of Writ. — The function of the writ of attachment is to seize the property of a defendant and hold it within the grasp of the law until the trial can be had and the rights of the parties determined, or it may be released pending the action if seized without proper cause. In no sense is it a process to bring the defendant into court. It may be issued to accompany the summons, or at any time thereafter. Ditmore v. Goins, 128 N.C. 325, 39 S.E. 61 (1901). See also, Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936).

Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring the property of the defendant within the legal custody of the court in order that it may be subsequently applied to the satisfaction of any judgment for money which may be rendered against defendant in the principal action. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Lis pendens, literally "pending suit," is a statutory device by which the world is put on notice that an order of attachment has been issued with respect to certain real property owned by a party against whom a monetary judgment is sought and that the lien of attachment may be executed and the property sold in satisfaction of the judgment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Due Process Protection. — Attachment of real property is a substantial deprivation of a significant property interest subject to the protection of the due process clause. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Appellant who was a non-resident at the time attachment proceedings were initiated against his property was not deprived of due process by the failure to provide pre-attachment notice and hearing. Miltland Raleigh-Durham v. Mudie, 122 N.C. App. 168, 468 S.E.2d 275 (1996), appeal dismissed, cert. denied, 343 N.C. 512, 473 S.E.2d 608 (1996).

The writ of attachment differs from the ordinary writ in that the plaintiff is allowed to get a judgment against the defendant without personal service of process, which is contrary to the course of the common law, and as a protection to the absent defendant, all the material facts must be set out in an affidavit, which is made the groundwork of the proceeding. Webb v. Bowler, 50 N.C. 362 (1858).

Strict Construction. — Attachment is a statutory remedy which must be strictly construed. Connolly v. Sharpe, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

A party seeking the benefit of the attachment statutes must bring himself strictly, not within the spirit, but within the letter; he can take nothing by intendment. President & Dirs. v. Hinton, 12 N.C. 397 (1828); Skinner v. Moore, 19 N.C. 138 (1836); Carson v. Woodrow, 160 N.C. 143, 75 S.E. 996 (1912).

The remedy by attachment is special and extraordinary, and the statutory provisions for it must be strictly construed, and cannot have force in cases not plainly within their terms. President & Dirs. v. Hinton, 12 N.C. 397 (1828); Skinner v. Moore, 19 N.C. 138 (1836); Carson v. Woodrow, 160 N.C. 143, 75 S.E. 996 (1912).

There is no law in the Code which more imperiously demands a strict construction; for the property of an absentee may be sold upon an attachment wrongfully sued out before he is appraised of the proceeding, and, if he then should discover that no bond and affidavit were taken and returned, his remedy must at best be very imperfect. President & Dirs. v. Hinton, 12 N.C. 397 (1828); Leak v. Moorman, 61 N.C. 168 (1867).

The provisions of the Code, authorizing the attachment of the property of a nonresident defendant upon constructive service of a summons by publication is an extraordinary and summary remedy, and is in derogation of the common law and statute law of the United States, and cannot be recognized in a case commenced in a federal court. Even in a state court the plaintiff must strictly and technically perform all the conditions required by the statute entitling him to such remedy. Jurisdiction in such cases cannot be acquired or enlarged by implication and liberal construction. Lackett v. Rumbaugh, 45 F. 23 (W.D.N.C. 1891).

Attachment of the proceeds from the sale of real property pursuant to G.S. 1-440.1(a) was not warranted where no facts suggested that the individual who possessed the funds would dispose, assign, or secrete property with the intent to defraud. Anderson v. Brokers, Inc. (In re Brokers, Inc.), — Bankr. —, 2005 Bankr. LEXIS 1916 (Bankr. M.D.N.C. Sept. 22, 2005).

Substantial Compliance. — While attachment is a statutory remedy which must be strictly construed, substantial compliance with the statutory requirements will suffice. Connolly v. Sharpe, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

Where, in a proceeding of attachment, it appears from the whole record that the provisions of the statute have been substantially complied with, the action will not be dismissed nor the attachment dissolved. Grant v. Burgwyn, 79 N.C. 513 (1878); Best v. British & Am. Co., 128 N.C. 351, 38 S.E. 923 (1901); Page v. McDonald, 159 N.C. 38, 74 S.E. 642 (1912).

Proceeding Is Quasi In Rem. — Attachment of the property of nonresident defendants in this State is a proceeding quasi in rem, for the purpose of bringing him under the jurisdiction of the State court for determining the controversy in the action brought against him, when properly constituted. Mohn v. Cressey, 193 N.C. 568, 137 S.E. 718 (1927).

Absence of conflicting interests in the attached property does not automatically mandate notice and hearing prior to attachment. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Property Held by Resident Agent. — By authorizing resident to hold property as their agent, nonresident defendants, as principals, did not surrender their ownership interests in the property, and were thus subject to attachment against their ownership interest in the property. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

Priority as to Bankruptcy Trustee. — Where lienors obtained an attachment lien on

Chapter 7 debtor's real property, but a final judgment in state court was stayed by the filing of the bankruptcy petition, the lien survived the trustee's 11 U.S.C.S. § 544 strong arm powers because the lien was perfected by levy pursuant to G.S. 1-440.33. Ivester v. Miller, 398 B.R. 408, 2008 U.S. Dist. LEXIS 98493 (M.D.N.C. 2008).

Applied in Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948); Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

Cited in Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964); Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970); Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978); Balcon, Inc. v. Sadler, 36 N.C. App. 322, 244 S.E.2d 164 (1978); Canterbury v. Monroe Lange Hardwood Imports, 48 N.C. App. 90, 268 S.E.2d 868 (1980); In re Millerburg, 61 Bankr. 125 (Bankr. E.D.N.C. 1986); Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988); Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 134, 377 S.E.2d 88 (1989).

OPINIONS OF ATTORNEY GENERAL

Notice and Opportunity for Hearing. — Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, rehearing denied, 409 U.S. 902, 93 S. Ct. 177, 34 L. Ed. 2d 165 (1972) does not require that a defendant be given notice and the opportunity for a hearing prior to the issuance by the clerk or judge of an order of attachment pursuant to this section and G.S. 1-440.2 and 1-440.14. See opinion of Attorney General to Mr. Clarence Kluttz, 43 N.C.A.G. 168 (1973).

§ 1-440.2. Actions in which attachment may be had.

Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, or in any action for alimony or for maintenance and support, or an action for the support of a minor child, but not in any other action. (1947, c. 693, s. 1; 1967, c. 1152, s. 4; c. 1153, s. 3.)

Legal Periodicals. — For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For comment on jurisdiction based upon attachment, see 16 Wake Forest L. Rev. 377 (1980).

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under prior similar provisions.

Legislative Intent. — The history of legislation as to attachments shows a legislative intent to broaden the right of this writ to make the same almost coextensive with any well-grounded demand for judgment in personam. Tisdale v. Eubanks, 180 N.C. 153, 104 S.E. 339 (1920); Mitchell v. Talley, 182 N.C. 683, 109 S.E. 882 (1921).

Strict construction. — Attachment of the proceeds from the sale of real property pursuant to G.S. 1-440.1(a) was not warranted where no facts suggested that the individual who possessed the funds would dispose, assign, or secrete property with the intent to defraud. Anderson v. Brokers, Inc. (In re Brokers, Inc.), — Bankr. —, 2005 Bankr. LEXIS 1916 (Bankr. M.D.N.C. Sept. 22, 2005).

As to the history of this section, see Price v. Cox, 83 N.C. 261 (1880); Wilson v. Louis Cook Mfg. Co., 88 N.C. 5 (1883); Mullen v. Norfolk & Carolina Canal Co., 114 N.C. 8, 19 S.E. 106, rehearing denied, 115 N.C. 15, 20 S.E. 167 (1894); Worth v. Knickerbocker Trust Co., 151 N.C. 191, 65 S.E. 918 (1909).

An attachment in equity will lie against the principal, even though the remedy at law against his surety has not been exhausted. Alexander v. Taylor, 62 N.C. 36 (1866).

Slander. — The security of a person's good name and reputation is within his personal rights as a citizen, and slander thereof is an injury to his person, and would sustain a proceeding for an attachment within the intent and meaning of former G.S. 1-440, as an "injury to the person by wrongful act." Tisdale v. Eubanks, 180 N.C. 153, 104 S.E. 339 (1920).

Death by Wrongful Act. — The former attachment statute was sufficiently comprehensive to include the action for causing the death of another by wrongful act, neglect or default of another. Mitchell v. Talley, 182 N.C. 683, 109 S.E. 882 (1921).

Workers Compensation Cases. — Section 97-95 provides a further action in which attachment may be had, and which must be read in pari materia with this section. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

Uninsured Employer. — Section 97-95 merely provides an avenue to allow for attachment where an employer (1) is uninsured or fails to qualify as a self-insurer, and (2) owns property in the State susceptible to disposal or removal. As such, plaintiff's affidavit must meet one of the grounds for attachment listed in this section or G.S. 1-440.11. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

Applied in Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Cited in In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968); Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972); Elmwood v. Elmwood, 34 N.C. App. 652, 241 S.E.2d 693 (1977); Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978); Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979); Loman Garrett, Inc. v. Timco Mechanical, Inc., 93 N.C. App. 500, 378 S.E.2d 194 (1989); Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 134, 377 S.E.2d 88 (1989); Sara Lee Corp. v. Gregg, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16019 (M.D.N.C. Aug. 15, 2002).

§ 1-440.3. Grounds for attachment.

In those actions in which attachment may be had under the provisions of G.S. 1-440.2, an order of attachment may be issued when the defendant is

(1) A nonresident, or
(2) A foreign corporation, or
(3) A domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence, or
(4) A resident of the State who, with intent to defraud his creditors or to avoid service of summons,
  a. Has departed, or is about to depart, from the State, or
  b. Keeps himself concealed therein, or
(5) A person or domestic corporation which, with intent to defraud his or its creditors,
  a. Has removed, or is about to remove, property from this State, or
  b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property. (1947, c. 693, s. 1.)

Cross References. — As to attachment of goods covered by a negotiable document, see G.S. 25-7-602.

Legal Periodicals. — For comment on jurisdiction based upon attachment, see 16 Wake Forest L. Rev. 377 (1980).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under prior similar provisions.*

Impact of this section and § 1-440.11 is either to (1) afford the court in the main action quasi in rem jurisdiction so as to bring the defendants' property under the jurisdiction of the State court or (2) bring property within the custody of the court which would otherwise be unavailable for satisfaction of an ultimate judgment in a principal suit because of assignment or removal by the debtor. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Section 1-440.11(a)(2)b, in conjunction with this section, manifests a statutory procedure in which a prejudgment writ will be issued only in exceptional circumstances on a rigorous showing that such circumstances exist. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Postponement of Notice and Hearing. — Circumstances contemplated in subdivisions (1) through (4) are extraordinary situations, justifying postponement of notice and hearing. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

This section and G.S. 1-440.11 in stating when and under what conditions an order of attachment may be issued manifest a definite procedure for granting the writ, a procedure which does not entail opportunity for prior notice and hearing. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Concealment Within the State. — Property of the judgment debtor could be attached under this section, where the judgment creditor presented evidence that the debtor had concealed himself in North Carolina and had resisted efforts by the creditor to serve him with process. Jimenez v. Brown, 131 N.C. App. 818, 509 S.E.2d 241 (1998).

Confinement of remedy is certainly an important, initial step in ensuring against wrongful or abusive use of the process by a creditor. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Subdivision (5) of this section is restricted to circumstances in which creditor is in immediate danger that the debtor will destroy or alienate the property sought to be attached. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

The ancillary writ of attachment may be issued only on one or more of the grounds specified by this section. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

The proper determination to be made regarding attachment is residence, not domicile. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

Residence is taken to signify one's place of actual abode, whether it be temporary or permanent, and is thus distinguished from domicile, which indicates one's permanent abode, to which, when absent, one intends to return. Although the two terms have sometimes been used interchangeably, and although the statutory use of "residence" has sometimes been construed to mean "domicile," the two terms are quite distinct. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

Property of State Resident Domiciled Outside State Held Not Subject to Attachment. — The trial court erred in concluding that defendant, who lived and paid taxes in North Carolina but was domiciled in the Netherlands, was a nonresident and that his interest in the subject property could be attached pursuant to subdivision (1) of this section. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

All Codefendants Need Not Be Nonresidents for Nonresidents' Property to Be Attached. — Subdivision (1) of this section authorizes attachment of the property of a nonresident defendant; it does not require that all codefendants be nonresidents in order for the property of those defendants who are nonresidents to be attached. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

Property Held by Resident Agent. — By authorizing resident to hold property as their agent, nonresident defendants, as principals, did not surrender their ownership interests in the property, and were thus subject to attachment against their ownership interest in the property. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

Grounds upon which an ancillary writ of attachment is issued must be made to appear by affidavit. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

Fraudulent Disposition of Property. — The statute authorizing a warrant of attachment where a fraudulent disposition of property is made as against creditors, relates to the intent with which it is disposed of and not to the manner in which the property is acquired. Howland v. Marshall, 127 N.C. 427, 37 S.E. 462 (1900).

Attachment of the proceeds from the sale of real property pursuant to G.S. 1-440.1(a) was not warranted where no facts suggested that the individual who possessed the funds would dispose, assign, or secrete property with the intent to defraud. Anderson v. Brokers, Inc. (In re Brokers, Inc.), — Bankr. —, 2005 Bankr. LEXIS 1916 (Bankr. M.D.N.C. Sept. 22, 2005).

Fraudulent Intent Unnecessary for Attachment Against Nonresident. — An attachment is now made a provisional remedy in the progress of a cause and can be sued out whenever the defendant is a nonresident, regardless of intent. Wheeler v. Cobb, 75 N.C. 21 (1876).

When One Is a Nonresident. — Where a person voluntarily removes from this to another state, for the purpose of discharging the duties of an office of indefinite duration, which requires his continued presence there for an unlimited time, such person is a nonresident of this State for the purpose of an attachment although he may occasionally visit this State, and have the intent to return at some uncertain future time. Wheeler v. Cobb, 75 N.C. 21 (1876).

The fact that a person leaves the State to seek work, for the purpose of prospecting with a view to change his residence if desirable, does not sustain an attachment on the ground that the defendant was a nonresident. Mahoney v. Tyler, 136 N.C. 40, 48 S.E. 549 (1904).

A person who leaves State for an indefinite time, becomes a nonresident even though such person may intend to return at some time in the future, and his motion made by special appearance to vacate an attachment on the ground of residence will be denied. Brann v. Hanes, 194 N.C. 571, 140 S.E. 292 (1927).

Domicile is not determinative of the question whether one is a nonresident. — Nor is the cause of the absence, such as severe illness, material if such absence prevents personal service of summons upon him during an indefinite period of time. Brann v. Hanes, 194 N.C. 571, 140 S.E. 292 (1927).

If upon the levy of an attachment on his property a person promptly returns to this State, and thereby subjects himself to personal service of process, his motion to vacate an attachment on the ground that he is not a nonresident would seem generally to be well sustained. Brann v. Hanes, 194 N.C. 571, 140 S.E. 292 (1927).

Applied in Tyndall v. Tyndall, 270 N.C. 106, 153 S.E.2d 819 (1967); Davenport v. Ralph N.

Peters & Co., 386 F.2d 199 (4th Cir. 1967); Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

Cited in Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848; Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965); Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979); Moore v. Surles, 673 F. Supp. 1398 (E.D.N.C. 1987); Loman Garrett, Inc. v. Timco Mechanical, Inc., 93 N.C. App. 500, 378 S.E.2d 194 (1989); Yates Constr. Co. v. Greenleaf Corp., 99 N.C. App. 489, 393 S.E.2d 563 (1990); In re Toussaint, 259 Bankr. 96, 2000 Bankr. LEXIS 213 (E.D.N.C. 2000); Sara Lee Corp. v. Gregg, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16019 (M.D.N.C. Aug. 15, 2002); Challenger Indus., Inc. v. 3-1, Inc., 152 N.C. App. 711, 568 S.E.2d 274, 2002 N.C. App. LEXIS 974 (2002).

§ 1-440.4. Property subject to attachment.

All of a defendant's property within this State which is subject to levy under execution, or which in supplemental proceedings in aid of execution is subject to the satisfaction of a judgment for money, is subject to attachment under the conditions prescribed by this Article. (1947, c. 693, s. 1.)

Cross References. — As to exemption of earnings, see G.S. 1-362.

Legal Periodicals. — As to attachment of stock in a foreign corporation, see 3 N.C.L. Rev. 103 (1925).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under prior similar provisions.*

As to the meaning of "property," see Worth v. Knickerbocker Trust Co., 151 N.C. 191, 65 S.E. 918 (1909).

What Property Is Subject to Attachment. — All property in this State, whether real or personal, tangible or intangible, owned by a nonresident defendant in an action to recover on any of the causes of action included within the provisions of the attachment statute, is liable to attachment. Newberry v. Meadows Fertilizer Co., 203 N.C. 330, 166 S.E. 79 (1949).

Only property which is subject to execution is attachable. Willis v. Anderson, 188 N.C. 479, 124 S.E. 834 (1924); Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936).

Attachment may be levied on land as under execution, and whatever interest the debtor has subject to execution may be attached, but the debtor must have some beneficial interest in the land. Willis v. Anderson, 188 N.C. 479, 124 S.E. 834 (1924); Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936).

For case holding that interest in land under a spendthrift trust was not subject to attachment, see Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936).

Defendant's property or choses in action in the hands of third persons may be attached. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

By authorizing resident to hold property as their agent, nonresident defendants, as principals, did not surrender their ownership interests in the property, and were thus subject to attachment against their ownership interest in the property. Vinson Realty Co. v. Honig, 88 N.C. App. 113, 362 S.E.2d 602 (1987).

As to liability of cash deposited as security in lieu of bond to attachment, see White v. Ordille, 229 N.C. 490, 50 S.E.2d 499 (1948).

A distributive share in the hands of an administrator, due the wife of a nonresident debtor, cannot be subjected to the payment of the husband's debts in this State by means of an attachment in equity. McLean v. McPhaul, 59 N.C. 15 (1860).

As to attachment of stock in foreign and domestic corporations under former statutes, see Parks-Cramer Co. v. Southern Express Co., 185 N.C. 428, 117 S.E. 505 (1923), cert. denied, 263 U.S. 717, 44 S. Ct. 180, 68 L. Ed. 522 (1924).

Property Absorbed by Nonresident Corporation. — Where a nonresident express company doing business in this State, and having property herein, incurred a liability to its shipper for breach of its contract for the transportation and delivery of a shipment, and afterwards became absorbed in another nonresident corporation carrying on the same business with the same property and stock of the selling (debtor) company, the one continuing to do business here was subject to attachment under the provisions of former law, where the cause of action arose here; and, the fact that the certificates of stock were not physically in the jurisdiction of the courts of this State was immaterial. Parks-Cramer Co. v. Southern Express Co., 185 N.C. 428, 117 S.E. 505 (1923), cert. denied, 263 U.S. 717, 44 S. Ct. 180, 68 L. Ed. 522 (1924).

Any interest an agent may have by rea-

son of the possession of his principal's property is not subject to attachment. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

The bare interest of a creditor in his chattel security is not subject to attachment. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Tax Books of Sheriff Not Liable to Attachment. — Though a sheriff, who has settled for the taxes due on a tax list which have not been paid to him, may collect the same within the time allowed by law, yet the tax books, showing the debts thus due him, cannot be attached by a creditor to whom he is indebted. Davie v. Blackburn, 117 N.C. 383, 23 S.E. 321 (1895).

Applied in Ivester v. Miller, 398 B.R. 408, 2008 U.S. Dist. LEXIS 98493 (M.D.N.C. 2008).

Cited in Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978).

§ 1-440.5. By whom order issued; when and where; filing of bond and affidavit.

(a) An order of attachment may be issued by
  (1) The clerk of the court in which the action has been, or is being, commenced, or by
  (2) A judge of the appropriate trial division, as authorized in subsection (b) of this section.

(b) An order of attachment issued by a judge may be issued as follows:
  (1) If the action has been or is being commenced in the Superior Court Division, a resident superior court judge of the district, or a judge regularly holding the superior courts of the district, may issue the order in open court or in chambers, in session or in vacation, and within or without the district. Any other judge holding a session of superior court in the county may issue the order in open court.
  (2) If the action has been or is being commenced in the District Court Division, the presiding judge, the chief district judge, or any district judge authorized by the chief to hear motions and enter interlocutory orders may issue the order in open court or in chambers in session or in vacation.

(c) In those cases where the order of attachment is issued by the judge, such judge shall cause the bond required by G.S. 1-440.10 and the affidavit required by G.S. 1-440.11 to be filed promptly with the clerk of the court of the county in which the action is pending. (1947, c. 693, s. 1; 1971, c. 268, s. 30.)

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under prior similar provisions.*

Constitutionality. — This section complies with procedural due process as required by the federal constitution. Connolly v. Sharpe, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

Issuance of attachment by clerk is consistent with due process. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

The issuance of the attachment order by the clerk is consistent with due process since the clerk is a judicial officer and not a mere administrative functionary. Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267, cert. denied, 289 N.C. 615, 223 S.E.2d 392 (1976).

The clerk only acts ministerially in issuing the process for attachment. Evans v. Etheridge, 96 N.C. 42, 1 S.E. 633 (1887).

Power of Clerk to Issue Warrant When He Is Plaintiff. — A clerk of the superior court, upon making the necessary affidavit before some person authorized by law, may issue a warrant of attachment in an action in which he is plaintiff. Evans v. Etheridge, 96 N.C. 42, 1 S.E. 633 (1887).

Issuance of Blank Forms Prohibited. — When an attachment form in blank, including a form for the affidavit, had been signed by the clerk and delivered to the attorney of the party seeking the attachment, upon condition that he properly fill out the papers and give sufficient bond, the writ and the levy thereunder were both void, though subsequently approved by the clerk. Carson v. Woodrow, 160 N.C. 143, 75 S.E. 996 (1912).

Appeal from Clerk's Decision. — From the decision of the clerk in granting a warrant of attachment an appeal lies to the judge.

Cushing v. Styron, 104 N.C. 338, 10 S.E. 258 (1889); Howland v. Marshall, 127 N.C. 427, 37 S.E. 462 (1900).

§ 1-440.6. Time of issuance with reference to summons or service by publication.

(a) The order of attachment may be issued at the time the summons is issued or at any time thereafter.

(b) No order of attachment may be issued in any action after judgment in the principal action is had in the superior court. (1947, c. 693, s. 1; 1967, c. 954, s. 3.)

§ 1-440.7. Time within which service of summons or service by publication must be had.

(a) When an order of attachment is issued before the summons is served.

(1) If personal service within the State is to be had, such personal service must be had within 30 days after the issuance of the order of attachment;

(2) If such personal service within the State is not to be had,

a. Service of the summons outside the State, in the manner provided by Rule 4(j)(9)a or b of the Rules of Civil Procedure, must be had within 30 days after the issuance of the order of attachment, or

b. Service by publication must be commenced not later than the thirty-first day after the issuance of the order of attachment. If publication is commenced, such publication must be completed as provided by Rule 4(j)(9)c of the Rules of Civil Procedure unless the defendant appears in the action or unless personal service is had on him within the State.

(b) Upon failure of compliance with the applicable provisions of subsection (a) of this section, either the clerk or the judge shall, upon the motion of the defendant or any other interested party, make an order dissolving the attachment, and the defendant shall have all the rights that would accrue to him under the provisions of G.S. 1-440.45, the same as if the principal action had been prosecuted to judgment and the defendant had prevailed therein. (1947, c. 693, s. 1; 1967, c. 954, s. 3; 1971, c. 1093, ss. 14, 15.)

Editor's Note. — The references in this section to paragraphs of subdivision (j)(9) of Rule 4 of the Rules of Civil Procedure, G.S. 1A-1, Rule 4(j)(9), were intended to refer to Rule 4 as it read prior to more recent amendments. As to manner of service to exercise personal jurisdiction, see now subdivision (j) of G.S. 1A-1, Rule 4. As to service by publication on a party that cannot otherwise be served, see subdivision (j1) of G.S. 1A-1, Rule 4. As to service in a foreign country, see subdivision (j3) of G.S. 1A-1, Rule 4.

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under prior similar provisions.*

Main Action Commenced by Summons. — The warrant of attachment is only a provisional or ancillary remedy in and dependent upon a main action commenced by the issuing of a summons. Lackett v. Rumbaugh, 45 F. 23 (W.D.N.C. 1891).

Proceedings When Notice Not Duly Served. — Under the former statute it was held that if the notice was not duly served by the publication, it was error to discharge an attachment granted as ancillary to an action because of the insufficiency of the affidavit to obtain service of the summons by publication, because it was possible that the defect might be cured by amendments. Branch v. Frank, 81 N.C. 180 (1879); Mills v. Hansel, 168 N.C. 651, 85 S.E. 17 (1915).

The remedy was not to dismiss the attachment, but to order a republication, for, as the defendant was a nonresident, to dismiss the attachment might deprive the plaintiff of all remedy by the removal of the property before a new proceeding and attachment could be had. Price v. Cox, 83 N.C. 261 (1880); Penniman v. Daniel, 90 N.C. 154 (1884); Penniman v. Daniel, 93 N.C. 332 (1885); Mills v. Hansel, 168 N.C. 651, 85 S.E. 17 (1915).

Failure to Commence Service by Publication Within Thirty-One Days. — A defendant is entitled to have an attachment dissolved if plaintiff fails to commence service by publication within 31 days after the issuance of the order of attachment. Accident Indem. Ins. Co. v. Johnson, 261 N.C. 778, 136 S.E.2d 95 (1964).

The court has a right to extend the time for service by publication. Finch v. Slater, 152 N.C. 155, 67 S.E. 264 (1910); Mills v. Hansel, 168 N.C. 651, 85 S.E. 17 (1915); Thrush v. Thrush, 246 N.C. 114, 97 S.E.2d 472 (1957).

Applied in S.D. Scott & Co. v. Jones, 230 N.C. 74, 52 S.E.2d 219 (1949); Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Cited in Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

§ 1-440.8. General provisions relative to bonds.

(a) Any bond given pursuant to the provisions of this Article shall be executed by the party required to furnish the bond and by

(1) A surety company authorized to do business in this State, as provided by G.S. 58-73-5, or by

(2) One or more individual sureties, as may be required by the court.

(b) Each individual surety shall execute an affidavit, to be attached to the bond, stating that he is a resident of the State and that he is worth the amount specified in the bond exclusive of property exempt from execution and over and above all his liabilities.

(c) Any bond given pursuant to any provisions of this Article shall be subject to the approval of the court.

(d) It is not a defense in an action on any bond given pursuant to this Article that

(1) The court had no jurisdiction to require or accept bond, or

(2) The order of attachment was improperly granted, or

(3) There was any other irregularity in the attachment proceeding. (1947, c. 693, s. 1.)

§ 1-440.9. Authority of court to fix procedural details.

The court of proper jurisdiction, before which any matter is pending under the provisions of this Article, shall have authority to fix and determine all necessary procedural details in all instances in which the statute fails to make definite provision as to such procedure. (1947, c. 693, s. 1.)

CASE NOTES

Court Has Authority to Dissolve Attachment After Order Not Carried Out. — This Article does not specifically authorize the court to dissolve or dismiss an attachment when a plaintiff fails to carry out the court's order to increase the bond, but pursuant to the general authorization of this section to fix all procedural details not specified elsewhere, and in aid of its own jurisdiction over the matter, the court has authority to dissolve an attachment after the court's lawful order has not been carried out. Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

Authority of Clerk to Stop Sale and Order Resale. — This section gave the clerk sufficient authority to stop the first sale of an aircraft, as to which the sheriff's announcement at the sale that the aircraft would be sold free of the plaintiff savings and loan's lien was at variance with the advertised notice that defendant's interest would be sold, where the aircraft brought at the first sale only a small fraction of its value, and the clerk also had the power to order a new sale. North State Sav. & Loan Corp. v. Carter Dev. Co., 83 N.C. App. 422, 350 S.E.2d 374 (1986), cert. denied, 319 N.C.

405, 354 S.E.2d 716 (1987).

Applied in Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Part 2. Procedure to Secure Attachment.

§ 1-440.10. Bond for attachment.

Before the court issues an order of attachment, the plaintiff must furnish a bond as follows:

(1) The amount of the bond shall be such as may be fixed by the court issuing the order of attachment and shall be such as may be deemed necessary by the court in order to afford reasonable protection to the defendant, but shall not be less than two hundred dollars ($200.00);

(2) The condition of the bond shall be that

a. If the order of attachment is dissolved, dismissed or set aside by the court, or

b. If the plaintiff fails to obtain judgment against the defendant, the plaintiff will pay all costs that may be awarded to the defendant and all damages that the defendant may sustain by reason of the attachment, the surety's liability, however, to be limited to the amount of the bond. (1947, c. 693, s. 1.)

Cross References. — As to recovery on bond, see G.S. 1-440.45.

Legal Periodicals. — For article discussing the requirement of security as a pre-condition to provisional injunctive relief, see 52 N.C.L. Rev. 1091 (1974).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under prior similar provisions.*

A judge of the superior court has authority to require plaintiffs in attachment to increase their bond or have their attachment dismissed. Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

And he has authority to dismiss the attachment by a second order when plaintiffs failed to post additional bond within the time fixed. Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

Plaintiffs Not Entitled to Jury Trial on Question of Increasing Bond. — Plaintiffs in attachment were not entitled to a jury trial on the question of increasing the bond required by this section, the size of a plaintiff's bond not being within the "issues" envisioned by G.S. 1-440.36(c). Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

Effect of Mistake in Signing Undertaking. — Under the former attachment statute it was held that where, by mistake, the surety on the undertaking of the plaintiff signed his name to the justification of the undertaking instead of to the undertaking itself, this was a valid and binding undertaking. Boger v. Cedar Cove Lumber Co., 165 N.C. 557, 81 S.E. 784 (1914).

For case holding bond sufficient, see Bryan v. The Steamer Enter., 53 N.C. 260 (1860).

Applied in State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Cited in Sara Lee Corp. v. Gregg, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16019 (M.D.N.C. Aug. 15, 2002).

§ 1-440.11. Affidavit for attachment; amendment.

(a) To secure an order of attachment, the plaintiff, or his agent or attorney in his behalf, must state by affidavit

(1) In every case:

a. The plaintiff has commenced or is about to commence an action, the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, and the amount thereof,

b. The nature of such action, and

c. The ground or grounds for attachment (one or more of those stated in G.S. 1-440.3); and

(2) In those cases described below, the additional facts indicated:

a. If the action is based on breach of contract, that the plaintiff is entitled to recover the amount for which judgment is sought over and above all counterclaims known to him;

b. If it is alleged as a ground for attachment that the defendant has done, or is about to do, any act with intent to defraud his creditors, the facts and circumstances supporting such allegation.

(b) A verified complaint may be used as the affidavit required by this section.

(c) The court, in its discretion, at any time before judgment in the principal action, may allow any such affidavit to be amended even though the original affidavit is wholly insufficient.

(d) An amendment of an insufficient affidavit of attachment relates to the beginning of the attachment proceeding, and no rights based on such irregularity can be required by any third party by any subsequent attachment intervening between the original affidavit and the amendment. (1947, c. 693, s. 1.)

Cross References. — As to order of attachment, see G.S. 1-440.12.

CASE NOTES

I. In General.
II. Form and Sufficiency of Affidavit.
III. Amendment.

I. IN GENERAL.

Editor's Note. — *Many of the cases cited below were decided under prior similar provisions.*

Impact of this section and § 1-440.3 is either to (1) afford the court in the main action quasi in rem jurisdiction so as to bring the defendants' property under the jurisdiction of the State court or (2) bring property within the custody of the court which would otherwise be unavailable for satisfaction of an ultimate judgment in a principal suit because of assignment or removal by the debtor. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Strict Construction. — The provisions of former G.S. 1-441, relating to the same subject matter as this section, were to be strictly followed. Leak v. Moorman, 61 N.C. 168 (1867); Spiers v. Halstead, Haines & Co., 71 N.C. 209 (1874); Wheeler v. Cobb, 75 N.C. 21 (1876).

Attachment of the proceeds from the sale of real property pursuant to G.S. 1-440.1(a) was not warranted where no facts suggested that the individual who possessed the funds would dispose, assign, or secrete property with the intent to defraud. Anderson v. Brokers, Inc. (In re Brokers, Inc.), — Bankr. —, 2005 Bankr. LEXIS 1916 (Bankr. M.D.N.C. Sept. 22, 2005).

Applied in Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976); State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Cited in Sara Lee Corp. v. Gregg, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16019 (M.D.N.C. Aug. 15, 2002).

II. FORM AND SUFFICIENCY OF AFFIDAVIT.

Affidavit Necessary. — In order for the valid issuance of an attachment from the superior court, it is necessary that the requisite facts be shown to the court by an affidavit of prescribed form and substance. Carson v. Woodrow, 160 N.C. 143, 75 S.E. 996 (1912).

The affidavit to procure an attachment must be specific and must set forth one of the grounds recited in the statute. Bacon v. Johnson, 110 N.C. 114, 14 S.E. 508 (1892); Mullen v. Norfolk & Carolina Canal Co., 114 N.C. 8, 19 S.E. 106, rehearing denied, 115 N.C. 15, 20 S.E. 167 (1894).

Grounds of Belief Must Be Stated. — Where the plaintiff makes oath that he believes or apprehends the property will be removed, he must also state the grounds of apprehension. Penniman v. Daniel, 90 N.C. 154 (1884).

When the affidavit is that the defendants are "about to assign or dispose of their property with intent to defraud the plaintiffs," which is not the assertion of a fact, but necessarily of a belief merely, the grounds upon which such belief is founded must be set out so that the court may adjudge if they are sufficient. Hughes v. Person, 63 N.C. 548 (1869); Gashine, Emory & Co. v. Baer, 64 N.C. 108 (1870); Clark v. Clark, 64 N.C. 150 (1870); Penniman v. Daniel, 90 N.C. 154 (1884); Judd v. Crawford Gold Mining Co., 120 N.C. 397, 27 S.E. 81 (1897); Connolly v. Sharpe, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

It is generally held that an affidavit made on belief as to the ground of attachment must give the sources of information and recite positive facts reasonably supporting the belief. Connolly v. Sharpe, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

Attachment against resident defendants must be based on an affidavit setting forth the facts and circumstances supporting allegations that they have done or are about to do any act with intent to defraud their creditors. Connolly v. Sharpe, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

And if grounds are not stated the affidavit is fatally defective. First Nat'l Bank v. Tarboro Cotton Factory, 179 N.C. 203, 102 S.E. 195 (1920).

Failure to set forth supporting facts and circumstances in a definite and distinct manner causes the attachment affidavit to be fatally defective. Connolly v. Sharpe, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

Jurisdiction of Court Need Not Be Specifically Alleged. — Where, in proceedings for attachment, it sufficiently appears of record that the court had jurisdiction of the subject matter, it is unnecessary that the affidavit of the attaching creditors specifically allege its jurisdiction. Bacon v. Johnson, 110 N.C. 114, 14 S.E. 508 (1892); Page v. McDonald, 159 N.C. 38, 74 S.E. 642 (1912); Davis v. Davis, 179 N.C. 185, 102 S.E. 270 (1920); County Sav. Bank v. Tolbert, 192 N.C. 126, 133 S.E. 558 (1926).

Nor That Defendant Has Property in This State. — It is not necessary that the affidavit upon which an attachment is sought should state that the defendant has property in this state. Branch v. Frank, 81 N.C. 180 (1879); Parks v. Adams, 113 N.C. 473, 18 S.E. 665 (1893); Foushee v. Owen, 122 N.C. 360, 29 S.E. 770 (1898), overruling Spiers v. Halstead, Haines & Co., 71 N.C. 209 (1874) and Windley v. Bradway, 77 N.C. 333 (1877).

An affidavit made by an agent need not state why it is not made by the principal. Bruff, Faulkner & Co. v. Stern & Bro., 81 N.C. 183 (1879); Sheldon v. Kivett, 110 N.C. 408, 14 S.E. 970 (1892).

Examples of Sufficient Affidavits. — Affidavits for publication of the summons and notice of attachment are sufficient when they show that the defendant cannot, after due and diligent search, be found in this State, that he is a nonresident and has property here of which the court has jurisdiction, and that the plaintiff has a cause of action against the defendant, arising out of a contract by which he expressly promises to pay a specific sum to the plaintiff for services rendered at his request, which sum is still due and owing. Page v. McDonald, 159 N.C. 38, 74 S.E. 642 (1912).

An affidavit for an attachment was sufficient which stated that the defendant was a nonresident and had property in this State, or had removed, or was about to remove some of his property from this State with intent to defraud his creditors. The statute put the modes in the alternative, and the plaintiff would succeed if he established either. Penniman v. Daniel, 90 N.C. 154 (1884).

In proceedings for attachment an affidavit is sufficient which sets out: (1) that the defendant is indebted; and (2) that the defendant has departed from this State with intent, as the affiant is informed and believes, to avoid the service of summons. Hess, Rogers & Co. v. Brower, 76 N.C. 428 (1877).

Examples of Defective Statement. — An affidavit for a warrant of attachment, under former G.S. 1-441, which stated "that the defendant is absent so that the ordinary process of law cannot be served upon him," without an averment that the absence "was with intent to defraud his creditors and to avoid the service of summons," was fatally defective. W.P. Love & Co. v. Young, 69 N.C. 65 (1873).

The affidavit, upon which a warrant of attachment has been issued, which alleges that the defendant is about to assign, dispose of and secrete money or goods with intent to defraud creditors, without setting forth the grounds upon which this belief is based, is fatally defective. First Nat'l Bank v. Tarboro Cotton Factory, 179 N.C. 203, 102 S.E. 195 (1920).

Affidavits for prejudgment attachment was insufficient under G.S. 1-440.11(a) because it alleged that a chiropractor fraudulently operated a medical practice by recruiting medical doctors to serve as paper owners, placing himself and other non-medical personnel in charge, and overcharging insurers and billing for unnecessary services, but the affidavits did not establish that defendants had secreted or imminently would secrete property from the state. Allstate Ins. Co. v. Weir, 531 F. Supp. 2d 674, 2008 U.S. Dist. LEXIS 2510 (E.D.N.C. 2008).

Remedy When Affidavit Defective. — A plea in abatement was held to be the proper mode of taking advantage of a defect in the affidavit for an attachment. Leak v. Moorman, 61 N.C. 168 (1867).

III. AMENDMENT.

The court has discretionary power to permit a plaintiff to amend a defective affidavit upon which warrant of attachment was issued. Thrush v. Thrush, 246 N.C. 114, 97 S.E.2d 472 (1957).

An affidavit can be amended by permission of the court, granted in its discretion, even though the first affidavit was wholly insufficient. Brown, Daniel & Co. v. Hawkins, 65 N.C. 645 (1871); Branch v. Frank, 81 N.C. 180 (1879); Bank of New Hanover v. Blossom, 92 N.C. 695 (1885); Penniman v. Daniel, 93 N.C. 332 (1885); Cushing v. Styron, 104 N.C. 338, 10 S.E. 258 (1889); Sheldon v. Kivett, 110 N.C. 408, 14 S.E. 970 (1892).

A plaintiff has a right to amend his affidavit as to mere matters of form, and if he is ready to swear to the amended affidavit it is error in the clerk to refuse it. Palmer v. Bosher, 71 N.C. 291 (1874).

Findings of Court May Have Effect of Amendment. — An affidavit on attachment defective in failing to set forth the requisite facts may be amended by permission of court, and where the court has found with plaintiff upon conflicting oral evidence, such findings have the effect of an amendment allowed by him. Thornburg v. Burton, 197 N.C. 193, 148 S.E. 28 (1929).

When Clerk Denies Amendment. — Where the clerk refuses to allow an amendment he may, and should, state his reason for such refusal. Cushing v. Styron, 104 N.C. 338, 10 S.E. 258 (1889).

Relation Back of Amendment. — An amendment of an insufficient affidavit in attachment relates back to the beginning of the proceedings, and no rights based on such irregularity can be acquired by third parties by subsequent attachments intervening between the original affidavit and the amendment. Cook v. New York Corundum Co., 114 N.C. 617, 19 S.E. 664 (1894).

From the leave to amend the affidavit no appeal lies. Lippard v. Roseman, 72 N.C. 427 (1875); Henry v. Cannon, 86 N.C. 24 (1882); Wiggins v. McCoy, 87 N.C. 499 (1882); Jarrett v. Gibbs, 107 N.C. 303, 12 S.E. 272 (1890); Sheldon v. Kivett, 110 N.C. 408, 14 S.E. 970 (1892); Cook v. New York Corundum Co., 114 N.C. 617, 19 S.E. 664 (1894).

§ 1-440.12. Order of attachment; form and contents.

(a) If the matters required by G.S. 1-440.11(a) are shown by affidavit to the satisfaction of the court and if the bond required by G.S. 1-440.10 is furnished, the court shall issue an order of attachment which shall

(1) Show the venue, the court in which the action has been, or is being, commenced, and the title of the action;

(2) Run in the name of the State and be directed to the sheriff of a designated county;

(3) State that an affidavit for the attachment of the defendant's property has been filed with the court in the action, that the required attachment bond has been executed and delivered to the court and that it has been made to appear to the satisfaction of the court that the allegations of the plaintiff's affidavit for attachment are true;

(4) Direct the sheriff to attach and safely keep all of the property of the defendant within the sheriff's county which is subject to attachment, or so much thereof as is sufficient to satisfy the plaintiff's demand, together with costs and expenses;

(5) Direct that the order of attachment be returned to the clerk of the court in which the action is pending;

(6) Show the date of issuance; and

(7) Be signed by clerk or the judge issuing the order.

(b) The order of attachment shall not contain a return date, but shall be returned to the clerk as provided by G.S. 1-440.16. (1947, c. 693, s. 1.)

Cross References. — As to bond for attachment, see G.S. 1-440.10. As to affidavit for attachment, see G.S. 1-440.11.

CASE NOTES

***Editor's Note.** — Most of the cases cited below were decided under prior similar provisions.*

A "notice of levy" served upon a garnishee was insufficient process to accord the serving party the status of an attaching creditor. It was incumbent on the party, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accordance with G.S. 1-440.1 et seq., or G.S. 1-440.43(2). Failing this, the party's contention that it could intervene as an attaching creditor under G.S. 1-440.33(g) failed, and the garnishee's motion to join all attaching creditors was moot. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

As to whom warrant was to be issued under former statute, see Carson v. Woodrow, 160 N.C. 143, 75 S.E. 996 (1912).

An irregularity in issuing a warrant of attachment to the constable or other lawful officer of the county, when the statute requires it to be issued to the sheriff, may be afterwards cured by an amendment of the court when it appears that the warrant was served by a deputy sheriff. Temple v. Eades Hay Co., 184 N.C. 239, 114 S.E. 162 (1922).

An attachment issued by the clerk of a court for a sum within the jurisdiction of the court, and made returnable to the proper term of the court, would not be dismissed for want of form because directed "to any constable or other lawful officer to execute and return within 30 days (Sundays excepted)," when it appeared that it was executed by the sheriff. Askew v. Stevenson, 61 N.C. 288 (1867).

When Sheriff Is Defendant. — The words of former G.S. 1-447, requiring that the warrant should direct the sheriff to attach "all the property of the defendant" did not, when the sheriff was the defendant, include his tax books showing debts due to him for taxes. Davie v. Blackburn, 117 N.C. 383, 23 S.E. 321 (1895).

A clerk's ex parte order of attachment was properly issued under this section if plaintiff's verified complaint and bond for attachment met the requirements of G.S. 1-440.11 and G.S. 1-440.10 respectively. Armstrong v. Aetna Ins. Co., 249 N.C. 352, 106 S.E.2d 515 (1959).

§ 1-440.13. Additional orders of attachment at time of original order; alias and pluries orders.

(a) At the time the original order of attachment is issued, or thereafter, one or more additional orders, at the request of the plaintiff, may be issued, and any such additional order may be directed to the sheriff of any county in which the defendant may have property.

(b) After the original order or orders have been returned, if no property or, in the opinion of the plaintiff, insufficient property has been attached thereunder, alias or pluries orders may be issued prior to judgment, at the request of the plaintiff, and such alias or pluries orders may be directed to the sheriff of any county in which the defendant may have property. (1947, c. 693, s. 1.)

CASE NOTES

Perfection of Attachment by Alias and Pluries Order. — Without a valid levy, the order of attachment is not perfected so as to create a lien of attachment, but remains executory until tolled by judgment in the principal action, or until perfected by a levy under an alias or pluries order. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

§ 1-440.14. Notice of issuance of order of attachment when no personal service.

(a) When service of process by publication is made subsequent to the original order of attachment, the published and mailed notice of service of process shall include notice of the issuance of the order of attachment.

(b) When the original order of attachment is issued after publication is begun, a notice of the issuance of the order of attachment shall be published once a week for four successive weeks in some newspaper published in the county in which the action is pending, such publication to be commenced within 30 days after the issuance of the order of attachment. Such notice shall show

(1) The county and the court in which the action is pending,
(2) The names of the parties,
(3) The purpose of the action, and
(4) The fact that on a date specified an order was issued to attach the defendant's property.

(c) If no newspaper is published in the county in which the action is pending, the notice

(1) Shall be published once a week for four successive weeks in some newspaper published in the same district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, or
(2) Shall be posted at the courthouse door in the county for 30 days. (1947, c. 693, s. 1; 1967, c. 954, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 40.)

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under prior similar provisions.*

Statement of Amount. — Under former G.S. 1-448, which provided that when the summons in an attachment suit was to be served by publication, the publication should state the fact of the attachment, "the amount of the claims," and in a brief way the nature of the demand, an order and a publication based thereon which fail to state the amount of the plaintiff's claims were fatally defective. Flint v. Coffin, 176 F. 872 (4th Cir. 1910), cert. denied, 217 U.S. 602, 30 S. Ct. 693, 54 L. Ed. 898, 219 U.S. 589, 31 S. Ct. 472, 55 L. Ed. 2d 348 (1911).

In attachment the plaintiff cannot recover an amount in excess of that stated in the summons. Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901).

Defendant's Bond as Waiver of Service of Summons. — Where property has been levied on under the writ, a bond given by the defendants in discharge of the attachment as provided by former G.S. 1-457 was considered equivalent to a personal appearance on the action and a waiver of the requirement for further service of the summons. It amounted to a voluntary submission of the defendant's cause to the jurisdiction of the court. Mitchell v. Elizabeth City Lumber Co., 169 N.C. 397, 86 S.E. 343 (1915).

Late Filing of Newspaper's Affidavit. — After the court acquires control of a debt by the garnishment order, objections that the affidavit of the newspaper showing the publication of the notice and the sheriff's endorsement and return showing the levy in the garnishment proceeding were not timely filed as the law required, are not sufficient to justify a motion to dismiss. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Omission of Notice in Order of Publication. — Where notice of the attachment was omitted from the order of publication, but in the published notice the defendant was informed that an attachment had been issued against his property, it was held under the former statute that the court had power to amend the order of publication, so as to insert a requirement that notice be given of the attachment. Bank of New Hanover v. Blossom, 92 N.C. 695 (1885).

Applied in S.D. Scott & Co. v. Jones, 230 N.C. 74, 52 S.E.2d 219 (1949).

Part 3. Execution of Order of Attachment; Garnishment.

§ 1-440.15. Method of execution.

(a) The sheriff to whom the order of attachment is directed shall note thereon the date of its delivery to him and shall promptly execute it by levying on the defendant's property as follows:

(1) The levy on real property shall be made as provided by G.S. 1-440.17;
(2) The levy on stock in a corporation shall be made as provided by G.S. 1-440.19;
(3) The levy on goods stored in a warehouse shall be made as provided by G.S. 1-440.20;

(4) The levy on tangible personal property in the possession of the defendant shall, except as provided in G.S. 1-440.19, be made as provided by G.S. 1-440.18;

(5) The levy on tangible personal property belonging to the defendant but not in his possession, or on any indebtedness to the defendant, or on any other intangible personal property belonging to the defendant, shall, except as provided by G.S. 1-440.19 and 1-440.20, be made as provided by G.S. 1-440.25 relating to garnishment.

(b) The sheriff is not required to levy upon personal property before levying upon real property.

(c) In order for the sheriff to make any levy, it is not necessary for him to deliver to the defendant or any other person any copy of the order of attachment or any other process except in the case of garnishment as provided by G.S. 1-440.25. (1947, c. 693, s. 1.)

CASE NOTES

Levy Made Under Original Order 41 Days After Issuance Is Invalid. — Where the sheriff's levy was under the original order for attachment and was 41 days after its issuance, it was insufficient to constitute a valid levy, and there was no error in the entry of the order to vacate it. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

Applied in Ivester v. Miller, 398 B.R. 408, 2008 U.S. Dist. LEXIS 98493 (M.D.N.C. 2008).

§ 1-440.16. Sheriff's return.

(a) After the sheriff has executed an order of attachment, he shall promptly make a written return showing all property levied upon by him and the date of such levy. In such return, he shall describe the property levied upon in sufficient detail to identify the property clearly. The sheriff forthwith shall deliver the order of attachment, together with his return, to the court in which the action is pending.

(b) If garnishment process is issued, as provided by G.S. 1-440.23 and 1-440.24, the sheriff shall include in his return a report of his proceedings with respect to such garnishment and shall return to the court the original process issued to the garnishee.

(c) If the sheriff makes no levy within 10 days after the issuance of the order of attachment, he forthwith shall deliver to the court, in which the action is pending, the order, and any other process relating thereto, together with his return showing that no levy has been made and the reason therefor. (1947, c. 693, s. 1.)

CASE NOTES

Levy under an order of attachment must be made within 10 days of the issuance of the order. Robinson v. Robinson, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

Late Filing of Return. — After the court acquires control of a debt by the garnishment order, objections that the affidavit of the newspaper showing the publication of the notice and the sheriff's endorsement and return showing the levy in the garnishment proceeding were not timely filed as the law required, are not sufficient to justify a motion to dismiss. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

The adequacy of the description of the property contained in a sheriff's return upon attachment should be decided on a case-by-case basis. Main St. Shops, Inc. v. Esquire Collections, Ltd., 115 N.C. App. 510, 445 S.E.2d 420 (1994).

Posting a bond to release property from attachment estops a defendant from thereafter challenging any procedural defects in the process. Main St. Shops, Inc. v. Esquire Collections, Ltd., 115 N.C. App. 510, 445 S.E.2d 420 (1994).

Applied in Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765 (1983).

§ 1-440.17. Levy on real property.

(a) In order to make a levy on real property, the sheriff need not go upon the land or take control over it, but he

(1) Shall make an endorsement upon the order of attachment or shall attach thereto a statement showing that he thereby levies upon the defendant's interest in the real property described in such endorsement or statement, describing the real property in sufficient detail to identify it clearly, and

(2) Shall, as promptly as practicable, certify such levy, and the names of the parties to the action, to the clerk of the superior court of the county in which the land lies.

(b) Upon receipt of the sheriff's certificate, the clerk shall docket the levy, as provided by G.S. 1-440.33. (1947, c. 693, s. 1.)

CASE NOTES

The sheriff may make a valid levy under a warrant of attachment on real property without going on the property. The levy is made effective by the endorsement thereof on the execution or warrant of attachment. The jurisdiction of the court dates from the levy, but the lien becomes effective when certified to the clerk and indexed. Voehringer v. Pollock, 224 N.C. 409, 30 S.E.2d 374 (1944), decided under former law.

Sufficiency of Description. — A levy on land under an attachment is sufficient, if it gives such a description as will distinguish and identify the land. Grier v. Rhyne, 67 N.C. 338 (1872), decided under former law.

§ 1-440.18. Levy on tangible personal property in defendant's possession.

The sheriff shall levy on tangible personal property in the possession of the defendant by seizing and taking into his possession so much thereof as will be sufficient to satisfy the plaintiff's demands. (1947, c. 693, s. 1.)

§ 1-440.19. Levy on stock in corporation.

(a) The sheriff may levy, as on tangible property, on a share of stock in a corporation by seizing the certificate of stock

(1) When the certificate is in the possession of the defendant, and

(2) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is embodied in the certificate of stock, as is provided by the Uniform Stock Transfer Act or similar legislation.

(b) The sheriff may levy on a share of stock in a corporation by delivery of copies of the garnishment process to the proper officer or agent of such corporation, as set out in G.S. 1-440.26,

(1) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is not embodied in the certificate of stock, or

(2) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is embodied in the certificate of the stock, as is provided by the Uniform Stock Transfer Act or similar legislation, and

a. Such certificate has been surrendered to the corporation which issued it, or

b. The transfer of such certificate by the holder thereof has been restrained or enjoined.

(c) A restraining order or injunction against the transfer of a certificate of stock, when proper in an attachment proceeding, may be granted by the clerk or judge pursuant to a motion in the cause to which the attachment is ancillary. (1947, c. 693, s. 1.)

CASE NOTES

This section does not envision an attachment of an intangible ownership interest. Instead, the statute clearly and unambiguously provides that the proper means to attach stock of a corporation is for the sheriff to seize the stock certificate. Medoil Corp. v. Clark, 751 F. Supp. 88 (W.D.N.C. 1990).

As to attachment of stock owned by one foreign corporation in another foreign corporation under superseded G.S. 1-459, see Parks-Cramer Co. v. Southern Express Co., 185 N.C. 428, 117 S.E. 505 (1923), cert. denied, 263 U.S. 717, 44 S. Ct. 180, 68 L. Ed. 522 (1924), decided under former law.

Cited in Ivester v. Miller, 398 B.R. 408, 2008 U.S. Dist. LEXIS 98493 (M.D.N.C. 2008).

§ 1-440.20. Levy on goods in warehouses.

(a) The sheriff may levy on goods delivered to a warehouseman for storage, by delivering copies of the garnishment process to the warehouseman, or to the proper officer or agent for the corporate warehouseman, as set out in G.S. 1-440.26,

(1) If a negotiable warehouse receipt has not been issued with respect thereto, or

(2) If a negotiable warehouse receipt has been issued with respect thereto, and
   a. Such receipt is seized, or
   b. Such receipt is surrendered to the warehouseman who issued it, or
   c. The transfer of such receipt by the holder thereof is restrained or enjoined.

(b) A restraining order or injunction against the transfer of a negotiable warehouse receipt, when proper in an attachment proceeding, may be granted by the clerk or judge pursuant to a motion in the cause to which the attachment is ancillary. (1947, c. 693, s. 1.)

§ 1-440.21. Nature of garnishment.

(a) Garnishment is not an independent action but is a proceeding ancillary to attachment and is the remedy for discovering and subjecting to attachment

(1) Tangible personal property belonging to the defendant but not in his possession, and

(2) Any indebtedness to the defendant and any other intangible personal property belonging to him.

(b) A garnishee is a person, firm, association, or corporation to which such a summons as specified by G.S. 1-440.23 is issued. (1947, c. 693, s. 1.)

CASE NOTES

***Editor's Note.** — Many of the cases cited below were decided under prior similar provisions.*

Constitutionality. — Former G.S. 1-461 applied alike to residents and nonresidents, persons and corporations, and it would not be declared unconstitutional in an action instituted long subsequent to its enactment. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Jurisdiction Necessary. — The court entertaining a garnishment must have some jurisdiction over the thing garnished. Balk v. Harris, 124 N.C. 467, 32 S.E. 799 (1899), rev'd on other grounds, 198 U.S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905).

In order to subject a debt to garnishment and to give the court jurisdiction to act with respect thereto, three things should occur: (1) The corporation who is the garnishee must have such a residence and agency within the State as renders it amenable to the process of the court; (2) the principal defendant, who is the plaintiff's debtor, must himself have the right to sue the garnishee, his debtor, in this State for the recovery of the debt; (3) it must appear that the situs of the debt is in this State. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Findings Sufficient to Support Jurisdiction. — Findings that the garnishee was a domesticated corporation, that it owed a debt, evidenced by a note, to a foreign corporation, that the note was assignable to the stockholders of the foreign corporation, that the foreign corporation owed a debt to plaintiff, that plaintiff, in his suit against the foreign corporation, duly garnished the debt and by amendment had the individual stockholders of the foreign corporation made parties, warranted the court in denying defendants' motion to dismiss for want of jurisdiction. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

A garnishment is in effect a suit by the principal debtor, the defendant in the action, in the name of the plaintiff, against the garnishee to recover the debt due to the plaintiff and apply it to the satisfaction of the plaintiff's demand. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

Proper Remedy to Reach Intangibles. — Garnishment is a proper ancillary remedy by which to discover intangible property rights and subject them to attachment. Ward v. Kolman Mfg. Co., 267 N.C. 131, 148 S.E.2d 27 (1966).

Not Necessary to Bring Separate Action Against Garnishee. — A judgment may be taken against a garnishee, who is found to be indebted to the debtor, in the action to which the garnishment proceeding is ancillary, and is not necessary to bring a separate action against such garnishee. Baker, Ginsberg & Co. v. Belvin, 122 N.C. 90, 122 N.C. 190, 30 S.E. 337, 30 S.E. 337 (1898).

Money Not Yet Due. — Under former G.S. 1-461, money due by a garnishee, or goods in his hands at the time of appearance and answer, were held applicable to the debt, though not earned and due when he was summoned to answer. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

Exemption of Earnings for Personal Services Allowed. — Section 1-362 provides that earnings of a debtor for his personal services for the 60 days next preceding shall be exempt from execution. It was held that the exemption protects such earnings from seizure in garnishment. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

But Exemption Must Be Claimed. — When a man has earned wages they can be garnished as his property, if no personal exemption is claimed. Pocomoke Guano Co. v. Colwell, 177 N.C. 218, 98 S.E. 535 (1919).

Plaintiff Substituted to Rights of Defendant Against Garnishee. — A plaintiff in garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and cannot enforce any greater claim against the garnishee than the debtor himself, if suing, would have been entitled to recover. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

Cross Action Against Garnishee Not Permitted. — Defendant in an action on contract is not entitled to file a cross action on a separate contract against a party brought in by plaintiff solely for the purpose of garnishment. Kitchen Equip. Co. v. International Erectors, Inc., 268 N.C. 127, 150 S.E.2d 29 (1966).

Amounts Due Corporation from Unpaid Stock Subscriptions. — A corporation was held a necessary party to an attachment proceeding to subject the amounts due it from unpaid subscriptions to its stock to the payment of its debts. Cooper v. Adel Sec. Co., 122 N.C. 463, 30 S.E. 348 (1898).

Bank May Be Garnishee. — A national bank may be proceeded against by garnishment to impound the proceeds of a draft in its hands. Markham-Stephens Co. v. E.L. Richmond Co., 177 N.C. 364, 99 S.E. 17 (1919).

Where Bank a Mere Stakeholder. — Where the funds of a nonresident defendant are attached in the hands of a local bank, which is only an agency for collection, which position it alleges in its answer, and also alleges ownership of title by its forwarding bank, the position taken by the local bank is that of a mere stakeholder without interest, between two conflicting claimants, and it may successfully maintain that the forwarding bank be made a party to the action, and await the determination of this question in the action, in order to protect itself in the payment of the funds attached in its hands. Temple v. Eades Hay Co., 184 N.C. 239, 114 S.E. 162 (1922).

Cited in Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974); Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978); Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 500, 377 S.E.2d 88 (1989); Ivester v. Miller, 398 B.R. 408, 2008 U.S. Dist. LEXIS 98493 (M.D.N.C. 2008).

§ 1-440.22. Issuance of summons to garnishee.

(a) A summons to garnishee may be issued

(1) At the time of the issuance of the original order of attachment, by the court making such order, or

(2) At any time thereafter prior to judgment in the principal action, by the court in which the action is pending.

(b) At the request of the plaintiff, such summons to garnishee shall, at either such time, be issued to each person designated by the plaintiff as a garnishee. (1947, c. 693, s. 1.)

CASE NOTES

Cited in Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

§ 1-440.23. Form of summons to garnishee.

The summons to garnishee shall be substantially in the following form:

State of North Carolina   In the Superior Court
__________ County

________________,
Plaintiff,
vs.
________________,
Defendant,
and
________________,
Garnishee.
} Summons to Garnishee

To __________, Garnishee:

You are hereby summoned, as a garnishee of the defendant, __________, and required, within twenty days after the service of this summons upon you, to file a verified answer in the Office of the Clerk of the Superior Court of the above named county, at __________, North Carolina, showing —

(1) Whether, at the time of the service of this summons upon you, or at any time since then until the date of your answer, you were indebted to the defendant or had any property of his in your possession and, if so, the amount and nature thereof; and

(2) Whether, according to your knowledge, information or belief, any other person is indebted to the defendant or has any property of the defendant in his possession and, if so, the name of each such person.

In case of your failure to file such answer a conditional judgment will be rendered against you for the full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as will be sufficient to cover the plaintiff's costs.

This the ________ day of __________, ______.

____
(Here designate Clerk Superior
Court or Judge.)

(1947, c. 693, s. 1; 1999-456, s. 59.)

CASE NOTES

Cited in Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

§ 1-440.24. Form of notice of levy in garnishment proceeding.

The notice of levy to be served on the garnishee shall be substantially in the following form:

State of North Carolina In the Superior Court
______________ County

______________________,
Plaintiff,
vs.
______________________,
Defendant,
and
______________________,
Garnishee.
} Notice to Levy

To ______________ Garnishee:

By virtue of the authority contained in an order of attachment issued by the Superior Court of ______ County and directed to me, I hereby levy upon any and all property that you have or hold in your possession for the account, use, or benefit of the defendant, and upon all debts owed by you to the defendant.

You are notified that a lien is hereby created on all the tangible property of the defendant in your possession, and that if you surrender the possession of, or transfer to anyone, any property belonging to the defendant, or if you pay any debt you owe the defendant, unless the same is delivered or paid to me or to the court for such proper disposition as the court may determine, you will be subject to punishment as for contempt, and that judgment may be rendered against you for the value of such property not exceeding the full amount of plaintiff's claim and costs of the action.

This the ______ day of ______, ______.

____
Sheriff of ______ County.

(1947, c. 693, s. 1; 1999-456, s. 59.)

§ 1-440.25. Levy upon debt owed by, or property in possession of, the garnishee.

The levy in all cases of garnishment shall be made by delivering to the garnishee, or a process agent authorized by him or expressly or impliedly authorized by law, or some representative of a corporate garnishee designated by G.S. 1-440.26, a copy of each of the following:

(1) The order of attachment,
(2) The summons to garnishee, and
(3) The notice of levy. (1947, c. 693, s. 1.)

CASE NOTES

Implied Agent. — It is of no import that a servee was not expressly designated to be an agent for service of process and thus must be termed an implied agent. While there have been no cases under this section dealing with service of process upon an implied agent, an analogy can be made to G.S. 1A-1, Rule 4(j)(6)a. Carolina Paper Co. v. Bouchelle, 19 N.C. App. 697, 200 S.E.2d 203 (1973), aff'd, 285 N.C. 56, 203 S.E.2d 1 (1974).

Although the title of purchasing agent is not specifically enumerated in this section and G.S. 1-440.26(a), this does not preclude the classification of such an agent within one of the listed categories. Carolina Paper Co. v. Bouchelle, 19 N.C. App. 697, 200 S.E.2d 203

(1973), aff'd, 285 N.C. 56, 203 S.E.2d 1 (1974).

Applied in State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Cited in Ivester v. Miller, 398 B.R. 408, 2008 U.S. Dist. LEXIS 98493 (M.D.N.C. 2008).

§ 1-440.26. To whom garnishment process may be delivered when garnishee is corporation.

(a) When the garnishee is a domestic corporation, the copies of the process listed in G.S. 1-440.25 may be delivered to the president or other head, secretary, cashier, treasurer, director, managing agent or local agent of the corporation.

(b) When the garnishee is a foreign corporation, the copies of the process listed in G.S. 1-440.25 may be delivered only to the president, treasurer or secretary thereof personally and while such officer is within the State, except that

(1) If the corporation has property within this State, or
(2) If the cause of action arose in this State, or
(3) If the plaintiff resides in this State,

the copies of the process may be delivered to any of the persons designated in subsection (a) of this section.

(c) A person receiving or collecting money within this State on behalf of a corporation is deemed to be a local agent of the corporation for the purpose of this section. (1947, c. 693, s. 1.)

CASE NOTES

Cases Decided Under Former § 1-97(1) Still Pertinent. — Because the language used in former G.S. 1-97(1) was the same as now appears in subsection (a) of this section, cases decided under former G.S. 1-97(1) are still pertinent. Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

Purchasing Agent May Be "Managing Agent". — Although a purchasing agent does not conveniently fit, at least by nomenclature, into the listed categories of subsection (a) of this section, a careful analysis of such agent's background and responsibilities may manifest sufficient reason why he should be termed a "managing agent." Carolina Paper Co. v. Bouchelle, 19 N.C. App. 697, 200 S.E.2d 203 (1973), aff'd, 285 N.C. 56, 203 S.E.2d 1 (1974).

Although the title of purchasing agent is not specifically enumerated in G.S. 1-440.25 and subsection (a) of this section, this does not preclude the classification of such an agent within one of the listed categories. Carolina Paper Co. v. Bouchelle, 19 N.C. App. 697, 200 S.E.2d 203 (1973), aff'd, 285 N.C. 56, 203 S.E.2d 1 (1974).

Test of Agency. — Where defendant is not the president or the head of the corporation, nor is he secretary, cashier, treasurer, or director, the question then becomes: Is he such an agent, regularly employed, having some charge or measure of control over the business entrusted to him, or of some feature of it, and of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that process has been served upon him. Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

Bank's loan officer trainee was agent for purpose of serving attachment papers upon garnishee bank in accordance with this section since trainee's duties included collecting of loan payments on bank's behalf. Higgins v. Simmons, 324 N.C. 100, 376 S.E.2d 449 (1989).

§ 1-440.27. Failure of garnishee to appear.

(a) When a garnishee, after being duly summoned, fails to file a verified answer as required, the clerk of the court shall enter a conditional judgment for the plaintiff against the garnishee for the full amount for which the plaintiff shall have prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(b) The clerk shall thereupon issue a notice to the garnishee requiring him to appear not later than 10 days after the date of service of the notice, and show cause why the conditional judgment shall not be made final. If, after service of such notice, the garnishee fails to appear within the time named and file a verified answer to the summons to the garnishee, or if such notice cannot be served upon the garnishee because he cannot be found within the county where the original summons to such garnishee was served, then in either such event, the clerk shall make the conditional judgment final. (1947, c. 693, s. 1.)

CASE NOTES

Cited in Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

§ 1-440.28. Admission by garnishee; setoff; lien.

(a) When a garnishee admits in his answer that he is indebted to the defendant, or was indebted to the defendant at the time of service of garnishment process upon him or at some date subsequent thereto, the clerk of the court shall enter judgment against the garnishee for the smaller of the two following amounts:

(1) The amount which the garnishee admits that he owes the defendant or has owed the defendant at any time from the date of the service of the garnishment process to the date of answer by the garnishee, or

(2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(b) When a garnishee admits in his answer that he has in his possession personal property belonging to the defendant, with respect to which the garnishee does not claim a lien or other interest, the clerk of the court shall enter judgment against the garnishee requiring him to deliver such property to the sheriff, and upon such delivery the garnishee shall be exonerated as to the property so delivered.

(c) When a garnishee admits in his answer that, at or subsequent to the date of the service of the garnishment process upon him, he had in his possession property belonging to the defendant, with respect to which the garnishee does not claim a lien or other interest, but that he does not have such property at the time of his answer, the clerk of the court shall at a hearing for that purpose determine, upon affidavit filed, the value of such property, unless the plaintiff, the defendant and the garnishee agree as to the value thereof, or unless, prior to the hearing, a jury trial thereon is demanded by one of the parties. The clerk shall give the parties such notice of the hearing as he may deem reasonable and by such means as he may deem best.

(d) When the value of the property has been determined as provided in subsection (c) of this section the court shall enter judgment against the garnishee for the smaller of the two following amounts:

(1) An amount equal to the value of the property in question, or

(2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(e) When a garnishee alleges in his answer that the debt or the personal property due to be delivered by him to the defendant will become payable or deliverable at a future date, and the plaintiff, within 20 days thereafter, files a reply denying such allegation, the issue thereby raised shall be submitted to and determined by a jury. If it is not denied that the debt owed or the personal property due to be delivered to the defendant will become payable or deliverable at a future date, or if is so found upon the trial, judgment shall be given against the garnishee which shall require the garnishee at the due date of the indebtedness to pay the plaintiff such an amount as is specified in subsection (a) of this section, or at the deliverable date of the personal property to deliver such property to the sheriff in order that it may be sold to satisfy the plaintiff's claim.

(f) In answer to a summons to garnishee, a garnishee may assert any right of setoff which he may have with respect to the defendant in the principal action.

(g) With respect to any property of the defendant which the garnishee has in his possession, a garnishee, in answer to a summons to garnishee, may assert any lien or other valid claim amounting to an interest therein. No garnishee shall be compelled to surrender the possession of any property of the defendant upon which the garnishee establishes a lien or other valid claim amounting to an interest therein, which lien or interest attached or was acquired prior to service of the summons to garnishee, and such property only may be sold subject to the garnishee's lien or interest. (1947, c. 693, s. 1.)

CASE NOTES

No Waiver of Setoff Right. — Where insolvent corporate defendant had $2,568.55 balance with bank, where defendant owed bank $5,000, plus interest on a note that had been past due for several months, where bank was attached as debtor of corporate defendant and was served with a summons and notice of levy, and where bank had honored a number of corporation's checks after note became due and did not assert its set off until account was attached, court incorrectly concluded that bank had waived its right of setoff against corporation since right to assert the setoff is recognized under subsection (f) of this section, and bank did not waive its setoff right by honoring some of company's checks after note became due. Killette v. Raemell's Sewing Apparel, Inc., 93 N.C. App. 162, 377 S.E.2d 73 (1989).

Applied in State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Cited in Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978).

§ 1-440.29. Denial of claim by garnishee; issues of fact.

(a) In addition to any other instances when issues of fact arise in a garnishment proceeding, issues of fact arise

(1) When a garnishee files an answer such that the court cannot determine therefrom whether the garnishee intends to admit or deny that he is indebted to, or has in his possession any property of, the defendant, or

(2) When a garnishee files an answer denying that he is indebted to, or has in his possession any property of, the defendant, or was indebted to, or had in his possession any property of, the defendant at the time of the service of the summons upon him or at any time since then, and the plaintiff, within 20 days thereafter, files a reply alleging the contrary.

(b) When a jury finds that the garnishee owes the defendant a specific sum of money or has in his possession property of the defendant of a specific value, or owed the defendant a specific sum of money or had in his possession property of the defendant of a specific value at the time of the service of the summons upon him or at any time since then, the court shall enter judgment against the garnishee for the smaller of the two following amounts:

(1) The amount specified in the jury's verdict, or

(2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs. (1947, c. 693, s. 1.)

CASE NOTES

***Editor's Note.** — The cases cited below were decided under prior similar provisions.*

Where Principal Defendant Denies Ownership. — The judgment against a nonresident debtor being exhausted by a sale of the property attached, a nonresident defendant in attachment proceedings, who denied ownership of the attached property, could not be injured by the judgment, and hence, was held not entitled, under the former statute, to have an issue submitted as to the title to the property. Foushee v. Owen, 122 N.C. 360, 29 S.E. 770 (1898).

Jury Trial. — Under former G.S. 1-463, relating to trial of issues in garnishment proceedings, the plaintiff in garnishment proceedings, upon the suggestion that he wished to traverse the return of the garnishee, was entitled, without any formal or verified statement, to have the issue tried by a jury. Brenizer v. Royal Arcanum, 141 N.C. 409, 53 S.E. 835 (1906).

No Personal Judgment Against Nonresident Defendant. — In garnishment proceedings under the former statute against a nonresident defendant, service being had by publication, no jurisdiction was acquired to support a personal judgment against the defendant. Goodwin v. Claytor, 137 N.C. 224, 49 S.E. 173 (1904).

§ 1-440.30. Time of jury trial.

All issues arising under G.S. 1-440.28 or G.S. 1-440.29 shall, when a jury trial is demanded by any party, be submitted to and determined by a jury at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial. (1947, c. 693, s. 1.)

§ 1-440.31. Payment to defendant by garnishee.

Any garnishee who shall pay to the defendant any debt owed the defendant or deliver to the defendant any property belonging to the defendant, after being served with garnishment process, and while the garnishment proceeding is pending, shall not thereby relieve himself of liability to the plaintiff. (1947, c. 693, s. 1.)

§ 1-440.32. Execution against garnishee.

(a) Pursuant to a judgment against a garnishee, execution may be issued against such garnishee prior to judgment against the defendant in the principal action. The court may issue such execution without notice or hearing. All property seized pursuant to such execution shall be held subject to the order of the court pending judgment in the principal action.

(b) The court, pending judgment in the principal action, may permit the property to remain in the garnishee's possession upon the garnishee's giving a bond in the same manner and on the same conditions as is provided by G.S. 1-440.39 with respect to the discharge of an attachment by the defendant. (1947, c. 693, s. 1.)

CASE NOTES

***Editor's Note.** — The cases cited below were decided under prior similar provisions.*

Without Notice or Hearing. — Where judgment has been regularly entered against certain garnishees in proceedings under former G.S. 1-440, the clerk of the superior court could issue execution on the judgment against the garnishees without notice or a hearing under former G.S. 1-461 and G.S. 1-305. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Execution may be issued against garnishees prior to final judgment against defendant, and the property held subject to the orders of the court pending final judgment. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

There was no distinction between an

execution on an ordinary judgment issued under G.S. 1-305, and an execution on a judgment against a garnishee issued under former G.S. 1-461. They were both judgments and sections to be construed in pari materia. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Part 4. Relating to Attached Property.

§ 1-440.33. When lien of attachment begins; priority of liens.

(a) Upon securing the issuance of an order of attachment, a plaintiff may cause notice of the issuance of the order to be filed with the clerk of the court of any county in which the plaintiff believes that the defendant has real property which is subject to levy pursuant to such order of attachment. Upon receipt of such notice the clerk shall promptly docket the same on the lis pendens docket.

(b) When the clerk receives from the sheriff a certificate of levy on real property as provided by G.S. 1-440.17, the clerk shall promptly note the levy on his judgment docket and index the same. When the levy is thus docketed and indexed,

(1) The lien attaches and relates back to the time of the filing of the notice of lis pendens if the plaintiff has prior to the levy caused notice of the issuance of the order of attachment to be properly entered on the lis pendens docket of the county in which the land lies, as provided by subsection (a) of this section.

(2) The lien attaches only from the time of the docketing of the certificate of levy if no entry of the issuance of the order of attachment has been made prior to the levy on the lis pendens docket of the county in which the land lies.

(c) A levy on tangible personal property of the defendant in the hands of the garnishee, when made in the manner provided by G.S. 1-440.25, creates a lien on the property thus levied on from the time of such levy.

(d) If more than one order of attachment is served with respect to property in possession of the defendant or is served upon a garnishee, the priority of the order of the liens is the same as the order in which the attachments were levied, subject to the provisions of subsection (b) of this section, relating to the time when a lien of attachment begins with respect to real property.

(e) If two or more orders of attachment are served simultaneously, liens attach simultaneously, subject to the provisions of subsection (b) of this section, relating to the time when a lien of attachment begins with respect to real property.

(f) If the funds derived from the attachment of property on which liens become effective simultaneously are insufficient to pay the judgments in full of the simultaneously attaching creditors who have liens which begin simultaneously, such funds are prorated among such creditors according to the amount of the indebtedness of the defendant to each of them, respectively, as established upon the trial.

(g) If more than one order of attachment is served on a garnishee, the court from which the first order of attachment was issued shall, upon motion of the garnishee or of any of the attaching creditors, make parties to the action all of the attaching creditors, who are not already parties thereto in order that any questions of priority among the attaching creditors may be determined in that action and in that court. (1947, c. 693, § 1.)

CASE NOTES

***Editor's Note.** — Some of the cases cited below were decided under prior similar provisions.*

Perfection by attachment occurs as to personal property upon levy. In re Millerburg, 61 Bankr. 125 (Bankr. E.D.N.C. 1986).

When an order of attachment is perfected by a levy, a lien of attachment is created thereby which establishes the lienor's claim as against all other creditors and subsequent lienors. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Lien Enforceable Against Subsequent Purchasers. — When the officer had complied with the provisions of former G.S. 1-449, relating to execution, levy and lien of attachments, the plaintiffs had a lien on such property, which was enforceable against all subsequent purchasers from the defendant. Newberry v. Meadows Fertilizer Co., 203 N.C. 330, 166 S.E. 79 (1932).

A person claiming under a conveyance or encumbrance executed subsequent to the docketing of the notice of the order with respect to the property conveyed or encumbranced takes subject to the action whose pendency was so noted. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

The date to which the lien relates back and fixes the priority of the claim, with respect to real property, is the time at which the notice of the order of attachment is docketed in the record of lis pendens in the county where the property is located. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Debt Owed by City to Principal Defendants. — In attachment proceedings under a former statute an examination of the officials of a city alleged to be indebted to defendants operated as a lien on anything owing by the city to defendants, as of the day when the copy of the warrant of attachment was delivered; and thereby prevented any alterations of the state of accounts between defendants and the city. Carmer v. Evers, 80 N.C. 56 (1879).

A "notice of levy" served upon a garnishee was insufficient process to accord the serving party the status of an attaching creditor. It was incumbent on the party, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accordance with G.S. 1-440.1 et seq. or G.S. 1-440.43(2). Failing this, the party's contention that it could intervene as an attaching creditor under this section failed, and the garnishee's motion to join all attaching creditors was moot. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Property of Garnishee. — Under former G.S. 1-461, it was held that no lien attached to any specific property of the garnishee until the issuance of execution on the judgment and proceedings to enforce such execution. Newberry v. Meadows Fertilizer Co., 203 N.C. 330, 166 S.E. 79 (1932).

Homestead. — The lien of an attachment levied under the former statute upon land of a nonresident debtor was paramount to the right of a homestead therein acquired by the debtor by becoming a citizen of the State prior to the rendition of judgment in the action. Watkins v. Overby, 83 N.C. 165 (1880).

Priority as to Bankruptcy Trustee. — Where lienors obtained an attachment lien on Chapter 7 debtor's real property, but a final judgment in state court was stayed by the filing of the bankruptcy petition, the lien survived the trustee's 11 U.S.C.S. § 544 strong arm powers because the lien was perfected by levy pursuant to G.S. 1-440.33. Ivester v. Miller, 398 B.R. 408, 2008 U.S. Dist. LEXIS 98493 (M.D.N.C. 2008).

Applicability to Intangible Property. — Where lienors obtained an attachment lien on Chapter 7 debtor's bank account, but a final judgment in state court was stayed by the filing of the bankruptcy petition, the lien did not survive the trustee's 11 U.S.C.S. § 544 strong arm powers because the plain language of G.S. 1-440.33 prevented application of its priority rules to attachment liens for intangible property, and the lien remained unperfected until entry of a final judgment pursuant to G.S. 1-440.46. Ivester v. Miller, 398 B.R. 408, 2008 U.S. Dist. LEXIS 98493 (M.D.N.C. 2008).

Cited in Doub v. Hartford Fire Ins. Co. (In re Medlin), 229 Bankr. 353 (Bankr. E.D.N.C. 1998).

§ 1-440.34. Effect of defendant's death after levy.

(a) In case of the death of the defendant, after the issuance of an order of attachment and after a levy is made thereunder but before service of summons is had or before an appearance is entered in the principal action, the levy shall remain in force

(1) If the cause of action set forth by the plaintiff in the principal action is one which survives, and

(2) If service is completed on the personal representative of the defendant within three months from the date of his qualification.

(b) If a levy has been made upon real property and the defendant dies before such real property is sold pursuant to the attachment, the lien of the attachment shall continue but the judgment may be enforced only through the defendant's personal representative in the regular course of administration. (1947, c. 693, s. 1.)

§ 1-440.35. Sheriff's liability for care of attached property; expense of care.

The sheriff is liable for the care and custody of personal property levied upon pursuant to an order of attachment just as if he had seized it under execution. Upon demand of the sheriff, the plaintiff shall advance to the sheriff from time to time such amount as may be required to provide the necessary care and to maintain the custody of the attached property. The expense so incurred in caring for and maintaining custody of attached property shall be taxed as part of the costs of the action. (1947, c. 693, s. 1.)

CASE NOTES

Sheriff's liability under this section arises only when such loss, damage or destruction is caused by the sheriff's failure to exercise proper care and diligence to preserve the property. Butler v. Southeastern Millworks, Inc. (In re Bldrs. Supply of Wilmington, Inc.), 40 Bankr. 753 (Bankr. E.D.N.C. 1984).

Part 5. Miscellaneous Procedure Pending Final Judgment.

§ 1-440.36. Dissolution of the order of attachment.

(a) At any time before judgment in the principal action, a defendant whose property has been attached may specially or generally appear and move, either before the clerk or the judge, to dissolve the order of attachment.

(b) When the defect alleged as grounds for the motion appears upon the face of the record, no issues of fact arise, and the motion is heard and determined upon the record.

(c) When the defect alleged does not appear upon the face of the record, the motion is heard and determined upon the affidavits filed by the plaintiff and the defendant, unless, prior to the actual commencement of the hearing, a jury trial is demanded in writing by the plaintiff or the defendant. Either the clerk or the judge hearing and determining the motion to dissolve the order of attachment shall find the facts upon which his ruling thereon is based. If a jury trial is demanded by either party, the issues involved shall be submitted and determined at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial. (1947, c. 693, s. 1.)

CASE NOTES

Editor's Note. — Many of the cases cited below were decided under prior similar provisions.

Remedy in This Section Is Not Exclusive. — When the defendant contests the grounds on which the writ issued, this section provides a ready means of attack upon the writ without awaiting the trial of the main issue. But this remedy is not exclusive. He may make the necessary allegations in his answer by way of defense and await the trial. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

Section 1-440.43 provides a method by which interested third parties attack an attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Inasmuch as a statutory method of third party attack on an attachment is available, the function of lis pendens would be to put a third party in a position to use it. It is unacceptable to hold that the efficacy of lis pendens to perform its designated function should depend on proper execution of the order which caused its entry. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Section 1-440.43 applies to any person who has acquired a lien upon or an interest in attached property whether such interest is acquired prior to or subsequent to the attachment and allows for the making of a motion, at any time prior to judgment in the principal action, to dissolve or modify the order of attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Section Affords Hearing and Judicial Determination. — In combination with the G.S. 1-440.11 requirement that the facts supporting the allegation of intent to defraud be stated in the affidavit, this section affords a meaningful hearing and judicial determination of the attachment at an early stage. Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

Jurisdiction of Judge of Superior Court. — On motion to dissolve an attachment, the judge of superior court has concurrent jurisdiction with the clerk of superior court to determine the matter; and consequently the judge is not limited to determining whether or not there was competent evidence to support the findings of the clerk but can consider the evidence de novo and hear evidence not before the clerk. Hiscox v. Shea, 8 N.C. App. 90, 173 S.E.2d 591 (1970).

Where jury determined that the attachment was wrongfully issued, it was proper for the court to dissolve the attachment and discharge the defendant's surety from liability. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

Clerk Has Jurisdiction. — The clerk of the superior court has jurisdiction to vacate an attachment. Palmer v. Bosher, 71 N.C. 291 (1874).

Motion May Be Made by Any One of Several Defendants. — Any one of several defendants whose property has been attached has such an interest in the action as to maintain a motion to vacate the attachment. Luff v. Levey, 203 N.C. 783, 166 S.E. 922 (1932).

Failure of Defendant to Move to Vacate. — The proper publication of summons for a nonresident defendant whose property has been attached gives the defendant notice that he can vacate the warrant if insufficient, and upon his failing to move to vacate the process he will not be held to be prejudiced by a subsequent judgment. Page v. McDonald, 159 N.C. 38, 74 S.E. 642 (1912).

Attachment Vacated When Defendant Bankrupt. — Bankruptcy of defendant was held to be sufficient ground for vacating an attachment levied upon his property. Mixer, Whitman & Co. v. Excelsior Oil & Guano Co., 65 N.C. 552 (1871); Ward v. Hargett, 151 N.C. 365, 66 S.E. 340 (1909).

And Where It Appears from Pleadings That Action Must Fail. — The trial judge may vacate an attachment pending trial where it plainly appears from the pleadings that the action of the plaintiff must fail. Knight v. Hatfield, 129 N.C. 191, 39 S.E. 807 (1901).

It is error to discharge an attachment, granted as ancillary to an action, because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defect may be cured by amendment. Branch v. Frank, 81 N.C. 180 (1879); Price v. Cox, 83 N.C. 261 (1880).

Validity of warrant of attachment is determined upon facts alleged in the original affidavit and existing at the time when the proceeding is instituted, not upon new matter which may have afterwards transpired. W.M. Devries & Co. v. Summit, 86 N.C. 126 (1882).

Court May Find Facts. — In attachment and other ancillary proceedings it is competent for the court to find the facts from the affidavits and other evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. Pasour v. Lineberger, 90 N.C. 159 (1884).

An appeal lies from the refusal to dismiss an attachment. Sheldon v. Kivett, 110 N.C. 408, 14 S.E. 970 (1892); Raisin Fertilizer Co. v. Grubbs, 114 N.C. 470, 19 S.E. 597 (1894); Judd v. Crawford Gold Mining Co., 120 N.C. 397, 27 S.E. 81 (1897).

Appeal Takes Case from Jurisdiction of Court Below. — Where an appeal is taken from a refusal to discharge an attachment, the court below cannot in the meantime allow a motion "to dismiss" the same to be entered, for the appeal takes the case out of its jurisdiction. Pasour v. Lineberger, 90 N.C. 159 (1884).

When Facts Upon Which Vacation of Attachment Was Based Must Be Set Out. — The superior court judge is not required to set out the facts upon which he has vacated an attachment levied on the defendant's property, unless the party, appealing and complaining of the ruling of law, requests him to find the facts necessary to give him the benefit of his exceptions. Coharie Lumber Co. v. Buhmann, 160 N.C. 385, 75 S.E. 1008 (1912).

When Findings of Fact Not Reviewable. — On appeal it will be presumed that the superior court judge found facts sufficient to support his order vacating an attachment on the debtor's property, when they do not appear of record; and any facts found by him, so appearing, are not reviewable. Coharie Lumber Co. v. Buhmann, 160 N.C. 385, 75 S.E. 1008 (1912).

The findings of fact of the clerk of the superior court, on a motion to vacate an attachment, supported by the evidence and approved by the judge, are not subject to review. Brann v. Hanes, 194 N.C. 571, 140 S.E. 292 (1927).

Failure of Judge to Make Findings of Fact. — On appeal to the superior court from an order of the clerk dissolving an attachment, failure of the judge to make findings of fact in his order which vacated and overruled the clerk's order is erroneous. Hiscox v. Shea, 8 N.C. App. 90, 173 S.E.2d 591 (1970).

Decision Is Res Judicata. — A decision on a motion to vacate an attachment is res judicata until reversed. Roulhac v. Brown, 87 N.C. 1 (1882); Pasour v. Lineberger, 90 N.C. 159 (1884); Morganton Mfg. & Trading Co. v. Foy-Seawell Lumber Co., 177 N.C. 404, 99 S.E. 104 (1919).

Dissolution of Bond. — Defendants were not prevented from challenging the court's ex parte findings on which the attachment and temporary restraining order were based because of the substitution of their bond. And, having shown that the attachment was erroneously ordered, they were entitled to have their bond dissolved. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Applied in Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976); Connolly v. Sharpe, 49 N.C. App. 152, 270 S.E.2d 564 (1980).

Cited in Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794, 1999 N.C. App. LEXIS 1228 (1999); Sara Lee Corp. v. Gregg, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16019 (M.D.N.C. Aug. 15, 2002).

§ 1-440.37. Modification of the order of attachment.

At any time before judgment in the principal action, the defendant may apply to the clerk or the judge for an order modifying the order of attachment. Such motion shall be heard upon affidavits. If the order is modified, the court making the order of modification shall make such provisions with respect to bonds and other incidental matters as may be necessary to protect the rights of the parties. (1947, c. 693, s. 1.)

CASE NOTES

Section 1-440.43 provides a method by which interested third parties may attack an attachment. Such section applies to any person who has acquired a lien upon or an interest in such property whether such interest is acquired prior to or subsequent to the attachment and allows for the making of a motion, at any time prior to judgment in the principal action, to dissolve or modify the order of attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Inasmuch as a statutory method of third party attack on an attachment is available, the function of lis pendens would be to put a third party in a position to use it. It is unacceptable to hold that the efficacy of lis pendens to perform its designated function should depend on proper execution of the order which caused its entry. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Applied in Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975); Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

Cited in Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794, 1999 N.C. App. LEXIS 1228 (1999).

§ 1-440.38. Stay of order dissolving or modifying an order of attachment.

Whenever a plaintiff appeals from an order dissolving or modifying an order of attachment, such order shall be stayed and the attachment lien with respect to all property theretofore attached shall remain in effect until the appeal is finally disposed of. In order to protect the defendant in the event that an order dissolving or modifying an order of attachment is affirmed on appeal, the court from whose order the appeal is taken may, in its discretion, require the plaintiff to execute and deposit with the clerk an additional bond with sufficient surety and in an amount deemed adequate by the court to indemnify the defendant against all losses which he may suffer on account of the continuation of the lien of the attachment pending the determination of the appeal. (1947, c. 693, s. 1.)

§ 1-440.39. Discharge of attachment upon giving bond.

(a) Any defendant whose property has been attached may move, either before the clerk or the judge, to discharge the attachment upon his giving bond for the property attached. If no prior general appearance has been made by such defendant, such motion shall constitute a general appearance.

(b) The court hearing such motion shall make an order discharging such attachment upon such defendant's filing a bond as follows:

(1) If it is made to appear to the satisfaction of the court by affidavit that the property attached is of a greater value than the amount claimed by the plaintiff, the court shall require a bond in double the amount of the judgment prayed for by the plaintiff, and the condition of such bond shall be that if judgment is rendered against the defendant, the defendant will pay to the plaintiff the amount of the judgment and all costs that the defendant may be ordered to pay, the surety's liability, however, to be limited to the amount of the bond.

(2) If it is made to appear to the satisfaction of the court by affidavit that the property attached is of less value than the amount claimed by the plaintiff, the court shall, upon affidavits filed, determine the value thereof and shall require a bond in double the amount of such value, and the condition of the bond shall be that if judgment is rendered against the defendant, the defendant will pay to the plaintiff an amount equal to the value of such property.

(c) If a bond is filed as provided in subsection (b) of this section, all property of such defendant then remaining in the possession of the sheriff pursuant to such attachment, including, but not by way of limitation, money collected and the proceeds of sales, shall be delivered to the defendant and shall thereafter be free from the attachment.

(d) The discharge of an attachment as provided by this section does not bar the defendant from exercising any right provided by G.S. 1-440.36, 1-440.37 or 1-440.40. (1947, c. 693, s. 1.)

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under prior similar provisions.*

By giving bond in the manner provided by former G.S. 1-457, the debtor could procure the release of the attachment. Bizzell v. Mitchell, 195 N.C. 484, 142 S.E. 706 (1928).

Bond in Lieu of Attachment Lien. — Where attachment had been levied on the defendant's property necessary for the prosecution of his business, and upon his giving bond, he or his receiver was permitted by the court to continue operations, the giving of the bond was in lieu of the lien acquired in attachment, and analogous to the proceedings in discharge authorized by former G.S. 1-456 and 1-457. Martin v. McBryde, 182 N.C. 175, 108 S.E. 739 (1921).

When Undertaking Unnecessary. — The undertaking required in former G.S. 1-457 was not necessary when the warrant on its face appeared to have been issued irregularly, or for a cause insufficient in law or false in fact. Bear v. Cohen, 65 N.C. 511 (1871); W.M. Devries & Co. v. Summit, 86 N.C. 126 (1882).

When an attachment on the debtor's property had been vacated by the superior court judge, the defendant was not required to give the undertaking under former G.S. 1-457 to regain possession of the property. Coharie Lumber Co. v. Buhmann, 160 N.C. 385, 75 S.E. 1008 (1912).

Effect of Undertaking as Waiver or Es-

toppel. — Giving the undertaking under former G.S. 1-457 was equivalent to a general appearance in the action, and waived certain irregularities. It estopped the defendant from denying ownership of the property levied on, but not from traversing the truth of the allegation on which the attachment was based. Giving the undertaking did not waive the validity of the statutory ground of attachment. Bizzell v. Mitchell, 195 N.C. 484, 142 S.E. 706 (1928).

The filing of bond by a defendant to release his property from an attachment does not bar defendant from challenging the validity of the attachment. Armstrong v. Aetna Ins. Co., 249 N.C. 352, 106 S.E.2d 515 (1959).

Dissolution of Bond. — Defendants were not prevented from challenging the court's ex parte findings on which the attachment and temporary restraining order were based because of the substitution of their bond. And, having shown that the attachment was erroneously ordered, they were entitled to have their bond dissolved. Davenport v. Ralph N. Peters & Co., 274 F. Supp. 99 (W.D.N.C. 1966), rev'd on other grounds, 386 F.2d 199 (4th Cir. 1967).

Restitution of Property. — Former G.S. 1-456, providing for the restitution of property upon an order dissolving the attachment, did not apply to cases where there had been a sale or transfer of the property by the defendant to the plaintiff after the levy of the attachment. Jackson, Oglesby & Co. v. Burnett, 119 N.C. 195, 25 S.E. 868 (1896).

Notwithstanding the dissolution of an attachment, the plaintiff, who claimed that the property has been transferred to him by the defendant after the levy of the warrant, was entitled to have submitted to the jury an issue as to the ownership of the property. Jackson, Oglesby & Co. v. Burnett, 119 N.C. 195, 25 S.E. 868 (1896).

Refusal of Sheriff to Deliver Property. — If the sheriff failed or refused to deliver the property after discharge of the attachment as provided in former G.S. 1-456, the defendant could perhaps apply to the court and obtain an order requiring him to do so, or could sue the sheriff and his sureties for the default, but the plaintiff would not be liable. Mahoney v. Tyler, 136 N.C. 40, 48 S.E. 549 (1904).

Discharge of Surety. — When the surety signed a bond under former G.S. 1-457, it was held that he entered into the obligation with reference to the cause as it then stood, so when a new element of liability was introduced by an amendment, the surety was discharged. Rushing v. Ashcraft, 211 N.C. 627, 191 S.E. 332 (1937).

Applied in Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975); Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976).

Cited in Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976); Collins v. Talley, 146 N.C. App. 600, 553 S.E.2d 101, 2001 N.C. App. LEXIS 987 (2001).

§ 1-440.40. Defendant's objection to bond or surety.

(a) At any time before judgment in the principal action, on motion of the defendant, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of the plaintiff.

(b) At any time before judgment in the principal action the defendant may except to any surety upon any bond given by the plaintiff pursuant to the provisions of this Article, in which case the surety shall be required to justify, and the procedure with respect thereto shall be as is prescribed for the justification of bail in arrest and bail proceedings. (1947, c. 693, s. 1.)

CASE NOTES

A judge of the superior court has authority to require plaintiffs in attachment to increase their bond or have their attachment dismissed. Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

And he has authority to dismiss the attachment by a special order when plaintiffs failed to post additional bond within the time fixed. Palmer v. M.R.S. Dev. Corp., 9 N.C. App. 668, 177 S.E.2d 328 (1970).

Failure to Request Findings. — Where the trial court was not required to make findings of fact in order to modify the plaintiffs' attachment bond on the motion of the defendant, pursuant to subsection (a) of this section, and where the plaintiffs failed to request such findings, they could not assert that the order had affected their substantial rights and they were not entitled to review. Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794, 1999 N.C. App. LEXIS 1228 (1999).

§ 1-440.41. Defendant's remedies not exclusive.

The exercise by the defendant of any one or more rights provided by G.S. 1-440.36 through 1-440.40 does not bar the defendant from exercising any other rights provided by those sections. (1947, c. 693, s. 1.)

§ 1-440.42. Plaintiff's objection to bond or surety; failure to comply with order to furnish increased or new bond.

(a) At any time before judgment in the principal action, on motion of the plaintiff, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of any defendant, garnishee or intervenor.

(b) At any time before judgment in the principal action the plaintiff may except to any surety upon any bond given by any defendant, garnishee or intervenor pursuant to the provisions of this Article, in which case the surety shall be required to justify, and the procedure with respect thereto shall be as is prescribed for the justification of bail in arrest and bail proceedings.

(c) Upon failure of a defendant, garnishee or intervenor to comply with an order requiring an increase in the amount of a bond previously given, or upon failure to comply with an order requiring a new bond when the surety on the previous bond is unsatisfactory, the court may, in addition to any other action with respect thereto, issue an order of attachment directing the sheriff to seize and take into his possession property released upon the giving of the previous bond, if the person failing to comply with the order still has possession of the same. Such property when retaken into his possession by the sheriff shall be subject to all the provisions of this Article relating to attached property. (1947, c. 693, s. 1.)

§ 1-440.43. Remedies of third person claiming attached property or interest therein.

Any person other than the defendant who claims property which has been attached, or any person who has acquired a lien upon or an interest in such property, whether such lien or interest is acquired prior to or subsequent to the attachment, may

(1) Apply to the court to have the attachment order dissolved or modified, or to have the bond increased, upon the same conditions and by the same methods as are available to the defendant, or

(2) Intervene and secure possession of the property in the same manner and under the same conditions as is provided for intervention in claim and delivery proceedings. (1947, c. 693, s. 1.)

CASE NOTES

Editor's Note. — *Most of the cases cited below were decided under prior similar provisions.*

This section provides a method by which interested third parties may attack an attachment. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Inasmuch as a statutory method of third party attack on an attachment is available, the function of lis pendens would be to put a third party in a position to use it. It is unacceptable to hold that the efficacy of lis pendens to perform its designated function should depend on proper execution of the order which caused its entry. Edwards v. Brown's Cabinets, 63 N.C. App. 524, 305 S.E.2d 765, cert. denied, 309 N.C. 632, 308 S.E.2d 64 (1983).

Subdivisions Interpreted. — With respect to subdivision (1), any person other than a defendant may dissolve an attachment order by the same method available to a defendant, and a defendant can dissolve an order of attachment "at any time before judgment in the principal action." With respect to subdivision (2), the language of G.S. 1A-1, Rule 24 would govern, and the third party's motion to intervene must be made "upon timely application." Loman Garrett, Inc. v. Timco Mechanical, Inc., 93 N.C. App. 500, 378 S.E.2d 194 (1989).

A "notice of levy" served upon a garnishee was insufficient process to accord the serving party the status of an attaching creditor. It was incumbent on the party, if it desired to establish a lien by attachment or an interest in the attached property, to put its claim in issue by filing a proper claim in accordance with G.S. 1-440.1 et seq. or this section. Failing this, the party's contention that it could intervene as an attaching creditor under G.S. 1-440.33(g) failed, and the garnishee's motion to join all attaching creditors was moot. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Owner of garage and wrecker service, with whom sheriff contracted to store certain cars levied on pursuant to court order, was a legal possessor, and under subsection (d) of G.S. 44A-2 had a lien on the cars from the time he began towing them away. Case v. Miller, 68 N.C. App. 729, 315 S.E.2d 737 (1984).

For remedies of claimant under prior law, whose property had been attached by a sheriff, under a warrant issued in an action to which he was not a party, see Stein v. Cozart, 122 N.C. 280, 30 S.E. 340 (1898); Martin v. Buffaloe, 128 N.C. 305, 38 S.E. 902 (1901); Gay v. Mitchell, 146 N.C. 509, 60 S.E. 426 (1908); Tyler v. Mahoney, 168 N.C. 237, 84 S.E. 362 (1915); Tatham v. Dehart, 183 N.C. 657, 112 S.E. 430 (1922); Flowers v. Spears, 190 N.C. 747, 130 S.E. 710 (1925).

Where Defendant Held Property as Agent. — Where the evidence tended to show that a defendant held property levied on as agent for another, such third person should be allowed to be made a party. Farmers' Bank & Trust Co. v. Murphy, 189 N.C. 479, 127 S.E. 527 (1925).

Separate Trials. — In attachment under the former statute a separate trial for the intervenor was discretionary with the trial judge. Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901).

Burden of Proving Title. — In attachment the burden was on the intervenor to establish title to the property. Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901).

Objection to Irregularity of Attachment Proceedings. — Under the former statute it was held that parties who intervened in attachment proceedings could not be heard to object to the irregularity of the same, that being a matter between the parties to the main action. Cook v. New York Corundum Co., 114 N.C. 617, 19 S.E. 664 (1894).

An intervenor in an action wherein attachment on the defendant's property had been issued, who claimed a prior lien by reason of a former order of court in another and independent proceeding, became party to the action and could not successfully attack the validity of the proceedings in attachment, and the question of priority was left to be determined in the action. Mitchell v. Talley, 182 N.C. 683, 109 S.E. 882 (1921).

Bank's Motion to Intervene Was Properly Denied. — Where the bank sought to intervene at the time of the hearing at which the trial court was ready to resolve the matter before it based on the pleadings and affidavits submitted by the parties, and where plaintiff's second complaint had been filed and served on counsel for defendant in October, where the record affirmatively disclosed that the same counsel had been representing the interests of the bank, as well as those of the bank's debtor since before June and was at all times since that date aware of the attachment proceedings, counsel for the bank had ample opportunity to intervene at any time after the filing of plaintiff's complaint, and the trial court did not abuse its discretion in denying the bank's motion to intervene. Loman Garrett, Inc. v. Timco Mechanical, Inc., 93 N.C. App. 500, 378 S.E.2d 194 (1989).

Under the former statute an intervenor had no right to interfere in the action between the original parties, since he was interested only as to the title to the property. Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901).

Cited in Harshaw v. Mustafa, 84 N.C. App. 296, 352 S.E.2d 247 (1987); Harshaw v. Mustafa, 321 N.C. 288, 362 S.E.2d 541 (1987).

§ 1-440.44. When attached property to be sold before judgment.

(a) The sheriff shall apply to the clerk or to the judge for authority to sell property, or any share or interest therein, seized pursuant to an order of attachment,

(1) If the property is perishable, or
(2) If the property is not perishable, but
    a. Will materially deteriorate in value pending litigation, or

b. Will likely cost more than one fifth of its value to keep pending a final determination of the action, and
c. Is not discharged from the attachment lien in the manner provided by G.S. 1-440.39 within ten days after the seizure thereof.

(b) If the court so orders, the property described in subsection (a) of this section shall thereupon be sold under the direction of the court unless the discharge of the same is secured by the defendant or other person interested therein, in the manner provided by G.S. 1-440.39, prior to such sale. The proceeds of such sale shall be liable for any judgment obtained in the principal action and shall be retained by the sheriff to await such judgment. (1947, c. 693, s. 1.)

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under prior similar provisions.*

Sale of Third Party's Goods. — Where an attachment was levied upon the goods of a third party which, being perishable, were sold by the sheriff, and the third party interpleaded in the action and recovered judgment, the costs and expenses of the attachment and sale were not properly chargeable against the fund arising from such sale. Haywood v. Hardie, 76 N.C. 384 (1877).

An intervenor obtaining the possession of property attached by giving a replevy bond could not sell part of the property, such sale not being made as provided by superseded G.S. 1-454, similar to this section, and claim the right to pay for the part sold and return the balance thereof. Bulluck v. Haley, 198 N.C. 355, 151 S.E. 731 (1930).

Authority of Clerk to Stop Sale and Order Resale. — Section 1-440.9 gave the clerk sufficient authority to stop the first sale of an aircraft, as to which the sheriff's announcement at the sale that the aircraft would be sold free of the plaintiff savings and loan's lien was at variance with the advertised notice that defendant's interest would be sold, where the aircraft brought at the first sale only a small fraction of its value, and the clerk also had the power to order a new sale. North State Sav. & Loan Corp. v. Carter Dev. Co., 83 N.C. App. 422, 350 S.E.2d 374 (1986), cert. denied, 319 N.C. 405, 354 S.E.2d 716 (1987).

Part 6. Procedure after Judgment.

§ 1-440.45. When defendant prevails in principal action.

(a) If the defendant prevails in the principal action, or if the order of attachment is for any reason dissolved, dismissed or set aside, or if service is not had on the defendant as provided by G.S. 1-440.7,
(1) The defendant shall be entitled to have delivered to him
a. All bonds taken for his benefit whether filed in the proceedings or taken by an officer, and
b. The proceeds of any sales and all money collected, and
c. All attached property remaining in the officer's hands, and
(2) Any garnishee shall be entitled to have vacated any judgment theretofore taken against him.

(b) Either the clerk or the judge shall have authority, upon motion of the defendant or any garnishee, to make any such order as may be necessary or proper to carry out the provisions of subsection (a) of this section.

(c) Upon judgment in his favor in the principal action, the defendant may thereafter, by motion in the cause, recover on any bond taken for his benefit therein, or he may maintain an independent action thereon. (1947, c. 693, s. 1; 1951, c. 837, s. 8.)

CASE NOTES

Editor's Note. — *Most of the cases cited below were decided under prior similar provisions.*

When Defendant Prevented from Recovering Garnished Wages. — Where an earlier order garnishing defendant's salary was stricken, defendant could not recover any funds on deposit with the clerk under this section since first, defendant could not claim to have prevailed in the principal case, the order striking the garnishment order not resolving any action in defendant's favor; second, the order of attachment was not dissolved by the order striking garnishment; and third, defendant could not assert the lack of service upon him for the reason that he failed in his response to motion for garnishment and countermotion to raise the defense of lack of proper service. Sturgill v. Sturgill, 49 N.C. App. 580, 272 S.E.2d 423 (1980).

Prior to 1947, there was no provision in this Article for the assessment of damages in the original action against the plaintiff and his surety for the wrongful issuance of a warrant of attachment. The defendant was compelled to pursue his remedy by independent action after the groundlessness of the action or the ancillary writ was judicially determined. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

Claim on Bond May Not Be Heard at Original Hearing. — Subsection (c) of this section does not mean that defendant's claim against plaintiff's bond may be heard and damages assessed at the original hearing. It provides instead that such damages are to be assessed in the same action, at the election of the defendant, after judgment on the main issue. Defendant's cause of action on the bond is bottomed on the wrongful issuance of the writ. The groundlessness of the writ is an essential element of his right to damages and this cannot completely exist or appear until that fact is judicially determined either by judgment vacating the writ of judgment against the plaintiff in the main action. Then only does defendant's cause of action on the bond arise and become complete. His proper remedy is by motion in the cause after judgment. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

Remedy Is by Motion After Judgment or Subsequent Independent Action. — Where it is determined upon the trial of the main issue that plaintiff's averment upon which attachment was issued was false, defendant may have damages assessed for the wrongful attachment either upon motion in the cause after judgment or by subsequent independent action. Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948).

When Limitations Begin to Run on Action on Bond. — In an action to recover on the bond given by the creditor and his surety in attachment proceedings for a wrongful levy therein, the statute of limitations began to run from the rendition of the judgment and not from the time the property was replevied. The recovery of the judgment in the former action was the condition authorizing the suit, and a vacation of the attachment. Smith v. American Bonding Co., 160 N.C. 574, 76 S.E. 481 (1912).

Misjoinder of Principal and Surety. — An action would not be dismissed for a misjoinder of parties where the plaintiff was suing, in the same action, the principal and surety on an attachment bond given under the former statute. The remedy was by motion to have the causes divided. Smith v. American Bonding Co., 160 N.C. 574, 76 S.E. 481 (1912).

Creditor Not Liable on Bond for Sheriff's Failure. — An attaching creditor under the former statute was not liable on his bond for the failure of the sheriff to perform his duty relative to the attached property. Mahoney v. Tyler, 136 N.C. 40, 48 S.E. 549 (1904).

Recovery of Expenses Incurred by Defendant in Procuring Bond. — In an action to recover on an attachment bond given under the former statute for the wrongful levy therein, damages might be awarded for the reasonable expense that the plaintiff, who was the defendant in the attachment proceedings, had incurred in procuring the undertaking he had given to obtain the release of the property attached. Smith v. American Bonding Co., 160 N.C. 574, 76 S.E. 481 (1912).

Traveling Expenses and Value of Time. — Damages could not be recovered in an action for a wrongful levy in attachment under the former statute for railroad and traveling expenses, and the value of the plaintiff's time in procuring the release of his property. Smith v. American Bonding Co., 160 N.C. 574, 76 S.E. 481 (1912).

Delivery of Property and Proceeds of Sales. — The sales of property mentioned in former G.S. 1-468, requiring delivery of property or proceeds of sale to defendant upon his recovery, referred to those before the attachment was vacated, as for instance sales made under the order of the court when property was perishable. The sheriff had no right, after the attachment had been vacated, to sell any property seized by him, as it then became his duty to deliver at once to the defendant all property in his hands. Mahoney v. Tyler, 136 N.C. 40, 48 S.E. 549 (1904).

When Defendant May Proceed on Bond. — If an order of attachment is dissolved, dismissed, or set aside by the court, or if the attachment plaintiff fails to obtain judgment against the attachment defendant, the attachment defendant may, without the necessity of showing malice or want of probable cause, proceed against the attachment plaintiff and his surety jointly or severally by independent action or motion in the cause, on the contractual obligations of the attachment plaintiff and his surety embodied in the bond and the statute under which it is given. Brown v. Guaranty Estates Corp., 239 N.C. 595, 80 S.E.2d 645 (1954); Godwin v. Vinson, 254 N.C. 582, 119 S.E.2d 616 (1961).

§ 1-440.46. When plaintiff prevails in principal action.

(a) If judgment is entered for the plaintiff in the principal action, the sheriff shall satisfy such judgment out of money collected by him or paid to him in the attachment proceeding or out of property attached by him as follows:

(1) After paying the costs of the action, he shall apply on the judgment as much of the balance of the money in his hands as may be necessary to satisfy the judgment.

(2) If the money so applied is not sufficient to pay the judgment in full, the sheriff shall, upon the issuance of an execution on the judgment, sell sufficient attached property, except debts and evidences of indebtedness to satisfy the judgment.

(3) While the judgment remains unsatisfied, and notwithstanding the pendency of the sale of any personal or real property as provided by subdivision (2) of this subsection, the sheriff shall collect and apply on the judgment any debts or evidences of indebtedness attached by him.

(4) If, after the expiration of six months from the docketing of the judgment, the judgment is not fully satisfied, the sheriff shall, when ordered by the clerk or judge, as provided in subsection (b) of this section, sell all debts and notes and other evidences of indebtedness remaining unpaid in his hands, and shall apply the net proceeds thereof, or as much thereof as may be necessary, to the satisfaction of the judgment. To forestall the running of the statute of limitations, earlier sale may be ordered in the discretion of the court.

(b) In order to secure the sale of the remaining debts and evidences of indebtedness as provided in subsection (a)(4) of this section, the plaintiff may move therefor, either before the clerk or the judge, and shall submit with his motion

(1) His affidavit setting forth fully the proceedings had by the sheriff since the service of the attachment, listing or describing the property attached, and showing the disposition thereof, and

(2) The affidavit of the sheriff that he has endeavored to collect the debts or evidences of indebtedness and that there remains uncollected some part thereof.

Upon the filing of such motion, the court to which the motion is made shall give the defendant or his attorney such notice of the hearing thereon as the court may deem reasonable, and by such means as the court may deem best. Upon the hearing, the court may order the sheriff to sell the debts and other evidences of indebtedness remaining in his hands, or may make such other order with respect thereto as the court may deem proper.

(c) In case of the sale of a share of stock of a corporation or of property in a warehouse for which a negotiable warehouse receipt has been issued, the sheriff shall execute and deliver to the purchaser a certificate of sale therefor, and the purchaser shall have all the rights with respect thereto which the defendant had.

(d) Upon judgment in his favor in the principal action, the plaintiff is entitled to judgment on any bond taken for his benefit therein.

(e) When the judgment and all costs of the proceedings have been paid, the sheriff, upon demand of the defendant, shall deliver to the defendant the residue of the attached property or the proceeds thereof. (1947, c. 693, s. 1; 1951, c. 837, s. 9.)

CASE NOTES

Editor's Note. — *Most of the cases cited below were decided under prior similar provisions.*

Judgment Against Defendant and Surety Proper. — Where the bond signed by the surety was for the benefit of the plaintiff, and the judgment did not exceed the amount of the bond, the trial judge correctly gave judgment against the defendant and the surety. Beck Distrib. Corp. v. Imported Parts, Inc., 10 N.C. App. 737, 179 S.E.2d 793 (1971).

Property Held Until Final Judgment. — The first paragraph of former G.S. 1-466, which was similar to the first paragraph of this section, indicated that the property was held until final judgment and the sheriff could collect from a garnishee against whom judgment was entered. Newberry v. Meadows Fertilizer Co., 206 N.C. 182, 173 S.E. 67 (1934).

Property in Possession of Third Party. — Where a person in possession of property was not a party to an attachment suit brought under the former statute, the plaintiff, in addition to a judgment for his debt, was not entitled to a judgment for such property, but must proceed under former G.S. 1-466. Post-Glover Elec. Co. v. McEntee-Peterson Eng'r Co., 128 N.C. 199, 38 S.E. 831 (1901).

Perfection of Attachment Lien in Intangible Property. — Where lienors obtained an attachment lien on Chapter 7 debtor's bank account, but a final judgment in state court was stayed by the filing of the bankruptcy petition, the lien did not survive the trustee's 11 U.S.C.S. § 544 strong arm powers because the lien remained unperfected as of the petition date pursuant to G.S. 1-440.46. Ivester v. Miller, 398 B.R. 408, 2008 U.S. Dist. LEXIS 98493 (M.D.N.C. 2008).

Judgment Against Nonresident. — No judgment in personam may be entered or enforced against a nonresident who has not been personally served with summons. Johnson v. Whilden, 166 N.C. 104, 81 S.E. 1057 (1914), rehearing denied, 171 N.C. 153, 88 S.E. 223 (1916).

Power and Duty of Sheriff. — The attachment is simply a levy before judgment, and upon execution issuing on a judgment it is the duty of the sheriff to sell the attached property. Gamble v. Rhyne, 80 N.C. 183 (1879); Farmers Mfg. Co. v. Steinmetz, 133 N.C. 192, 45 S.E. 552 (1903); Morganton Mfg. & Trading Co. v. Foy-Seawell Lumber Co., 177 N.C. 404, 99 S.E. 104 (1919).

Former G.S. 1-466 gave an express direction to the sheriff to sell the property previously levied on by him under the attachment, and invested him with as much power and authority to act in the premises as if an execution, in the form of a venditioni exponas, had been issued to him, specially commanding him to sell the particular property. Post-Glover Elec. Co. v. McEntee-Peterson Eng'rs Co., 128 N.C. 199, 38 S.E. 831 (1901); Chemical Co. v. Sloan, 136 N.C. 122, 48 S.E. 577 (1904); May v. Getty, 140 N.C. 310, 53 S.E. 75 (1905); Morganton Mfg. & Trading Co. v. Foy-Seawell Lumber Co., 177 N.C. 404, 99 S.E. 104 (1919).

Sale Passes Only Right of Defendant. — A sale under an execution issuing upon a judgment on an attachment only passed the right of the defendant in attachment. Post-Glover Elec. Co. v. McEntee-Peterson Eng'rs Co., 128 N.C. 199, 38 S.E. 831 (1901).

Surety Concluded from Asserting Insufficiency of Bond. — Where judgment by default final had been rendered against the principal debtor and the surety on an attachment bond given in the action in the form required by former G.S. 1-457 to secure whatever judgment might be rendered, and the property attached had accordingly been retained by the debtor, the surety was concluded from asserting the insufficiency of the bond in not having another surety thereon, as the statute required, when the bond was given and accepted as he had intended, and he had not excepted thereto. Thompson v. Dillingham, 183 N.C. 566, 112 S.E. 321 (1922).

Bond Does Not Establish Independent Measure of Damages. — A bond posted in lieu of an attachment in an action alleging a fraudulent bulk sale in violation of G.S. 25-6-101 et seq., the North Carolina Bulk Sales Act, was not intended to establish an independent measure of damages in the principal action and the claimant could not elect to receive the amount of the bond in lieu of a lesser jury award. Collins v. Talley, 146 N.C. App. 600, 553 S.E.2d 101, 2001 N.C. App. LEXIS 987 (2001).

Cited in Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972); Sara Lee Corp. v. Gregg, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 16019 (M.D.N.C. Aug. 15, 2002).

Part 7. Attachments in Justice of the Peace Courts.

§§ 1-440.47 through 1-440.56: Repealed by Session Laws 1971, c. 268, s. 34.

Part 8. Attachment in Other Inferior Courts.

§ 1-440.57: Repealed by Session Laws 1971, c. 268, s. 34.

Part 9. Superseded Sections.

§§ 1-441 through 1-471: Superseded by Session Laws 1947, c. 693, codified as G.S. 1-440.1 to 1-440.57.

ARTICLE 36.

Claim and Delivery.

§ 1-472. Claim for delivery of personal property.

The plaintiff in an action to recover the possession of personal property may claim the immediate delivery of the property as provided in this Article at any time before the judgment in the principal action. (C.C.P., s. 176; Code, s. 321; Rev., s. 790; C.S., s. 830; 1977, c. 753.)

CASE NOTES

This statutory remedy is adopted from the Code of New York. Manix v. Howard, 82 N.C. 125 (1880).

Strictly speaking, there is no such action under the Code as "claim and delivery." The action is for the recovery of a specific chattel, and the delivery of the chattel is a provisional remedy, ancillary, but not essential to such action. If the plaintiff see fit, delivery of the chattel may be waived, and the action prosecuted to recover possession of the chattel, as in the old action of detinue, or to recover the value of the property, as in trover or trespass. Jarman v. Ward, 67 N.C. 32 (1872); Allsbrook v. Shields, 67 N.C. 333 (1872); Hopper v. Miller, 76 N.C. 402 (1877); Wilson v. Hughes, 94 N.C. 182 (1886).

Claim and Delivery Founded on Right to Possession. — Claim and delivery is founded on the right of the plaintiff to the possession of the property. If the defendant also claims the possession, the main issue is on that right, and the party establishing it will have judgment to retain or be restored to the possession, as the case may be. Holmes v. Godwin, 69 N.C. 467 (1873).

Defendants' motion for claim and delivery pursuant to Fed. R. Civ. P. 64 and G.S. 1-472 to G.S. 1-484.1 was allowed; defendant purchaser had shown that it owned the bottle cap molds at issue, defendants had demonstrated that the molds were being wrongfully detained within the meaning of G.S. 1-473(2). Weener Plastics, Inc. v. HNH Packaging, LLC, 590 F. Supp. 2d 760, 2008 U.S. Dist. LEXIS 92321 (E.D.N.C. 2008).

And Is a Substitute for Common-Law Remedies. — Under this section the action of "claim and delivery" is a substitute for the action of replevin, if a bond is given by the plaintiff; if not, it is a substitute for the action of detinue or trover. Jarman v. Ward, 67 N.C. 32 (1872); Hopper v. Miller, 76 N.C. 402 (1877).

And Is an Ancillary Remedy. — There is but one form of action in civil cases. In that, many ancillary remedies may be asked, i.e., arrest and bail, claim and delivery, injunction, attachment, and appointment of receivers. These need not be asked, even if the party is entitled to them and if they are improperly asked they are simply denied or dismissed, but that does not affect the action itself, which goes on if the plaintiff is entitled to any other remedy. Deloatch v. Coman, 90 N.C. 186 (1884); Morris v. O'Briant, 94 N.C. 72 (1886); Wilson v. Hughes, 94 N.C. 182 (1886); Hargrove v. Harris, 116 N.C. 418, 21 S.E. 916 (1895).

Section Mandatory. — To entitle a party to maintain an action for claim and delivery of personal property, there must be a compliance with all the requisites specified in this section and G.S. 1-473. Hirsh v. J.D. Whitehead & Co., 65 N.C. 516 (1871).

Object of Action Is to Recover Specific Property. — The recovery of the thing itself, and not damages in lieu thereof, is the primary object of the suit, and the value is given only as an alternative when delivery of the specific property cannot be had. Hendley v. McIntyre, 132 N.C. 276, 43 S.E. 824 (1903).

Who May Bring the Action. — One in the rightful possession of property as bailee can maintain an action of claim and delivery against a wrongdoer who is depriving him of possession. Hopper v. Miller, 76 N.C. 402 (1877).

The crop produced by a tenant being vested in the lessor until the rents shall be paid, he can maintain an action for recovery of an undivided portion thereof, and it is not necessary that he shall specifically designate in his complaint, or affidavit in claim and delivery, such undivided part. Boone v. Darden, 109 N.C. 74, 13 S.E. 728 (1891).

One tenant in common of personal property may not maintain claim and delivery against a third person in possession without the other owners it being required that the claimant show sole ownership. Allen v. McMillan, 191 N.C. 517, 132 S.E. 276 (1926).

Where, in a contract between the landlord and tenant, no time was fixed for the division of the crops, the landlord was not obliged to wait until the whole crop had been gathered, but had a right to bring his action for the possession of the crop before it was fully harvested. State v. Copeland, 86 N.C. 691 (1882); Jordan v. Bryan, 103 N.C. 59, 9 S.E. 135 (1889); Rich v. Hobson, 112 N.C. 79, 16 S.E. 931 (1893).

After default and refusal to surrender possession to the mortgagee, the mortgagee becomes, in law, the absolute owner of the mortgaged property, though the mortgagor has the right to redeem, until the property is sold, and the mortgagee is entitled to the same remedy against him for the possession that he would have against any other person who has the possession of his property. W.C. Kiser & Co. v. Blanton, 123 N.C. 400, 31 S.E. 878 (1898).

An action for the possession of property must be brought against the party in possession. Haughton v. Newberry, 69 N.C. 456 (1873); Webb v. Taylor, 80 N.C. 305 (1879); Moore v. Brady, 125 N.C. 35, 34 S.E. 72 (1899); GMAC v. Waugh, 207 N.C. 717, 178 S.E. 85 (1935).

Claim and delivery is not maintainable against one who has neither possession nor control of the property sought to be recovered, but who has sold and delivered it to another party. Webb v. Taylor, 80 N.C. 305 (1879), citing Jones v. Green, 20 N.C. 488 (1839); Charles v. Elliott, 20 N.C. 606 (1839); Slade v. Washburn, 24 N.C. 414 (1842); Foscue v. Eubank, 32 N.C. 424 (1849); Haughton v. Newberry, 69 N.C. 456 (1873).

Claim and delivery will lie for the recovery of a title deed if the controversy does not involve the determination of the title to the land conveyed by it. Pasterfield v. Sawyer, 132 N.C. 258, 43 S.E. 799 (1903).

And action is proper where the crops are removed from the land leased. Livingston v. Farish, 89 N.C. 140 (1883).

Effect of Alteration of Article Claimed. — If a person bestows his labor upon the property of another, thereby changing it into another species of article, the property is changed, and the owner of the original material cannot recover the article in its altered condition, but is only entitled to its value in the shape in which it was taken from him. Potter v. Mardre, 74 N.C. 36 (1876).

Statute of Limitations Applies. — The three-year statute of limitations in G.S. 1-52 is also applicable to an action of claim and delivery. Hence where a note was given in payment for personal property and the statute of limitations had run on the note no action of claim and delivery could be maintained. Lester Piano Co. v. Loven, 207 N.C. 96, 176 S.E. 290 (1934).

Conflicting Evidence Presents Question for Jury. — Where the evidence is conflicting as to the plaintiff's sole ownership of the personal property in claim and delivery, the question is one for the jury. Allen v. McMillan, 191 N.C. 517, 132 S.E. 276 (1926).

Judgment. — Where claim and delivery is brought to get possession of property for the purpose of selling it, according to the terms of a contract, to pay an indebtedness, and all parties interested are before the court and the amount due ascertained, the plaintiff upon recovering holds as a trustee, and a judgment, directing an adjustment of all the equities involved in order that the matter may be determined, is the proper one to be rendered; and if possession of the property cannot be had, then the judgment should be in the alternative. Austin v. Secrest, 91 N.C. 214 (1884).

In claim and delivery the judgment should be for the delivery of the property or its value. Oil Co. v. Grocery Co., 136 N.C. 354, 48 S.E. 781 (1904).

Plaintiff May Recover Both Possession of Property and Damages for Its Detention. — In a proceeding for claim and delivery of personal property a plaintiff is entitled in a single action to recover both possession of the property and damages for its detention. Bowen v. King, 146 N.C. 385, 59 S.E. 1044 (1907); Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Action Will Lie Against Officer Taking Property Under Execution Against Third Person. — An action for claim and delivery of personal property can be maintained by the owner against an officer taking the same under an execution against a third person. Jones v. Ward, 77 N.C. 337 (1877); Churchill v. Lee, 77 N.C. 341 (1877); Mitchell v. Sims, 124 N.C. 411, 32 S.E. 735 (1899); Mica Indus., Inc. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Cited in Rawlings v. Neal, 126 N.C. 271, 35 S.E. 597 (1900); McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928); C.I.T. Corp. v. Watkins, 208 N.C. 448, 181 S.E. 270 (1935); Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130 (1983); Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

§ 1-473. Affidavit and requisites.

Where a delivery is claimed, an affidavit must be made before the clerk of the court in which the action is required to be tried or before some person competent to administer oaths, by the plaintiff, or someone in his behalf, showing —

(1) That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to its possession by virtue of a special property therein, the facts in respect to which must be set forth.

(2) That the property is wrongfully detained by the defendant.

(3) The alleged cause of the detention, according to his best knowledge, information and belief.

(4) That the property has not been taken for tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,

(5) The actual value of the property. (C.C.P., s. 177; 1881, c. 134; Code, s. 322; Rev., s. 791; C.S., s. 831.)

CASE NOTES

Broad Language. — The words of this section are as broad as can well be imagined, and include every case, with four specified exceptions, where the plaintiff makes an affidavit that he is entitled to the possession of certain personal property, and that it is wrongfully detained by the defendant, and gives the required bond. Jones v. Ward, 77 N.C. 337 (1877).

Under this section there is no limitation or restriction put upon the plaintiff, who seeks to recover personal property and have the same immediately delivered to him, except that the same has not been taken for tax assessments or fines pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or, if seized, that it is by statute exempt from such seizure. Mitchell v. Sims, 124 N.C. 411, 32 S.E. 735 (1899).

Application of Section. — It is only in cases when the plaintiff seeks to have the property delivered to him immediately, and to have the possession pending the action, as in the old action of replevin, that the affidavit and bond are required. Jarman v. Ward, 67 N.C. 32 (1872).

The affidavit required by this section is indispensable to maintain claim and delivery. Griffith v. Richmond, 126 N.C. 377, 35 S.E. 620 (1900).

And in making the affidavit this section must be strictly followed. Hirsh v. J.D. Whitehead & Co., 65 N.C. 516 (1871).

And plaintiff should set forth his special interest in the property. Cooper v. Evans, 174 N.C. 412, 93 S.E. 897 (1917).

The deputy of the clerk of the superior court is authorized to take the affidavit of the plaintiff and to order the seizure of personal property in an action of claim and delivery. Jackson v. Buchanan, 89 N.C. 74 (1883).

Burden of Proof. — In claim and delivery proceedings the burden is on the plaintiff to establish a cause of action. Smith v. Cook, 196 N.C. 558, 146 S.E. 229 (1929).

Value Where No Market for Item. — Although there was no market for certain bottle cap molds, based on the most recent transactions involving the molds, and the replacement costs, the court determined that the actual value of the molds was $522,000. Weener Plastics, Inc. v. HNH Packaging, LLC, 590 F. Supp. 2d 760, 2008 U.S. Dist. LEXIS 92321 (E.D.N.C. 2008).

Claimant Authorized to Take Possession of Property upon Execution of Bond. — Under this section when the immediate delivery of the property is sought, the broad language of the statute gives the right to the claimant, upon his executing the bond required by law, to take the property from the possession of any person, even from an officer of the law. Mitchell v. Sims, 124 N.C. 411, 32 S.E. 735 (1899).

Applied in GMAC v. Waugh, 207 N.C. 717, 178 S.E. 85 (1935).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928); Keith Tractor & Implement Co. v. McLamb, 252 N.C. 760, 114 S.E.2d 668 (1960); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960).

§ 1-474. Order of seizure and delivery to plaintiff.

(a) Order. — The clerk of court may, upon notice and hearing as provided in G.S. 1-474.1 and upon the giving by the plaintiff of the undertaking prescribed in G.S. 1-475, require the sheriff of the county where the property claimed is located to take the property from the defendant and deliver it to the plaintiff. The act of the clerk in issuing or refusing to issue the order to the sheriff is a judicial act and may be appealed pursuant to G.S. 1-301.1 to the judge of the district or superior court having jurisdiction of the principal action.

(b) Expiration of Certain Orders. — When delivery of property is claimed from a debtor who allegedly defaulted on his payments for personal property purchased under a conditional sale contract, a purchase money security agreement or on a loan secured by personal property, an order of seizure and delivery to the plaintiff for that property expires 60 days after it is issued. (C.C.P., s. 178; Code, s. 323; Rev., s. 792; C.S., s. 832; 1973, c. 472, s. 1; 1985, c. 736; 1999-216, s. 6.)

CASE NOTES

Summons Necessary to Invoke Jurisdiction. — In an action for the claim and delivery of personal property, the issuing of a summons is necessary to give the clerk jurisdiction to make the order to the sheriff, requiring him to take such property and deliver the same to the plaintiff, and an order to that effect without such summons is no justification to the sheriff or the defendant for any action in the premises. Potter v. Mardre, 74 N.C. 36 (1876).

Issuance of Order Is Ministerial Act. — In issuing the order, the clerk does not represent the court, whose officer he is, and as in numerous cases he is authorized to do, under the statute, but he performs a ministerial act, peremptorily enjoined, and exercises a function belonging to the office. Jackson v. Buchanan, 89 N.C. 74 (1883).

Which May Be Performed by Deputy Clerk. — The clerk of the superior court, in making the order of seizure of property in the provisional remedy of claim and delivery, only does a ministerial and not a judicial act or service, and therefore a deputy clerk might make such order. Jackson v. Buchanan, 89 N.C. 74 (1883); Evans v. Etheridge, 96 N.C. 42, 1 S.E. 633 (1887).

Dismissal of Action by Plaintiff After Receipt of Property Prohibited. — In an action of claim and delivery it is not competent to the plaintiff, after the property is put into his possession by process of law, to move to dismiss the action and fail to file a complaint, thereby raising no issue and depriving the defendant of an opportunity to assert his right. Manix v. Howard, 82 N.C. 125 (1880).

Questions raised by defendants involving substantial rights can be decided only when the case is heard on its merits. Wachovia Bank & Trust Co. v. Smith, 24 N.C. App. 133, 210 S.E.2d 212 (1974), cert. denied, 286 N.C. 420, 211 S.E.2d 801 (1975).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928); Hutchison v. Bank of N.C., 392 F. Supp. 888 (M.D.N.C. 1975).

§ 1-474.1. Notice of hearing; waiver; permissible form of notice and waiver.

(a) The clerk of court, upon the request of the plaintiff, shall issue a notice to the defendant setting a time and place for a hearing before the clerk which shall not be less than 10 days from the date of service of said notice upon the defendant. The notice shall be served on the defendant in any manner provided by the Rules of Civil Procedure for the service of summons. Upon the request of the plaintiff the notice shall contain an order enjoining the defendant from willfully disposing of the property in any manner, from removing or permitting the removal of the property from the State of North Carolina, or from causing or permitting willful damage or destruction of the property. If in a trial on the merits it is determined that the plaintiff was entitled to the possession of the property, and the defendant after service of notice of the hearing shall have willfully disposed of the property, removed or permitted the removal of the property from the State of North Carolina, or caused or permitted its willful damage or destruction, the defendant may be found in contempt of court and may be fined or imprisoned by the court as provided by law.

(b) Waiver of the rights to notice and hearing shall not be permitted except as set forth herein. At any time subsequent to service of the notice of hearing provided in subsection (a), the clerk of court, upon the request of the plaintiff, shall mail to the defendant at his last known address a form by which the defendant may waive his right to the hearing. Upon the return of the form to the clerk of court, bearing the signature of the defendant and that of a witness to the defendant's signature (which witness shall not be a party to the action or an agent or employee of a party to the action), the clerk in his discretion may dispense with the necessity of a hearing and may proceed to issue the order of seizure prescribed by G.S. 1-474.

(c) In addition to any other forms substantially complying with the requirements of the preceding subsections, form (1) below may be used to give the notice provided for in subsection (a) above and form (2) below may be used to waive the hearing as provided in subsection (b) above:

(1) READ THIS NOTICE.

WARNING: DO NOT WILLFULLY DISPOSE OF, REMOVE OR PERMIT THE REMOVAL FROM THE STATE OF NORTH CAROLINA, OR CAUSE OR PERMIT WILLFUL DAMAGE OR DESTRUCTION OF THE PROPERTY DESCRIBED BELOW BECAUSE YOU MAY BE HELD IN CONTEMPT OF COURT AND MAY BE FINED AND IMPRISONED.

To: ______________ (Defendant).

If you want to present reasons why you should not have the property described below taken from you, then you should appear at a hearing to be held before the undersigned clerk of court at ______ o'clock ___.M. on the ______________________________
day of ____________, _________, at the ____________________
________________________________ County Courthouse because
____ (Plaintiff)
has sworn that you wrongfully hold the following property and that he is entitled to it:

(Description of Property)

____

____

____

____

At the hearing the plaintiff will present evidence, and you are allowed to present evidence. You may bring an attorney to this hearing. Upon the basis of the evidence presented, the clerk will decide whether or not to issue an order directing the sheriff to take the property until a trial on the merits is held. You are hereby ORDERED:

a. Not to willfully dispose of the property;
b. Not to remove or permit its removal from the State of North Carolina; and
c. Not to cause or permit its damage or destruction.

If you fail to comply with this order, and it is finally determined that the plaintiff is entitled to the possession of the property, you may be guilty of contempt of court and may be fined or imprisoned as provided by law.

If you have any questions about the hearing, you may contact an attorney or the clerk of court prior to the hearing.

(Certificate of Service)

(2) VOLUNTARY WAIVER OF HEARING.

To ______________________________ (Defendant).

You have been served with a notice that a hearing will be held before the undersigned clerk of court at ____________ o'clock ________.M. on the ________ day of ________, ______, at the ____________ County Courthouse to determine if ____________ (Plaintiff) is entitled to the possession of the following described property until a trial on the merits is held

(Description of Property)

____

____

____

____

If you do not wish to object to the plaintiff's right to the possession of this property until a trial on the merits is held, you may waive your right to the hearing by signing the statement below, having your signature witnessed by any person who is not a party or an agent or employee of a party to this action and returning it to the undersigned clerk of court by mail or in person prior to the date set for the hearing.

____

Clerk of Superior Court

I, ________, do hereby voluntarily waive and relinquish my right to the hearing described above.

____

Defendant

Witness:
(Name)

____

(Address)

____

(1973, c. 472, s. 2; 1999-456, s. 59.)

Cross References. — As to service of summons, see G.S. 1A-1, Rule 4.

CASE NOTES

Cited in Tom's Amusement Co. v. Cuthbertson, 816 F. Supp. 403 (W.D.N.C. 1993).

§ 1-475. Plaintiff's undertaking.

The plaintiff must give a written undertaking payable to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, with damages for its deterioration and detention if return can be had, and if for any cause return cannot be had, for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereon as damages for such seizure and detention. (C.C.P., s. 179; Code, s. 324; 1885, c. 50; Rev., s. 793; C.S., s. 833.)

Legal Periodicals. — For article discussing security as a pre-condition to provisional injunctive relief, see 52 N.C.L. Rev. 1091 (1974).

CASE NOTES

Purpose of Undertaking. — The required undertaking is for the protection of defendants, so that a fund might be established from which recovery could be had were it shown that the plaintiff was not lawfully entitled to the property or that the property was damaged or diminished in value through plaintiff's fault while plaintiff held possession of it. Marine Ecology Sys. v. Spooners Creek Yacht Harbor, Inc., 40 N.C. App. 726, 253 S.E.2d 613 (1979).

Judgment on Bond Should Be in Alternative. — A judgment on the forthcoming bond in claim and delivery proceedings should be in the alternative for the return of the property, or, if that cannot be had, for its value with damages. Grubbs v. Stephenson, 117 N.C. 66, 23 S.E. 97 (1895).

Value of Property Should Be Ascertained. — For the benefit of the sureties upon the undertaking the value of the property at the time of seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. Griffith v. Richmond, 126 N.C. 377, 35 S.E. 620 (1900).

Where, in claim and delivery proceedings, the vendor of the property, who had retained title until the notes for its purchase should be paid, intervened and was adjudged to be entitled to the property, the plaintiff (purchaser from the vendee), who had given bond for the return of the property to the defendant is entitled to have its value ascertained and should be adjudged to pay that amount, not exceeding, however, the balance due the vendor. Barrington v. Skinner, 117 N.C. 47, 23 S.E. 90 (1895).

Because the actual value of the bottle cap molds at issue was $522,000, defendants were entitled to issuance of an order of claim and delivery conditioned upon its filing a bond in the amount of $1,044,000 and otherwise conforming to G.S. 1-475, and the court's approval of the bond. Weener Plastics, Inc. v. HNH Packaging, LLC, 590 F. Supp. 2d 760, 2008 U.S. Dist. LEXIS 92321 (E.D.N.C. 2008).

Maximum Amount in Controversy Ordinarily Assigned as Value of Property. — Custom and prudence have established that plaintiffs will ordinarily assign to the property to be repossessed a value which represents the maximum amount in controversy over such property, where that figure is likely to be higher than the actual value of the property. This provides the maximum protection for the party from whom the property has been taken by the claim and delivery proceeding and is consistent with the notions of due process. Marine Ecology Sys. v. Spooners Creek Yacht Harbor, Inc., 40 N.C. App. 726, 253 S.E.2d 613 (1979).

But Valuation in Undertaking Not Conclusive. — The valuation made in an affidavit or undertaking may be some evidence of value but is not conclusive. Marine Ecology Sys. v. Spooners Creek Yacht Harbor, Inc., 40 N.C. App. 726, 253 S.E.2d 613 (1979).

And Plaintiff Not Prevented from Proving Actual Value at Trial. — The affidavit and undertaking in a claim and delivery action, intended as they are for the defendant's protection, are not made as conclusive declarations of value and, accordingly, defendant is not entitled to take those valuations and seek, by collateral estoppel, to prevent plaintiff from proving at trial the actual value of the property, using market value or other applicable standards of valuation. Marine Ecology Sys. v. Spooners Creek Yacht Harbor, Inc., 40 N.C. App. 726, 253 S.E.2d 613 (1979).

Measure of Damages Where Property Cannot Be Returned. — Where defendant recovers judgment and the property cannot be returned to him, the measure of damages is the value of the property at the time of its seizure, and an instruction that defendant would be entitled to recover, if plaintiff's seizure of the property were wrongful. C.I.T. Corp. v. Watkins, 208 N.C. 448, 181 S.E. 270 (1935).

The plaintiff and surety are not liable where sheriff seized and retained certain property not specified or described in the affidavit. Williams v. Perkins, 192 N.C. 175, 134 S.E. 417 (1926).

Voluntary Nonsuit by Plaintiff. — Where the plaintiff has taken a voluntary nonsuit after the property had been taken in claim and delivery and therein sold, the defendant in that action may maintain an independent action for damages, against the plaintiff in the former action and the surety on his bond, given in conformity with this section, wherein nominal damages at least are recoverable, with actual damages for the value of the property at the time of the seizure under claim and delivery. Davis Bros. Co. v. Wallace, 190 N.C. 543, 130 S.E. 176 (1925).

Applied in Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928); Universal C.I.T. Credit Corp. v. Saunders, 235 N.C. 369, 70 S.E.2d 176

(1952); Moore v. Humphrey, 247 N.C. 423, 101 S.E.2d 460 (1958); Tillis v. Calvine Cotton Mills, Inc., 251 N.C. 359, 111 S.E.2d 606 (1959); Wachovia Bank & Trust Co. v. Smith, 24 N.C. App. 133, 210 S.E.2d 212 (1974); Walker Frames v. Shively, 123 N.C. App. 643, 473 S.E.2d 776 (1996).

§ 1-476. Sheriff's duties.

Upon the receipt of the order from the clerk with the plaintiff's undertaking, the sheriff shall forthwith take the property described in the affidavit, if it is in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion. (C.C.P., s. 179; Code, s. 324; 1885, c. 50; Rev., s. 793; C.S., s. 834.)

CASE NOTES

The sheriff or his deputy is not the agent of the party who sued out the claim and delivery, but he is an officer to carry out the mandate of the court. Williams v. Perkins, 192 N.C. 175, 134 S.E. 417 (1926).

Independent Action May Be Maintained Against Sheriff. — Where the sheriff has wrongfully seized certain personal property of the defendant in claim and delivery, not described therein as the subject of such seizure, the defendant may maintain an independent action for damages against the sheriff. Williams v. Perkins, 192 N.C. 175, 134 S.E. 417 (1926).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928); GMAC v. Waugh, 207 N.C. 717, 178 S.E. 85 (1935).

§ 1-477. Exceptions to undertaking; liability of sheriff.

The defendant may, within three days after the service of a copy of the affidavit and undertaking, notify the sheriff personally, or by leaving a copy at his office in the county seat of the county, that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice, in like manner as upon bail on arrest. The sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they justify, or until new sureties are substituted and justify. If the defendant excepts to the sureties he cannot reclaim the property as provided in the succeeding section [G.S. 1-478]. (C.C.P., s. 180; Code, s. 325; Rev., s. 794; C.S., s. 835.)

CASE NOTES

Sheriff Liable as Surety. — In delivering property to a defendant, when seized in claim and delivery proceedings without taking a proper undertaking and requiring the same to be justified, a sheriff becomes liable as a surety thereon. Wells v. Bourne, 113 N.C. 82, 18 S.E. 106 (1893).

Measure of Damages. — The measure of liability is the delivery of the property to the plaintiff with the damages for its deterioration, or, failing delivery, the value of the property. Wells v. Bourne, 113 N.C. 82, 18 S.E. 106 (1893).

Proof. — Where plaintiff, in an action against a sheriff to recover damages for his failure to take a proper undertaking for the return of property seized by him at the instance of the plaintiff and adjudged to be returned, failed to show that execution issued for the property and against the sureties on the undertaking had been returned unsatisfied, he failed to show, and could not recover, actual damage against such sheriff. Wells v. Bourne, 113 N.C. 82, 18 S.E. 106 (1893).

When Objection to Undertaking Must Be Made. — The objection that what purports to be the undertaking of the plaintiff, in such action, was not properly executed, comes too late when made at the trial term. Spencer v. Bell, 109 N.C. 39, 13 S.E. 704 (1891).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928).

§ 1-478. Defendant's undertaking for replevy.

At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages, not less than the difference in value of the property at the time of the execution of the undertaking and the value of the property at the time of its delivery to the plaintiff, together with damages for detention and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention, together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader.

The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the superior court. (C.C.P., s. 181; Code, s. 326; 1885, c. 50, s. 2; Rev., s. 795; 1911, c. 17; C.S., s. 836; 1961, c. 462.)

Cross References. — As to judgment in an action for the return of personal property, see G.S. 1-230.

CASE NOTES

Liability of Surety. — The principle, applying to ordinary contracts, that a surety is released from liability by an extension of time given to his principal does not apply to a surety on a replevin bond given under the provisions of this section, where the defendant retains possession of the property. V. Wallace & Sons v. Robinson, 185 N.C. 530, 117 S.E. 508 (1923).

The liability of the surety on a replevy bond in claim and delivery is not required to be determined in a separate action. Federal Fin. & Credit Co. v. Teeter, 196 N.C. 232, 145 S.E. 8 (1928).

The sureties to an undertaking, on behalf of the defendant, in claim and delivery are not liable for any debt which the plaintiff may recover in the action. Hall v. Tillman, 103 N.C. 276, 9 S.E. 194 (1889).

Liability Where Bond Voluntary. — Where an action of claim and delivery is instituted in a court inferior to the superior court, the defendant is not required by this section to give bond for the payment by him of the costs of the action if a judgment adverse to him is rendered in the action. However, when the bond is so conditioned it is not rendered void and unenforceable against either the defendant or his surety. In the absence of fraud, mistake, or other matters entitling them or either of them to equitable relief, both the defendant and his surety are bound according to the terms of the bond, which they executed voluntarily. Wright v. Nash, 205 N.C. 221, 171 S.E. 48 (1933).

The recovery against the surety can in no event exceed the penalty of the bond. Boyd v. Walters, 201 N.C. 378, 160 S.E. 451 (1931).

Summary Judgment Against Sureties. — Summary judgment may be rendered against the defendant's sureties on an undertaking to retain the property in an action of claim and delivery, but the judgment must be such as is authorized by this section and G.S. 1-230. Hall v. Tillman, 103 N.C. 276, 9 S.E. 194 (1889).

Form of Judgment Against Surety. — Where the defendant in claim and delivery replevies the property, giving bond for the retention to cover loss in the action, the form of the judgment against the surety on the bond should be for the full amount of the bond, to be discharged upon return of the property and the payment of damages and costs recovered by the plaintiff. Boyd v. Walters, 201 N.C. 378, 160 S.E. 451 (1931).

Sureties' Defenses. — The surety on a replevin bond in claim and delivery, under the requirements of this section that the property shall be delivered to the plaintiff, or, if it cannot be, the value at the time it was delivered to the defendant, may not, upon adjudication in plaintiff's favor, set up the defense that it had been taken by another, or prevented by an act of God, or that another than the plaintiff had a superior title to the property by mortgage or otherwise. Garner v. Quakenbush, 188 N.C. 180, 124 S.E. 154 (1924).

The remedy of a surety on a replevin bond to contest his liability as such under a consent judgment entered by the court against the defendant, his principal, is by appeal from the judgment, or by an independent action in case of fraud, and not by his motion in the case. V. Wallace & Sons v. Robinson, 185 N.C. 530, 117 S.E. 508 (1923).

Recovery of Costs. — The entire costs of prosecuting an action involving the title to the property should be recovered by a plaintiff who prevails against the defendant and the sureties on the bond. Hall v. Tillman, 110 N.C. 220, 14 S.E. 745 (1892).

Applied in Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928); McCormick v. Crotts, 198 N.C. 664, 153 S.E. 152 (1930); GMAC v. Waugh, 207 N.C. 717, 178 S.E. 85 (1935); Universal C.I.T. Credit Corp. v. Saunders, 235 N.C. 369, 70 S.E.2d 176 (1952); General Tire & Rubber Co. v. Distributors, Inc., 251 N.C. 406, 111 S.E.2d 614 (1959); Weener Plastics, Inc. v. HNH Packaging, LLC, 590 F. Supp. 2d 760, 2008 U.S. Dist. LEXIS 92321 (E.D.N.C. 2008).

§ 1-479. Qualification and justification of defendant's sureties.

The qualification of the defendant's sureties, and their justification, is as prescribed in respect to bail upon an order of arrest. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than six days, shall justify before the court or judge, and upon this justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until justification is completed or expressly waived, and he may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff. (C.C.P., ss. 182, 183; Code, ss. 327, 328; Rev., ss. 796, 797; C.S., s. 837; 1971, c. 268, s. 30.1.)

Cross References. — As to qualifications of bail in arrest and bail, see G.S. 1-423. As to justification, see G.S. 1-424.

CASE NOTES

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928).

OPINIONS OF ATTORNEY GENERAL

Clerks of Court May Take Justification of Defendant's Sureties; Magistrates Have Not Succeeded to the Power of Justice of Peace to Take Such Justification. — See opinion of Attorney General to Honorable Robert J. Pleasants, 41 N.C.A.G. 628 (1971).

§ 1-480. Property concealed in buildings.

If the property, or any part of it, is concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it is not delivered he must cause the building or enclosure to be broken open, and take the property into his possession. If necessary, he may call to his aid the power of his county, and if the property is upon the person the sheriff or other officer may seize the person, and search for and take it. (C.C.P., s. 184; Code, s. 329; Rev., s. 798; C.S., s. 838.)

CASE NOTES

Although this section permits forcible entry, no similar exception has been promulgated with respect to the execution of writs of possession pursuant to G.S. 1-313(4). Red House Furn. Co. v. Smith, 310 N.C. 617, 313 S.E.2d 569 (1984).

An officer cannot break open an outer door or window of a dwelling against the consent of the owner for the purpose of making a levy on the goods of the owner. Red House Furn. Co. v. Smith, 310 N.C. 617, 313 S.E.2d 569 (1984).

Applied in Red House Furn. Co. v. Smith, 63 N.C. App. 769, 306 S.E.2d 130 (1983).

§ 1-481. Care and delivery of seized property.

When the sheriff has taken property, as provided in this Article, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping it. (C.C.P., s. 185; Code, s. 330; Rev., s. 799; C.S., s. 839.)

CASE NOTES

Expenses of Seizing Included in Costs. — It is proper to allow in the bill of costs the expense of seizing and caring for the property. Hendricks v. Ireland, 162 N.C. 523, 77 S.E. 1011 (1913).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928).

§ 1-482. Property claimed by third person; proceedings.

When the property taken by the sheriff is claimed by any person other than the plaintiff or defendant the claimant may intervene upon filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title, and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in his affidavit, for the delivery of the property to the person entitled to it, and for the payment of all such costs and damages as may be awarded against him, this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavit shall be served by the sheriff on the plaintiff and defendant at least 10 days before the return day of the summons in the action, when the court trying it shall order a jury to be impaneled to inquire in whom is the right to the property specified in plaintiff's complaint. The finding of the jury is conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. However, this section shall not be construed to prevent any such intervener or third person from intervening and asserting his claim to the property, or any part thereof, without giving bond as herein required, where such intervener or other third person does not ask for possession of the property pending the trial of the issue. (1793, c. 389, s. 3, P.R.; R.C., c. 7, s. 10; C.C.P., s. 186; Code, s. 331; Rev., s. 800; 1913, c. 188; C.S., s. 840; 1933, c. 131; 1971, c. 268, s. 30.2.)

Cross References. — For requisites of affidavit, see G.S. 1-473.

CASE NOTES

Purpose of Section. — It is the purpose of the section to allow one interpleading to come into the action in its course, allege and prove his title and right of possession of the property upon their real merits, and, if he shall succeed, take it without the delay and expense incident to a separate and independent action that otherwise he might be forced to bring. This seems to be the just and reasonable view, and the one that harmonizes with well-settled principles of the law applicable. Claywell v. McGimpsey, 15 N.C. 89 (1833); Churchill v. Lee, 77 N.C. 341 (1877); Hudson v. Wetherington, 79 N.C. 3 (1878); Wallace Bros. v. Robeson, 100 N.C. 206 (1888).

The right of an outside claimant to intervene is well settled by precedent. McKesson v. Mendenhall, 64 N.C. 286 (1870); Toms v. Warson, 66 N.C. 417 (1872); Clemmons v. Hampton, 70 N.C. 534 (1874); Bruff v. Stern, 81 N.C. 183 (1879); Sims v. Goettle Bros., 82 N.C. 268 (1880).

Intervener Restricted to Question of Title. — It is well settled that in an action involving the title to property an interpleader is restricted to the issue as to his title or claim to the property, and cannot raise or litigate questions or rights which do not affect such titles. McLean v. Douglas, 28 N.C. 233 (1846); Dawson v. Thigpen, 137 N.C. 462, 49 S.E. 959 (1905).

In a proceeding under this section the intervener is not called on or required, and indeed he is not permitted to question the validity of the plaintiff's claim against the defendant, nor to file any answer thereto which denies or tends to deny its validity. On the contrary, the intervener has himself become the actor in the suit, and, on authority, is restricted to the issue whether his claim of right and title is superior to that of the original plaintiff. Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901); Maynard v. Insurance Co., 132 N.C. 711, 44 S.E. 405 (1903); Mitchell v. Talley, 182 N.C. 683, 109 S.E. 882 (1921); Hill v. Patillo, 187 N.C. 531, 122 S.E. 306 (1924).

Intervener Must Prove Title. — In proceedings in attachment one who interpleads under this section is an actor upon whom rests the burden of proving his title to the property he claims. And this is so, although the property was in his possession when seized by the sheriff. Wallace Bros. v. Robeson, 100 N.C. 206, 6 S.E. 650 (1888); Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901).

Appearance Waives Objections. — A party to an action is deemed to have waived his right to object to the sufficiency of an affidavit of an attorney for an interpleader or intervener, as not having been made in accordance with the requirements of G.S. 1-473, by appearing at the taking of depositions in his behalf and cross-examining his witness. Allen v. McMillan, 191 N.C. 517, 132 S.E. 276 (1926).

Voluntary Recognition of Jurisdiction. — Where the court has allowed a third party to interplead and ordered him to be made a party to the action, an appearance of an original party to the action must first attack the validity of the order, if he so desires and a voluntary recognition that the court has acquired jurisdiction of a party is conclusive. Allen v. McMillan, 191 N.C. 517, 132 S.E. 276 (1926).

Separate Trial. — A separate trial for the intervener is discretionary with the trial judge. Cotton Mills v. Weil, 129 N.C. 452, 40 S.E. 218 (1901).

Effect of Three Years' Delay by Intervener. — In an action for the possession of personal property, under this section, a third party claiming such property loses his right to be made a party to the suit after a lapse of three years from the filing of his affidavit and his motion to allow him to interplead. Clemmons v. Hampton, 70 N.C. 534 (1874).

Where the defendant consents to a judgment against himself and sureties, the sureties cannot be allowed to intervene as parties and move to have the judgment vacated, when they have not offered to interplead and claim the property in the manner prescribed by this section. McDonald v. McBryde, 117 N.C. 125, 23 S.E. 103 (1895).

Nonsuit by Plaintiff. — In an action to recover possession of personal property, where the defendant has replevied the property and a third person has interpleaded, the plaintiff may take a nonsuit, but the action goes on for the interpleader. Dawson v. Thigpen, 137 N.C. 462, 49 S.E. 959 (1905).

Jurisdiction of Justice of the Peace. — A justice of the peace may entertain and try an interplea to determine the title although the value of the property exceeds fifty dollars ($50.00). Grambling v. Dickey, 118 N.C. 986, 24 S.E. 671 (1896).

When Garnishee Bank a Mere Stakeholder. — Where funds of a nonresident defendant are attached in a local bank that maintains the position of a mere stakeholder, and alleges ownership of its forwarding bank, and asks that the forwarding bank be made a party to the action, the forwarding bank, when brought in, may make its own claim of title and thus cure the defect, if any, in the proceedings in this respect, it being a matter of procedure. Temple v. Eades Hay Co., 184 N.C. 239, 114 S.E. 162 (1922).

The bond required of an intervener by this section has no application in attachment, where the garnishee bank holding the funds attached does so as a stakeholder, not claiming them, but only seeks to hold the same for the adjudication of the court between two conflicting claimants. Temple v. Eades Hay Co., 184 N.C. 239, 114 S.E. 162 (1922).

Where the plaintiffs attach property and bring action against a husband and wife to have a deed from the husband to the wife set aside and to subject the property attached to the payment of the judgment, the wife has a right to set up her claim to the property attached, and the refusal of the trial court to require her to give an interpleader bond under this section is not error. Unaka & City Nat'l Bank v. Lewis, 201 N.C. 148, 159 S.E. 312 (1931).

Applied in GMAC v. Waugh, 207 N.C. 717, 178 S.E. 85 (1935).

Cited in McKinney v. Sutphin, 196 N.C. 318, 145 S.E. 621 (1928); Francis v. Mortgage Sec. Corp., 198 N.C. 734, 153 S.E. 317 (1930).

§ 1-483. Delivery of property to intervener.

Upon the filing by the claimant of the undertaking set forth in G.S. 1-482, the sheriff is not bound to keep the property, or to deliver it to the plaintiff; but may deliver it to the claimant, unless the plaintiff executes and delivers to him a similar undertaking to that required of claimant; and notwithstanding such claim, when so made, the sheriff may retain the property a reasonable time to demand such indemnity. (1793, c. 389, s. 3, P.R.; R.C., c. 7, s. 10; Code, s. 332; Rev., s. 801; C.S., s. 841.)

CASE NOTES

Purpose of Section. — This section is intended only for the benefit of the sheriff, and to enable him to protect himself against the claim of the third party, by taking from the plaintiff an indemnity against such claim before he delivers the property to him. Clemmons v. Hampton, 70 N.C. 534 (1874).

Sheriff Must Take Security. — Under this section the property is not to be delivered to the intervener by the sheriff until the security is given. Bear v. Cohen, 65 N.C. 511 (1871).

§ 1-484. Sheriff to return papers in 10 days.

The sheriff must return the undertaking, notice and affidavit, with his proceedings thereon, to the court in which the action is pending within 10 days after taking the property mentioned therein. (C.C.P., s. 187; Code, s. 133; Rev., s. 802; C.S., s. 842.)

§ 1-484.1. Remedy not exclusive.

The provisions of this Article shall not be construed to preclude the use of attachment or any other ancillary remedy (upon the terms and subject to the conditions provided by law for the exercise thereof) simultaneously with the remedy of claim and delivery. (1973, c. 472, s. 2.1.)

CASE NOTES

Cited in Weener Plastics, Inc. v. HNH Packaging, LLC, 590 F. Supp. 2d 760, 2008 U.S. Dist. LEXIS 92321 (E.D.N.C. 2008).

ARTICLE 37.

Injunction.

§ 1-485. When preliminary injunction issued.

A preliminary injunction may be issued by order in accordance with the provisions of this Article. The order may be made by any judge of the superior court or any judge of the district court authorized to hear in-chambers matters in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried:

(1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

(2) When, during the litigation, it appears by affidavit that a party thereto is doing or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,

(3) When, during the pendency of an action, it appears by affidavit of any person that the defendant threatens or is about to remove or dispose of his property, with intent to defraud the plaintiff. (C.C.P., ss. 188, 189; Code, ss. 334, 338; Rev., s. 806; C.S., s. 843; 1967, c. 954, s. 3; 1973, c. 66, s. 1.)

Legal Periodicals. — For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983), see 63 N.C.L. Rev. 222 (1984).

CASE NOTES

I. General Consideration.
II. Nature of Injunction.
III. Grounds for Relief.
  A. Character of Relief in General.
  B. Availability of Other Relief.
  C. Application of Section.

I. GENERAL CONSIDERATION.

This section is constitutional. Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

This section is merely a statutory recognition of the abolition of the distinction between special and common injunctions, a distinction existing under the old practice. Since the adoption of the Code all injunctions are simply ancillary proceedings and are not available to anyone the basis of whose claims for such relief does not come within at least one of the enumerated classes of this section. Person v. Person, 154 N.C. 453, 70 S.E. 752 (1911).

Issuance of an injunction presupposes, as an essential requisite, the pendency of an action which is receiving or will receive a judicial determination. Armstrong v. Kinsell, 164 N.C. 125, 80 S.E. 235 (1913).

Restraint Sought Must Be Germane to Subject of Action. — This section does not permit injunction to issue when the restraint sought is not germane to the subject of the action. Jackson v. Jernigan, 216 N.C. 401, 5 S.E.2d 143 (1939).

Notice and Hearing Required. — A preliminary injunction, unlike a temporary restraining order, requires notice to the adverse party and a hearing. Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

Court May Consider Affidavits. — Both before and after the adoption of the new Rules of Civil Procedure, it was and is proper for the court to consider evidence by affidavits in show cause hearings for injunctions, and subdivision (1) of this section does not prohibit this. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

When proceeding under subdivision (1) of this section for a preliminary injunction, the court is not limited to what appears in the complaint. The courts have historically heard motions for preliminary injunction on affidavits. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

Restraining Order and Injunction Distinguished. — This section in nowise abolishes the distinction between restraining orders and injunctions. The distinctive features between these remedial agencies remain and are respected to the utmost extent by the courts. A restraining order can be issued in any cause by any judge of the superior court anywhere in the State, and made returnable at any time within 20 days, at any place, before a judge residing in or assigned to or holding by exchange the courts within the district in which the county where the cause is pending is situated; but a perpetual injunction can be granted only in the county where the cause is pending, and by the judge who tries the cause at the final hearing. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893); Kinston v. Wooten, 150 N.C. 295, 63 S.E. 1061 (1909).

An injunction may be granted by a judge outside the county in which the main cause is pending since this is an ancillary proceeding not involving the merits of the cause. Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893); Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897).

Mandamus and Mandatory Injunction Distinguished. — In North Carolina, where both legal and equitable jurisdiction is vested in the same court, there is very little difference in its practical results between proceedings in mandamus and mandatory injunction, the former is permissible when the action is to enforce performance of duties existent for the benefit of the public, and the latter is confined usually to causes of an equitable nature, and to the enforcement of rights which solely concerns individuals. Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co., 159 N.C. 9, 74 S.E. 636 (1912).

Good Faith and Reasonable Diligence Necessary. — Before injunctive relief will be granted it is necessary that the plaintiff show his good faith and reasonable diligence in instituting his action. Jones v. Commissioners of Person County, 107 N.C. 248, 12 S.E. 69 (1890).

Increasing Bond. — Under this section the garnishees may be restrained and enjoined from making further payments on their indebtedness to the defendant, until the final determination of the action, but the defendant and the garnishees may move that the bond required of the plaintiffs shall be increased in amount, to the end that said defendant and the garnishees shall be fully protected against loss or damage resulting from the injunction. Newberry v. Meadows Fertilizer Co., 203 N.C. 330, 166 S.E. 79 (1932).

The burden is upon the applicant for an interlocutory injunction to prove a probability of substantial injury to the applicant from the continuance of the activity of which it complains to the final determination of the action. Board of Provincial Elders v. Jones, 273 N.C. 174, 159 S.E.2d 545 (1968).

Findings and Proceedings Are Not Binding at Trial on Merits. — The findings of fact and other proceedings of the judge who hears the application for an interlocutory injunction are not binding on the parties at the trial on the merits. Indeed, these findings and proceedings are not proper matters for the consideration of the court or jury in passing on the issues determinable at the final hearing. Schloss v. Jamison, 258 N.C. 271, 128 S.E.2d 590 (1962).

The constitutionality of a statute or ordinance should not be decided in an interlocutory injunction on pleadings and an ex parte affidavit, but should be determined at the hearing on the merits, when all the facts can be shown. Schloss v. Jamison, 258 N.C. 271, 128 S.E.2d 590 (1962).

The constitutional prohibition of trial of "issues of fact" by the Supreme Court extends to issues of fact as heretofore understood, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the propriety of continuing or vacating an order of a provisional injunction. Heilig v. Stokes, 63 N.C. 612 (1869).

Discretion of Court. — It ordinarily lies in the sound discretion of the court to determine whether or not a temporary injunction will be granted on hearing pleadings and affidavits only. In the exercise of such discretion the court should consider the inconvenience and damage to defendant as well as the benefit that will accrue to the plaintiff. Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962).

It lies within the discretion of the court to determine whether a preliminary injunction will be granted upon pleadings and affidavits. In exercising its discretion the court should consider the inconvenience and damage to defendant as well as the benefit that will accrue to the plaintiff. A.E.P. Indus., Inc. v. McClure, 58 N.C. App. 155, 293 S.E.2d 232 (1982), rev'd on other grounds, 308 N.C. 393, 302 S.E.2d 754 (1983).

Issuance of a preliminary injunction is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

It is proper for the court to take into account probable injuries to persons not parties to the action and to the public if a preliminary injunction were to be issued. Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 373 S.E.2d 449 (1988), aff'd, 324 N.C. 327, 377 S.E.2d 750 (1989).

Appeal. — On appeal the reviewing court is not bound by the findings or ruling of the court below in injunction cases, but may review the evidence on appeal. Even so there is a presumption that the judgment entered below is correct, and the burden is upon appellant to assign and show error. Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962); State ex rel. Edmisten v. Challenge, Inc., 54 N.C. App. 513, 284 S.E.2d 333 (1981).

In reviewing the denial of a preliminary injunction, the appellate court is not bound by the findings of the lower court, but there is a presumption that the lower court decision was correct. A.E.P. Indus., Inc. v. McClure, 58 N.C. App. 155, 293 S.E.2d 232 (1982), rev'd on other grounds, 308 N.C. 393, 302 S.E.2d 754 (1983).

A decision by the trial court to issue or deny an injunction will generally be upheld on appeal if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings. A.E.P. Indus., Inc. v. McClure, 58 N.C. App. 155, 293 S.E.2d 232 (1982), rev'd on other grounds, 308 N.C. 393, 302 S.E.2d 754 (1983); Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied,.

On appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983); Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 373 S.E.2d 449 (1988), aff'd, Hampton v. Hardin, 88 N.C. 592 (1883).

In reviewing the grant of a preliminary injunction, the appellate court may weigh the evidence and find facts for itself. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

Order Setting Injunction Bond Remanded Where Facts and Amount of Bond in Dispute. — Where order setting an injunction bond at $20,000 contained no findings of fact or conclusions of law relating to the amount of the bond, and facts were in dispute, remand was necessary for proper determination of the amount of the security bond. Iverson v. TM One, Inc., 92 N.C. App. 161, 374 S.E.2d 160 (1988).

Court erred in entering an injunction against the sale of real property because there was no action to which an ancillary injunction might have attached; there was no pending case between an executor seeking partition of a farm and sale of a widow's interest in the farm, and the widow, who had been defaulted in the partition action, later filed a separate federal class action. Revelle v. Chamblee, 168 N.C. App. 227, 606 S.E.2d 712, 2005 N.C. App. LEXIS 158 (2005).

Injunction Issued Erroneously. — Court erred in issuing a preliminary injunction preventing a Florida franchiser from proceeding with a Florida arbitration in a contract dispute with North Carolina franchisees because the injunction was issued on a finding that G.S. 22B-3 prohibited enforcement of a forum selection clause that mandated a Florida arbitration, but that statute was inapplicable since the Federal Arbitration Act preempted the state statute and the franchise agreement was not entered into in North Carolina; consequently, the franchisees did not have a likelihood of success on the merits since the forum selection clause was enforceable and mandated that the dispute be arbitrated and prosecuted in Florida. Szymczyk v. Signs Now Corp., 168 N.C. App. 182, 606 S.E.2d 728, 2005 N.C. App. LEXIS 162 (2005).

Applied in River Dev. Corp. v. Parker Tree Farms, Inc., 12 N.C. App. 1, 182 S.E.2d 211 (1971); Smith's Cycles, Inc. v. American Honda Motor Co., 26 N.C. App. 76, 214 S.E.2d 785 (1975); Staton v. Russell, 151 N.C. App. 1, 565 S.E.2d 103, 2002 N.C. App. LEXIS 688 (2002).

Cited in Collins v. North Carolina State College, 198 N.C. 337, 151 S.E. 646 (1930); Hopkins v. Swain, 206 N.C. 439, 174 S.E. 409 (1934); Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938); Brown v. Williams, 242 N.C. 648, 89 S.E.2d 260 (1955); Town of Hillsborough v. Smith, 10 N.C. App. 70, 178 S.E.2d 18 (1970).

II. NATURE OF INJUNCTION.

The remedy authorized by this section is an ancillary one afforded by the courts of equity for the purpose of preserving the status quo pending the action. It will issue to prevent an injury being committed or seriously threatened. In addition, a mandatory injunction may be issued to restore the status wrongfully disturbed. Seaboard Air Line R.R. v. Atlantic C.L.R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Under North Carolina statutes and procedure, an injunction is not a cause of action or a lawsuit in and of itself, but is a remedy which is ancillary to a pending suit. Lynch v. Snepp, 350 F. Supp. 1134 (W.D.N.C. 1972), rev'd on other grounds, 472 F.2d 769 (4th Cir. 1973).

Where no complaint or summons has been filed, no action has been instituted and therefore there is no pending action to which the injunction can be ancillary. Lynch v. Snepp, 350 F. Supp. 1134 (W.D.N.C. 1972), rev'd on other grounds, 472 F.2d 769 (4th Cir. 1973).

A preliminary injunction is interlocutory in nature, issued after notice and hearing, and restrains a party pending final determination on the merits. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

It is the purpose of a temporary injunction to maintain as nearly as possible the status quo. Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962).

The purpose of a preliminary injunction is ordinarily to preserve the status quo pending trial on the merits. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

Preliminary injunction serves as an equitable policing measure to prevent the parties from harming one another during the litigation; to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began. Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221

(1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975); Musten v. Musten, 36 N.C. App. 618, 244 S.E.2d 699 (1978).

Extraordinary and Provisional Remedy. — Although the specific details for the granting of injunctions are set out in the section, an injunction is still regarded as an extraordinary and provisional remedy, recourse to which may only be had by a party who has exhausted all available remedies, or unless it be made to appear that the party will suffer irreparable injury unless such relief is granted. Chambers v. Penland, 78 N.C. 53 (1878); Fink v. Stewart, 94 N.C. 484 (1886).

Injunction, being equitable in its nature and origin, must be administered upon equitable principles, except insofar as it may come within some plain statutory provision. Person v. Leary, 127 N.C. 114, 37 S.E. 149 (1900).

This section enlarges the power of the court to grant equitable relief, especially since the granting of the temporary injunction, herein provided, may be accompanied with the appointment of a receiver when necessary for the protection of the subject matter of the action. John L. Roper Lumber Co. v. Wallace, 93 N.C. 22 (1885).

III. GROUNDS FOR RELIEF.

A. Character of Relief in General.

An injunction can only operate in personam and unless jurisdiction of the party can be acquired, the attempted procedure is a nullity; and upon this principle proceedings to restrain the negotiation of a note in the hands of a holder, a nonresident and beyond the borders of the State, should be dismissed. Warlick v. Reynolds, 151 N.C. 606, 66 S.E. 657 (1910); Armstrong v. Kinsell, 164 N.C. 125, 80 S.E. 235 (1913).

The grant of a preliminary mandatory injunction is within the prerogative jurisdiction of courts of equity. Such preliminary injunctions are issued to preserve the status quo until upon final hearing the court may grant full relief, and are usually issued in cases where the defendant has proceeded knowingly in breach of contract or in willful disregard of an order of court. Seaboard Air Line R.R. v. Atlantic C.L.R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Mandatory Injunction May Be Issued for Protection of Easements and Proprietary Rights. — When it appears with reasonable certainty that the complainant is entitled to relief, the court will ordinarily issue the preliminary mandatory injunction for the protection of easements and proprietary rights. In such case it is not necessary to await the final hearing. If the asserted right is clear and its violation palpable, and the complainant has not slept on his rights, the writ will generally be issued without exclusive regard to the final determination of the merits and the defendant compelled to undo what he has done. Seaboard Air Line R.R. v. Atlantic C.L.R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Mandatory Injunction Should Not Be Issued Except in Case of Apparent Necessity. — A preliminary mandatory injunction on ex parte application should not be granted, except in case of apparent necessity for the purpose of restoring the status quo pending the litigation. Seaboard Air Line R.R. v. Atlantic C.L.R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Injury Must Be Immediate, Pressing, Irreparable, and Clearly Established. — As a rule a mandatory order will not be made as a preliminary injunction, except where the injury is immediate, pressing, irreparable, and clearly established. Seaboard Air Line R.R. v. Atlantic C.L.R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

Injunctive relief is granted only when irreparable injury is real and immediate. This is especially true with reference to the issuance of a preliminary injunction. Board of Provincial Elders v. Jones, 273 N.C. 174, 159 S.E.2d 545 (1968).

Mandatory Injunction Held Improvidently Granted. Seaboard Air Line R.R. v. Atlantic C.L.R.R., 237 N.C. 88, 74 S.E.2d 430 (1953).

B. Availability of Other Relief.

When proper relief can otherwise be had then no injunction will be issued, and where a party can obtain his relief by a motion in the original action he will not be permitted later to institute a new and independent action for the purpose of obtaining an injunction. Faison v. McIlwaine, 72 N.C. 312 (1875).

An injunction ordinarily will not be granted where there is an adequate legal remedy which is as practical and efficient as is the equitable remedy. A.E.P. Indus., Inc. v. McClure, 58 N.C. App. 155, 293 S.E.2d 232 (1982), rev'd on other grounds, 308 N.C. 393, 302 S.E.2d 754 (1983).

Irreparable Injury. — The rule in regard to the granting of an injunction on the ground that the injury complained of is irreparable in its nature is a strict one. The plaintiff must clearly show that the injury is peculiar in nature, one that cannot be repaired, put back again, or atoned for in damages. McKesson v. Hennessee, 66 N.C. 473 (1872); Bond v. Wool, 107 N.C. 139, 12 S.E. 281 (1890); Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 127 N.C. 130, 37 S.E. 152 (1900).

The injury threatened to plaintiff must be irreparable, real and immediate. A.E.P. Indus., Inc. v. McClure, 58 N.C. App. 155, 293 S.E.2d 232 (1982), rev'd on other grounds, 308 N.C. 393, 302 S.E.2d 754 (1983).

The party moving for a preliminary injunction must offer particular facts supporting its claim of irreparable injury. A.E.P. Indus., Inc. v. McClure, 58 N.C. App. 155, 293 S.E.2d 232 (1982), rev'd on other grounds, 308 N.C. 393, 302 S.E.2d 754 (1983).

To constitute irreparable injury it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

Where there has been an improper or premature execution by the clerk, the injured party's remedy is the perfection of his appeal and notice thereof which will have the effect of staying the proceedings, and an injunction will not be granted in such case. Bryan v. Hubbs, 69 N.C. 423 (1873).

Where it is shown that injury will result from the issuance of an irregular execution, the proper remedy is by motion to set aside and not injunction. Foard v. Alexander, 64 N.C. 69 (1870).

C. Application of Section.

An injunction pendente lite should not be granted where there is a serious question as to the right of the defendant to engage in the activity and to forbid the defendant to do so, pending the final determination of the matter, would cause the defendant greater damage than the plaintiff would sustain from the continuance of the activity while the litigation is pending. Board of Provincial Elders v. Jones, 273 N.C. 174, 159 S.E.2d 545 (1968).

Injunction Subsidiary to Another Action or Special Proceeding. — A court of equity, or a court in the exercise of its equity powers, may use the writ of injunction as a remedy subsidiary to and in aid of another action or special proceeding. However, in such cases, in order to justify continuing the writ until the final hearing, ordinarily it must be made to appear (1) that there is probable cause the plaintiff will be able to establish the asserted right, and (2) that there is a reasonable apprehension of irreparable loss unless the temporary order of injunction remains in force, or that in the opinion of the court such injunctive relief appears to be reasonably necessary to protect the plaintiff's rights until the controversy can be determined. Edmonds v. Hall, 236 N.C. 153, 72 S.E.2d 221 (1952).

By subsidiary injunction proceedings a party to an action may be restrained from committing an act respecting the subject of the action which would render judgment therein ineffective. Edmonds v. Hall, 236 N.C. 153, 72 S.E.2d 221 (1952).

When Temporary Injunction Granted Generally. — Ordinarily a temporary injunction will be granted pending trial on the merits, (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's right until the controversy between him and defendant can be determined. Western Conference of Original Free Will Baptists v. Creech, 256 N.C. 128, 123 S.E.2d 619 (1962); Waff Bros. v. Bank of N.C., N.A., 289 N.C. 198, 221 S.E.2d 273 (1976); State ex rel. Edmisten v. Challenge, Inc., 54 N.C. App. 513, 284 S.E.2d 333 (1981).

A preliminary injunction will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983); Iredell Digestive Disease Clinic v. Petrozza, 92 N.C. App. 21, 373 S.E.2d 449 (1988), aff'd, State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

To receive a preliminary injunction, plaintiff must show the likelihood of success on the merits and some type of irreparable harm. This standard, however, does not require a showing that the injury is beyond repair, but that the injury is one to which complainant should not be required to submit or which the other party should be permitted to inflict. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

The courts cannot enjoin the enforcement of the criminal law, nor can the validity of an ordinance be tested by an injunction. Paul v. Washington, 134 N.C. 363, 47 S.E. 793 (1904).

An injunction will not issue to restrain an act which has already been committed. Yount v. Setzer, 155 N.C. 213, 71 S.E. 209 (1911).

Injunction Awarded Only for Relief Sought. — Court did not err in dismissing plaintiffs' claims for preliminary injunctive relief, where, under a fair reading of plaintiffs' prayer for relief, the only preliminary injunctive relief requested was the enjoining of the disposal of school property, and although allegations may have been sufficient to show with particularity irreparable harm resulting from the expenditure of bond monies for the purchase of the facility, plaintiffs did not seek to enjoin that purchase. Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164, cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992).

Wasteful or Wrongful Disposition of Property of Dissolved Corporation. — The court, upon the dissolution of a corporation, has full control over the property of such corporation, and if necessary for the protection of such property, an injunction may be properly issued. State ex rel. Attorney Gen. v. Roanoke Nav. Co., 84 N.C. 705 (1881).

Obstruction of Easement. — A preliminary mandatory injunction may be issued when an easement into one's property has been obstructed. Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

An injunction does not ordinarily lie in a suit to try the title to land. Musten v. Musten, 36 N.C. App. 618, 244 S.E.2d 699 (1978).

This section applies equally as well whether the party litigants be public service or municipal corporations or individuals. Merrick v. Intramontaine R.R., 118 N.C. 1081, 24 S.E. 667 (1896); Griffin v. Goldsboro Water Co., 122 N.C. 206, 30 S.E. 319 (1898); Woodley v. Carolina Tel. & Tel. Co., 163 N.C. 284, 79 S.E. 598 (1913).

Private Nuisance. — Where plaintiffs were likely to succeed on at least one of their claims (private nuisance) at a trial on the merits with regard to picketing of doctor's home by abortion protestors, the claim warranted injunctive relief. Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828, appeal dismissed and discretionary review denied, 335 N.C. 175, 436 S.E.2d 379 (1993), cert. denied, 512 U.S. 1253, 114 S. Ct. 2783, 129 L. Ed. 2d 894 (1994).

§ 1-486. When solvent defendant restrained.

In an application for an injunction to enjoin a trespass on land it is not necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees. (1885, c. 401; Rev., s. 807; C.S., s. 844.)

Legal Periodicals. — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Where the injury being sustained or about to be sustained is irreparable so that there can be no sufficient recompense in money, then the plaintiff need not, in his pleadings, allege the insolvency of the defendant, but if the injury is an ordinary one which may be atoned for in money, then the plaintiff, in order to secure a temporary injunction, must allege the defendant's insolvency, for otherwise he has an adequate remedy in an action for damages. Lewis v. John L. Roper Lumber Co., 99 N.C. 11, 5 S.E. 19 (1888); Stewart v. Munger, 174 N.C. 402, 93 S.E. 927 (1917).

Continuing Trespass. — Where it appears that the facts of the case are in dispute and the trespass by the defendant would be continuous, and would produce injury to the plaintiff, a restraining order should be issued. Lodge v. Ijames, 156 N.C. 159, 72 S.E. 204 (1911); Sutton v. Sutton, 161 N.C. 665, 77 S.E. 838 (1913); Cobb v. Atlantic C.L.R.R., 172 N.C. 58, 89 S.E. 807 (1916).

When relief is sought against on continuing trespass, a restraining order may properly issue without allegation of insolvency; and this ancillary remedy may be available in an action where the title to land is at issue, but may not be used as an instrument to settle a dispute as to the possession, or to effect an ouster. Young v. Pittman, 224 N.C. 175, 29 S.E.2d 551 (1944).

Allegations that defendant is insolvent and is cutting down timber trees on plaintiff's land and hauling them off and threatens to continue to do so, to the irreparable damage of the plaintiff, is sufficient to authorize the appointment of a receiver, and since the enactment of this section, it is not necessary to allege the insolvency of the defendant. McKay v. Chapin, 120 N.C. 159, 26 S.E. 701 (1897).

When a continuous trespass is sought to be enjoined, and the rights of the parties require the determination of the jury upon conflicting evidence, and irreparable injury for the continued trespass will likely follow, the courts will ordinarily continue the cause to the hearing to prevent further litigation, cost, and trouble, when no harm thereby can be done, irrespective of the solvency of the alleged trespasser. Norfolk S.R.R. v. Rapid Transit Co., 195 N.C. 305, 141 S.E. 882 (1928).

Court Must Weigh Relative Conveniences and Inconveniences to Parties. — The hearing judge may issue an interlocutory injunction upon the application of the plaintiff in actual or constructive possession to enjoin a trespass on land when the trespass would be continuous in nature and produce injury to the plaintiff during the litigation. But the rule that the judge will consider and weigh the relative conveniences and inconveniences to the parties in determining the propriety of the injunction is operative here. In consequence, an interlocutory injunction against a trespass should be refused where its issuance would confer little benefit on the plaintiff and cause great inconvenience to the defendant. Huskins v. Yancey Hosp., 238 N.C. 357, 78 S.E.2d 116 (1953).

Effect of Section upon Discretionary Power of the Court. — The construction placed on this section does not deprive the courts of their discretionary power to require a bond to secure the plaintiff against damages, or to appoint a receiver, where there is a bona fide contention as to the title to lands or timber trees thereon. Stewart v. Munger, 174 N.C. 402, 93 S.E. 927 (1917).

Applied in Norman v. Williams, 241 N.C. 732, 86 S.E.2d 593 (1955).

§ 1-487. Timberlands, trial of title to.

In all actions to try title to timberlands, and for trespass thereon for cutting timber trees, when the court finds as a fact that there is a bona fide contention on both sides based upon evidence constituting a prima facie title, no order shall be made pending such action, permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees is finally determined in the action. In all cases where the title to any timber or trees, or the right to cut and remove the same during a term of years, is claimed by any party to such action, and the fee of the soil or other estate in the land by another, whether party to the action or not, the time within which such timber or trees may be cut or removed by the party claiming the same, and all other rights acquired in connection therewith, shall not be affected or abridged, but the running of the term is suspended during the pendency of the action. (1901, c. 666, s. 1; 1903, c. 642; Rev., s. 808; C.S., s. 845.)

Legal Periodicals. — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Constitutionality. — Although the time for cutting the timber trees was extended with the enactment of this section, it is now settled that the section does not interfere with any vested right within the meaning of the constitutional provision prohibiting such interference. Charles S. Riley & Co. v. Carter, 165 N.C. 334, 81 S.E. 414 (1914).

Purpose of Section. — The primary object of this section is to throw a greater safeguard around the rights of the litigating parties and to preserve the timber upon the lands in dispute, until the rights of the respective parties can be adjudicated. Moore v. Fowle, 139 N.C. 51, 51 S.E. 796 (1905).

Plaintiff Must Show a Bona Fide Claim. — The plaintiff, in order to prevent a dissolution of the injunction obtained against the defendant, must show (1) a bona fide claim to the lands, and (2) that such claim is based upon evidence constituting a prima facie title. Moore v. Fowle, 139 N.C. 51, 51 S.E. 796 (1905).

Applied in Chandler v. Cameron, 227 N.C. 233, 41 S.E.2d 753 (1947).

Cited in Lawhon v. McArthur, 213 N.C. 260, 195 S.E. 786 (1938); Fordham v. Eason, 131 N.C. App. 226, 505 S.E.2d 895 (1998).

§ 1-488. When timber may be cut.

In any action specified in G.S. 1-487, when the judge finds as a fact that the contention of either party is not in good faith and is not based upon evidence constituting a prima facie title, upon motion of the other party, who may satisfy the court of the bona fides of his contention and who may produce evidence showing a prima facie title, the court may allow such party to cut the timber trees by giving bond as required by law. Nothing in this section affects the right of appeal, and when any party to such action has been enjoined, a sufficient bond must be required to cover all damages that may accrue to the party enjoined by reason of the injunction as now required by law. (1901, c. 666, ss. 2, 3; Rev., s. 809; C.S., s. 846.)

Legal Periodicals. — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Under this section the plaintiff must not only show that his claim is made in good faith and that he has a prima facie title thereto, but the court must be able to find, as a matter of fact, that the claim of the adverse party is not made in good faith. When relief is sought under this provision all these conditions must be complied with. Johnson v. Duvall, 135 N.C. 642, 47 S.E. 611 (1904). See also, Chandler v. Cameron, 227 N.C. 233, 41 S.E.2d 753 (1947).

Injunction Granted Where Contention Bona Fide. — This section was not intended to be a substitute for the preceding sections, and when the court fails to find, in the light of all the evidence, that there is not a bona fide contention, then it should grant an injunction under G.S. 1-486 and 1-487. Kelly v. Enter. Lumber Co., 157 N.C. 175, 72 S.E. 957 (1911).

Cited in Lawhon v. McArthur, 213 N.C. 260, 195 S.E. 786 (1938).

§§ 1-489 through 1-492: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to injunctions and temporary restraining orders, see G.S. 1A-1, Rule 65.

§ 1-493. What judges have jurisdiction.

All judges of the superior court and judges of the district court authorized to hear in-chambers matters have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings pending in their respective divisions. (1876-7, c. 223, ss. 1, 2; 1879, c. 63, ss. 1, 3; Code, s. 335; Rev., s. 814; C.S., s. 851; 1971, c. 381, s. 12; 1973, c. 66, s. 2.)

Legal Periodicals. — For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

CASE NOTES

Editor's Note. — *The cases cited below were decided prior to the 1973 amendment to this section.*

Jurisdiction. — The general jurisdiction of restraining orders and injunctions is vested in the judges of the superior courts. Any judge of such court may issue a restraining order in any cause and anywhere in the State. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893).

For case holding that references to the superior court would be deemed to refer also to the district court, see Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Perpetual Injunction. — A perpetual injunction must be granted only in the county in which the cause is pending. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893). See also, Ledbetter v. Pinner, 120 N.C. 455, 27 S.E. 123 (1897).

Where an action to try title is pending, a judge of the superior court has judicial power to issue an order restraining a party from further action. Massengill v. Lee, 228 N.C. 35, 44 S.E.2d 356 (1947).

Cited in Hopkins v. Swain, 206 N.C. 439, 174 S.E. 409 (1934); City of Reidsville v. Slade, 224 N.C. 48, 29 S.E.2d 215 (1944); Baker v. Varsar, 239 N.C. 180, 79 S.E.2d 757 (1954).

§ 1-494. Before what judge returnable.

All restraining orders and injunctions granted by any of the judges of the superior court shall be made returnable before the resident judge of the district, a special judge residing in the district, or any superior court judge assigned to hold court in the district where the civil action or special proceeding is pending, within 20 days from date of order. If a judge before whom the matter is returned fails, for any reason, to hear the motion and application, on the date set or within 10 days thereafter, any regular or special judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the said motion and application, after giving 10 days' notice to the parties interested in the application or motion. This removal continues in force the motion and application or motion. This removal continues in force the motion and application theretofore granted till they can be heard and determined by the judge having jurisdiction.

All restraining orders and injunctions granted by any judge of the district court shall be made returnable before the judge granting such order or injunction or before the chief district judge or a district judge authorized to hear in-chambers matters in the district where the civil action is pending, within 20 days from the date of the order. If the judge before whom the matter is returned fails, for any reason, to hear the motion and application on the date set, or within 10 days thereafter, any district judge of the district authorized to hear in-chambers matters may hear and determine the said motion and application, after giving 10 days' notice to the parties interested in the application or motion. (1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51; Code, s. 336; Rev., s. 815; C.S., s. 852; 1963, c. 1143; 1973, c. 66, s. 3.)

CASE NOTES

Where the judge to whom the motion is returnable fails to hear it, the judge of the adjoining district can hear it upon 10 days' notice to the parties. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893).

Applied in Herff Jones Co. v. Allegood, 35 N.C. App. 475, 241 S.E.2d 700 (1978).

Cited in Royal v. Thornton, 150 N.C. 293, 63 S.E. 1040 (1909); Ward v. Agrillo, 194 N.C. 321, 139 S.E. 451 (1927); Hopkins v. Swain, 206 N.C. 439, 174 S.E. 409 (1934).

§ 1-495. Stipulation as to judge to hear.

By a stipulation in writing, signed by all the parties to an application for an injunction order, or their attorneys, to the effect that the matter may be heard before a judge of the appropriate trial division designated in the stipulation, the judge before whom the restraining order is returnable by law, or who is by law the judge to hear the motion for an injunction order, shall, upon receipt of the stipulation forward it and all the papers to the judge designated, whose duty it then is to hear and decide the matter, and return all the papers to the court out of which they issued. (1883, c. 33; Code, s. 337; Rev., s. 816; C.S., s. 853; 1973, c. 66, s. 4.)

CASE NOTES

Stipulation of Parties Permitted. — Agreement in writing by all parties concerned as to what judge of the superior court shall hear the motion is allowed under this section. Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893); Crabtree v. Scheelky, 119 N.C. 56, 25 S.E. 707 (1896).

Duty of Judge Designated by Stipulation. — When the parties have stipulated as to what judge shall hear the motion, it is the duty of such judge, if he has before him all the facts, to hear and determine the case, and it is error to continue the injunction. Cooper v. Cooper, 127 N.C. 490, 37 S.E. 492 (1900).

Applied in Forester v. Town of North Wilkesboro, 206 N.C. 347, 174 S.E. 112 (1934).

§§ 1-496, 1-497: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of the repealed sections, see G.S. 1A-1, Rule 65.

§ 1-498. Application to extend, modify, or vacate; before whom heard.

Applications to extend, modify, or vacate temporary restraining orders and preliminary injunctions issued in the superior court division may be heard by the judge having jurisdiction if he is within the district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district.

Applications to extend, modify, or vacate temporary restraining orders and preliminary injunctions issued in the district court division may be heard by the district judge who made the original order or by the chief district judge or by a district judge of the district authorized to hear in-chambers matters. (C.C.P., s. 195; Code, s. 344; 1905, c. 26; Rev., s. 819; C.S., s. 856; 1967, c. 954, s. 3; 1973, c. 66, s. 5.)

CASE NOTES

Applied in City of New Bern v. Walker, 255 N.C. 355, 121 S.E.2d 544 (1961).

§ 1-499: Repealed by Session Laws 1967, c. 954, s. 4.

§ 1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond.

Whenever a plaintiff shall appeal from a judgment rendered at chambers, or in session, either vacating a restraining order theretofore granted, or denying a perpetual injunction in any case where such injunction is the principal relief sought by the plaintiff, and where it shall appear that vacating said restraining order or denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the appellate division, reversing the judgment of the lower court, then in such case the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal shall be finally disposed of: Provided, the plaintiff shall forthwith execute and deposit with the clerk a written undertaking with sufficient surety, approved by the clerk or judge, in an amount to be fixed by the judge to indemnify the party enjoined against all loss, not exceeding an amount to be specified, which he may suffer on account of continuing such restraining order as aforesaid, in the event that the judgment of the lower court is affirmed by the appellate division. (1921, c. 58; C.S., s. 858(a); 1969, c. 44, s. 12; 1971, c. 381, s. 12.)

Cross References. — As to suspension, modification, restoration or grant of an injunction during the pendency of an appeal, see G.S. 1A-1, Rule 62(c).

CASE NOTES

The dissolution of a restraining order is in the discretion of the trial judge. Such an order is not reviewable by the appellate division except in cases of abuse of discretion. Currin v. Smith, 270 N.C. 108, 153 S.E.2d 821 (1967).

Supplementary Order Held Within Discretion of Court. — Where an appeal was taken from a judgment of the superior court judge vacating an order restraining county board of education from transferring a public school from one district to another, a supplementary order providing for the payment of the teachers pending the appeal was within the sound discretion of the trial judge and was not reviewable. Clark v. McQueen, 195 N.C. 714, 143 S.E. 528 (1928).

Scope of Review. — In determining on appeal whether the lower court erred in ordering a temporary restraining order vacated prior to a hearing of the matter on the merits, the Supreme Court is not bound by the findings of fact or lack of such findings by the lower court, but may review the evidence and make its own findings of fact. Waff Bros. v. Bank of N.C., 289 N.C. 198, 221 S.E.2d 273 (1976).

Matters to Be Considered upon Final Hearing. — Upon the final hearing on the merits of a complaint seeking a temporary restraining order, neither the Supreme Court's findings of fact upon appeal of an order vacating a temporary restraining order nor the findings or conclusions of the Court of Appeals or of the trial judge at the hearing upon the order to show cause why the restraining order should not be continued are to be considered by the superior court. Waff Bros. v. Bank of N.C., 289 N.C. 198, 221 S.E.2d 273 (1976).

Applied in Treasure City of Fayetteville, Inc. v. Clark, 261 N.C. 130, 134 S.E.2d 97 (1964); Clark's Charlotte, Inc. v. Hunter, 261 N.C. 222, 134 S.E.2d 364 (1964); Frosty Ice Cream, Inc. v. Hord, 263 N.C. 43, 138 S.E.2d 816 (1964); High Point Surplus Co. v. Pleasants, 263 N.C. 587, 139 S.E.2d 892 (1965); High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965).

Cited in Boyd v. Brooks, 197 N.C. 644, 150 S.E. 178 (1929); City of Reidsville v. Slade, 224 N.C. 48, 29 S.E.2d 215 (1944); GI Surplus Store, Inc. v. Hunter, 257 N.C. 206, 125 S.E.2d 764 (1962); Town of Hillsborough v. Smith, 10 N.C. App. 70, 178 S.E.2d 18 (1970); Painter v. Wake County Bd. of Educ., 288 N.C. 165, 217 S.E.2d 650 (1975); Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216 (1987).

ARTICLE 38.

Receivers.

Part 1. Receivers Generally.

§ 1-501. What judge appoints.

Any judge of the superior or district court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions, except only a judge of the Superior Court Division has jurisdiction to appoint receivers of corporations. Any resident judge of the Superior Court Division or any nonresident judge of the Superior Court Division assigned to a district who appoints receivers pursuant to the authority granted hereby while holding court in that district may, in his discretion, retain jurisdiction and supervision of the original action, of the receivers appointed therefor and of any other civil actions pending in the same district involving the receivers, following his rotation out of the district. (C.C.P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 379; Rev., s. 846; C.S., s. 859; 1971, c. 268, s. 31; 1979, c. 525, s. 13.)

Cross References. — As to receiver in supplemental proceedings, see G.S. 1-363 et seq. As to what judges have jurisdiction to grant restraining orders and injunctions, see G.S. 1-493.

Legal Periodicals. — For article discussing installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

This section and § 1-485 invest the court with very large and comprehensive powers to protect rights and prevent the perpetration or the continuance of wrong in respect to the subject matter of the action, and to take charge of and protect the property in controversy both before and after judgment, by injunctions and through receivers, pending the litigation; they facilitate and enlarge the authority of the courts in the exercise of these remedial agencies and do not in any degree abridge the exercise of like general powers that appertain to courts of equity to grant the relief specified or to grant perpetual injunctions in proper cases and like relief. John L. Roper Lumber Co. v. Wallace, 93 N.C. 22 (1885).

Inherent Power of Courts to Appoint Receivers. — The power to appoint a receiver is necessarily inherent in a court which possesses equitable jurisdiction. Skinner v. Maxwell, 66 N.C. 45 (1872).

The clerk cannot appoint a receiver as that power is reserved to the judge alone. Parks v. Sprinkle, 64 N.C. 637 (1870).

Appointment of Receivers in Discretion of Judge. — The appointment of a receiver is not a matter of positive right, but rests in the sound legal discretion of the judge, who will take into consideration the nature of the property and the effect of granting or refusing such an application upon the material interests of the respective parties to the controversy. Whitehead v. Hale, 118 N.C. 601, 24 S.E. 360 (1896).

What Plaintiff Must Show. — Where the appointment of a receiver is sought as an ancillary remedy, the plaintiffs must allege and show that they are entitled to the main relief, and must then show their equity entitling them to the ancillary relief in aid of their main relief. Witz, Biedler & Co. v. Gray, 116 N.C. 48, 20 S.E. 1019 (1895).

Verification and Notice. — The practice of appointing a receiver upon an unverified complaint and without notice to creditors and other interested persons is not commended. Fisher v. Trust Co., 138 N.C. 90, 50 S.E. 592 (1905).

What Judge Should Determine. — Upon an application for an injunction and receiver, it is not necessary for the judge to "find the facts" further than to examine the affidavits and determine whether sufficient cause is shown for the ancillary relief. Jones v. Boyd, 80 N.C. 258 (1879); City Nat'l Bank v. Bridgers, 114 N.C. 381, 19 S.E. 642 (1894).

Effect on Both Parties Must Be Considered. — It is the duty of the court, in passing upon a motion for an injunction or the appointment of a receiver, to consider the consequences of such action upon both parties. Hanna v. Hanna, 89 N.C. 68 (1883); Venable v. Smith, 98 N.C. 523, 4 S.E. 514 (1887). See also, Lewis v. John L. Roper Lumber Co., 99 N.C. 11, 5 S.E. 19 (1888).

As to which judge may appoint a receiver, see Corbin v. Berry, 83 N.C. 27 (1880); Galbreath v. Everett, 84 N.C. 546 (1881); Hamilton v. Icard, 112 N.C. 589, 17 S.E. 519 (1893); Worth v. Piedmont Bank, 121 N.C. 343, 28 S.E. 488 (1897).

Number of Receivers Appointed. — The court should not appoint more receivers than are necessary. Battery Park Bank v. Western Carolina Bank, 126 N.C. 531, 36 S.E. 39 (1900).

Section Fixes Place Where Orders Are Returnable. — It is perfectly manifest that this section, with a view to prevent the inconvenience of parties, intended to fix the place where, rather than the persons before whom, such orders should be made returnable, and that the judges were denominated in the order in which the reviewing finds them because it was supposed that one or the other of them would at all times be within the district of the action. Galbreath v. Everett, 84 N.C. 546 (1881).

Place of Hearing. — The hearing as to a receiver may be held outside of the county where the main action is pending. Parker v. McPhail, 112 N.C. 502, 16 S.E. 848 (1893).

Retention of Jurisdiction by Judge Rotated out of District. — In an action challenging the appointment of operating receivers for a corporation where the trial judge made the appointment after he was rotated out of the district, the trial judge properly entered an order retaining jurisdiction in himself of all matters in the action. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

A receiver is an officer of the court, and his possession of the property is the possession of the court. He holds it as a custodian until the rightful claimant is ascertained by the court, and then for such claimant. Battle v. Davis, 66 N.C. 252 (1872).

The interest of the owner is in nowise

changed by the appointment of a receiver. The legal title and possession are held by him for the owner and the property is to be administered under the orders of the court. Southern Pants Co. v. Rochester German Ins. Co., 159 N.C. 78, 74 S.E. 812 (1912).

As to relation back of receiver's title, see Worth v. Piedmont Bank, 121 N.C. 343, 28 S.E. 488 (1897).

As to determination of priority where two receivers have been appointed, see Worth v. Piedmont Bank, 121 N.C. 343, 28 S.E. 488 (1897).

Effect of Omission of Security. — An order appointing a receiver is not void by reason of an omission of the court to require adequate security. Nesbitt & Bro. v. Turrentine, 83 N.C. 535 (1880).

As to proof of appointment of foreign receivers, see Person v. Leary, 127 N.C. 114, 37 S.E. 149 (1900).

Temporary Receiver Held Not Liable for Failure to Honor Levy. — A temporary receiver appointed by a state superior court judge for the purpose of taking possession of all the assets of a partnership which was involved in certain legal disputes incident to its dissolution was not personally liable for failure to honor a levy for unpaid taxes of one of the partners under 26 U.S.C. § 6332(c), as the property involved was subject to a prior judicial attachment or execution by being the subject of the state court supervised receivership. United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

Cited in Person v. Leary, 126 N.C. 504, 36 S.E. 35 (1900); Hopkins v. Swain, 206 N.C. 439, 174 S.E. 409 (1934); Bennett v. Mortgage Serv. Corp., 206 N.C. 902, 173 S.E. 22 (1934); Essex Inv. Co. v. Pickelsimer, 210 N.C. 541, 187 S.E. 813 (1936); National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950); East Carolina Lumber Co. v. West, 247 N.C. 699, 102 S.E.2d 248 (1958); Dowd v. Charlotte Pipe & Foundry Co., 263 N.C. 101, 139 S.E.2d 10 (1964); Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972).

§ 1-502. In what cases appointed.

A receiver may be appointed —

(1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

(2) After judgment, to carry the judgment into effect.

(3) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

(4) In cases provided in G.S. 1-507.1 and in like cases, of the property within this State of foreign corporations.

(5) In cases wherein restitution is sought for violations of G.S. 75-1.1.

(6) In cases involving partition of real property, pursuant to G.S. 46-3.1.

The provisions of G.S. 1-507.1 through 1-507.11 are applicable, as near as may be, to receivers appointed hereunder. (C.C.P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 379; Rev., s. 847; C.S., s. 860; 1955, c. 1371, s. 3; 1973, c. 614, s. 3; 1981, c. 584, s. 2.)

Legal Periodicals. — For article discussing installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

This section is expressly made applicable to all receivers. Ledbetter v. Farmers Bank & Trust Co., 142 F.2d 147 (4th Cir.), cert. denied, 323 U.S. 719, 65 S. Ct. 48, 89 L. Ed. 578 (1944), rehearing denied, 323 U.S. 813, 65 S. Ct. 112, 89 L. Ed. 647, 323 U.S. 886, 65 S. Ct.

682, 89 L. Ed. 1435 (1945).

Effect of Section. — This section specifies certain cases in which a receiver may be appointed, but does not materially alter the equitable jurisdiction of North Carolina courts upon this subject. Skinner v. Maxwell, 66 N.C. 45 (1872).

The power to appoint a receiver is inherent in a court of equity. The change to the Code did not abridge, but enlarged, it. In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

And Is Not Limited by This Section. — The power of the court to appoint a receiver in proper cases and upon a proper showing is not limited by this section. Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E.2d 555 (1947).

Receivership is ordinarily ancillary to some equitable relief. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

A receiver will not be appointed where there is a full and adequate remedy at law. In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

Receivership is a harsh remedy and will be granted only where there is no other safe or expedient remedy. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

A receiver of defendant's property will not be appointed at the request of a judgment creditor without more being shown where he has the remedy of execution against the property. Scoggins v. Gooch, 211 N.C. 677, 191 S.E. 750 (1937).

The trial court did not have the statutory or equitable power to appoint a receiver where there was no evidence to indicate the property or its rents or profits were in danger of being lost or materially injured or impaired. Williams v. Liggett, 113 N.C. App. 812, 440 S.E.2d 331 (1994).

Unless Defense of Adequate Remedy at Law Is Waived. — A simple contract creditor may obtain equitable relief in proper cases where the answer admits indebtedness and consents to appointment of a receiver, waiving the defense of adequate remedy at law. In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

Appointment of Receiver Pendente Lite in Discretion of Court. — The appointment of a receiver pendente lite is not a matter of strict right, but rests in the sound discretion of the court. Hanna v. Hanna, 89 N.C. 68 (1883).

Appointment Within Discretion of Court. — Shareholders appeal of the trial court's interlocutory order denying their motion for the appointment of a receiver was dismissed because the shareholders were not entitled to the appointment of a receiver because the appointment of a receiver was within the discretion of the trial court under G.S. 1-502. Barnes v. Kochhar, 178 N.C. App. 489, 633 S.E.2d 474, 2006 N.C. App. LEXIS 1574 (2006).

A receiver may be appointed pendente lite in the discretion of the court. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

In order to appoint a receiver before judgment under this section, it must appear that claimant has an apparent right to property which is the subject of the action and the property or the rents are in danger of being lost. Witz, Biedler & Co. v. Gray, 116 N.C. 48, 20 S.E. 1019 (1895); Pearce v. Elwell, 116 N.C. 595, 21 S.E. 305 (1895).

Where a party establishes an apparent right to land, and the person in possession is insolvent, a receiver will be appointed to take charge of the rents and profits during the pendency of the action. Kerchner v. Fairley, 80 N.C. 24 (1879); Nesbitt & Bro. v. Turrentine, 83 N.C. 536 (1880); Horton v. White, 84 N.C. 297 (1881); Oldham v. First Nat'l Bank, 84 N.C. 304 (1881); John L. Roper Lumber Co. v. Wallace, 93 N.C. 22 (1885); McNair v. Pope, 96 N.C. 502, 2 S.E. 54 (1887).

Where property is the subject of an action and is liable to clear equities in a party out of possession, the court may appoint a receiver when it seems just and necessary to keep the property in dispute from the control of either party until the controversy is determined. Skinner v. Maxwell, 66 N.C. 45 (1872).

Where the plaintiff makes it proper to appear to the court that he is in imminent danger of loss by the defendant's insolvency, or that he reasonably apprehends that the defendant's property will be destroyed, removed or otherwise disposed of by the defendant pending the action, or that the defendant is insolvent, and the property must be sold to pay his debts, or that he is attempting to defraud the plaintiff, a receiver for his property may be appointed before judgment. Kelly v. McLamb, 182 N.C. 158, 108 S.E. 435 (1921).

Where equity will impress a trust upon property in the hands of one who has obtained it by fraud or covin, and the property or fund is threatened both by his fraud and insolvency, the principles of equity will justify and call for the appointment of a receiver to take charge of the property and conserve it pending the litigation. Peoples Nat'l Bank v. Waggoner, 185 N.C. 297, 117 S.E. 6 (1923).

It is generally necessary to show that the party in possession is insolvent. Ellington v. Currie, 193 N.C. 610, 137 S.E. 869 (1927); In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

But Insolvency Alone Is Insufficient. — The mere insolvency of the party in possession of property, where there is no allegation that the defendant intends to run off with or conceal or destroy the property, is not sufficient ground for the appointment of a receiver. Whitehead v. Hale, 118 N.C. 601, 24 S.E. 360 (1896).

Danger of Loss Must Be Shown. — Property or funds will not be taken from one entitled to custody thereof, and transferred to a receiver, unless there is imminent danger of loss.

Thompson v. McNair, 62 N.C. 121 (1867); Rheinstein v. Bixby, 92 N.C. 307 (1885).

Under this section, apparent danger of waste or injury to the property, or loss of the rents and profits by reason of the insolvency of the adverse party in possession, is the ground for appointing a receiver thereof. Rollins v. Henry, 77 N.C. 467 (1877); Twitty v. Logan, 80 N.C. 69 (1879).

General Allegations of Threat of Loss Insufficient. — A receiver will not be appointed pendente lite, on a general allegation that loss will ensue from nonappointment, without a full statement of the facts. Hughes v. Person, 63 N.C. 548 (1869); Wood v. Harrell, 74 N.C. 338 (1876); Hanna v. Hanna, 89 N.C. 68 (1883). See also, Southern Flour Co. v. McIver, 109 N.C. 120, 13 S.E. 905 (1891).

Apparently Good Title to Land Sufficient. — Where a party in an action involving the title and possession of land demands affirmative relief and asks for the appointment of a receiver, it is sufficient if he shows an apparently good title, either not controverted or not unequivocably denied by his adversary. Lovett v. Slocumb, 109 N.C. 110, 13 S.E. 893 (1891).

Appointment of Receiver upon Application for Injunction. — Under the broad terms of this section the court has power to appoint a receiver upon an application for an injunction, where it appears that this action will best serve the interests of both parties. Hurwitz v. Carolina Sand & Gravel Co., 189 N.C. 1, 126 S.E. 171 (1925).

Insolvent Foreign Corporations. — An insolvent corporation, with its property or plant located in this State, is subject to the appointment by North Carolina courts of a receiver to take charge of its assets here and administer them as a trust fund for its creditors, though incorporated under the laws of another state. Holshouser v. Copper Co., 138 N.C. 248, 50 S.E. 650 (1905); Summit Silk Co. v. Kinston Spinning Co., 154 N.C. 421, 70 S.E. 820 (1911).

Infant's Estate. — On the principle of protection, a receiver may be appointed for an infant's estate if it is not vested in a trustee, for he is incompetent to take charge of it himself. Skinner v. Maxwell, 66 N.C. 45 (1872).

Domestic Relations Cases. — Receivers have been appointed in domestic relations cases to preserve specific property and to collect rents and income. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

Appointment Held Proper — To Prevent Suspension of Business. — Where the property and franchise of a city water company were to be sold to satisfy a judgment, it was held that in order to prevent all possible risk of the temporary suspension of the business of the water company, it would be proper to appoint a receiver. McNeal Pipe & Foundry Co. v. Howland, 111 N.C. 615, 16 S.E. 857 (1892).

Same — Fraudulent Confession of Judgment. — A receiver could be appointed under this section in a suit against a debtor and others to restrain an execution sale, where the debtor had confessed judgment apparently with fraudulent intent, and executions had been levied on the only property of the debtor within the State in favor of nonresident creditors who sought to take the property out of the State. Stern & Co. v. Austern, 120 N.C. 107, 27 S.E. 31 (1897).

Same — On Application of Mortgagee. — Where plaintiff mortgagor obtained an injunction to restrain the sale of the mortgaged premises until certain counterclaims could be passed upon and the sum really due could be ascertained, the defendant mortgagee was entitled to have a receiver appointed to take charge of the property and secure the rents and profits where the same were in danger of being lost. Oldham v. First Nat'l Bank, 84 N.C. 304 (1881).

Where plaintiff mortgagee was administrator of one of two mortgagors, whose heirs and the other mortgagor were defendants in an action to foreclose a mortgage, and the property conveyed was inadequate to pay the debt, and the mortgagor in possession was insolvent, and the plaintiff denied an alleged payment of the debt and the existence of assets in his hands applicable thereto, in such case it was not error in the court on application of the plaintiff to appoint a receiver to secure the rents and profits pending the litigation. Kerchner v. Fairley, 80 N.C. 24 (1879). See also, Broeck v. Orchard, 74 N.C. 409 (1876); Rollins v. Henry, 77 N.C. 467 (1877).

Same — Mining by One of Two Devisee-Executors. — Where lands were devised to two persons, both of whom were appointed executors, charged with the payment of certain debts, and one of the executors, claiming a part of the land under a deed subsequent in date to the execution of the will, had entered thereon and was proceeding to operate it as mining property, and it appeared there was some danger of waste of the property, and the solvency of the vendee-executor was doubtful, appointment of a receiver was proper. Stith v. Jones, 101 N.C. 360, 8 S.E. 151 (1888).

Appointment Proper to Protect Security Interest. — The record contained ample evidence that defendant had severe financial difficulties at the time bank had a receiver appointed, and therefore, bank did not wrongfully seize property by having receiver appointed since it had a right to protect its security interest in the property. Wachovia Bank & Trust Co. v. Carrington Dev. Assocs., 119 N.C. App. 480, 459 S.E.2d 17 (1995).

Appointment Not Proper Where Receivership Would Cause Loss. — A receiver would not be appointed in an action to foreclose a mortgage on a newspaper where the defendant denied owing anything on the mortgage debt, and it was apparent that, owing to the peculiar nature of the property, the appointment of a receiver would practically destroy its value. Whitehead v. Hale, 118 N.C. 601, 24 S.E. 360 (1896).

Same — Mere Allegation of Insufficiency of Personalty. — Where an executor's petition to sell lands alleged merely that personalty was insufficient to pay debts, plaintiff executor was not entitled to the appointment of a receiver for the lands on the ground that the action could not be tried until a subsequent term, and that the devisee had refused to pay taxes; the allegation that the personalty was insufficient failed to show plaintiff executor's apparent right to the relief, especially as the devisee denied the allegation that the personalty was insufficient. Neighbors v. Evans, 210 N.C. 550, 187 S.E. 796 (1936).

Notice to Owner. — Notice to the owner of property should be given before appointment of a receiver therefor. York v. McCall, 160 N.C. 276, 76 S.E. 84 (1912).

No Requirement of Notice to Shareholders Who Are Not Parties. — In an action challenging the appointment of operating receivers for a corporation, there was no merit to defendants' contention that the initial order of the trial court appointing the receivers was void because certain shareholders were not given notice of the proceedings and were thereby denied their due process rights to notice prior to a court proceeding, the outcome of which would affect their property interests, since there is no requirement in the statutes, either in the provisions governing the appointment of receivers or in the provisions governing derivative shareholder suits, that notice be given to persons who are not parties to the action. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Effect of Instrument Giving Mortgagee Power of Appointment of Trustee. — The appointment of a receiver is an equitable remedy and the provisions of this section and G.S. 1-503, enacted before the giving of a deed of trust upon lands, may not be entirely supplanted by a provision in the instrument which gives the mortgagee or trustee the unequivocal right to the appointment of a receiver in the event of the happening of certain conditions, so as to prevent North Carolina courts sitting in their equity jurisdiction from administering the equities to which the mortgagor is entitled under the facts. Woodall v. North Carolina Joint Stock Land Bank, 201 N.C. 428, 160 S.E. 475 (1931).

Turning over Assets to Bankruptcy Trustee. — Where the debtor and one small creditor agree to have a receiver appointed and to restrain all other creditors from doing anything, a receivership under such circumstances is an agency for the defendant, and the title of such a receiver to the assets of the bankrupt debtor is merely colorable and he may be required to turn over assets to trustee in bankruptcy. In re Penny, 10 F. Supp. 638 (M.D.N.C. 1935).

Temporary Receiver Held Not Liable for Failure to Honor Levy. — A temporary receiver appointed by a state superior court judge for the purpose of taking possession of all the assets of a partnership which was involved in certain legal disputes incident to its dissolution was not personally liable for failure to honor a levy for unpaid taxes of one of the partners under 26 U.S.C. § 6332(c), as the property involved was subject to a prior judicial attachment or execution by being the subject of the state court supervised receivership. United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

For case distinguishing between receiver appointed as provisional remedy in an ordinary suit and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

Applied in National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952); Stegall Milling Co. v. Hettiger, 27 N.C. App. 76, 217 S.E.2d 767 (1975); Couch v. ADC Realty Corp., 48 N.C. App. 108, 268 S.E.2d 237 (1980).

Cited in L. Levenson & Co. v. Elson, 88 N.C. 182 (1883); Rheinstein v. Bixby, 92 N.C. 307 (1885); Essex Inv. Co. v. Pickelsimer, 210 N.C. 541, 187 S.E. 813 (1936); Harris v. Hilliard, 221 N.C. 329, 20 S.E.2d 278 (1942); National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950); York v. Cole, 251 N.C. 344, 111 S.E.2d 334 (1959); Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975).

§ 1-502.1. Applicant for receiver to furnish bond to adverse party.

Before a judge may appoint a receiver, the judge shall require the party making application for the appointment to furnish a bond payable to the adverse party in a form and amount approved by the judge. The bond shall secure payment by the applicant of all damages, including reasonable attorney fees, sustained by the adverse party by the appointment and acts of the receiver if the appointment is vacated or otherwise set aside. The judge may require that the amount of bond be increased for this purpose any time after the appointment of a receiver. (1983 (Reg. Sess., 1984), c. 994, s. 1.)

§ 1-503. Appointment refused on bond being given.

In all cases where there is an application for the appointment of a receiver, upon the ground that the property or its rents and profits are in danger of being lost, or materially injured or impaired, or that a corporation defendant is insolvent or in imminent danger of insolvency, and the subject of the action is the recovery of a money demand, the judge before whom the application is made or pending shall have the discretionary power to refuse the appointment of a receiver if the party against whom such relief is asked, whether a person, partnership or corporation, tenders to the court an undertaking payable to the adverse party in an amount double the sum demanded by the plaintiff, with at least two sufficient and duly justified sureties, conditioned for the payment of such amount as may be recovered in the action, and summary judgment may be taken upon the undertaking. In the progress of the action the court may in its discretion require additional sureties on such undertaking. (1885, c. 94; Rev., s. 848; C.S., s. 861.)

CASE NOTES

This section was enacted for the benefit and protection of a defendant against whom an application for a receiver is prosecuted. It authorizes the judge in his discretion, upon the filing of the undertaking therein stipulated, to refuse the appointment of a receiver. Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E.2d 555 (1947).

Execution of Bond as Alternative to Appointment of Receiver. — Where there is danger of loss of rents and profits, instead of appointing a receiver the court may allow the defendant to execute a bond to secure the rents and profits and such damages as may be adjudged the plaintiff, and require an account to be kept. John L. Roper Lumber Co. v. Wallace, 93 N.C. 22 (1885); Durant v. Crowell, 97 N.C. 367, 2 S.E. 541 (1887); Lewis v. John L. Roper Lumber Co., 99 N.C. 11, 5 S.E. 19 (1888); Ousby v. Neal, 99 N.C. 146, 5 S.E. 901 (1888).

Retention of Possession upon Giving Bond. — Upon application for a receiver, it is proper to allow a defendant to continue in possession of property upon giving a sufficient bond to protect the other claimants. Frank v. Robinson, 96 N.C. 28, 1 S.E. 781 (1887). See also, Kron v. Smith, 96 N.C. 386, 2 S.E. 463 (1887); Godwin v. Watford, 107 N.C. 168, 11 S.E. 1051 (1890).

Effect of Acceptance of Bond. — Plaintiffs who are parties at the time the court accepts bond and denies application for appointment of a receiver are thereby estopped from further prosecuting their application for a receiver, and the court is without authority to revoke such order at a subsequent term over the objection of the defendants. Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E.2d 555 (1947).

Appointment of Receiver Held Error. — The court erred in directing a receiver to take possession and control of mines and machinery for operating the same without giving the defendant an opportunity to file a bond to secure the payment over to the receiver of any proceeds therefrom as the court might subsequently direct. Stith v. Jones, 101 N.C. 360, 8 S.E. 151 (1888).

Bankruptcy of Defendant. — Where plaintiff in an action in the superior court acquires a lien on defendant's property, which is taken into the custody of the court and released on the giving of a bond under this section, and defendant is adjudicated a bankrupt, the State court may order that the cause proceed to trial, any judgment rendered for plaintiff to be collectible, by execution, only from the sureties on the bond, so that the plaintiff or sureties may prove the judgment as a claim in the bankruptcy proceeding. Gordon v. Calhoun Motors, Inc., 222 N.C. 398, 23 S.E.2d 325 (1942).

Effect of § 1-111 on Power of Court. — Section 1-111, requiring a defendant in ejectment to give bond before putting in a defense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. Kron v. Dennis, 90 N.C. 327 (1884); Durant v. Crowell, 97 N.C. 367, 2 S.E. 541 (1887); Arey v. Williams, 154 N.C. 610, 154 N.C. 910, 70 S.E. 931, 70 S.E. 931 (1911).

Applied in Woodall v. North Carolina Joint Stock Land Bank, 201 N.C. 428, 160 S.E. 475 (1931); Little v. Wachovia Bank & Trust Co., 208 N.C. 726, 182 S.E. 491 (1935).

Cited in York v. Cole, 251 N.C. 344, 111 S.E.2d 334 (1959).

§ 1-504. Receiver's bond.

A receiver appointed in an action or special proceeding must, before entering upon his duties, execute and file with the clerk of the court in which the action is pending an undertaking payable to the adverse party with at least two sufficient sureties in a penalty fixed by the judge making the appointment, conditioned for the faithful discharge of his duties as receiver. And the judge having jurisdiction thereof may at any time remove the receiver, or direct him to give a new undertaking, with new sureties, and on the like condition. This section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver. (Code, s. 383; Rev., s. 849; C.S., s. 862.)

Cross References. — As to bonds in surety company, see G.S. 58-73-1 et seq. (formerly codified as G.S. 109-16 et seq.)

CASE NOTES

The determination of the amount of the bond is within the discretion of the court. Ledbetter v. Farmers Bank & Trust Co., 142 F.2d 147 (4th Cir.), cert. denied, 323 U.S. 719, 65 S. Ct. 48, 89 L. Ed. 578 (1944), rehearing denied, 323 U.S. 813, 65 S. Ct. 112, 89 L. Ed. 647, 323 U.S. 886, 65 S. Ct. 682, 89 L. Ed. 1435 (1945).

Effect of Failure to Require Adequate Security. — An order appointing a receiver is not void by reason of an omission of the court to require adequate security. Nesbitt & Bro. v. Turrentine, 83 N.C. 536 (1880).

An order appointing a receiver is not void because of an inadequate bond. Ledbetter v. Farmers Bank & Trust Co., 142 F.2d 147 (4th Cir.), cert. denied, 323 U.S. 719, 65 S. Ct. 48, 89 L. Ed. 578 (1944), rehearing denied, 323 U.S. 813, 65 S. Ct. 112, 89 L. Ed. 647, 323 U.S. 886, 65 S. Ct. 682, 89 L. Ed. 1435 (1945), citing Nesbitt & Bro. v. Turrentine, 83 N.C. 536 (1880).

Mortgagees Not Liable for Suggesting Inadequate Bond. — The fact that mortgagees suggested an inadequate amount in the bond of a receiver did not thereby render them legally liable to the mortgagor. Ledbetter v. Farmers Bank & Trust Co., 142 F.2d 147 (4th Cir.), cert. denied, 323 U.S. 719, 65 S. Ct. 48, 89 L. Ed. 578 (1944), rehearing denied, 323 U.S. 813, 65 S. Ct. 112, 89 L. Ed. 647, 323 U.S. 886, 65 S. Ct. 682, 89 L. Ed. 1435 (1945).

What Is a Breach of the Bond. — Where the receiver's delinquency is manifest, and he fails to comply with the order of the court in respect to the fund, such failure is a breach of the bond, upon which suit may be brought by leave of the court. Bank of Washington v. Creditors, 86 N.C. 323 (1882).

Default Must Be Ascertained Before Suit on Bond. — A receiver and his surety cannot be sued upon the bond for an alleged breach of his trust before a default is ascertained, the proper practice being to apply to the court for a rule on the receiver to render his account. Bank of Washington v. Creditors, 86 N.C. 323 (1882); Atkinson v. Smith, 89 N.C. 72 (1883).

Burden of Proof. — The burden is upon a receiver and his sureties to show that he used due diligence in investing the money in his hands. Waters v. Melson, 112 N.C. 89, 16 S.E. 918 (1893).

Procedure for Recovery on Bond. — The court will not, by order in a cause in which a receiver has been appointed, direct a judgment to be entered against him and his sureties. The proper practice is upon a report finding the amount due by the receiver, and upon his failure to pay the same, for the court to grant leave to sue upon the bond. Atkinson v. Smith, 89 N.C. 72 (1883).

Independent Action Against Sureties Required. — The liability of sureties on a receiver's bond can only be enforced by independent action against them and not by motion in the cause. Black v. Gentery, 119 N.C. 502, 26 S.E. 43 (1896).

Receiver Not Necessary Party to Action Against Sureties. — Where judgment has been recovered against the receiver, he is not a necessary party to an action against the sureties on his bond. Black v. Gentery, 119 N.C. 502, 26 S.E. 43 (1896).

Cited in United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

§ 1-505. Sale of property in hands of receiver.

In a case pending in the Superior Court Division in which a receiver has been appointed, the resident superior court judge or a superior court judge regularly holding the courts of the district shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly appointed. In a case pending in the District Court Division in which a receiver has been appointed, the chief district judge or a district judge designated by the chief district judge to hear motions and enter interlocutory orders shall have the power and authority to order a sale of any property, real or personal, in the hands of a duly appointed receiver. Sales of property authorized by this section shall be upon such terms as appear to be to the best interests of the creditors affected by the receivership. The procedure for such sales shall be as provided in Article 29A of Chapter 1 of the General Statutes. (1931, c. 123, s. 1; 1949, c. 719, s. 2; 1955, c. 399, s. 1; 1971, c. 268, s. 32.)

Legal Periodicals. — For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

As to sale of property in hands of receiver appointed to enforce payment of alimony, see Lambeth v. Lambeth, 249 N.C. 315, 106 S.E.2d 491 (1959).

Cited in Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230 (1983).

§ 1-506: Repealed by Session Laws 1955, c. 399, s. 2.

§ 1-507. Validation of sales made outside county of action.

All receiver's sales made prior to March 16, 1931, where orders were made and confirmation decreed or where either orders were made or confirmation decreed outside the county in which said actions were pending by a resident judge or the judge assigned to hold the courts of the district are hereby validated, ratified and confirmed. (1931, c. 123, s. 3.)

CASE NOTES

Temporary Receiver Held Not Liable for Failure to Honor Levy. — A temporary receiver appointed by a state superior court judge for the purpose of taking possession of all the assets of a partnership which was involved in certain legal disputes incident to its dissolution was not personally liable for failure to honor a levy for unpaid taxes of one of the partners under 26 U.S.C. § 6332(c), as the property involved was subject to a prior judicial attachment or execution by being the subject of the state court supervised receivership. United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

Nothing in this section suggests that the receiver should take the property free of existing obligations. State ex rel. Eure v. Lawrence, 93 N.C. App. 446, 378 S.E.2d 207 (1989).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

Cited in Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972).

Part 2. Receivers of Corporations.

§ 1-507.1. Appointment and removal.

When a corporation becomes insolvent or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, or has forfeited its corporate right, or its corporate existence has expired by limitation, a receiver may be appointed by the court under the same regulations that are provided by law for the appointment of receivers in other cases; and the court may remove a receiver or trustee and appoint another in his place, or fill any vacancy. Everything required to be done by receivers or trustees is valid if performed by a majority of them. (Code, s. 668; 1901, c. 2, ss. 73, 79; Rev., ss. 1219, 1223; C.S., s. 1208; 1955, c. 1371, s. 2.)

Legal Periodicals. — For article on corporate receivership in North Carolina, see 32 N.C.L. Rev. 149 (1954).

For article on North Carolina receivership statutes applicable to insolvent debtors, see 17 Wake Forest L. Rev. 745 (1981).

CASE NOTES

Broad Powers Conferred. — This Part is so broad and comprehensive in its provisions regarding the appointment of receivers that it is not necessary to refer to the general power of a court of equity in such cases. Summit Silk Co. v. Kinston Spinning Co., 154 N.C. 421, 70 S.E. 820 (1911).

Section Does Not Limit Power of Court. — The power of the court to appoint a receiver in proper cases is not limited by this section or G.S. 1-502. Sinclair v. Moore Cent. R.R., 228 N.C. 389, 45 S.E.2d 555 (1947).

Selection of Receivers in Discretion of Court. — The selection of a receiver for an insolvent corporation is a matter largely in the discretion of the trial judge, and will not generally be reviewed unless this discretionary power has been greatly abused; hence, though the practice of appointing the plaintiff's attorney as receiver is not commended, he will not be removed, as a matter of law, on appeal, though like any other receiver, he may be removed upon application to the proper judge of the superior court. Mitchell v. Aulander Realty Co., 169 N.C. 516, 86 S.E. 358 (1915). See also, Fisher v. Southern Loan & Trust Co., 138 N.C. 90, 50 S.E. 592 (1905).

Presumption as to Order Made Without Specific Findings or Request Therefor. — Where an order appointing receivers is made without specific findings of fact and without any request for findings, it will be presumed that the judge accepted as true for the purposes of the order the facts alleged in the complaint, used as an application for receivership. Royall v. Carr Lumber Co., 248 N.C. 735, 105 S.E.2d 65 (1958).

Receiver Represents Both Creditors and Owners. — Upon the insolvency of a corporation and the appointment of a receiver under the provisions of this section, the receiver represents the creditors as well as the owners, excluding the general creditors from taking any separate or effective steps on their account in furtherance of their claims; and the proceeding for the receivership is in the nature of a judicial process by which the rights of the general creditors are fastened upon the property. Observer Co. v. Little, 175 N.C. 42, 94 S.E. 526 (1917).

Relation Back of Receiver's Title to Time of Order. — The title of the receiver on his appointment dates back to the time of granting the order, even though certain preliminary conditions must first be performed and the receiver remains out of possession pending such performance. Worth v. Bank of New Hanover, 122 N.C. 397, 29 S.E. 775 (1898); Pelletier v. Greenville Lumber Co., 123 N.C. 596, 31 S.E. 855 (1898); Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Fisher v. Western Carolina Bank, 132 N.C. 769, 44 S.E. 601 (1903).

Valid Liens Not Divested. — The title of a receiver relates only to the time of his appointment, and valid liens existing at that time are not divested. Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Roberts v. Bowen Mfg. Co., 169 N.C. 27, 85 S.E. 45 (1915).

A receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto. Young v. Rollings, 90 N.C. 125 (1884).

Effect of Appointment on Powers of Officers. — The appointment of a receiver, who is directed to take control of all the property of a company, and to assume entire management of its affairs, has the effect of suspending all the officers of the company; they may not interfere with the business of the company and are entitled to no salaries during the continuance of the receivership. Lenoir v. Linville Imp. Co., 126 N.C. 922, 36 S.E. 185 (1900).

Delivery of Funds to Receiver. — An order appointing a receiver of a defunct corporation with power to receive into possession all the effects of the company, and with the usual rights and powers of receivers, involves the correlative duty of delivering the funds to him by the late officers of the company in whose hands the funds are, although this is not expressly required in the decretal order. Young v. Rollings, 90 N.C. 125 (1884).

Appointment of Assignee as Receiver. — One to whom an insolvent bank made an assignment of its assets, and who on the same day, and at the suit of creditors, was appointed receiver, held the assets, after such adjudication, not by virtue of the deed of assignment, but as an officer of the court appointed to settle and wind up the affairs of such insolvent bank. Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371 (1894).

Receiver Appointed After Reorganization. — The organization of a new corporation at once dissolves the old one, and if there are creditors of the dissolved corporation, they may cause the property of the defunct corporation to be applied to their debts by means of a receiver. Marshall v. Western N.C.R.R., 92 N.C. 322 (1885).

Dissolution of De Facto Corporation. — Assuming that a bank which had never been duly incorporated had a corporate existence as to those who bona fide dealt with it as a corporation, a receiver should be appointed to take charge of and preserve its effects, where it has voluntarily dissolved, and no one claims to own its stock, and all its supposed officers disclaim their offices. Dobson v. Simonton, 78 N.C. 63 (1878).

Fraudulent Disposal of Property. — If, during the existence of a corporation, its officers fraudulently or unlawfully disposed of any of its property, the creditors are entitled to have a receiver appointed to sue for and recover it. Latta v. Catawba Elec. Co., 146 N.C. 285, 59 S.E. 1028 (1907).

Cessation of Business. — Where a corporation had ceased operation, a stockholder had the right to maintain an action for the appointment of a receiver, although the corporation had not been dissolved in accordance with statutory provisions. Greenleaf v. Land & Lumber Co., 146 N.C. 505, 60 S.E. 424 (1908).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

When Receiver May Be Appointed for a Solvent Corporation. — While appointing a receiver for a going, solvent corporation is an especially rare and drastic remedy, it has been found to constitute a proper remedy in cases where there is fraud or gross misconduct in the management of the corporation, where there is incapacity or neglect on the part of those operating it, where there is evidence of diversion of corporate funds, and even where there is a refusal to permit inspection of corporate books, at least when such a refusal occurs in combination with the existence of other grounds. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

When Receiver Unnecessary. — It is unnecessary to have a receiver appointed in order for the assignee of a judgment creditor, and those beneficially interested, to maintain an action against officers and stockholders for misapplication of funds in distribution among the shareholders as dividends. Chatham v. Mecklenburg Realty Co., 180 N.C. 500, 105 S.E. 329 (1920).

The law contemplates the settlement of all claims against the insolvent debtor in the original action in which the receiver is appointed, except in the infrequent instances where the appointing court, for good cause shown, grants leave to a claimant to bring an independent action against the receiver. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

No Requirement of Notice to Shareholders Not Parties. — In an action challenging the appointment of operating receivers for a corporation, there was no merit to defendants' contention that the initial order of the trial court appointing the receivers was void because certain shareholders were not given notice of the proceedings and were thereby denied their due process rights to notice prior to a court proceeding, the outcome of which would affect their property interests, since there is no requirement in the statutes, either in the provisions governing the appointment of receivers or in the provisions governing derivative shareholder suits, that notice be given to persons who are not parties to the action. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Adjudication of Bankruptcy During Insolvency Proceedings. — Proceedings against an insolvent corporation under this section do not preclude creditors from petitioning to have the corporation adjudged a bankrupt, notwithstanding the action of the State courts. In re McKinnon Co., 237 F. 869 (E.D.N.C. 1916).

Selection of Counsel by Receiver. — When a receiver is directed by the court appointing him to employ counsel to assist him in the discharge of his duties, it is the receiver's duty to select an independent counsel rather than one who is acting for either party in the action. Where there is a perfect identity of interests between the plaintiffs and the receivers or where the parties have consented, the exception may arise, permitting a party's counsel to serve as counsel to the receiver. Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983), rehearing denied, 310 N.C. 749, 319 S.E.2d 266 (1984).

Cited in National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952); Savannah Sugar Ref. Co. v. Royal Crown Bottling Co., 259 N.C. 103, 130 S.E.2d 33 (1963).

§ 1-507.2. Powers and bond.

The receiver has power and authority to —

(1) Demand, sue for, collect, receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description of the corporation.

(2) Foreclose mortgages, deeds of trust, and other liens executed to the corporation.

(3) Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation, and he shall, upon application by him, be substituted as party plaintiff in the place of the corporation in any suit or proceeding pending at the time of his appointment.

(4) Sell, convey, and assign all of the said estate, rights, and interest.

(5) Appoint agents under him.

(6) Examine persons and papers, and pass on claims as elsewhere provided in this part.

(7) Do all other acts which might be done by the corporation, if in being, that are necessary for the final settlement of its unfinished business.

The powers of the receiver may be continued as long as the court thinks necessary, and the receiver shall hold and dispose of the proceeds of all sales of property under the direction of the court, and, before acting, must enter into such bond and comply with such terms as the court prescribes. (Code, s. 668; 1901, c. 2, ss. 74, 84; Rev., ss. 1222, 1231; C.S., s. 1209; 1955, c. 1371, s. 2.)

Legal Periodicals. — For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

Source of Receiver's Authority. — A receiver receives his authority from the applicable statutes, together with the directions and instructions of the court in its order appointing him. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Capacity in Which Receiver Holds and Disposes of Property. — The receiver holds and disposes of all property coming into his hands in his official capacity, under the direction of the court. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Power of Receiver to Sue. — The receiver represents and, in a certain sense, succeeds to the rights of the corporation. There is no valid reason why he may not, representing the corporation and its creditors, bring any and all actions in respect to its assets, or rights of action, which it or its creditors could have brought. Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904).

The receiver may sue either in his own name or that of the corporation. In whichever name he may elect to bring the action, it is essentially a suit by the corporation, prosecuted by order of the court, for the collection of the assets. Gray v. Lewis, 94 N.C. 392 (1886); Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371, 23 L.R.A. 322 (1894); Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904).

Ordinarily the mere appointment of a receiver will not toll the statute of limitations unless the circumstances are such that such appointment precludes the institution of suit. Thus, when a receiver has full authority to institute suit, his appointment will not suspend the running of limitations under G.S. 1-40. Nicholas v. Salisbury Hdwe. & Furn. Co., 248

N.C. 462, 103 S.E.2d 837 (1958).

Scope of Suit by Receivers of Bank. — In a suit by the receivers of a bank, all the rights of the bank, its creditors, and the defendant debtor, both legal and equitable, pertaining to the matters set out in the pleadings, could be adjudicated, and such judgment could be entered as would enforce the rights of the general creditors and also protect any equities that the defendant might be entitled to. Smathers v. Western Carolina Bank, 135 N.C. 410, 47 S.E. 893 (1904). See also, Gray v. Lewis, 94 N.C. 392 (1886); Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371, 23 L.R.A. 322 (1894).

Receiver May Plead Usury. — The plea of usury may be made by the receiver of an insolvent corporation against which a usurious contract is sought to be enforced. Riley v. Sears, 154 N.C. 509, 70 S.E. 997 (1911).

Valid Existing Liens Protected. — The title of a receiver of a private corporation to the corporate property relates back only to the time of his appointment, and it cannot divest the property of valid liens existing at that time. Roberts v. Bowen Mfg. Co., 169 N.C. 27, 85 S.E. 45 (1915).

Power of Receiver After Charter Has Expired. — A receiver appointed under G.S. 1-507.1 to wind up the affairs of a corporation may proceed to collect the assets and to prosecute and defend suits after the corporation has ceased to exist by the expiration of its charter. Asheville Div. No. 15 v. Aston, 92 N.C. 578 (1885).

Power to Make Conveyances. — While subdivision (4) of this section empowers receivers to convey the estate, the receiver of a corporation may not ordinarily dispose of a substantial part of the assets entrusted to him without authority of court, and his sales are subject to confirmation unless authority to convey on specified terms is expressly given. Harrison v. Brown, 222 N.C. 610, 24 S.E.2d 470 (1943).

Deed Held Sufficient to Pass Title. — Where, under a court order, the receiver of an insolvent bank conveyed lands according to the terms of a deed of trust by which the bank held the land, under this section and G.S. 1-507.3 the deed was sufficient in law to pass title. Wachovia Bank & Trust Co. v. Hudson, 200 N.C. 688, 158 S.E. 244 (1931).

§ 1-507.3. Title and inventory.

All of the real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects, upon the appointment of a receiver, forthwith vest in him, and the corporation is divested of the title thereto. Within thirty days after his appointment he shall lay before the court a full and complete inventory of all estate, property, and effects of the corporation, its nature and probable value, and an account of all debts due from and to it, as nearly as the same can be ascertained, and shall make a report of his proceedings to the superior court at such times as the court may direct during the continuance of the trust. (1901, c. 2, ss. 75, 80; Rev., ss. 1224, 1225; C.S., s. 1210; 1945, c. 635; 1955, c. 1371, s. 2.)

CASE NOTES

Receiver holds title to property vested in him as an officer of the court. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

Nothing in this section suggests that the receiver should take the property free of existing obligations. State ex rel. Eure v. Lawrence, 93 N.C. App. 446, 378 S.E.2d 207 (1989).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

Prior Liens Not Divested. — In the very nature of things, the receiver takes the property of the insolvent debtor subject to the mortgages, judgments and other liens existing at the time of his appointment. This rule is recognized and enforced when the court permits a receiver to sell encumbered property free from liens, and transfers the liens to the proceeds of sale under G.S. 1-507.8. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

The appointment of a receiver does not divest the property of prior existing liens, but the court, through its receiver, receives such property impressed with all existing rights and equities, and the relative ranks of claims and standing of liens remain unaffected by the receivership. Pelletier v. Greenville Lumber Co., 123 N.C. 596, 31 S.E. 855 (1898); Battery Park Bank v. Western Carolina Bank, 127 N.C. 432, 37 S.E. 461 (1900); Fisher v. Western Carolina Bank, 132 N.C. 769, 44 S.E. 601 (1903); Garrison v. Vermont Mills, 154 N.C. 1, 69 S.E. 743 (1910); Witherell v. Murphy, 154 N.C. 82, 69 S.E. 748 (1910).

Effect of Subsequent Judgments. — The title to the property of a corporation vests in the receiver at the time he was duly appointed by the court, from which time the corporation is divested thereof, and a judgment against the corporation entered thereafter, but before the docketing of the order or the qualifying of the receiver thereunder, can acquire no lien in favor of the judgment creditor. Odell Hdwe. Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

A judgment rendered in an independent action after the appointment of a receiver does not create a lien on the corporate property as against the receiver. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

A judgment rendered against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver who had in the meanwhile been appointed. Odell Hdwe. Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

Where a creditor held an unsecured claim against an insolvent partnership at the time of the appointment of the receiver, and subsequent to that event reduced such claim to judgment in an independent action against the partners, the creditor did not acquire any lien under the judgment on any of the property owned by the defendants as partners, because under this section such property vested in the receiver prior to the rendition of the judgment. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Effect of Unrecorded Condition in Contract of Conditional Sale. — A receiver has the power of creditors armed with process to disregard or avoid the unrecorded condition in a contract of conditional sale. Observer Co. v. Little, 175 N.C. 42, 94 S.E. 526 (1917).

Insurance Policies Not Forfeited. — The vesting of the property of a corporation in the receiver under this section does not constitute such a change in the "interest, title or possession" of the property as to forfeit insurance policies on the property. Southern Pants Co. v. Rochester German Ins. Co., 159 N.C. 78, 74 S.E. 812 (1912).

Procedure Where Receiver Refuses to Bring Action. — In an action brought by creditors, depositors or stockholders to recover assets belonging to the corporation, the title to which has vested in the receiver, upon his refusal to bring the action the receiver may properly be made a defendant, to the end that the recovery may be subject to orders and decrees by the court, in the judgment as to its application to the claims of creditors and depositors, or to its distribution among stockholders. Douglass v. Dawson, 190 N.C. 458, 130 S.E. 195 (1925).

§ 1-507.4. Foreclosure by receivers and trustees of corporate mortgagees or grantees.

Where real estate has been conveyed by mortgage deed, or deed of trust to any corporation in this State authorized to accept such conveyance for the purpose of securing the notes or bonds of the grantor, and such corporation thereafter shall be placed in the hands of a receiver or trustee in properly instituted court proceedings, then such receiver or trustee under and pursuant to the orders and the decrees of the said court or other court of competent jurisdiction may sell such real property pursuant to the orders and the decrees of the said court or may foreclose and sell such real property as provided in such mortgage deed, or deed of trust, pursuant to the orders and decrees of such court.

All such sales shall be made as directed by the court in the cause in which said receiver is appointed or the said trustee elected, and for the satisfaction and settlement of such notes and bonds secured by such mortgage deed or deed of trust or in such other actions for the sales of the said real property as the said receiver or trustee may institute and all pursuant to the orders and decrees of the court having jurisdiction therein.

All sales of real property made prior to April 10, 1931 by such receiver or trustee of and pursuant to the orders of the courts of competent jurisdiction in such cases, are hereby validated. (1931, c. 265; 1955, c. 1371, s. 2.)

§ 1-507.5. May send for persons and papers; penalty for refusing to answer.

The receiver has power to send for persons and papers, to examine any persons, including the creditors, claimants, president, directors, and other officers and agents of the corporation, on oath or affirmation (which oath or affirmation the receiver may administer), respecting its affairs and transactions and its estate, money, goods, chattels, credits, notes, bills, choses in action, real and personal estate and effects of every kind; and also respecting its debts, obligations, contracts, and liabilities, and the claims against it; and if any person refuses to be sworn or affirmed, or to make answers to such questions as may be put to him, or refuses to declare the whole truth touching the subject matter of the examination, the court may, on report of the receiver, commit such person as for contempt. (1901, c. 2, s. 78; Rev., s. 1227; C.S., s. 1211; 1955, c. 1371, s. 2.)

§ 1-507.6. Proof of claims; time limit.

All claims against an insolvent corporation must be presented to the receiver in writing; and the claimant, if required, shall submit himself to such examination in relation to the claim as the receiver directs, and shall produce such books and papers relating to the claim as shall be required. The receiver has power to examine under oath or affirmation all witnesses produced before him touching the claim, and shall pass upon and allow or disallow the claims or any part thereof, and notify the claimants of his determination. The court may limit the time within which creditors may present and prove to the receiver their respective claims against the corporation, and may bar all creditors and claimants failing to do so within the time limited from participating in the distribution of the assets of the corporation. The court may also prescribe what notice, by publication or otherwise, must be given to creditors of such limitation of time. (1901, c. 2, ss. 81, 82; Rev., ss. 1228, 1229; C.S., s. 1212; 1955, c. 1371, s. 2.)

CASE NOTES

Court May Limit Time for Presentation and Proof of Claims. — This section authorizes the court to limit the time within which creditors may present and prove to the receiver their respective claims against a corporation and may bar all creditors and claimants failing to prove their claims within the time allotted from participating in the distribution of the assets of the corporation. Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co., 2 N.C. App. 531, 163 S.E.2d 510 (1968).

And Should Give Appropriate Notice Thereof. — The court in control of a receivership should fix the time in which any and all claims against the estate of the insolvent debtor are to be presented to the receiver, give appropriate notice to creditors of such limitation of time by publication or otherwise, and postpone any order of distribution until an opportunity has been afforded for the determination of the status of all claims and their order of priority. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Creditors must file and prove their claims when the court so directs or be barred. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Proof of claims must be filed with the receiver in writing pursuant to this section and within the time limit directed by the court or such claim may be barred. First-Citizens Bank & Trust Co. v. Berry, 2 N.C. App. 547, 163 S.E.2d 505 (1968).

But Court May Extend Time for Filing. — The court has the discretion to permit the filing of claims subsequent to the time fixed after the appointment of the receiver. Odell Hdwe. Co. v. Holt-Morgan Mills, 173 N.C. 308, 92 S.E. 8 (1917).

Assignment of Claims. — After a receiver is appointed for a bank, a creditor may assign his claim, but such assignment is subject to the receiver's right to set off claims the bank may have against the creditor, and if the assignee of a claim is himself a debtor of the bank he cannot use the assigned claim as a setoff. Davis v. Industrial Mfg. Co., 114 N.C. 321, 19 S.E. 371 (1894).

Power of Receiver to Conduct Examination. — To enable the receiver to decide whether claims are just, the law confers upon him plenary power to examine the claimants and witnesses touching the claims, and to require the production of relevant books and papers. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Corporate Officer's Burden of Proof. — North Carolina law places on an officer of a corporation the burden of proving that he was not unjustly enriched by his dealing with the corporation. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

Where officer of corporation engaged in transactions which were not approved by the corporate defendants or shareholders, the burden was on him to prove that the transactions were just and reasonable. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

Corporate Officer's Failure to Account. — Where a trial court found that a corporate officer's failure to account made it impossible for the receivers to defend against the claims of that officer and his wife against the corporation in liquidation, the trial court was therefore authorized, pursuant to G.S. 1A-1, Rule 41(b), to dismiss the claims of the officer and his wife on their receivership in the event that the corporate officer failed to provide an accounting within 30 days of the effective date of the order of the trial court. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

Burden of Proof on Claimants to Receivership. — Where, in response to claims of a corporate officer and his wife made on the receivership, a judge ordered the court-appointed receivers to retain personal property claimed by the two claimants until there was a comprehensive accounting by the corporate officer to the defendant corporations, the order was consistent with this section, requiring claimants to receivership to prove their claims. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

As a claimant on the receivership, the wife of a corporate officer bears the burden of proving her claim and as such is subject to all valid defenses. Accordingly, she is subject to the court's authority over the receivership even if she is not a necessary party to the derivative action. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

Claims Based on Joint Ownership. — A claimant in the liquidation of a corporation has the burden of proving her claims pursuant to this section. With respect to claims based on joint ownership, a defense against the claims of a party count as a defense to the joint claims of a spouse. The trial court was therefore justified in denying all the claims of a wife made jointly with her husband, a corporate officer, until an accounting was made to comply with a court order for the husband to make an accounting to the corporation. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

§ 1-507.7. Report on claims to court; exceptions and jury trial.

It is the duty of the receiver to report to the session of the superior court subsequent to a finding by him as to any claim against the corporation, and exceptions thereto may be filed by any person interested, within 10 days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. Provided, that no court shall issue any order of distribution or order of discharge of a receiver until said receiver has proved to the satisfaction of the court that written notice has been mailed to the last known address of every claimant who has properly filed claim with the receiver, to the effect that such orders will be applied for at a certain time and place therein set forth and by producing a receipt issued by the United States post office, showing that such notice has been mailed to each of such claimant's last known address at least 20 days prior to the time set for hearing and passing upon such application to the court for said orders of distribution and/or discharge.

As to delinquency proceedings for insurance companies under Article 30 of General Statutes Chapter 58, such prior notice need be given only to those claimants whose presented claims have been denied or have not been adjudicated; and notice is satisfied by mailing either a general notice of application for distribution showing disposition of the claims or a copy of the application to such claimants. Proof of mailing with the United States Postal Service may be made by the receiver's certificate of service without either the necessity of postal receipt or the listing of individual claimants names and addresses. (1901, c. 2, s. 83; Rev., s. 1230; C.S., s. 1213; 1945, c. 219; 1955, c. 1371, s. 2; 1971, c. 381, s. 12; 1985, c. 666, s. 70; 2003-221, s. 3.)

CASE NOTES

The term "any person interested" undoubtedly includes a claimant who wishes to resist a finding by the receiver adjudging his claim to be invalid or of less dignity than that alleged by him. Moreover, a creditor who has a valid claim is certainly a "person interested" for the purpose of opposing a report of the receiver allowing the validity or priority of other asserted claims, payment of which will exhaust or reduce the receivership assets otherwise available for the satisfaction of his claim. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Partner as "Interested Person". — A partner who is individually liable for partnership debts if the partnership assets are insufficient to discharge a claim is unquestionably an "interested person" who may challenge the validity of an asserted partnership obligation. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

The power to extend time for filing exceptions to a receiver's report is expressly given by this section. Benson v. Roberson, 226 N.C. 103, 36 S.E.2d 729 (1946).

Effect of Exceptions Not Filed Within Time Prescribed. — Exceptions filed and made a part of the record are not void as a matter of law merely because they are not filed within the first three days of the term of court commencing next after the filing of the receiver's report, in the absence of a motion to strike or order to that effect, and a judgment entered on the ground that such exceptions were not before the court for consideration will be remanded. Benson v. Roberson, 226 N.C. 103, 36 S.E.2d 729 (1946).

Validity of claim must be determined by court. Brewer v. Elks, 260 N.C. 470, 133 S.E.2d 159 (1963).

Refusal to Grant Hearing on Objections Held Error. — Where objections were filed by a creditor of a corporation in the hands of a receiver to an order allowing a claim against such corporation, which order adjudicated material and controverted issues of fact without consent, evidence or findings, it was error to deny a motion to set aside the allowance of such claim and refuse to grant a hearing on such objections alleging facts which if true would constitute a valid defense to such claim. Peoples Bank & Trust Co. v. Tar River Lumber Co., 224 N.C. 432, 31 S.E.2d 353 (1944). See also, Peoples Bank & Trust Co. v. Tar River Lumber Co., 224 N.C. 153, 29 S.E.2d 348 (1944).

Compliance with Notice Requirement Prerequisite to Discharge. — This section expressly prohibits issuance of order of discharge unless the receiver demonstrates compliance with the notice requirement. John T. Council, Inc. v. Balfour Prods. Group, Inc., 80 N.C. App. 157, 341 S.E.2d 74 (1986).

Determining Claim to Be Preferred Improper Without Notice. — An order of the superior court adjudging that the claim of a particular creditor constituted a preferred claim and ordering the receiver to pay such claim, made without notice, either actual or constructive, to other claimants, is contrary to the established rules of practice and procedure in receivership proceedings. National Sur. Corp. v. Sharpe, 232 N.C. 98, 59 S.E.2d 593 (1950).

Vacation of Order for Failure to Comply with Notice Procedure. — Even where defendant had actual notice of hearing and did not show how it was prejudiced by noncompliance with the prescribed notice procedure, where there was no showing that notice was mailed to each claimant at least 20 days prior to the hearing, the order discharging the receiver would be vacated. John T. Council, Inc. v. Balfour Prods. Group, Inc., 80 N.C. App. 157, 341 S.E.2d 74 (1986).

As to establishment of claim where jury trial waived, see National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Cited in Webb v. Gaskins, 255 N.C. 281, 121 S.E.2d 564 (1961); Tractor & Auto Supply Co. v. Fayetteville Tractor & Equip. Co., 2 N.C. App. 531, 163 S.E.2d 510 (1968); Cato v. Crown Fin., Ltd., 131 N.C. App. 683, 508 S.E.2d 822 (1998).

§ 1-507.8. Property sold pending litigation.

When the property of an insolvent corporation is at the time of the appointment of a receiver encumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of encumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale to be disposed of as the court directs. And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report, which said notice shall be published at least 10 days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale; and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as if made at a regular session of the superior court of the county in which the property is situated. (1901, c. 2, s. 86; Rev., s. 1232; C.S., s. 1214; Ex. Sess. 1924, c. 13; 1955, c. 1371, s. 2; 1971, c. 381, s. 12.)

CASE NOTES

As to the applicability of this section to pending litigation, see Martin v. Valaningham, 189 N.C. 656, 127 S.E. 695 (1925).

Cited in State ex rel. Eure v. Lawrence, 93 N.C. App. 446, 378 S.E.2d 207 (1989).

§ 1-507.9. Compensation and expenses; counsel fees.

Before distribution of the assets of an insolvent corporation among the creditors or stockholders, the court shall allow a reasonable compensation to the receiver for his services, not to exceed five percent upon receipts and disbursements, and the costs and expenses of administration of his trust and of the proceedings in said court, to be first paid out of said assets. The court is authorized and empowered to allow counsel fees to an attorney serving as a receiver (in addition to the commissions allowed him as receiver as herein provided) where such attorney in behalf of the receivership renders professional services, as an attorney, which are beyond the ordinary routine of a receivership and of a type which would reasonably justify the retention of legal counsel by any such receiver not himself licensed to practice law. (1901, c. 2, s. 88; Rev., s. 1226; C.S., s. 1215; 1955, c. 1371, s. 2; 1967, c. 32.)

CASE NOTES

The effect of this section is to take from the funds of the insolvent corporation a sufficient sum to pay all the costs, allowances and legitimate expenses, and then to distribute what is left according to priority. Hickson Lumber Co. v. Gay Lumber Co., 150 N.C. 281, 63 S.E. 1048 (1909).

Allowance of Costs Affects a Substantial Right of Creditors. — The allowance of the costs of administration of a receivership of an insolvent corporation made by a court affects a substantial right of the creditors, in that it disposes of a part of the assets of the insolvent corporation, and is a reduction to that extent of the amounts to which the creditors are entitled under their claims against it. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

Items Included in Costs. — Costs of administration of a receivership include, inter alia, such items as the following: (1) Court costs in proceedings relating to the receivership; (2) Compensation for the receiver; (3) Reasonable and proper compensation for the receiver's attorney for services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership; (4) Costs of conserving property in receivership; (5) Costs of sales of property in receivership; (6) Premiums for fire insurance on property in receivership; (7) Bookkeeping, clerical and accounting expense and postage in connection with the administration of the receivership; (8) Payment of all taxes on property real or personal in the possession of the receiver which fall due during the time he is in possession as receiver, or which have accrued upon the property in his possession prior to his appointment. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

Costs of administration include such items as the following: (1) Court costs in proceedings relating to the receivership; (2) Compensation for the receiver; (3) Compensation for the receiver's attorney; (4) Bookkeeping and clerical expense; (5) Auditing expense; (6) Premiums for fire insurance on property in receivership; (7) Compensation for watchmen for services in guarding property in receivership; and (8) Costs of sale of property in receivership. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Costs and expenses of receivership are generally limited to taxes and those costs and expenses necessary to preserve the estate for the benefit of all persons interested, and are payable, primarily, out of the fund in the hands of the receiver, but if necessary, out of the corpus of the estate in the custody of the court. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Commissions payable to a receiver are part of the costs and expenses of the suit in which he is appointed, and should be paid as such instead of being classed as a debt payable pro rata with other debts. Wilson Cotton Mills v. Randleman Cotton Mills, 115 N.C. 475, 20 S.E. 770 (1894), rehearing denied, 116 N.C. 647, 21 S.E. 431 (1895).

Section Limits Commissions to Five Percent. — A rate not exceeding five percent on receipts and five percent on disbursements is the statutory limit of a receiver's commissions. Battery Park Bank v. Western Carolina Bank, 126 N.C. 531, 36 S.E. 39 (1900).

But this section does not state that a receiver is entitled to a five percent commission upon receipts and disbursements. Rather, it states that "the court shall allow a reasonable compensation to the receiver for his services, not to exceed five percent upon receipts and disbursements." King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

Commission May Be Divided Between Parties. — An allowance to a receiver is a part of the costs of the action and usually taxable against the losing party, but the court below may, in its discretion, divide it between the parties, as in the case of referees' fees. Simmons v. Allison, 119 N.C. 556, 26 S.E. 171 (1896).

Counsel Fees Not Allowed for Collecting Assets of Estate. — A receiver is not entitled to allowance for the services of an attorney in hunting up and taking into possession the property belonging to the estate, since it is the personal duty of the receiver to look after such matters. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

Nor for Duties Not Requiring Legal Skill. — The contacting of purchasers, the showing of property for sale, the sales and resales of property, and the accounting and bookkeeping in respect to the administration of the receivership require no legal knowledge and skill, and are the performance of ordinary duties, which may and should be performed by the receiver himself and are not the subject of an allowance of counsel fees. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

Counsel Fees Where Employment Unlawful Because of Conflict of Interest. — Where the employment of an attorney by a receiver is unlawful by reason of his employment by an adverse party, he should not for that reason be denied a reasonable compensation for services which were necessary or valuable to the receiver, when performed with the usual fidelity and ability. Charges properly excluded would be for services rendered in a manner influenced by the attorney's professional connection with the adverse party. Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983), rehearing denied, 310 N.C. 749, 319 S.E.2d 266 (1984).

The court may charge against the interest of lienholders expenses incurred by the receiver in preserving and selling the property subject to the liens and in applying the cash realized by its sale upon the claims of the lienholders. As a general rule, however, expenses of this character will not be charged against the interests of lienholders where unencumbered assets are available for their payment. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

For case distinguishing costs of administration and expenses of operation, see National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Costs of administration are preferred in payment to expenses of operation. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Expenses of Operation Subordinate to Claims of Nonconsenting Lienholders. — Indebtedness incurred by a receiver for the expenses of carrying on and operating the business of an insolvent private concern owing no duty to the public cannot be given priority over the claims of nonconsenting lienholders to the corpus of the property. National Sur. Corp. v.

Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Application of First Assets to Costs. — Under this section, the first assets that are the property of the corporation must be applied to the costs of the proceedings in court, including the fees of the receiver and referee, and except as to private corporations, receivers' certificates issued in operation of the plant, under the orders of the court, and liabilities incurred for labor, and torts. Hickson Lumber Co. v. Gay Lumber Co., 150 N.C. 281, 63 S.E. 1048 (1909); Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N.C. 514, 93 S.E. 971 (1917).

When Costs Take Priority over Mortgage. — One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts, past or prospective, does so with the knowledge that, under this section, the lien of his mortgage is subject to be displaced in favor of the expenses of receivership; but when the corporation has acquired the property subject to a valid registered mortgage, then the costs of receivership are not prior to that mortgage. Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N.C. 514, 93 S.E. 971 (1917).

Allowance of Commissions Held Premature. — The allowance of commissions to receivers appointed by the court, by consent, to finish partially constructed waterworks, was premature before the work was finished, as it could not be determined whether such allowance was excessive or too little. Delafield v. Mercer Constr. Co., 118 N.C. 105, 24 S.E. 10 (1896).

Allowance of Costs Is Subject to Review. — That the amount of the allowance of costs by the superior court of attorney's fees is reviewable is well settled. King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963).

Review of Compensation of Persons Employed to Assist Receiver. — Those employed by a receiver to assist in the administration of a receivership should understand that their compensation is subject to trial court review and approval. Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983), rehearing denied, 310 N.C. 749, 319 S.E.2d 266 (1984).

The allowance of commissions and counsel fees to a receiver by the superior court is prima facie correct, and the appellate court will not alter or modify the same unless based on the wrong principle, or clearly inadequate or excessive. Graham v. Carr, 133 N.C. 449, 45 S.E. 847 (1903); King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963); Lowder v. All Star Mills, Inc., 309 N.C. 695, 309 S.E.2d 193 (1983), rehearing denied, 310 N.C. 749, 319 S.E.2d 266 (1984).

When the order of the court below allowing commissions to a receiver for services as such is appealed from, and there is no suggestion that the amount was excessive or based upon a wrong principle, the order will not be disturbed. Talbot v. Tyson, 147 N.C. 273, 60 S.E. 1125 (1908).

§ 1-507.10. Debts provided for, receiver discharged.

When a receiver has been appointed, and it afterwards appears that the debts of the corporation have been paid, or provided for, and that there remains, or can be obtained by further contributions, sufficient capital to enable it to resume its business, the court may, in its discretion, a proper case being shown, discharge the receiver, and decree that the property, rights, and franchises of the corporation revert to it, and thereafter the corporation may resume control of the same, as fully as if the receiver had never been appointed. (1901, c. 2, s. 76; Rev., s. 1220; C.S., s. 1216; 1955, c. 1371, s. 2.)

CASE NOTES

Discharged Receiver Held Not a Proper Party. — Where the receiver of an insolvent railroad company had been discharged, he was not a proper party to an action against a foreclosure purchaser to recover for personal injuries suffered after his discharge. Howe v. Harper, 127 N.C. 356, 37 S.E. 505 (1900).

§ 1-507.11. Reorganization.

When a majority in interest of the stockholders of the corporation have agreed upon a plan for its reorganization and a resumption by it of the management and control of its property and business, the corporation may, with the consent of the court, upon the reconveyance to it of its property and franchises, either by deed or decree of the court, mortgage the same for an amount necessary for the purposes of the reorganization; and may issue bonds or other evidences of indebtedness, or additional stock, or both, and use the same for the full or partial payment of the creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization. (1901, c. 2, s. 77; Rev., s. 1221; C.S., s. 1217; 1955, c. 1371, s. 2.)

CASE NOTES

Power of Superior Court to Approve Reorganization. — This section gives the superior court, in a receivership, power to approve a plan for the reorganization of a corporation which provides for the readjustment of the company's capital structure, when approved by a majority in interest of the stockholders; but it cannot affect either the rights of dissenting stockholders not parties to the receivership or the vested rights of parties to the proceedings unless they fail to appear. Commercial Nat'l Bank v. Mooresville Cotton Mills, 222 N.C. 305, 22 S.E.2d 913 (1942).

Where a corporation engaged in business transfers its entire property rights and franchise to a new company incorporated and organized by the same stockholders and directors as the old, and the new company continues the business and adopts the contracts of its predecessor, the effect of such a merger is to create a novation so far as the creditors of the old company are concerned, and to substitute the new one as debtor, and in such case it is not necessary to obtain the consent of the creditors of the old company to the change. Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co., 117 N.C. 544, 23 S.E. 490 (1895).

New Corporation Assumes Contracts of Old. — Where, by merger of an old into a new corporation, a novation of the debts of the old is created, the new corporation is, to all intents and purposes, the same body and answerable for its own contracts made under a different name. Friedenwald Co. v. Asheville Tobacco Works & Cigarette Co., 117 N.C. 544, 23 S.E. 490 (1895).

Duty of Fiduciaries. — In the reorganization of a corporation under this section, executors, trustees and other fiduciaries holding stock in the corporation not only have the right, but also the duty, to assert whatever legal rights they may have which in their opinion will be for the best interest of the estates involved. Commercial Nat'l Bank v. Mooresville Cotton Mills, 222 N.C. 305, 22 S.E.2d 913 (1942).

For case distinguishing between a receiver appointed as a provisional remedy in an ordinary suit, and a corporate receiver, see United States v. McPherson, 631 F. Supp. 269 (M.D.N.C. 1986).

ARTICLE 39.

Deposit or Delivery of Money or Other Property.

§ 1-508. Ordered paid into court.

When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the judge may order it deposited in court, or delivered to such party with or without security, subject to the further direction of the judge. (C.C.P., s. 215; Code, s. 380; Rev., s. 850; C.S., s. 863.)

CASE NOTES

When Custodian May Retain Fund. — Absent threatened irreparable damage or loss of a fund, it will be suffered to remain in the hands of the party who in law is entitled to its custody and care. Thompson v. McNair, 62 N.C. 121 (1867); L. Levenson & Co. v. Elson, 88 N.C. 182 (1883).

When Court Will Retain Fund. — When a disputed fund is in the possession and under the control of the court, and the right of a claimant is doubtful, it will be retained until the determination of the controversy, when it can be ascertained to whom it belongs. Ponton v. McAdoo, 71 N.C. 101 (1874); Morris v. Willard, 84 N.C. 293 (1881); L. Levenson & Co. v. Elson, 88 N.C. 182 (1883).

Court Authorized to Order Money Delivered to Party. — Where a tenant, upon the uncontroverted facts, is entitled as a matter of law to the proceeds of a crop insurance policy paid into court by an insurer, free from the landlord's crop lien for advancements, the court has authority under this section to order that such fund be to the tenant. Peoples v. United States Fire Ins. Co., 248 N.C. 303, 103 S.E.2d 381 (1958).

Cited in Rivenbark v. Southmark Corp., 93 N.C. App. 414, 378 S.E.2d 196 (1989).

§ 1-509. Ordered seized by sheriff.

When, in the exercise of his authority, a judge has ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the judge, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the judge. (C.C.P., s. 215; Code, s. 381; Rev., s. 851; C.S., s. 864.)

§ 1-510. Defendant ordered to satisfy admitted sum.

When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the judge, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy. (C.C.P., s. 215; Code, s. 382; Rev., s. 852; C.S., s. 865.)

CASE NOTES

This section may not be invoked where its application would give sanction to piecemeal recoveries which would be essentially inconsistent. Universal C.I.T. Credit Corp. v. Saunders, 235 N.C. 369, 70 S.E.2d 176 (1952).

Where the complaint in an action on two notes set out each note as a separate cause of action and the defendant answered as to one only, it was error to refuse judgment on the note to which no defense was interposed, and from such refusal, being a denial of a substantial right, an appeal was properly taken. In such case judgment should have been given on the one note and the cause continued as to the other. Curran v. Kerchner, 117 N.C. 264, 23 S.E. 177 (1895).

Where, in an action on a note, the defendants admitted liability in a certain part thereof, but denied liability for the balance, an order directing that plaintiff recover the amount admitted to be due without prejudice to plaintiff's right to litigate the balance of the note was authorized by this section. Meadows Fertilizer Co. v. Farmers Trading Co., 203 N.C. 261, 165 S.E. 694 (1932).

Cited in Wachovia Bank & Trust Co. v. Wilder, 255 N.C. 114, 120 S.E.2d 404 (1961).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 40.

Mandamus.

§§ 1-511 through 1-513: Repealed by Session Laws 1967, c. 954, s. 4.

ARTICLE 41.

Quo Warranto.

§ 1-514. Writs of sci. fa. and quo warranto abolished.

The writs of scire facias and of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this Article. To the extent that rules of procedure are not provided for in this Article, the Rules of Civil Procedure shall apply. (R.C., c. 26, ss. 5, 25; C.C.P., s. 362; Code, s. 603; Rev., s. 286; C.S., s. 869; 1967, c. 954, s. 3.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

Legal Periodicals. — For article, "Some Aspects of the Criminal Court Process in North Carolina," see 49 N.C.L. Rev. 469 (1971).

For article, "Removing Local Elected Officials from Office in North Carolina," see 16 Wake Forest L. Rev. 547 (1980).

CASE NOTES

This Article prescribes a specific mode for trying the title to a public office. Such relief is to be sought in a civil action. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Title to a public office can only be determined in a direct proceeding brought for that purpose under the statutes incorporated in this Article. Corey v. Hardison, 236 N.C. 147, 72 S.E.2d 416 (1952).

Though for convenience the action of quo warranto is still spoken of, it must be remembered that the action has been specifically abolished, and there is in fact only a civil action in which the subject matter is a trial of the title to an office. Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

Interest of Public in Determining Title to Office. — Although the proceeding by information in the nature of the writ of quo warranto has been abolished, the remedy to be pursued whenever the controversy is as to the validity of an election, or the right to hold a public office, is by an action in the nature of a writ of quo warranto. It is not merely an action to redress the grievance of a private person who claims a right to the office; rather, the public has an interest in the question which the legislature seems to have considered paramount to that of the private rights of the persons aggrieved. Hence, the requirement that such actions must be brought by the Attorney General in the name of the people of the State, and upon his own information without the relation of a private person when the person aggrieved does not see proper to assert his right. And when the claimant does seek redress, he must be joined in the action, but still it must be brought by the Attorney General in the name of the people. Patterson v. Hubbs, 65 N.C. 119 (1871); People ex rel. Nichols v. McKee, 68 N.C. 429 (1873); Brown v. Turner, 70 N.C. 93 (1874); People ex rel. Hargrove v. Hilliard, 72 N.C. 169 (1875); Hargrove ex rel. Tuck v. Hunt, 73 N.C. 24 (1875); Saunders v. Gatling, 81 N.C. 298 (1879).

Object of Former Writ of Scire Facias. — Writs of scire facias consisted of two classes: The object of the first class was to remedy defects in or to continue an action; that of the second class, to commence some proceeding. McDowell v. Asbury, 66 N.C. 444 (1872).

Substance of Remedy Not Affected by Section. — Proceedings in the nature of a scire facias of the first class are almost indispensable in the administration of justice, and the object of this section was merely to abolish the name and form of writs of this class and simplify the process into a notice or summons to show cause why further proceedings should not be had to provide further relief in matters where parties had had a day in court, etc., and not to affect the substance of the remedy. On such motion the judge may allow the defendant to make any defense of which he could have availed himself under the old scire facias proceeding. McDowell v. Asbury, 66 N.C. 444 (1872).

For historical discussion, see State ex rel. Giles v. Hardie, 23 N.C. 42 (1840); Ex parte Daughtry, 28 N.C. 155 (1845); Saunders v. Gatling, 81 N.C. 298 (1879); State ex rel. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892).

Applied in Stephens v. Dowell, 208 N.C. 555, 181 S.E. 629 (1935); Swaringen v. Poplin, 211 N.C. 700, 191 S.E. 746 (1937).

Cited in Bouldin v. Davis, 197 N.C. 731, 150 S.E. 507 (1929).

§ 1-515. Action by Attorney General.

An action may be brought by the Attorney General in the name of the State, upon his own information or upon the complaint of a private party, against the party offending, in the following cases:

(1) When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,

(2) When a public officer, civil or military, has done or suffered an act which, by law, makes a forfeiture of his office.

(3) When any person, natural or corporate, has or claims to have or hold any rights or franchises by reason of a grant or otherwise, in violation of the provisions of G.S. 146-39. (C.C.P., s. 366; Code, s. 607; Rev., s. 827; 1911, cc. 195, 201; C.S., s. 870; 1983, c. 768, s. 1.)

Cross References. — As to actions by the Attorney General in the name of the State to vacate land grants, see G.S. 146-63.

Legal Periodicals. — For comment on taxpayers' actions, see 13 Wake Forest L. Rev. 397 (1977).

CASE NOTES

Scope of Provisions. — This and the subsequent sections provide for the fullest relief to the rightful claimant against an unlawful intrusion, and thereby dispense with the need of recourse to another process, unless those required to induct still refuse to do so after the motion of the intruder by the judgment of the court; and then they may be compelled to proceed in the discharge of their duties. As the statutory remedy is ample, so where it can be had and made effectual, it is the only mode of deciding the conflicting claims to office by an adjudication between the contesting parties. Ellison v. Aldermen of Raleigh, 89 N.C. 125 (1883).

Actions of this character may be instituted in the name of the State on the relation of the Attorney General or of any individual who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. Saunders v. Gatling, 81 N.C. 298 (1879); State ex rel. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892); State ex rel. Hines v. Vann, 118 N.C. 3, 23 S.E. 932 (1896); State ex rel. Haughtalling v. Taylor, 122 N.C. 141, 122 N.C. 171, 29 S.E. 101, 29 S.E. 101 (1898).

A private person cannot institute or maintain an action of this character in his own name or upon his own authority, even if he is a claimant of the office. The action must be brought and prosecuted in the name of the State by the Attorney General or in the name of the State upon the relation of a private person who claims to be entitled to the office, or in the name of the State upon the relation of a private person who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Relator need not allege title to the office or interest therein. State ex rel. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892).

But the action is nonetheless personal as to the parties claiming the office, the issue between them being the right to the same. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910). See also, Ellison v. Aldermen of Raleigh, 89 N.C. 125 (1883).

It is not permissible to try the title to an office by injunction or mandamus; a civil action in the nature of quo warranto is the appropriate remedy, to be tried before a judge and jury. Ellison v. Aldermen of Raleigh, 89 N.C. 125 (1883); Lyon v. Board of Comm'rs, 120 N.C. 237, 26 S.E. 929 (1897); Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

Procedure for Determining Title to Public Office. — One of the chief purposes of quo warranto or an information in the nature of quo warranto is to try the title to an office. This is the method prescribed for settling a controversy between rival claimants when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the jurisdiction of the superior court in this behalf has never been abdicated in favor of the board of county canvassers or other officers of an election. Swaringen v. Poplin, 211 N.C. 700, 191 S.E. 746 (1937), citing Harkrader v. Lawrence, 190 N.C. 441, 130 S.E. 35 (1925). See also, State ex rel. Giles v. Hardie, 23 N.C. 42 (1840); Ex parte Daughtry, 28 N.C. 155 (1845); Saunders v. Gatling, 81 N.C. 298 (1879).

The title to a public office in dispute between two rival claimants must be determined by an action in the nature of quo warranto, especially when the defendant is in possession of the office under a claim of right in him to hold it and exercise its function or perform its duties; and a mandamus to compel the surrender of the books and papers will not lie until the claimant has established the disputed title. Rogers v. Powell, 174 N.C. 388, 93 S.E. 917 (1917). See also, State ex rel. Burke v. Commissioners of Bessemer City, 148 N.C. 46, 61 S.E. 609 (1908).

Remedy to Determine Validity of Election. — A civil action in the nature of a writ of quo warranto is the appropriate remedy to test the validity of an election of the right to a public office. Such action must be brought in the name of the people of the State by the Attorney General on the relation of the party aggrieved. Saunders v. Gatling, 81 N.C. 298 (1879); Davis v. Moss, 81 N.C. 303 (1879).

A tabulation of the result of an election by the clerk, in the manner required by law, is prima facie correct, and can only be questioned in an action in the nature of a quo warranto proceeding. Swain v. McRae, 80 N.C. 111 (1879); Gatling v. Boone, 98 N.C. 573, 3 S.E. 392 (1887); Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

The certificate of election of an officer, or his commission coming from the proper source, is prima facie evidence in favor of the holder, and in every proceeding except a direct one to try the title of such holder it is conclusive; but in quo warranto the court will go behind the certificate or commission, and inquire into the validity of the election or appointment and decide the legal rights of the parties upon full investigation of the facts. Lyon v. Board of Comm'rs, 120 N.C. 237, 26 S.E. 929 (1897).

Quo warranto was inappropriate where plaintiff/registered voter challenged the constitutionality of an election statute, not the election or its results. Comer v. Ammons, 135 N.C. App. 531, 522 S.E.2d 77, 1999 N.C. App. LEXIS 1179 (1999).

How Right to Judge's Office Determined. — For all practical purposes, a judge de facto is a judge de jure as to all parties other than the State itself. His right or title to his office cannot be impeached in a habeas corpus proceeding or in any other collateral way. It cannot be questioned except in a direct proceeding brought against him for that purpose by the Attorney General in the name of the State, upon his own information or upon the complaint of a private person. In re Wingler, 231 N.C. 560, 58 S.E.2d 372 (1950).

An action against a judge of probate to vacate his office is properly brought by the Attorney General under this section. Patterson v. Hubbs, 65 N.C. 119 (1871); People ex rel. Att'y Gen. v. Heaton, 77 N.C. 18 (1877).

Determination of Right to Hold Two Offices. — A citizen and taxpayer of a county is entitled to bring an action in the nature of quo warranto to try the right of a person to hold two offices in such county at the same time. State ex rel. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892); State ex rel. Hines v. Vann, 118 N.C. 3, 23 S.E. 932 (1896); State ex rel. Barnhill v. Thompson, 122 N.C. 493, 29 S.E. 720 (1898).

Where board of county canvassers illegally determined that one who had been elected to the office of register of deeds was not so elected, and that his opponent had been elected, but the latter failed to qualify and enter upon the duties of the office, whereupon the board of county commissioners declared the office vacant and appointed a third party, this could not in anywise affect the right of the duly elected officer to have the action of the board of canvassers revised by the courts in an action under this section. State ex rel. Roberts v. Calvert, 98 N.C. 580, 4 S.E. 127 (1887).

Recount of Ballots. — Preservation of ballots is required that they may be kept as evidence to certify or correct election returns when impeached, and on a quo warranto the ballot boxes may be brought into court and the recount made in the presence of the court and jury. Broughton v. Young, 119 N.C. 915, 27 S.E. 277 (1896); Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

Quo Warranto Is Not Proper Remedy to Test Validity of Tax. — Quo warranto is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax, even though it is levied under the authority of a popular election. Barbee v. Board of Comm'rs, 210 N.C. 717, 188 S.E. 314 (1936).

No Jurisdiction in Courts to Determine Contest for a Seat in the General Assembly. — The Constitution of North Carolina withdraws from the consideration of North Carolina courts the question of title involved in a contest for a seat in the General Assembly, and an action in quo warranto will not lie under this section. State ex rel. Alexander v. Pharr, 179 N.C. 699, 103 S.E. 8 (1920).

What Is a Public Office. — An office such as properly comes within the legitimate scope of a quo warranto information may be defined as a public position to which a portion of the sovereignty of the county, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public. High Ex. Leg. Rem., G.S. 620; Eliason v. Coleman, 86 N.C. 235 (1882).

The statute has reference to such usurping occupants as are exercising public functions or conferred franchises wrongfully; it is confined to an office which is a part of the government and part of the State policy, and to an officer who takes part in the government. Eliason v. Coleman, 86 N.C. 235 (1882). See also, People ex rel. Nichols v. McKee, 68 N.C. 429 (1873).

The true test of a public office is that it is a parcel of the administration of government, civil or military, or is itself created directly by the law-making power; and an information in the nature of a quo warranto only will lie to recover the same. Eliason v. Coleman, 86 N.C. 235 (1882).

While it has often been a matter of controversy what shall be said to be a public office, a town clerk, recorder, and clerk of the peace, a constable, and even a sexton, a parish clerk, and clerk of the city works are officers of such a public character as to come within the rule. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

Chief of Police. — The office of chief of police is such an office that an action in the nature of a quo warranto may be brought to try the title to it. State ex rel. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892).

Chief Engineer. — This section did not authorize a quo warranto as to the office of chief engineer in a quasi private corporation, namely the Western North Carolina R.R. Company. Eliason v. Coleman, 86 N.C. 235 (1882); State ex rel. Foard v. Hall, 111 N.C. 369, 16 S.E. 420 (1892).

The business of selling liquor is not an office so that the defendant's right to it shall be tested by an action in the nature of a quo warranto under this section. Hargett v. Bell, 134 N.C. 394, 46 S.E. 749 (1904).

The wrongful occupant must have entered under color of authority and not be a mere usurper, in the restricted sense of that term, to put the rightful claimant to the necessity of a resort to this remedy. Ellison v. Aldermen of Raleigh, 89 N.C. 125 (1883).

As to allegation that defendant has usurped and is illegally exercising duties of office, see Cozart v. Fleming, 123 N.C. 547, 31 S.E. 822 (1898).

Defendant's testimony concerning hearings held by a county board of elections was not hearsay, as defendant testified only as to what he had done, and he did not testify as to the results of the inquiry to the board of elections. Such evidence was relevant to the issue before the jury, that is, whether defendant has usurped, intruded into, or unlawfully held his public office. State ex rel. Everett v. Hardy, 65 N.C. App. 350, 309 S.E.2d 280 (1983).

Scope of Review on Appeal. — The facts found by the referee as to the result of an election in a proceeding in the nature of a quo warranto, approved by the trial judge, are not subject to review on appeal when supported by competent evidence. State ex rel. Robertson v. Jackson, 183 N.C. 695, 110 S.E. 593 (1922).

The question of fraud in the returns of the county board of canvassers as to those voting in an election, in proceedings in the nature of a quo warranto to determine the rights of contestants for a public office, is eliminated on appeal, when the report of the referee, approved by the trial judge, finds an absence of fraud, upon competent evidence. State ex rel. Robertson v. Jackson, 183 N.C. 695, 110 S.E. 593 (1922).

Applied in State ex rel. Grimes v. Holmes, 207 N.C. 293, 176 S.E. 746 (1934); State ex rel. Pitts v. Williams, 260 N.C. 168, 132 S.E.2d 329 (1963).

Cited in Bouldin v. Davis, 197 N.C. 731, 150 S.E. 507 (1929); Edwards v. Board of Educ., 235 N.C. 345, 70 S.E.2d 170 (1952); State ex rel. Tillett v. Mustain, 243 N.C. 564, 91 S.E.2d 696 (1956); Starbuck v. Havelock, 252 N.C. 176, 113 S.E.2d 278 (1960); State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986); Newsome v. North Carolina State Bd. of Elections, 105 N.C. App. 499, 415 S.E.2d 201 (1992); State ex rel. Barker v. Ellis, 144 N.C. App. 135, 547 S.E.2d 166, 2001 N.C. App. LEXIS 327.

§ 1-516. Action by private person with leave.

When application is made to the Attorney General by a private relator to bring such an action, he shall grant leave that it may be brought in the name of the State, upon the relation of such applicant, upon the applicant tendering to the Attorney General satisfactory security to indemnify the State against all costs and expenses which may accrue in consequence of the action. (1874-5, c. 76; 1881, c. 330; Code, s. 608; Rev., s. 828; C.S., s. 871.)

CASE NOTES

Constitutionality. — This section, allowing the prosecution of an action in the name of the State to assert the right of a citizen to a public office, is not, for that reason, unconstitutional. McCall v. Webb, 135 N.C. 356, 47 S.E. 802 (1904).

The right to proceed by an action in the nature of a quo warranto information is not guaranteed to every citizen, and can only be prosecuted by leave of the Attorney General. Ellison v. Aldermen of Raleigh, 89 N.C. 125 (1883).

Prerequisites to Prosecution of Action by Private Person. — Before any private person can commence or maintain an action of this nature in the capacity of a relator, he must apply to the Attorney General for permission to bring the action, tender to the Attorney General satisfactory security to indemnify the State against all costs and expenses incident to the action, and obtain leave from the Attorney General to bring the action in the name of the State upon his relation. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

In proceedings under this section and G.S. 1-514 to try title to a public office, the interest of the public is involved and is paramount to the rights of the relator, and the consent of the Attorney General, the filing of the bond, etc., as required by this section, are prerequisites to the right of the relator to maintain the action. Cooper v. Crisco, 201 N.C. 739, 161 S.E. 310 (1931).

Applicability of Statutory Conditions to Second Suit After Voluntary Nonsuit. — Common-law procedure by quo warranto, and proceedings by information in the nature thereof have been abolished by G.S. 1-514 and the remedy in such matters is under the provisions of this section. And where the relator has complied with these conditions and takes a voluntary nonsuit and within a year brings another action upon the same subject matter against the same respondent, but fails to obtain permission to bring the second action or to file bond therefor until the day before judgment is signed, his delay is fatal and the action is properly dismissed, it being necessary that the provisions of the section be again complied with before the bringing of the second action. Cooper v. Crisco, 201 N.C. 739, 161 S.E. 310 (1931).

Judge Cannot Confer Power to Prosecute Action. — Where a relator had no leave from the Attorney General permitting him to sue as such, he was incapacitated by law to prosecute the action, and the trial judge could not confer upon him the legal power denied to him by positive legislative enactment through the simple expedient of designating him a party-plaintiff and treating his answer as a complaint. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Applied in State ex rel. Midgett v. Gray, 159 N.C. 443, 74 S.E. 1050 (1912); State ex rel. Grimes v. Holmes, 207 N.C. 293, 176 S.E. 746 (1934).

Cited in Bouldin v. Davis, 197 N.C. 731, 150 S.E. 507 (1929); Barbee v. Board of Comm'rs, 210 N.C. 717, 188 S.E. 314 (1936).

§ 1-517. Solvent sureties required.

The Attorney General, before granting leave to a private relator to bring a suit to try the title to an office, may require two sureties to the bond required by law to be filed to indemnify the State against costs and expenses, and require such sureties to justify, and may require such proof and evidence of the solvency of the sureties as is satisfactory to him. (1901, c. 595, s. 2; Rev., s. 829; C.S., s. 872.)

§ 1-518. Leave withdrawn and action dismissed for insufficient bond.

When the Attorney General has granted leave to a private relator to bring an action in the name of the State to try the title to an office, and it afterwards is shown to the satisfaction of the Attorney General that the bond filed by the private relator is insufficient, or that the sureties are insolvent, the Attorney General may recall and revoke such leave, and upon a certificate of the withdrawal and revocation by the Attorney General to the clerk of the court of the county where the action is pending, it is the duty of the presiding judge, upon motion of the defendant, to dismiss the action. (1891, c. 595; Rev., s. 830; C.S., s. 873.)

§ 1-519. Arrest and bail of defendant usurping office.

When action is brought against a person for usurping an office, the Attorney General, in addition to the statement of the cause of action, may set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to and by means of his usurpation of the office, an order shall be granted by a judge of the superior court for the arrest of the defendant, and holding him to bail; and thereupon he shall be arrested and held to bail in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest. (C.C.P., s. 369; 1883, c. 102; Code, s. 609; Rev., s. 831; C.S., s. 874.)

Cross References. — As to arrest and bail in civil actions, see G.S. 1-409 et seq.

§ 1-520. Several claims tried in one action.

Where several persons claim to be entitled to the same office or franchise, one action may be brought against all of them, in order to try their respective rights to the office or franchise. (C.C.P., s. 374; Code, s. 614; Rev., s. 832; C.S., s. 875.)

§ 1-521. Trials expedited.

All actions to try the title or right to any State, county or municipal office shall stand for trial at the next session of court after the summons and complaint have been served for 30 days, regardless of whether issues were joined more than 10 days before the session; and it is the duty of the judge to expedite the trial of these actions and to give them precedence over all others, civil or criminal. It is unlawful to appropriate any public funds to the payment of counsel fees in any such action. (1874-5, c. 173; Code, s. 616; 1901, c. 42; Rev., s. 833; C.S., s. 876; 1947, c. 781; 1971, c. 381, s. 12.)

CASE NOTES

Cited in State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951); State ex rel. Barker v. Ellis, 144 N.C. App. 135, 547 S.E.2d 166, 2001 N.C. App. LEXIS 327.

§ 1-522. Time for bringing action.

All actions brought by a private relator, upon the leave of the Attorney General, to try the title to an office must be brought, and a copy of the complaint served on the defendant, within ninety days after his induction into the office to which the title is to be tried; and when it appears from the papers in the cause, or is otherwise shown to the satisfaction of the court, that the summons and complaint have not been served within ninety days, it is the duty of the judge upon motion of defendant to dismiss the action at any time before the trial, at the cost of the plaintiff. (1901, c. 519; 1903, c. 556; Rev., s. 834; C.S., s. 877.)

Legal Periodicals. — For article, "Removing Local Elected Officials from Office in North Carolina," see 16 Wake Forest L. Rev. 547 (1980).

CASE NOTES

Rules of Civil Procedure Do Not Set Deadline for Service. — The deadline for service in a quo warranto action is prescribed by the statute, and not by the Rules of Civil Procedure. State ex rel. Barker v. Ellis, 144 N.C. App. 135, 547 S.E.2d 166, 2001 N.C. App. LEXIS 327, cert. denied, 354 N.C. 74, 553 S.E.2d 204 (2001).

When Section Does Not Apply. — This provision, requiring a private relator, upon leave of the Attorney General, to bring his action within 90 days after the induction of the defendant into the contested office, does not apply where the alleged intruder has occupied the office more than 90 days before the plaintiff's cause of action accrued, or where it is impossible under the circumstances to give the required notice. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

Action Untimely. — A quo warranto action was untimely where a mayor was sworn in on December 21, 1999, but the complaint and summons were not served on him until March 23, 2000, which was 93 days later. State ex rel. Barker v. Ellis, 144 N.C. App. 135, 547 S.E.2d 166, 2001 N.C. App. LEXIS 327, cert. denied, 354 N.C. 74, 553 S.E.2d 204 (2001).

Applied in State ex rel. Long v. Smitherman, 251 N.C. 682, 111 S.E.2d 834 (1960).

§ 1-523. Defendant's undertaking before answer.

Before the defendant may answer or demur to the complaint he must execute and file in the superior court clerk's office of the county wherein the suit is pending, an undertaking, with good and sufficient surety, in the sum of two hundred dollars ($200.00), which may be increased from time to time in the discretion of the judge, to be void upon condition that the defendant pays to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff may recover. (1895, c. 105; Rev., s. 835; C.S., s. 878.)

§ 1-524. Possession of office not disturbed pending trial.

(a) In any civil action pending in any of the courts of this State in which the title to an office is involved, the defendant being in the possession of the office and discharging the duties thereof shall continue therein pending the action, and no judge shall make a restraining order interfering with or enjoining such officer in the premises. The officer shall, notwithstanding any such order, continue to exercise the duties of the office pending the litigation, and receive the emoluments thereof.

(b) This section shall not apply to any person subject to Article 31B of Chapter 7A of the General Statutes. (1899, c. 33; Rev., s. 836; C.S., s. 879; 2007-104, s. 2.)

Editor's Note. — Session Laws 2007-104, s. 3, provides, in part, that the act, which added subsection (b), does not apply to persons elected to or serving in the capacity of justice or judge on or before January 1, 1981, that were not authorized to practice law at the time of their election or at the time they began serving in the capacity of justice or judge.

CASE NOTES

Purpose of Section. — An injunction to prevent the exercise of a public office would produce general inconvenience; for instance, an injunction against one who it is alleged has usurped the office of the clerk of a court, forbidding him to discharge the duties of the office, would stop all judicial proceedings, and the public would be made to suffer by this mode of contesting the right to the office and to the fees and emoluments. Hence, in this and like cases, the appropriate remedy is by an action in the nature of a quo warranto, not an injunction. Patterson v. Hubbs, 65 N.C. 119 (1871).

Title Should Be Determined First. — Individuals claiming to comprise the board of trustees of a school district de jure may not enjoin those in possession under a colorable claim of right as such board from the performance of their duties as such, and require the defendants to turn over to them the school buildings, etc., and thus determine collaterally the question of title, nor would remedy by injunction be permitted in quo warranto proceedings, where the title to office is directly involved, but the parties should first try out the question of title in an action brought directly for the purpose. Rogers v. Powell, 174 N.C. 388, 93 S.E. 917 (1917).

Cited in Osborne v. Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

§ 1-525. Judgment by default and inquiry on failure of defendant to give bond.

At any time after a duly verified complaint is filed alleging facts sufficient to entitle plaintiff to the office, whether this complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days' notice to the defendant or his attorney of record, move before the judge resident in or riding the district, at chambers, to require the defendant to give the undertaking specified in G.S. 1-523. It is the duty of the judge to require the defendant to give the undertaking within ten days, and if it is not so given, the judge shall render judgment in favor of plaintiff and against defendant for the recovery of the office and the costs, and a judgment by default and inquiry to be executed at a term for damages, including loss of fees and salary. Upon the filing of the judgment for the recovery of such office with the clerk, it is his duty to issue and the sheriff's duty to serve the necessary process to put the plaintiff into possession of the office. If the defendant shall give the undertaking, the court, if judgment is rendered for plaintiff, shall render judgment against the defendant and his sureties for costs and damages, including loss of fees and salary. Nothing herein prevents the judge's extending, for cause, the time in which to give the undertaking. (1895, c. 105, s. 2; 1899, c. 49; Rev., s. 837; C.S., s. 880.)

CASE NOTES

For a discussion of this section, see McCall v. Webb, 135 N.C. 356, 47 S.E. 802 (1904). See also, State ex rel. Morganton Graded School v. McDowell, 157 N.C. 316, 72 S.E. 1083 (1911).

§ 1-526. Service of summons and complaint.

The service of the summons and complaint as hereinbefore provided may be made by leaving a copy at the last residence or business office of the defendant or defendants, and service so made shall be deemed a legal service. (1899, c. 126; Rev., s. 838; C.S., s. 881.)

Cross References. — As to service of process in civil actions, see G.S. 1A-1, Rule 4.

CASE NOTES

As to sufficiency of summons, see McLeod v. Pearson, 208 N.C. 539, 181 S.E. 753 (1935).

§ 1-527. Judgment in such actions.

In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party alleged to be entitled, or only upon the right of the defendant, as justice requires. When the defendant, whether a natural person or corporation, against whom the action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that the defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against him. The court may also, in its discretion, fine the defendant a sum not exceeding two thousand dollars ($2000). The clear proceeds of the fine shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (Const., Art. IX, s. 5; R.C., c. 95; C.C.P., ss. 370, 375; Code, ss. 610, 615; Rev., ss. 839, 840; C.S., s. 882; 1998-215, s. 95.)

CASE NOTES

Where defendant went into office under an unconstitutional appointment by the General Assembly, the court presumed that there was no criminal intent and did not impose the fine. People ex rel. Nichols v. McKee, 68 N.C. 429 (1873).

Applied in State ex rel. Everett v. Hardy, 65 N.C. App. 350, 309 S.E.2d 280 (1983).

§ 1-528. Mandamus to aid relator.

In any civil action brought to try the title or right to hold any office, when the judgment of the court is in favor of the relator in the action, it is the duty of the court to issue a writ of mandamus or such other process as is necessary and proper to carry the judgment into effect, and to induct the party entitled into office. (1885, c. 406, s. 1; Rev., s. 841; C.S., s. 883.)

§ 1-529. Appeal; bonds of parties.

No appeal by the defendant to the appellate division from the judgment of the superior court in such action shall stay the execution of the judgment, unless a justified undertaking is executed on the part of the appellant by one or more sureties, in a sum to be fixed by the court, conditioned that the appellant will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellant by virtue or under color of the office. In no event shall the judgment be executed pending appeal, unless a justified undertaking is executed on the part of the appellee by one or more persons in a sum to be fixed by the court, conditioned that the appellee will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellee by virtue or under color of office during his occupancy thereof. (1885, c. 406, s. 2; Rev., s. 842; C.S., s. 884; 1969, c. 44, s. 13.)

§ 1-530. Relator inducted into office; duty.

If the judgment is rendered in favor of the person alleged to be entitled, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office. It is his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he has been excluded. (C.C.P., ss. 371, 373; Code, ss. 611, 613; Rev., ss. 843, 844; C.S., s. 885.)

CASE NOTES

Recovery of Fees and Emoluments. — Compensation in damages for the loss of the fees and emoluments of the office could be recovered from the intruder who had received the same, in an action brought after the rendition of the judgment for money had and received to the relator's use. State ex rel. Howerton v. Tate, 70 N.C. 161 (1874); Swain v. McRae, 80 N.C. 111 (1879); State ex rel. Jones v. Jones, 80 N.C. 127 (1879).

Person Entitled Has Property Interest in Office. — A person who is rightfully entitled to an office, although not in the actual possession thereof, has a property interest therein, and may maintain an action for money had and received against a mere intruder who may perform the duties of such office for a time and receive the fees arising therefrom; and such intruder cannot retain any part of the fees as a compensation for his labor. State ex rel. Howerton v. Tate, 70 N.C. 161 (1874); Osborne v. Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

Oath and Bond. — Where defendant alleges that he refused to surrender the office because he was entitled thereto, his motion to amend his answer to allege, as a further reason for refusal, that the relator had not filed bond or taken the oath of office, is properly denied, since such further allegations do not constitute a defense, the filing of bond and the taking of oath not being required of relator when defendant refuses to surrender the office on the ground that he is the de jure officer, because in such circumstances such action would be a vain thing which the law does not require and it being expressly provided by this section, that if judgment is rendered in favor of the relator he shall be entitled to take over the office after taking oath and executing the official bond, and the fact that the motion is made after defendant has surrendered the office and the relator has filed bond and taken the oath, does not alter this result, the defense not being germane on the question of the right to the emoluments of the office between the time of relator's election and his actual induction into office. Osborne v. Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

It is the intention of the lawmaking power that one who is rightfully entitled to an office which another wrongfully claims and withholds shall not be required, as a condition precedent to an action to try title to that office, to do the vain thing of going through the formality of complying with the requirements for induction into the office. Osborne v. Canton, 219 N.C. 139, 13 S.E.2d 265 (1941).

Court Can Enforce Demand for Documents. — When the relator has taken office and made the demand for the books and papers belonging to the office, the court can issue any appropriate process to enforce compliance with such demand by a refractory or contumacious defendant. Rhodes v. Love, 153 N.C. 468, 69 S.E. 436 (1910).

Cited in Edwards v. Board of Educ., 235 N.C. 345, 70 S.E.2d 170 (1952).

§ 1-531. Refusal to surrender official papers misdemeanor.

If a person against whom a judgment has been rendered in an action brought to recover a public office shall fail or refuse to turn over, on demand, to the person adjudged to be entitled to such office, all papers, documents and books belonging to such office, he shall be guilty of a Class 1 misdemeanor. (C.C.P., s. 372; Code, s. 612; Rev., s. 3601; C.S., s. 886; 1993, c. 539, s. 2; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 1-532. Action to recover property forfeited to State.

When any property, real or personal, is forfeited to the State, or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in any superior court. (C.C.P., s. 381; Code, s. 621; Rev., s. 845; C.S., s. 887.)

CASE NOTES

This section describes a category of contraband which is not per se illegal to possess at all times but only derivatively subject to seizure due to its connection with illegal acts. State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913, cert. denied, 312 N.C. 497, 322 S.E.2d 564 (1984).

For a comparison of contraband per se and derivative contraband discussed in a Maryland case but recommended by the North Carolina Court of Appeals, see State v. Triplett, 70 N.C. App. 341, 318 S.E.2d 913, cert. denied, 312 N.C. 497, 322 S.E.2d 564 (1984).

ARTICLE 42.

Waste.

§ 1-533. Remedy and judgment.

Wrongs, remediable by the old action of waste, are subjects of action as other wrongs; and the judgment may be for damages, forfeiture of the estate of the party offending, and eviction from the premises. (C.C.P., s. 383; Code, s. 624; Rev., s. 853; C.S., s. 888.)

CASE NOTES

Waste Defined. — Waste is a spoiling or destroying of the estate, with respect to buildings, wood or soil, to the lasting injury of the inheritance; but the acts done or permitted which constitute such injury differ according to the condition of the country. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

Waste, at common law, was any permanent injury with respect to lands, houses, gardens, trees, or other corporeal hereditaments by the owner of an estate less than a fee. Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114

(1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

With reference to the lessor-lessee situation, waste has been defined as an implied obligation in every lease on the part of the lessee to use reasonable diligence to treat the premises in such a manner that no injury is done to the property. Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

Where the evidence did not conclusively show that defendants, lessees under a 30 year lease, committed waste, and on the contrary, there was plenary evidence that defendants made extensive improvements to all the rental units on the property, which they would be expected to do under a 30 year lease, plaintiff failed to establish a clear and uncontradicted prima facie case on the issue of waste, and the trial court erred in entering a directed verdict for plaintiff on this issue. Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

Nature of Action. — An action for wrongs in the nature of waste is not necessarily an action "for penalties," or "for damages merely vindictive"; on the contrary, the action is generally used to recover actual and substantial damages. And that an action survives when such is its purpose, either to or against the personal representative, is well established. Rippey v. Miller, 33 N.C. 247 (1850); Butner v. Keelhn, 51 N.C. 60 (1858); Collier v. Arrington, 61 N.C. 356 (1867); Peebles v. North Carolina R.R., 63 N.C. 238 (1869); Shuler v. Millsaps, 72 N.C. 297 (1874); Shields v. Lawrence, 72 N.C. 43 (1875).

Discretion of Jury. — It must be left, in large measure, to the discretion of the jury to say whether the destruction of timber, or giving up a cultivated field and permitting bushes to grow and take possession of it, in the light of the evidence in the case, has proved a lasting injury to the inheritance. King v. Miller, 99 N.C. 583, 6 S.E. 660 (1888); Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

In ascertaining whether a given act or omission subjects the tenant to liability, the condition of the land when dower was assigned should be compared with its state during the period for which damage is claimed. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

No one shall have an action of waste unless he has the immediate estate of inheritance. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

One entitled to a contingent remainder cannot maintain an action at law against the tenant in possession to recover damages for waste, for the reason that it cannot be known in advance of the happening of the contingency whether the contingent remainderman would suffer damage or loss by the waste; and if the estate never became vested in him, he would be paid for that which he had not lost. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

An action cannot be maintained by plaintiff a contingent remainderman because, if allowed, the life estate is destroyed by the forfeiture resulting from the waste under the statute, and yet the event upon which the plaintiff is to take his estate in remainder has not happened. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

If a person's interest is a contingent remainder, such person has no standing to maintain an action for waste and forfeiture under this section. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

But a contingent remainderman is entitled to an injunction to prevent a person in possession from committing future waste, the action being maintainable for the protection of the inheritance, which is certain, although the persons on whom it may fall are uncertain. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

Contingent and vested remainder distinguished. Edens v. Foulks, 2 N.C. App. 325, 163 S.E.2d 51 (1968).

Cited in Batten v. Corporation Comm'n, 199 N.C. 460, 154 S.E. 748 (1930).

§ 1-534. For and against whom action lies.

In all cases of waste, an action lies in the appropriate trial division of the General Court of Justice at the instance of him in whom the right is, against all persons committing the waste, as well tenant for term of life as tenant for term of years and guardians. (52 Hen. III, c. 23; 6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; R.C., c. 116, s. 1; Code, s. 625; Rev., s. 854; C.S., s. 889; 1971, c. 268, s. 33.)

CASE NOTES

The writ of waste is founded upon principles peculiar to itself and is dependent upon privy between the reversioner and tenant. No one shall have the action of waste, unless he has the immediate estate of inheritance; and between the heir of the reversioner and the tenant, who commits waste, there is no privy, the waste being committed in the lifetime of the reversioner. Browne v. Blick, 7 N.C. 511 (1819).

Contingent Remainderman Cannot Sue. — A contingent remainderman cannot sue for waste, but, for the protection of his right, he must resort to equity for the protection of his interest. Gordon v. Lowther, 75 N.C. 193 (1876); Latham v. Lumber Co., 139 N.C. 9, 51 S.E. 780 (1905); Richardson v. Richardson, 152 N.C. 705, 68 S.E. 217 (1910).

The judgment creditor is in no sense like a remainderman or reversioner. He cannot bring "the old action of waste," as it was at common law, nor is he embraced in any one of the classes "for and against whom an action of waste lies" under this section. Jones v. Britton, 102 N.C. 166, 9 S.E. 554 (1889).

The right to sue for waste includes the right to restrain its commission. Hinson v. Hinson, 120 N.C. 400, 27 S.E. 80 (1897); Morrison v. Morrison, 122 N.C. 598, 29 S.E. 901 (1898).

While persons holding a vested estate for life, coupled with contingent interest, are not liable in an action for waste, they and their tenants may be restrained from further despoiling and injuring the inheritance, where it appears that they have been removing from the land timber trees not cut down in the course of prudent husbandry. Gordon v. Lowther, 75 N.C. 193 (1876); Jones v. Britton, 102 N.C. 166, 9 S.E. 554 (1889); Farabow v. Green, 108 N.C. 339, 12 S.E. 1003 (1891).

Cited in Howell v. Shaw, 183 N.C. 460, 112 S.E. 38 (1922).

§ 1-535. Tenant in possession liable.

Where a tenant for life or years grants his estate to another, and still continues in the possession of the lands, tenements, or hereditaments, an action lies against the said tenant for life or years. (11 Hen. VI, c. 5; R.C., c. 116, s. 2; Code, s. 626; Rev., s. 855; C.S., s. 890.)

§ 1-536. Action by tenant against cotenant.

Where a joint tenant or a tenant in common commits waste, an action lies against him at the instance of his cotenant or joint tenant. (13 Edw. I, c. 22; R.C., c. 116, s. 4; Code, s. 627; Rev., s. 856; C.S., s. 891.)

Legal Periodicals. — For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?", see 18 Campbell L. Rev. 203 (1996).

CASE NOTES

Section Changes Common-Law Rule. — One of the settled rules at common law in England, was that one tenant in common could not sue his cotenant, except for partition. However, the legislature, feeling the practical difficulties at an early date, authorized a tenant in common to maintain an action for waste against his cotenant or joint tenant. And such tenant can also restrain his cotenant from the commission of waste. Morrison v. Morrison, 122 N.C. 598, 29 S.E. 901 (1898).

Under this section, one tenant in common may sue his cotenant for waste for cutting down trees to be sold as cross ties and hauled off the land. Hinson v. Hinson, 120 N.C. 400, 27 S.E. 80 (1897).

Applied in Daniel v. Tallassee Power Co., 204 N.C. 274, 168 S.E. 217 (1933).

Cited in Langley v. Moore, 64 N.C. App. 520, 307 S.E.2d 817 (1983).

§ 1-537. Action by heirs.

Every heir may bring action for waste committed on lands, tenements, or hereditaments of his own inheritance, as well in the time of his ancestor as in his own. (6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; R.C., c. 116, s. 5; Code, s. 628; Rev., s. 857; C.S., s. 892.)

CASE NOTES

Cited in Hybart v. Jones, 130 N.C. 227, 41 S.E. 293 (1902); State v. Palmer, 212 N.C. 10, 192 S.E. 896 (1937).

§ 1-538. Judgment for treble damages and possession.

In all cases of waste, when judgment is against the defendant, the court may give judgment for treble the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted, if the damages are not paid on or before a day to be named in the judgment. (6 Edw. I, c. 5; 20 Edw. I, st. 2; R.C., c. 116, s. 3; Code, s. 629; Rev., s. 858; C.S., s. 893.)

Legal Periodicals. — For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

CASE NOTES

Application of Section. — Under this section a life tenant, who, by neglect or wantonness, occasions permanent waste or injury to the inheritance, whether voluntary or permissive, thereby subjects himself to liability to pay the actual damages, or treble damages, at the discretion of the judge, and also to forfeit the place wasted on a day to be fixed by the judge, if he should in the meantime fail to pay the damages recovered of him. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

Section Changes Former Law. — This section is substantially the same as the law in force before the enactment of the Code except for two important changes. The word "may" has been substituted for "shall" in the old statute of Gloucester, and, by a qualification added to it, the judgment for the place wasted must be conditional, and can take effect only upon the failure of the defendant to pay the actual damages before a day certain. It is therefore left within the sound discretion of the judge who tries the action to determine whether he will give treble or single damages, as well as to fix a day after which a writ of possession may issue for the place wasted, if the damage allowed shall not have been in the meantime actually paid. The old statute was, manifestly, amended when the Code was enacted, for the purpose of vesting a discretionary power in the court in reference to the amount of the judgment, and fixing the time for forfeiture of the place wasted on failure to pay the amount recovered. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

For case discussing prospective damages, see Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

Judgment Must Be in Accord with This Section. — In an action by remaindermen against the life tenant for waste under G.S. 1-533, judgment must be in accord with this section, and the court in such action has no authority to order the realty to be sold and the life tenant's share, diminished in the amount of damages awarded by the jury for waste, paid to the life tenant. Parrish v. Parrish, 247 N.C. 584, 101 S.E.2d 480 (1958).

In an action for waste where the jury finds insignificant damages, judgment will be arrested. Sheppard v. Sheppard, 3 N.C. 382 (1806).

Judgment for Damages Only Authorized. — It is not error for the judgment in an action of waste to be for the damages only, and not also for the place wasted. Bright v. Wilson, 1 N.C. 251 (1800).

New Action for Subsequent Injury Authorized. — If the life tenant should allow the inheritance to sustain further injury after the time of trial, damage may be recovered in another action. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

Appeal. — Under this section the court may give judgment for treble damages and the place wasted, and on appeal the court will not make such discretionary power obligatory. Sherrill v. Connor, 107 N.C. 630, 12 S.E. 588 (1890).

Cited in Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

ARTICLE 43.

Nuisance and Other Wrongs.

§ 1-538.1. Strict liability for damage to person or property by minors.

Any person or other legal entity shall be entitled to recover actual damages suffered in an amount not to exceed a total of two thousand dollars ($2,000) from the parent or parents of any minor who shall maliciously or willfully injure such person or destroy the real or personal property of such person. Parents whose custody and control have been removed by court order or by contract prior to the act complained of shall not be liable under this act. This act shall not preclude or limit recovery of damages from parents under common law remedies available in this State. (1961, c. 1101; 1981, c. 414, s. 1; 1993, c. 540, s. 1.)

Legal Periodicals. — For survey of 1981 tort law, see 60 N.C.L. Rev. 1465 (1982).

CASE NOTES

Constitutionality. — The enactment of this section is within the police power of the State and it is not violative of the provisions of N.C. Const., Art. I, § 17, or of the provisions of U.S. Const., Amend. V. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

This section gives to the parents of children a full opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case, which is uniform and regular and in accord with fundamental rules which do not violate fundamental rights. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Purpose of Section. — This section and similar statutes appear to have been adopted not out of consideration for providing a restorative compensation for the victims of injurious or tortious conduct of children, but as an aid in the control of juvenile delinquency. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

The rationale of this section apparently is that parental indifference and failure to supervise the activities of children is one of the major causes of juvenile delinquency; that parental liability for harm done by children will stimulate attention and supervision; and that the total effect will be a reduction in the anti-social behavior of children. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Section Imposes Vicarious Liability on Parents. — In an action against the parents under this section the complaint is not fatally defective because it fails to allege that any act or omission to act on the part of the defendants was the proximate cause of an injury to plaintiff, for the reason that this section imposes vicarious liability upon parents by virtue of their relationship for the malicious or wilfull destruction of property by a child under the age of eighteen. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

At common law, the mere relationship of parent and child was not considered a proper basis for imposing vicarious liability upon the parent for the torts of the child. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Parental liability for a child's tort at common law was imposed generally in two situations, i.e., where there was an agency relationship, or where the parent was himself guilty in the commission of the tort in some way. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

For the plaintiff to recover from the parents he must establish, inter alia, by the greater weight of the evidence, that the minor was under the age of eighteen years, and that the child maliciously or wilfully destroyed property, real, personal, or mixed. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Insurer Paying Loss May Sue on Subrogated Claim. — An insurance company, as plaintiff, may bring suit in its own name against defendants upon a claim to which it has become subrogated by payment in full of its loss to its insured under the provisions of its policy of insurance, who pursuant to the provisions of this section, would have been able to bring such an action in its own name. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963).

Application of Section. — For application of section to automobile collision case, see Smith v. Simpson, 260 N.C. 601, 133 S.E.2d 474 (1963).

The limit of the parents' civil liability for damage "maliciously or willfully" done to property by a juvenile pursuant to this section is not the proper criteria for determining the punishment to be imposed upon that juvenile found to be delinquent under G.S. 7A-649 [see now G.S. 7B-2506]. In re Register, 84 N.C. App. 336, 352 S.E.2d 889 (1987).

Applied in In re Berry, 33 N.C. App. 356, 235 S.E.2d 278 (1977).

Cited in S & N Freight Line v. Bundy Truck Lines, 3 N.C. App. 1, 164 S.E.2d 89 (1968); Moore v. Crumpton, 55 N.C. App. 398, 285 S.E.2d 842 (1982).

§ 1-538.2. Civil liability for larceny, shoplifting, theft by employee, embezzlement, and obtaining property by false pretense.

(a) Any person, other than an unemancipated minor, who commits an act that is punishable under G.S. 14-72, 14-72.1, 14-74, 14-90, or 14-100 is liable for civil damages to the owner of the property. In any action brought by the owner of the property, the owner is entitled to recover the value of the goods or merchandise, if the goods or merchandise have been destroyed, or any loss of value to the goods or merchandise, if the goods or merchandise were recovered, or the amount of any money lost by reason of the theft or embezzlement or fraud of an employee. In addition to the above, the owner of the property is entitled to recover any consequential damages, and punitive damages, together with reasonable attorneys' fees. The total compensatory and consequential damages awarded to a plaintiff against a defendant under this section shall not be less than one hundred fifty dollars ($150.00) and shall not exceed one thousand dollars ($1,000), except an act punishable under G.S. 14-74 or G.S. 14-90 shall have no maximum limit under this section.

(b) The parent or legal guardian, having the care, custody and control of an unemancipated minor who commits an act punishable under G.S. 14-72, 14-72.1, 14-74, 14-90, or 14-100, is civilly liable to the owner of the property obtained by the act if such parent or legal guardian knew or should have known of the propensity of the child to commit such an act; and had the opportunity and ability to control the child, and made no reasonable effort to correct or restrain the child. In an action brought against the parent or legal guardian by the owner, the owner is entitled to recover the amounts specified in subsection (a) except punitive damages. The total compensatory and consequential damages awarded to a plaintiff against the parent or legal guardian shall not be less than one hundred fifty dollars ($150.00) and shall not exceed one thousand dollars ($1,000).

(c) An action may be brought under this section regardless of whether a criminal action is brought or a criminal conviction is obtained for the act alleged in the civil action.

(c1) For the purposes of this section, consequential damages shall include, but shall not be limited to:

(1) The salary paid to any employee for investigation, reporting, testifying, or any other time related to the investigation or prosecution for any violation under subsection (a) of this section; and

(2) Any costs, such as mileage, postage, stationery, or telephone expenses that were incurred as a result of the violation.

(c2) The owner of the property may seek payment for damages under subsections (a) and (b) of this section prior to filing a civil action, by sending the violator a demand letter. If such a letter is sent, it shall be substantially similar to the following:

> "Our records show that on (date), you unlawfully took possession of property from (store name/owner of the property), located in (city, state), without the consent of (store name/owner of the property), without paying for the property, and with the intent of converting the property to your own use. In accordance with G.S. 1-538.2, we are authorized to demand that you pay damages of one hundred fifty dollars ($150.00).
>
> In the event you fail to comply with our demand for one hundred fifty dollars ($150.00) within 15 days from the date of your receipt of the notice, you may be held civilly liable for an amount not less than one hundred fifty dollars ($150.00) and not more than one thousand dollars ($1,000) in a civil action against you to recover the penalties

and damages authorized by law, which include court costs and attorneys' fees. If you pay the one hundred fifty dollars ($150.00), (store name/owner of the property) will have no further civil remedy against you arising from the events occurring on (date).

If you are the parent or legal guardian of an unemancipated minor who unlawfully took possession of property as set out above, you can be held liable if you knew or should have known of the propensity of the child to commit the act complained of, and you had the opportunity and ability to control the child and you made no reasonable effort to correct or restrain the child.

If you believe you have received this notice in error, please contact (name) immediately.

YOU HAVE A RIGHT TO CONTEST YOUR LIABILITY IN COURT."

(c3) The owner of the property sending the demand letter required by this section shall have qualified privilege from any civil liability resulting therefrom provided that there is no excessive publication and that the owner acted in good faith and without malice.

(c4) If the recipient of a notice pursuant to subsection (c2) of this section pays the demanded one hundred fifty dollars ($150.00) within 15 days of the recipient's receipt of the notice, the owner of the property shall have no further civil remedy against that violator for the incident described in the notice.

(d) Nothing contained in this act shall prohibit recovery upon any other theory in the law. (1987, c. 519, s. 1; 1987 (Reg. Sess., 1988), c. 1081, s. 4.1; 1995, c. 185, s. 1; 1995 (Reg. Sess., 1996), c. 742, s. 3.)

CASE NOTES

Civil Penalty Under the Statute Did Not Lead to Violation of Double Jeopardy Clause. — Where the attorney for the store from which defendant stole a pair of shoes demanded in a letter pursuant to G.S. 1-538.2 that defendant pay the owner of the store $200, and defendant paid the store owner $200, the payment by defendant of the $200 did not constitute a criminal sanction, and thus defendant's ensuing conviction for misdemeanor larceny did not violate the Double Jeopardy Clause. State v. Beckham, 148 N.C. App. 282, 558 S.E.2d 255, 2002 N.C. App. LEXIS 14 (2002).

Cited in State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

§ 1-538.3. Negligent supervision of minor.

(a) The parent or individual legal guardian who has the care, custody, and control of an unemancipated minor may be held civilly liable to an educational entity for the negligent supervision of that minor if the educational entity proves by clear, cogent, and convincing evidence that:

(1) The minor:

a. Violated the provisions of G.S. 14-49, 14-49.1, 14-50, 14-69.1(c), 14-69.2(c), 14-269.2(b1), 14-269.2(c1), or committed a felony offense involving injury to persons or property through use of a gun, rifle, pistol, or other firearm of any kind as defined in G.S. 14-269.2(b); and

b. The offense occurred on educational property; and

(2) The parent or individual legal guardian who has the care, custody, and control of the minor:

a. Knew or reasonably should have known of the minor's likelihood to commit such an act;

b. Had the opportunity and ability to control the minor; and

c. Made no reasonable effort to correct, restrain, or properly supervise the minor.

(b) In an action brought against the parent or legal guardian under this section for a false report, hoax, or possession of a bomb or other explosive device on educational property, the educational entity is entitled to recover the actual compensatory and consequential damages resulting from the disruption or dismissal of school or the school-sponsored activity arising from the false report, the hoax, the bringing or possession of a bomb or other explosive device onto educational property or to a school-sponsored activity. The total amount of compensatory and consequential damages awarded to a plaintiff against the parent or legal guardian pursuant to this subsection shall not exceed twenty-five thousand dollars ($25,000).

(c) In an action brought against the parent or legal guardian under this section, the educational entity is entitled to recover the actual compensatory and consequential damages to educational property that is the result of the discharge of the firearm or the detonation or explosion of the bomb or other explosive device. The total amount of compensatory and consequential damages awarded to a plaintiff against the parent or legal guardian pursuant to this subsection shall not exceed fifty thousand dollars ($50,000).

(d) For purposes of this section, the term "educational property" has the same definition as in G.S. 14-269.2(a)(1), and the term "educational entity" means the board of education or other entity that administers and controls the educational property or the school-sponsored activity.

(e) Nothing contained in this section shall prohibit recovery upon any other theory in the law. (1999-257, s. 5.)

Legal Periodicals. — For survey on new penalties for criminal behavior in schools, see 22 Campbell L. Rev. 253 (2000).

§ 1-539. Remedy for nuisance.

Injuries remediable by the old writ of nuisance are subjects of action as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or both. (C.C.P., s. 387; Code, s. 630; Rev., s. 825; C.S., 894.)

Cross References. — As to injunction against nuisance, see G.S. 1-485.

CASE NOTES

Nuisance Defined. — That which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him is a nuisance. Baltimore & P.R.R. v. Fifth Baptist Church, 108 U.S. 317, 2 S. Ct. 719, 27 L. Ed. 739 (1883).

A private nuisance exists where the right or privilege interfered with is essentially a private one. If the offense is so general as to affect a number of citizens in the neighborhood the aggravation of offenses will amount to a public wrong and may be the subject of a public prosecution. But in such a case the individual can still maintain a civil action, and he need not show that his particular damage differs in kind and degree from that of the other individuals affected. McManus v. Southern Ry., 150 N.C. 655, 64 S.E. 766 (1909).

Adequate Remedies Available for Nuisance. — Where a nuisance has been established, working harm to the rights of an individual citizen, the law of North Carolina is searching and adequate to afford an injured person ample redress, both by remedial and preventive remedies. McManus v. Southern Ry., 150 N.C. 655, 64 S.E. 766 (1909).

The ancient writ of nuisance has been superseded under this section by civil action for damages or for a removal of the nuisance, or for both. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

Damages in nuisance action should be such as to lead to the abatement of the nuisance. Bradley v. Amis, 3 N.C. 399 (1806).

Appreciable Damage Must Be Suffered. — To sustain an action for a nuisance, public or private, which does not involve the physical invasion of the property of another, it is always required to be shown that some appreciable damage has been suffered, or that some serious or irreparable injury is threatened, and unless this is made to appear a right to nominal damages does not arise. McManus v. Southern Ry., 150 N.C. 655, 64 S.E. 766 (1909).

An individual may not maintain an action for a public nuisance unless he shows unusual and special damage, different from that suffered by the general public. Pedrick v. Railroad, 143 N.C. 485, 55 S.E. 877 (1906); McManus v. Southern Ry., 150 N.C. 655, 64 S.E. 766 (1909); Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

An action by an individual to abate a nuisance cannot be successfully resisted on the ground that no special damage to the plaintiff has been shown, when it appears that the nuisance complained of was the fact that the defendant caused water to flood adjoining lands, which bred fever carrying mosquitoes, thereby inflicting sickness on the plaintiff and his family, although others in the community suffered sickness from the same cause. Pruitt v. Bethell, 174 N.C. 454, 93 S.E. 945 (1917).

One suffering peculiar damages from a public nuisance is not restricted but may sue for an injunction. Reyburn v. Sawyer, 135 N.C. 328, 47 S.E. 761 (1904).

Where the nuisance is continuous and recurrent and the injury irreparable, and remedy by way of damages inadequate, equity will restrain, even though the enterprise be in itself lawful. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

Permanent Damages for Continued Trespass or Nuisance. — In North Carolina, the landowner may recover permanent damages from a defendant municipality or other corporation having the power of eminent domain when that body intends to continue committing trespass or nuisance; in such a situation, the remedy of abatement is not available. Rudd v. Electrolux Corp., 982 F. Supp. 355 (M.D.N.C. 1997).

Permanent damages for the depreciation of property cannot be recovered. The owners may enjoin commission of the acts constituting the nuisance and recover such temporary damages as their property has sustained thereby. Taylor v. Seaboard Air Line Ry., 145 N.C. 400, 59 S.E. 129 (1907).

Proximate Cause. — In order to recover damages the maintenance of a public nuisance must be the proximate cause of the injuries. McGhee v. Norfolk & S. Ry., 147 N.C. 142, 60 S.E. 912 (1908).

Abatement of a private nuisance is not dependent upon recovery of damages. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

Plaintiff alleged that by reason of the topography and the manner of its use and operation, planes using the airport on adjoining planes using the airport on adjoining property flew over plaintiff's clinic at a height of not more than 100 feet, so as to constitute a recurrent danger and disturbance to plaintiff and patients of his clinic. It was held that the complaint alleged a private nuisance, and upon verdict of the jury that the airport constituted a nuisance as alleged in the complaint, plaintiff was entitled to enjoin such use notwithstanding the further finding of the jury that plaintiff had not been damaged in a special and peculiar way. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

An airport is not a nuisance per se, but may become a nuisance if its location, structure and manner of use and operation result in depriving complainant of the comfort and enjoyment of his property. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949).

Plaintiffs were not entitled to recover for future flooding in nuisance proceeding. Plaintiff's remedy in nuisance proceeding between private parties is by successive suits brought from time to time against the author of the nuisance as long as the noxious condition is maintained, in which he may recover past damages down to the time of trial. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990).

Diminution of Damage. — In an action for damages from a permanent nuisance, the suit being in the nature of a proceeding to condemn the plaintiff's property, it was held, that special benefits arising out of the establishment of the nuisance may be set off in diminution of damages. Brown v. Virginia-Carolina Chem. Co., 162 N.C. 83, 77 S.E. 1102 (1913).

Cited in Hampton v. North Carolina Pulp Co., 49 F. Supp. 625 (E.D.N.C. 1943); Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); Moore v. Sullivan, 123 N.C. App. 647, 473 S.E.2d 659 (1996).

§ 1-539.1. Damages for unlawful cutting, removal or burning of timber; misrepresentation of property lines.

(a) Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

(b) If any person, firm or corporation shall willfully and intentionally set on fire, or cause to be set on fire, in any manner whatever, any valuable wood, timber or trees on the lands of another, such person, firm or corporation shall be liable to the owner of said lands for double the value of such wood, timber or trees damaged or destroyed thereby.

(c) Any person, firm or corporation cutting timber under contract and incurring damages as provided in subsection (a) of this section as a result of a misrepresentation of property lines by the party letting the contract shall be entitled to reimbursement from the party letting the contract for damages incurred. (1945, c. 837; 1955, c. 594; 1971, c. 119; 1977, c. 859.)

Legal Periodicals. — For article discussing remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Strict Construction. — Strict construction of this section requires that everything be excluded from the operation of the section which does not come within the scope of the language used, taking the words in their natural and ordinary meaning. Jones v. Georgia-Pacific Corp., 15 N.C. App. 515, 190 S.E.2d 422 (1972).

Application of Section. — In order for this statute to apply, the defendant must be a trespasser to the land and must injure, cut or remove wood, timber, shrubs, or trees thereon or therefrom. Matthews v. Brown, 62 N.C. App. 559, 303 S.E.2d 223 (1983).

Effect of Section. — This section not only doubles the value of the timber cut but imposes strict liability as well. Britt v. Georgia-Pacific Corp., 46 N.C. App. 107, 264 S.E.2d 395 (1980).

Damages Are to Be Assessed Before Crediting Defendant. — Where trial judge signed a judgment which denied plaintiff's motion to double the timber value because he found that credits to defendant left no damages to double, the trial court erred in failing to double the damages for the unlawful cutting of timber pursuant to subsection (a) of this section; the $22,000.00 amount assigned to the value of the cut timber should have been doubled to equal a $44,000.00 judgment against defendant. Because plaintiff had stipulated that defendant was to be allowed a credit for proceeds recovered by plaintiff and for the value of timber left on the ground at the tract, defendant was entitled to a credit from the $44,000.00 judgment in the amount of $20,140.00. Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992).

Double Timber Value. — This section authorizes doubling timber value, but not doubling loss in property value. Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999).

Alternative Measures of Damages. — Where plaintiff sues for the unlawful cutting or removal of timber, there are two alternative measures of damages available. One gives the landowner the difference in the value of his property immediately before and immediately after the cutting, and the other gives plaintiff the value of the timber itself. This latter value is then doubled by reason of this section, which allows plaintiff to recover double the value of timber cut or removed. Britt v. Georgia-Pacific Corp., 46 N.C. App. 107, 264 S.E.2d 395 (1980).

Plaintiffs who sought to recover both their statutory damages for cut timber and damages for diminution in value of their property elected to recover their statutory damages when they proceeded upon that theory at trial and recovered damages thereunder. Britt v. Georgia-Pacific Corp., 46 N.C. App. 107, 264 S.E.2d 395 (1980).

A plaintiff suing for unlawful cutting or removal of timber may recover either (1) the difference in value of the property immediately before and immediately after the cutting (in addition to punitive damages), or (2) double the value of the timber itself, but not both. Barnard v. Rowland, 132 N.C. App. 416, 512 S.E.2d 458 (1999).

Owner May Recover Value Added by Intentional Wrongdoer. — If the trespasser is an intentional and knowing wrongdoer, the owner of the land may recover the enhanced value of the timber added to it by the labor of the trespasser. Jones v. Georgia-Pacific Corp., 15 N.C. App. 515, 190 S.E.2d 422 (1972).

But This Section and the Enhanced Value Theory Are Mutually Exclusive. — The common-law theory of enhanced value and the statutory remedy of double value are mutually exclusive. Jones v. Georgia-Pacific Corp.,

15 N.C. App. 515, 190 S.E.2d 422 (1972).

And Section May Not Be Applied to Enhanced Value. — A strict interpretation of this section would not permit its application to an enhanced value situation. Jones v. Georgia-Pacific Corp., 15 N.C. App. 515, 190 S.E.2d 422 (1972).

While this section provides that the wrongdoer shall be liable to the owner of the land for double the value of the wood or trees injured, cut or removed, the statute does not indicate when the value should be doubled. To collect double the enhanced value plaintiffs would be proceeding under the common-law theory of an action in trover to recover the value of the goods in their enhanced condition and at the same time proceeding under the statutory remedy. The two remedies are exclusive and are not to be combined to provide an additional remedy. Jones v. Georgia-Pacific Corp., 15 N.C. App. 515, 190 S.E.2d 422 (1972).

In order to recover penalties under this section plaintiff must establish ownership of the land from which the timber was cut. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

In order to sustain an action for permanent damages to the freehold, or to the ownership interest, such as an action for unlawful cutting of timber, plaintiff must allege and show that he is the owner of the land from which the timber was cut. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Defendants' denial of plaintiff's allegation of title and trespass placed the burden on plaintiff of establishing each of these allegations. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Where the plaintiff claims damages for unlawful cutting of timber, he is claiming permanent damages to the freehold, or damages to the ownership interest, and his right to recover depends upon his establishing his title to the described lands. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

In an action for permanent damages to the freehold, or to the ownership interest, plaintiff must rely upon the strength of his own title. This requirement may be met by various methods: (1) He may offer a connected chain of title or a grant direct from the State to himself; (2) Without exhibiting any grant from the State, he may show open, notorious, continuous adverse and unequivocal possession of the land in controversy, under color of title in himself and those under whom he claims, for 21 years before the action was brought; (3) He may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title to himself and those under whom he claims, for seven years before the action was brought; (4) He may show, as against the State, possession under known and visible boundaries for 30 years, or as against individuals for 20 years before the action was brought; (5) He can prove title by estoppel, as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought; or (6) He may connect the defendant with a common source of title and show in himself a better title from that source. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

The possession of real property is not a sufficient interest upon which to base a recovery for permanent damages to the freehold — the ownership interest. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Defendant's entry upon plaintiff's land was authorized even though defendant knew or should have known that plaintiff's president exceeded his authority when he signed and accepted payment under the agreement made with defendant; since neither the officers, directors nor shareholders of plaintiff objected at any time to the timber being cut and removed, the cutting and removal of timber was in the ordinary course of plaintiff's business and plaintiff had authorized the president to clear the land, plaintiff's president had the apparent authority to bind plaintiff-corporation to the timber agreement with defendant, and the trial court was correct in granting defendant's motion for summary judgment on the trespass claim. Sentry Enters., Inc. v. Canal Wood Corp., 94 N.C. App. 293, 380 S.E.2d 152 (1989).

Instruction Directing Jury to Double Damages Authorized. — In an action for wrongful cuttings of timber on plaintiffs' land, it was not error for the court to instruct the jury that if they found the plaintiffs had suffered damages they should double the amount of damages in arriving at their verdict, rather than instructing the jury to determine the amount of damages and then doubling it himself. Pridgen v. Callaway, 44 N.C. App. 163, 260 S.E.2d 441 (1979).

Award of Double Damages Is Not Within the Judge's Discretion. — Trial judge erred by refusing to instruct the jury to award double damages and by subsequently failing to order double damages. The phrase "shall be liable" in the statutory provision provides that double damages must be ordered when the requirements of the statute are met. The plain language of the statute indicates that an award of double damages is not within the judge's discretion. Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992).

Trespass Not Established. — Plaintiffs were not entitled to double damages under G.S. 1-539.1 where the logger allegedly harvested timber and removed it from their land without permission; the trespass element of G.S. 1-539.1 was not established because third-party defendant, a tenant-in-common with plaintiffs, gave the logger consent to harvest and remove timber from the property. Mitchell v. Broadway, 177 N.C. App. 430, 628 S.E.2d 847, 2006 N.C. App. LEXIS 980 (2006).

Applied in Pine Burr Golf, Inc. v. Poole, 8 N.C. App. 92, 173 S.E.2d 478 (1970); Barringer v. Weathington, 11 N.C. App. 618, 182 S.E.2d 239 (1971); Tyson v. Winstead, 15 N.C. App. 585, 190 S.E.2d 281 (1972); Dawson v. Sugg, 32 N.C. App. 650, 233 S.E.2d 639 (1977); Hefner v. Stafford, 64 N.C. App. 707, 308 S.E.2d 93 (1983); Moon v. Central Bldrs., Inc., 65 N.C. App. 793, 310 S.E.2d 390 (1984).

Cited in Paschal v. Autry, 256 N.C. 166, 123 S.E.2d 569 (1962); Brandenburg Land Co. v. White, 26 N.C. App. 548, 216 S.E.2d 912 (1975); Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978); Hollowell v. Hollowell, 107 N.C. App. 166, 420 S.E.2d 827 (1992).

§ 1-539.2. Dismantling portion of building.

When one person owns a portion of a building and another or other persons own the remainder of said building, neither of said owners shall dismantle his portion of said building without making secure the portions of said building belonging to other persons. Any person violating the provisions of this section shall be responsible in damages to the owners of other portions of such building. (1955, c. 1359.)

§ 1-539.2A. Damages for computer trespass.

(a) Any person whose property or person is injured by reason of a violation of G.S. 14-458 may sue for and recover any damages sustained and the costs of the suit. Without limiting the general of the term, "damages" shall include loss of profits. If the injury arises from the transmission of unsolicited bulk commercial electronic mail, the injured person, other than an electronic mail service provider, may also recover attorneys' fees and may elect, in lieu of actual damages, to recover the lesser of ten dollars ($10.00) for each and every unsolicited bulk commercial electronic mail message transmitted in violation of this section, or twenty-five thousand dollars ($25,000) per day. The injured person shall not have a cause of action against the electronic mail service provider which merely transmits the unsolicited bulk commercial electronic mail over its computer network. If the injury arises from the transmission of unsolicited bulk commercial electronic mail, an injured electronic mail service provider may also recover attorneys' fees and costs and may elect, in lieu of actual damages, to recover the greater of ten dollars ($10.00) for each and every unsolicited bulk commercial electronic mail message transmitted in violation of this section, or twenty-five thousand dollars ($25,000) per day.

(b) A civil action under this section shall be commenced before expiration of the time period prescribed in G.S. 1-54. In actions alleging injury arising from the transmission of unsolicited bulk commercial electronic mail, personal jurisdiction may be exercised pursuant to G.S. 1-75.4. (1999-212, s. 4; 1999-456, s. 8.)

§ 1-539.2B. Double damages for injury to agricultural commodities or production systems; define value of agricultural commodities grown for educational, testing, or research purposes.

(a) Any person who unlawfully and willfully injures or destroys any other person's agricultural commodities or production system is liable to the owner for double the value of the commodities or production system injured or destroyed.

(b) For purposes of this section, the value of agricultural commodities that are grown for educational, testing, or research purposes includes all of the following:

(1) The diminution in market value of the commodities when the commodities were grown for sale and the plaintiff is the entity who sold the commodities or would have sold the commodities but for their injury or destruction.
(2) Costs to the plaintiff for research and development of the injured or destroyed commodities.
(3) Other incidental and consequential damages proven to have been incurred by the plaintiff.

(c) For the purpose of this section, the following definitions apply:
(1) "Agricultural commodities" means:
  a. Commodities produced for individual and public use, consumption, and marketing from one of the following:
    1. The cultivation of soil or hydroponics or any other method of production for crops, including fruits, vegetables, flowers, and ornamental plants.
    2. The planting and production of trees, timber, forests, or forest products.
    3. The raising of livestock, poultry, and eggs.
    4. Aquaculture as defined in G.S. 106-758.
  b. Seed, genetic material, tissue cultures, and any research and development materials, information, and records related to items included in subdivision (1)a. of this subsection developed or used for educational, testing, or research purposes.
(2) "Production systems" means land, buildings, and equipment used in the production of agricultural commodities, including aquaculture facilities as defined in G.S. 106-758. (2001-290, s. 1.)

§ 1-539.2C. Damages for identity theft.

(a) Any person whose property or person is injured by reason of an act made unlawful by Article 19C of Chapter 14 of the General Statutes, or a violation of G.S. 75-66, may sue for civil damages. For each unlawful act, or each violation of G.S. 75-66, damages may be
(1) In an amount of up to five thousand dollars ($5,000), but no less than five hundred dollars ($500.00), or
(2) Three times the amount of actual damages,
whichever amount is greater. A person seeking damages as set forth in this section may also institute a civil action to enjoin and restrain future acts that would constitute a violation of this section. The court, in an action brought under this section, may award reasonable attorneys' fees to the prevailing party.

(b) If the identifying information of a deceased person is used in a manner made unlawful by Article 19C of Chapter 14 of the General Statutes, or by a violation of G.S. 75-66, the deceased person's estate shall have the right to recover damages pursuant to subsection (a) of this section.

(c) The venue for any civil action brought under this section shall be the county in which the plaintiff resides or any county in which any part of the alleged violation of G.S. 75-66, G.S. 14-113.20 or G.S. 14-113.20A took place, regardless of whether the defendant was ever actually present in that county. Civil actions under this section must be brought within three years from the date on which the identity of the wrongdoer was discovered or reasonably should have been discovered.

(d) Civil action under this section does not depend on whether or not a criminal prosecution has been or will be instituted under Article 19C of Chapter 14 of the General Statutes for the acts which are the subject of the civil action. The rights and remedies provided by this section are in addition to any other rights and remedies provided by law. (2002-175, s. 8; 2005-414, s. 9; 2007-534, s. 3.)

ARTICLE 43A.

Adjudication of Small Claims in Superior Court.

§§ 1-539.3 through 1-539.8: Repealed by Session Laws 1971, c. 268, s. 34.

ARTICLE 43B.

Defense of Charitable Immunity Abolished; and Qualified Immunity for Volunteers.

§ 1-539.9. Defense abolished as to actions arising after September 1, 1967.

The common-law defense of charitable immunity is abolished and shall not constitute a valid defense to any action or cause of action arising subsequent to September 1, 1967. (1967, c. 856.)

CASE NOTES

Cited in Darsie v. Duke Univ., 48 N.C. App. 20, 268 S.E.2d 554 (1980).

§ 1-539.10. Immunity from civil liability for volunteers.

(a) A volunteer who performs services for a charitable organization or a volunteer engaged in providing emergency services is not liable in civil damages for any acts or omissions resulting in any injury, death, or loss to person or property arising from the volunteer services rendered if:

(1) The volunteer was acting in good faith and the services rendered were reasonable under the circumstances; and

(2) The acts or omissions do not amount to gross negligence, wanton conduct, or intentional wrongdoing.

(3) The acts or omissions did not occur while the volunteer was operating or responsible for the operation of a motor vehicle.

(b) To the extent that any charitable organization or volunteer has liability insurance, that charitable organization or volunteer shall be deemed to have waived the qualified immunity herein to the extent of indemnification by insurance for the negligence by any volunteer.

(c) Nothing herein shall be construed to alter the standard of care requirement or liability of persons rendering professional services. (1987, c. 505, s. 1(2); 2005-273, s. 1.)

CASE NOTES

Volunteer Must Make Showing of Entitlement to Immunity. — This section provides immunity from civil liability for volunteers performing services for charitable organizations under specific circumstances, and the trial court was not required to dismiss an action that an injured party filed against a church and a person who volunteered to work at a church festival until the volunteer showed that he was entitled to immunity from liability under the statute. Clontz v. St. Mark's Evangelical Lutheran Church, 157 N.C. App. 325, 578 S.E.2d 654, 2003 N.C. App. LEXIS 537 (2003), cert. denied, 357 N.C. 249, 582 S.E.2d 29 (2003).

§ 1-539.11. Definitions.

As used in this Article:

(1) "Charitable Organization" means an organization that has humane and philanthropic objectives, whose activities benefit humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward and is exempt from taxation under either G.S. 105-130.11(a)(3) or G.S. 105-130.11(a)(5) or Section 501(c)(3) of the Internal Revenue Code of 1954.

(1a) "Emergency services" means the preparation for and the carrying out of functions to prevent, minimize, and repair injury and damage resulting from natural or man-made disasters and all other activities necessary or incidental to the preparation for and carrying out of these functions. These functions include firefighting services, police services, medical and health services, rescue services, engineering services, land surveying services, warning services and communications, radiological, chemical and other special weapons defense services, evacuation of persons from stricken areas, emergency welfare services, including providing emergency shelter, emergency transportation, and emergency resource management services, existing or properly assigned plant protection services, temporary restoration of public utility services, services performed as a function of a Medical Reserve Corps (MRC) unit or a Community Emergency Response Team (CERT), and other functions related to civilian protection, including the administration of approved State and federal disaster recovery and assistance programs.

(2) "Volunteer" means an individual, serving as a direct service volunteer performing services for a charitable, nonprofit organization, who does not receive compensation, or anything of value in lieu of compensation, for the services, other than reimbursement for expenses actually incurred or any person providing emergency services without any financial gain. (1987, c. 505, s. 1(2); 2005-273, s. 2.)

§ 1-539.12. Immunity from civil liability for employers disclosing information.

(a) An employer who discloses information about a current or former employee's job history or job performance to a prospective employer of the current or former employee upon request of the prospective employer or upon request of the current or former employee is immune from civil liability and is not liable in civil damages for the disclosure or any consequences of the disclosure. This immunity shall not apply when a claimant shows by a preponderance of the evidence both of the following:

(1) The information disclosed by the current or former employer was false.

(2) The employer providing the information knew or reasonably should have known that the information was false.

(b) For purposes of this section, "job performance" includes:

(1) The suitability of the employee for re-employment;

(2) The employee's skills, abilities, and traits as they may relate to suitability for future employment; and

(3) In the case of a former employee, the reason for the employee's separation.

(c) The provisions of this section apply to any employee, agent, or other representative of the current or former employer who is authorized to provide and who provides information in accordance with the provisions of this section. For the purposes of this section, "employer" also includes a job placement service but does not include a private personnel service as defined in G.S. 95-47.1 or a job listing service as defined in G.S. 95-47.19 except as provided hereinafter. The provisions of this section apply to a private personnel service as defined in G.S, 95-47.1 and a job listing service as defined in G.S. 95-47.19 only to the extent that the service conveys information derived from credit reports, court records, educational records, and information furnished to it by the employee or prior employers and the service identifies the source of the information.

(d) This section does not affect any privileges or immunities from civil liability established by another section of the General Statutes or available at common law. (1997-478, s. 1.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 389.

For survey, "Survey of Developments in North Carolina Law and the Fourth Circuit, 1999: Potential Violence to the Bottom Line — Expanding Employer Liability for Acts of Workplace Violence in North Carolina," see 79 N.C.L. Rev. 2053 (2000).

§§ 1-539.13 through 1-539.14: Reserved for future codification purposes.

ARTICLE 43C.

Actions Pertaining to Local Units of Government.

§ 1-539.15: Repealed by Session Laws 1981, c. 777, s. 1.

§ 1-539.16. Notice of claims against local units of government.

No local act, including city charters, shall require a notice to a local unit of government of any claim against it and prohibit suit against the local unit if notice is not given or limit the period during which an action may be brought on such a claim after notice has been given. (1981, c. 777, s. 2.)

Legal Periodicals. — For comment, "Municipal Tort Liability for Negligent Failure to Provide Adequate Police Protection," see 20 Wake Forest L. Rev. 697 (1984).

§§ 1-539.17 through 1-539.20: Reserved for future codification purposes.

ARTICLE 43D.

Abolition of Parent-Child Immunity in Motor Vehicle Cases.

§ 1-539.21. Abolition of parent-child immunity in motor vehicle cases.

The relationship of parent and child shall not bar the right of action by a person or his estate against his parent or child for wrongful death, personal injury, or property damage arising out of operation of a motor vehicle owned or operated by the parent or child. (1975, c. 685, s. 1; 1985, c. 201; 1989, c. 782, s. 2.)

Legal Periodicals. — For survey of 1981 tort law, see 60 N.C.L. Rev. 1465 (1982).

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

For note on use of the family purpose doctrine when no outsiders are involved, in light of Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984), see 21 Wake Forest L. Rev. 243 (1985).

For note discussing North Carolina's retention of its partial parent-child immunity doctrine, in light of Lee v. Mowett Sales Co., 316 N.C. 489, 342 S.E.2d 882 (1986), and arguing for its abrogation, see 65 N.C.L. Rev. 1457 (1987).

For comment, "The Last Pangs of Parent-Child Immunity in North Carolina: Lee v. Mowett Sales Co. and Allen v. Allen," see 22 Wake Forest L. Rev. 607 (1987).

For note, "It's Time to Abolish North Carolina's Parent-Child Immunity, But Who's Going to Do It?—Coffey v. Coffey and North Carolina General Statutes Section 1-539.21," see 68 N.C.L. Rev. 1317 (1990).

For note, "Closing One Door on the Parent-Child Immunity Doctrine: Legislature Rejects the Decision of Coffey v. Coffey," see 13 Campbell L. Rev. 105 (1990).

For note, "The North Carolina Supreme Court Engages in Stealthy Judicial Legislation: Doe v. Holt," see 71 N.C.L. Rev. 1227 (1993).

For note and comment, "Liner v. Brown: Where Should We Go From Here—Two Different Approaches for North Carolina," see 19 Campbell L. Rev. 447 (1997).

CASE NOTES

This section does not violate substantive due process because it does not deny a parent seeking to bring an action against a child for personal injury a right to which she otherwise would be entitled. Before this statute was enacted, the established rule was that both children and their parents were immune from such suits by each other. This section abolished parental immunity and opened an avenue for children to sue their parents. To hold that an established right was taken away because the statute did not open the same door for parents is incorrect. Even if one views this section as "denying" parents of such a right, such denial is within the rights of the Legislature. Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

The class created by this section was based on a "reasonable distinction." It is rationally related to the governmental objective of promoting and protecting domestic harmony. This section is not in violation of the equal protection requirements in the North Carolina or United States Constitutions. Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

This section does not create an arbitrary classification in violation of the equal protection clauses of N.C. Const., Art. I, § 19, and U.S. Const., Amend. XIV. Ledwell v. Berry, 39 N.C. App. 224, 249 S.E.2d 862 (1978), cert. denied, 296 N.C. 585, 254 S.E.2d 35 (1979).

It is the general rule in North Carolina that unemancipated minors may not maintain an action against their parents to recover damages for an unintentional tort. Since the parent cannot be held liable in a direct action against him by the injured child, a third-party may not maintain an action against the parent, based on allegations of joint negligence, to recover contribution for damages awarded to the minor. Lee v. Mowett Sales Co., 76 N.C. App. 556, 334 S.E.2d 250 (1985), aff'd, 316 N.C. 489, 342 S.E.2d 882 (1986).

But parent-child immunity is inapplicable to willful and malicious acts. — The parent-child immunity doctrine in North Carolina has never applied to, and may not be applied to, actions by unemancipated minors to recover for injuries resulting from their parent's willful and malicious acts. Doe ex rel. Connolly v. Holt, 332 N.C. 90, 418 S.E.2d 511 (1992).

By the enactment of this section, the Legislature created a limited exception to the common-law doctrine of parent-child immunity in North Carolina. Lee v. Mowett Sales Co., 76 N.C. App. 556, 334 S.E.2d 250 (1985), aff'd, 316 N.C. 489, 342 S.E.2d 882 (1986).

This section abolishes only a parent's immunity to suit. Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

The text of this section is very explicit and it, not the title, controls, despite the contention that the title implies total abolition of the parent-child immunity doctrine. Allen v. Allen, 76 N.C. App. 504, 333 S.E.2d 530, cert. denied and appeal dismissed, 315 N.C. 182, 337 S.E.2d 855 (1985).

It is not this section standing alone

which abrogates parental immunity in wrongful death actions arising out of operation of motor vehicles; it is this section and G.S. 28A-18-2, read in pari materia, which bring about this result. Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984).

A riding lawnmower is not a "motor vehicle" within the meaning of this section. Lee v. Mowett Sales Co., 76 N.C. App. 556, 334 S.E.2d 250 (1985), aff'd, 316 N.C. 489, 342 S.E.2d 882 (1986).

For case declining to judicially abolish the parent-child immunity doctrine in cases not involving motor vehicles, see Lee ex rel. Schlosser v. Mowett Sales Co., 316 N.C. 489, 342 S.E.2d 882 (1986).

Wrongful Death Action by Child's Estate. — A wrongful death action based on defendant mother's negligence in operation of a motor vehicle could be maintained on behalf of deceased child's estate against defendant mother, but only the father would be entitled to share in any recovery. Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984).

Father would not be barred from sharing in any recovery by his son's estate where the estate's recovery would be grounded, if at all, solely on the negligence of the child's mother. Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984).

An unemancipated minor child injured prior to October 1, 1975, by the ordinary negligence of its parent, has no right of action against the parent, since this section applies to action occurring on or after that date. Cassidy v. Cheek, 58 N.C. App. 742, 294 S.E.2d 414 (1982), modified on other grounds, 308 N.C. 670, 303 S.E.2d 792 (1983).

Adult Child's Immunity from Suits by Parents for Conduct Occurring While Unemancipated Minor. — This section's exception to the parent-child immunity doctrine did not abolish the unemancipated minor's immunity from suits by his parents; furthermore, defendant, who had reached age of majority at the time of the lawsuit, remained immune from suit by his mother, plaintiff, for negligent conduct occurring when defendant was an unemancipated minor. Coffey v. Coffey, 94 N.C. App. 717, 381 S.E.2d 467 (1989).

Application of Foreign Law. — The trial court properly dismissed a wrongful death action brought by the daughter's estate against the mother, where the accident occurred in Alabama, which has not abolished the parental immunity doctrine. Gbye v. Gbye, 130 N.C. App. 585, 503 S.E.2d 434 (1998), cert. denied, 349 N.C. 357, 517 S.E.2d 893 (1998).

Cited in Raftery v. Wm. C. Vick Constr. Co., 291 N.C. 180, 230 S.E.2d 405 (1976); Christenbury v. Hedrick, 32 N.C. App. 708, 234 S.E.2d 3 (1977); Triplett v. Triplett, 34 N.C. App. 212, 237 S.E.2d 546 (1977); Snow v. Nixon, 52 N.C. App. 131, 277 S.E.2d 850 (1981); Furr v. Pinoca Volunteer Fire Dep't, 53 N.C. App. 458, 281 S.E.2d 174 (1981); Carver v. Carver, 55 N.C. App. 716, 286 S.E.2d 799 (1982); Cassidy v. Cheek, 308 N.C. 670, 303 S.E.2d 792 (1983); McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984); State Farm Mut. Auto. Ins. Co. v. Holland, 90 N.C. App. 730, 370 S.E.2d 70 (1988); Liner v. Brown, 117 N.C. App. 44, 449 S.E.2d 905 (1994).

§§ 1-539.22 through 1-539.24: Reserved for future codification purposes.

ARTICLE 43E.

Affirmative Defense Based On Year 2000 Failure.

§§ 1-539.25, 1-539.26: Expired October 1, 2000.

Cross References. — As to Year 2000 liability and damages, see G.S. 66-295, et seq.

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 44.

Compromise.

§ 1-540. By agreement receipt of less sum is discharge.

In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same. (1874-5, c. 178; Code, s. 574; Rev., s. 859; C.S., s. 895.)

Legal Periodicals. — For discussion of the law of contracts in relation to this section, see 13 N.C.L. Rev. 45 (1935).

CASE NOTES

I. In General.
II. Illustrative Cases.

I. IN GENERAL.

Constitutionality. — This section is constitutional. Koonce v. Russell, 103 N.C. 179, 9 S.E. 316 (1889); Petit v. Woodlief, 115 N.C. 120, 20 S.E. 208 (1894); Wittkowsky v. Baruch, 127 N.C. 313, 37 S.E. 449 (1900).

This section applies as a compromise and settlement when an agreement is made and accepted. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

An agreement to compromise and settle disputed matters is valid and binding. The law favors the avoidance or adjustment of litigation, and a compromise made in good faith for such a purpose will be sustained as not only based upon a sufficient consideration but upon the highest consideration of public policy as well, and this, too, without any special regard to the special merits of the controversy or the character or validity of the claims of the respective parties. York v. Westall, 143 N.C. 276, 55 S.E. 724 (1906). See also, Williams v. Alexander, 39 N.C. 207 (1845); Barnawell v. Threadgill, 56 N.C. 50 (1856); Mayo v. Gardner, 49 N.C. 359 (1857); Mathis v. Bryson, 49 N.C. 508 (1857); Findly v. Ray, 50 N.C. 125 (1857).

When the amount due is uncertain or unliquidated, if an offer in satisfaction of the claim is accompanied with such acts and declarations as amount to a condition that the money shall be accepted only as a payment in full of the claim, and the party to whom the offer is made must of necessity understand, from its very terms, that if he takes the money he takes it subject to such condition, then, in law, the payment operates to discharge the whole claim. Petit v. Woodlief, 115 N.C. 120, 20 S.E. 208 (1894).

Essentials of Compromise. — As in the case of other contracts, mutuality is essential to a valid compromise. There must be a meeting of minds upon every feature and element of such agreement. Horn v. Detroit Dry Dock Co., 150 U.S. 610, 14 S. Ct. 214, 37 L. Ed. 1199 (1893).

The agreement, in order to be binding upon the parties, must have been executed voluntarily and without duress, or undue influence, in good faith, deliberately and understandingly. Hennessy v. Bacon, 137 U.S. 78, 11 S. Ct. 17, 34 L. Ed. 605 (1890).

The word "agreement" implies the parties are of one mind, that all have a common understanding of the rights and obligations of the others and that there has been a meeting of the minds. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969); Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, cert. denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

Agreements are reached by an offer by one party and an acceptance by the other. This is true even though the legal effect of the acceptance may not be understood. Baillie

Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969); Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, cert. denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

A compromise and settlement must be based upon a disputed claim. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

This section is not applicable where the payment is not intended as a compromise of the whole, or any part of the debt, but as a payment in full. Smith v. Richards, 129 N.C. 267, 40 S.E. 5 (1901).

Elements of Accord and Satisfaction — Generally. — An accord and satisfaction is compounded of two elements: An accord, which is an agreement whereby one of the parties undertakes to give or perform and the other to accept in satisfaction of a claim, liquidated or in dispute, something other than or different from what he is or considers himself entitled to; and a satisfaction, which is the execution or performance of such agreement. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969); Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, cert. denied, 304 N.C. 196, 285 S.E.2d 101 (1981); Sharpe v. Nationwide Mut. Fire Ins. Co., 62 N.C. App. 564, 302 S.E.2d 893, cert. denied, 309 N.C. 823, 310 S.E.2d 353 (1983).

For additional case discussing elements of accord and satisfaction, see Allgood v. Wilmington Sav. & Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955).

An accord is an agreement in which one of the parties undertakes a performance in satisfaction of a liquidated or disputed claim, arising from tort or contract, and the other party agrees to accept the performance even though it is different from what he considered himself entitled to; satisfaction is the completion or execution of the agreed performance. Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

Same — Consideration Required. — Consideration must in some form or other be present in an accord. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Slight Irregularities Do Not Vitiate. — Where a plea in accord and satisfaction, has been made in bar to an action that defendant had paid an agreed amount and costs into the clerk's office, the fact that a witness ticket of a small amount, which the plaintiff had refused to receive, was not taxed in the costs, will not affect the validity of the tender. McAuley v. Sloan, 173 N.C. 80, 91 S.E. 701 (1917).

Where a creditor agrees to accept a lesser amount in satisfaction of his debt, the lesser amount to include advertising, the amount of which was to be agreed upon by the creditor, the failure of the debtor to pay the amount of the compromise, the creditor having refused to state the amount of advertising he would take, does not invalidate the compromise. Ramsey v. Browder, 136 N.C. 251, 48 S.E. 651 (1904).

Applicability of Accord and Satisfaction to Tort and Contract Actions. — Accord and satisfaction is a method of discharging a contract or settling a cause of action arising either from a contract or tort, by the parties compromising the matter in dispute between them, and accepting its benefits. Walker v. Burt, 182 N.C. 325, 109 S.E. 43 (1921).

A plea of accord and satisfaction is recognized as a method of discharging a contract or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substitute agreement. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969); Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, cert. denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

The accord is the agreement. — Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

An accord is an agreement between the parties that discharges a contract or settles a cause of action. Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980).

And the satisfaction is the execution or performance of the agreement. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969); Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980).

An accord and satisfaction may be based on an undisputed or liquidated claim. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

But Accord and Satisfaction Does Not Result from Part Payment of Liquidated and Undisputed Claim. — The fact that a remittance by check purporting to be "in full" is accepted and used does not result in an accord and satisfaction if the claim involved is liquidated and undisputed, under the generally accepted rule that an accord and satisfaction does not result from the part payment of a liquidated and undisputed claim. The creditor is justified in treating the transaction as merely the act of an honest debtor remitting less than is due under a mistake as to the nature of the contract. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Distinction Between Liquidated and Unliquidated Claims. — There is a well-recognized distinction between liquidated or undisputed claims and unliquidated or disputed ones. Under the common law, an agreement to receive a part of a debt due in lieu of the whole of an undisputed, as distinguished from a disputed debt due, was held to be a nudum pactum as to all in excess of the sum actually paid. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

When Account Deemed Liquidated. — An account is liquidated when the amount thereof has been fixed by agreement or if it can be exactly determined by the application of rules of arithmetic or of law. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

The acceptance of a lesser sum in full payment of a larger sum is valid under this section. Koonce v. Russell, 103 N.C. 179, 9 S.E. 316 (1889); Union Bank v. Board of Comm'rs, 116 N.C. 339, 21 S.E. 410 (1895); Lochner v. Silver Sales Serv., Inc., 232 N.C. 70, 59 S.E.2d 218 (1950).

Under the construction placed upon this section the offer of a less sum than is due, when the amount of the debt is certain, is in effect the same as the offer of a given sum in satisfaction of a contingent or unliquidated claim. And the courts are governed by the rule adopted in reference to offers to settle contingent claims, because they are analogous to proposals of compromise of indebtedness under the statute. Petit v. Woodlief, 115 N.C. 120, 20 S.E. 208 (1894).

Acceptance of Part Payment Acts as Complete Discharge. — The receipt of a part in satisfaction of the whole is now as effective as if the whole amount of the debt had been paid. Tiddy v. Harris, 101 N.C. 589, 8 S.E. 227 (1888); Koonce v. Russell, 103 N.C. 179, 9 S.E. 316 (1889); Petit v. Woodlief, 115 N.C. 120, 20 S.E. 208 (1894); Union Bank v. Board of Comm'rs, 116 N.C. 339, 21 S.E. 410 (1895); Wittkowsky v. Baruch, 127 N.C. 313, 37 S.E. 449 (1900).

Ordinarily when a creditor calls on his debtor or a beneficiary calls on his trustee for an accounting and settlement and the demand is met with an offer of money or property in full discharge of debtor's or trustee's obligation, an acceptance and retention of the thing tendered constitutes a complete discharge, even though the sum or property received is less than the amount actually owing. Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

And Precludes Further Action Thereon. — Where a plaintiff agreed to accept a certain sum by way of compromise in full satisfaction of his claim, and having been paid that amount by the defendant, he cannot maintain an action thereon. Pruden v. Asheboro & M.R.R., 121 N.C. 509, 28 S.E. 349 (1897).

Payment of One Account Not Settlement of Another. — While the acceptance of a lesser sum in full payment of a larger sum is valid under this section, the payment of one account is not the settlement of another. And the acceptance of a lesser sum constitutes a settlement only as to those items of liability embraced in the settlement. Lochner v. Silver Sales Serv., Inc., 232 N.C. 70, 59 S.E.2d 218 (1950).

Executed Agreement Terminating Controversy Is a Contract. — Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Section Incorporated into Contract. — Where agreements to receive a part in lieu of the whole debt due have been made since the enactment of this section, they are deemed to have been entered into in as full contemplation of its provisions as though it had been incorporated into the contract. Union Bank v. Board of Comm'rs, 116 N.C. 339, 21 S.E. 410 (1895), citing Koonce v. Russell, 103 N.C. 179, 9 S.E. 316 (1889).

The question of accord and satisfaction may be one of fact and of law. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

When Accord and Satisfaction Is Question of Law. — Normally, the existence of an accord and satisfaction is a question of fact for the jury. But where the only reasonable inference is existence or nonexistence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when the essential facts are made clear of record. Rockingham Square Shopping Ctr., Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, cert. denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

When Creditor Is Remitted to Original Rights. — If the debtor repudiates the agreement or unreasonably delays to execute it, the creditor is remitted to his rights under the original contract, for payment of the sum agreed to be paid under the new contract is essential to a discharge of the old contract. Ramsey v. Browder, 136 N.C. 251, 48 S.E. 651 (1904). See also, Hunt v. Wheeler, 116 N.C. 422, 21 S.E. 915 (1895).

Right to Demand Acceptance. — When a proposal to pay a given sum, provided that the payment shall operate to relieve one of three judgment debtors, is accepted by the creditor, and the debtor within a reasonable time tenders the amount, he has the right to demand that it shall be received and applied in discharge of his obligation to make any further payment. Boykin v. Buie, 109 N.C. 501, 13 S.E. 879 (1891).

When Payer Is Entitled to Restitution. — Where one pays a certain sum upon a contested debt in compromise thereof in case it shall afterwards be established, a finding by the jury that it never existed will entitle the payer to a restitution for the money advanced by him. Fickey v. Merrimon, 79 N.C. 585 (1878).

A principal may not repudiate the act of his agent in compromising a debt due, and receive the benefit of the consideration therefor. Cashmar-King Supply Co. v. Dowd & King, 146 N.C. 191, 59 S.E. 685 (1907).

Rule Prior to Enactment of Section. — Prior to the passage of the Acts 1874-75, c. 178, an agreement to receive a part in lieu of the whole of a debt due was held to be a nudum pactum as to all in excess of the sum actually paid. Hayes v. Davidson, 70 N.C. 573 (1874); Mitchell v. Sawyer, 71 N.C. 70 (1874); Love v. Johnston, 72 N.C. 415 (1875); Currie v. Kennedy, 78 N.C. 91 (1878); Petit v. Woodlief, 115 N.C. 120, 20 S.E. 208 (1894); Union Bank v. Board of Comm'rs, 116 N.C. 339, 21 S.E. 410 (1895).

Applied in B.B. Walker Co. v. Ashland Chem. Co., 474 F. Supp. 651 (M.D.N.C. 1979).

Cited in McAuley v. Sloan, 173 N.C. 80, 91 S.E. 701 (1917); Walker v. Burt, 182 N.C. 325, 109 S.E. 43 (1921); State Distrib. Corp. v. G.E. Bobbitt & Assocs., 62 N.C. App. 530, 303 S.E.2d 349 (1983); Hassett v. Dixie Furn. Co., 333 N.C. 307, 425 S.E.2d 683 (1993).

II. ILLUSTRATIVE CASES.

Bonds. — When a debtor pays a sum supposed by him to be the balance due on his bond, and the creditor refuses to give up the bond, but says that he will credit the amount paid, it does not amount to a compromise and satisfaction of the bond, although the debtor intends it as such. King v. Phillips, 94 N.C. 555 (1886).

Checks. — Under a uniform construction of this section, as announced in a long line of decisions, it is held that where two parties are in dispute as to the correct amount of an account, and one sends the other a check, or makes a payment, clearly purporting to be in full settlement of the claim, and the other knowingly accepts it upon such condition, this will amount to a full and complete discharge of the debt. Mercer v. Frank Hitch Lumber Co., 173 N.C. 49, 91 S.E. 588 (1917); Blanchard v. Edenton Peanut Co., 182 N.C. 20, 108 S.E. 332 (1921); De Loache v. De Loache, 189 N.C. 394, 127 S.E. 419 (1925); Allgood v. Wilmington Sav. & Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955); Fidelity & Cas. Co. v. Nello L. Terre Co., 250 N.C. 547, 109 S.E.2d 171 (1959).

Where a settlement was arrived at between the parties by the terms of which all claims between them were settled by the payment to plaintiff of $10,000 and for which he executed releases in full on all claims against the defendants or either of them, and payment was made by check of defendant on which was plainly typed: "Settlement of all accounts in full as of today November 8, 1954," and the check was endorsed and cashed by plaintiff, this section is clearly applicable and controlling. Jordan Motor Lines v. McIntyre, 157 F. Supp. 475 (M.D.N.C. 1957).

When in case of a disputed account between parties a check is given and received under such circumstances as clearly import that it is intended to be, and is tendered, in full settlement of the disputed items, the acceptance and cashing of the check and the appropriation of the proceeds will be regarded as complete satisfaction of the claim. One party will not be allowed to accept a benefit of the check so tendered and at the same time retain the right to sue for an additional amount. Moore v. Greene, 237 N.C. 614, 75 S.E.2d 649 (1953).

The cashing of a "full payment check," i.e., a check marked with some indication that it is tendered in full payment of a disputed claim, is an accord and satisfaction as a matter of law. Barber v. White, 46 N.C. App. 110, 264 S.E.2d 385 (1980).

In an action to recover on an account, plaintiff's retention of a cashier's check marked "for payment in full," tendered by defendant, though the check was not deposited, was sufficient acceptance of a lesser amount than plaintiff claimed was due it to result in an accord and satisfaction or compromise and settlement. FCX, Inc. v. Ocean Oil Co., 46 N.C. App. 755, 266 S.E.2d 388 (1980).

Where an employee was discharged and received and cashed a check for $125, on which was written, "In full for services," which amount was less than claimed, he cannot recover more, although he attempted to qualify his acceptance of the proceeds of the check by writing across the check, above his signature, the words, "Accepted for one month's services." Kerr v. Sanders, 122 N.C. 635, 29 S.E. 943 (1898).

A check given and received by the creditor, which purports to be payment in full of an account, does not preclude the creditor accepting it from showing that in fact it was not in full unless, under the principle of accord and satisfaction, there had been an acceptance of the check in settlement of a disputed account. Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969).

Where a check is sent in full payment of an account, the creditor cannot accept and appropriate the check and afterwards recover the amount of any item which was a part of the account. Having elected to take a part in satisfaction of the whole, he will be held to his agreement; but the principle, of course, does not apply to a transaction not embraced by the account. Whether it is or not may often be a question of law upon admitted facts; but sometimes the evidence may be such as to make it a question for the jury. Aydlett v. Brown, 153 N.C. 334, 69 S.E. 243 (1910); Lochner v. Silver Sales Serv., Inc., 232 N.C. 70, 59 S.E.2d 218 (1950).

Where plaintiff's evidence was to the effect that defendant promised to pay him a stipulated amount annually, the remuneration to be paid on the basis of weekly checks for a stipulated commission on sales made by plaintiff, with quarterly payments to make up the proportionate part of the annual salary. The acceptance of such checks by plaintiff with stipulations above plaintiff's endorsement that the payment released the payer of all claims due to date, with accompanying voucher stipulating that the sums included in the checks covered no items except commissions and travel allowances, raised for the determination of the jury the question as to whether the weekly payments composed one account of liability and the quarterly payments another, and therefore whether the settlement included the claim for quarterly payments. Lochner v. Silver Sales Serv., Inc., 232 N.C. 70, 59 S.E.2d 218 (1950).

The cashing of a check tendered in full payment of a disputed claim establishes an accord and satisfaction as a matter of law. In such case the claim is extinguished, regardless of any disclaimers which may be communicated by the payee. Sharpe v. Nationwide Mut. Fire Ins. Co., 62 N.C. App. 564, 302 S.E.2d 893, cert. denied, 309 N.C. 823, 310 S.E.2d 353 (1983).

When there is some indication on a check that it is tendered in full payment of a disputed claim, the cashing of the check is held to be an accord and satisfaction as a matter of law. Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

Where it was uncontradicted that plaintiff negotiated defendant's check which was tendered as full payment of the disputed claim, this established an accord and satisfaction as a matter of law. When the debtor tendered the check to the creditor, the creditor had to take the check on the terms offered by the creditor or not take it at all. Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985).

Insurance. — Payment to beneficiary of one half of proceeds of life insurance policy did not constitute accord and satisfaction as a matter of law where beneficiary testified that by virtue of such payment she did not abandon her right to balance of proceeds, and receipt did not expressly state that the sum received was in full settlement. Allgood v. Wilmington Sav. & Trust Co., 242 N.C. 506, 88 S.E.2d 825 (1955).

Execution of a sworn statement in proof of fire loss, which established the value of the loss, constituted an accord as to the unliquidated claim and a satisfaction occurred upon plaintiff's acceptance and negotiation of the draft from the insurer. Insured's attempt to alter its terms was unavailing, since insured had to accept it on the terms offered by defendant or not at all, and acceptance and negotiation of it constituted an accord and satisfaction despite insured's attempt to characterize it as merely partial payment. Sharpe v. Nationwide Mut. Fire Ins. Co., 62 N.C. App. 564, 302 S.E.2d 893, cert. denied, 309 N.C. 823, 310 S.E.2d 353 (1983).

When the sum paid under an indemnity insurance policy is the only sum due at the time, the language of the receipt will be restricted to the amount due, and will not be construed as a compromise of the whole claim of indemnity for future sickness. Moore v. Maryland Cas. Co., 150 N.C. 153, 63 S.E. 675 (1909).

Mistake as to Amount. — Where the plaintiff agreed to accept a lesser sum in discharge of a larger, which he thought was the amount of the debt, but was mistaken and later found that the debt was larger, there was no compromise as to the amount of the mistake. Holden v. Warren, 118 N.C. 326, 24 S.E. 770 (1896).

Money Paid into Court. — Money tendered and deposited into court by the defendant with costs accrued, "in full tender of all indebtedness of defendant to plaintiffs," if withdrawn by the plaintiffs, pending the litigation, amounts to a satisfaction of their claims, and subjects the plaintiffs to all subsequently accruing costs. Cline v. Rudisill, 126 N.C. 523, 36 S.E. 36 (1900).

Offer and Acceptance by Telegram. — Offer and acceptance by telegram to pay a sum certain in full settlement of a claim in dispute, followed by immediate payment by debtor, constitutes a valid compromise in full satisfaction of the claim. Pruden v. Asheboro & M.R.R., 121 N.C. 509, 28 S.E. 349 (1897).

Where the plaintiff's damages, caused by the defendant's breach of contract, were based upon two distinctive items, the plaintiff agreeing upon and receiving compensation for the first item did not preclude a recovery upon the second one, when it appeared that the settlement had been made in contemplation of the first item alone. Garland v. Linville Imp. Co., 184 N.C. 551, 115 S.E. 164 (1922).

Where at a sale under a deed of trust, it was agreed between the creditor and debtor that the former would bid for the property, and if it brought less than the debt he would accept it in satisfaction of the sums due him, and the debtor was thereby induced not to bid or procure others to do so, and the property was bid off by the creditor for a less sum than his debt, it was held that there was a sufficient consideration to support the agreement and the debtor was discharged from his obligation. Jones v. Wilson, 104 N.C. 9, 10 S.E. 79 (1889).

Where two of several makers of a note agree with the payee that they shall be released from their obligations by giving a new note in a smaller sum, subject to the same conditions of warranty as the old one, the giving of a new note is valid as a compromise under this section, and the warranty in the former transaction is a part of the consideration for the new one, and is enforceable. Standing Stone Nat'l Bank v. Walser, 162 N.C. 53, 77 S.E. 1006 (1913).

Partnership Accounting. — Where a partnership in real estate held for rentals had title to land purchased with partnership funds and, after demand by one of the two partners for an accounting, one of the pieces of real estate was conveyed to him with the verbal statement that it was in complete settlement, the retention of the deed and the collection of rentals would constitute a settlement regardless of the intent of the grantee partner if he accepted the deed as conveying the property to him in his individual capacity and collected the rentals on the basis of individual ownership, but would not constitute a settlement if he merely retained title for the partnership, offering to account for the rents and profits in the settlement of the partnership affairs. Prentzas v. Prentzas, 260 N.C. 101, 131 S.E.2d 678 (1963).

§ 1-540.1. Effect of release of original wrongdoer on liability of physicians and surgeons for malpractice.

The compromise settlement or release of a cause of action against a person responsible for a personal injury to another shall not operate as a bar to an action by the injured party against a physician or surgeon or other professional practitioner treating such injury for the negligent treatment thereof, unless the express terms of the compromise, settlement or release agreement given by the injured party to the person responsible for the initial injury provide otherwise. (1961, c. 212.)

Legal Periodicals. — For comment on effect of release given tort-feasor causing initial injury in later action for malpractice against treating physician, see 40 N.C.L. Rev. 88 (1961).

For case law survey on tort law, see 43 N.C.L. Rev. 906 (1965).

For comment on aggravation of injury by treating physicians, see 2 Wake Forest Intra. L. Rev. 91 (1966).

For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra. L. Rev. 359 (1969).

CASE NOTES

Constitutionality. — Section does not violate N.C. Const., Art. I, § 1. Galloway v. Lawrence, 263 N.C. 433, 139 S.E.2d 761 (1965).

This section on its face applies only to actions for personal injury. Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

Actions for wrongful death are not included in the terms of this section. Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

Former Law. — Prior to October 1, 1961, a release executed in favor of one responsible for the original injury protected a physician or surgeon against a claim based on negligent treatment of the injury. Simmons v. Wilder, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

Applied in Carver v. Carver, 55 N.C. App. 716, 286 S.E.2d 799 (1982).

Cited in Warren v. Canal Indus., Inc., 61 N.C. App. 211, 300 S.E.2d 557 (1983).

§ 1-540.2. Settlement of property damage claims arising from motor vehicle collisions or accidents; same not to constitute admission of liability, nor bar party seeking damages for bodily injury or death.

In any claim, civil action, or potential civil action which arises out of a motor vehicle collision or accident, settlement of any property damage claim arising from such collision or accident, whether such settlement be made by an individual, a self-insurer, or by an insurance carrier under a policy of insurance, shall not constitute an admission of liability on the part of the person, self-insurer or insurance carrier making such settlement, which arises out of the same motor vehicle collision or accident. It shall be incompetent for any claimant or party plaintiff in the said civil action to offer into evidence, either by oral testimony or paper writing, the fact that a settlement of the property damage claim arising from such collision or accident has been made; provided further, that settlement made of such property damage claim arising out of a motor vehicle collision or accident shall not in and of itself act as a bar, release, accord and satisfaction, or discharge of any claims other than the property damage claim, unless by the written terms of a properly executed settlement agreement it is specifically stated that the acceptance of said settlement constitutes full settlement of all claims and causes of action arising out of the said motor vehicle collision or accident. (1967, c. 662, s. 1.)

CASE NOTES

Maintenance of Action Where Defendant's Release Relied on to Defeat Counterclaim. — This section, which provides that the settlement of a property damage claim does not constitute the admission of liability as to personal injury claims from an automobile accident, that it may not be used as evidence to that effect, and that, of itself, the settlement shall not act as a bar to any claim other than the property damage claim unless, by the terms of the settlement, all claims arising from the accident are covered, does not affect the rule that a plaintiff may not maintain an action for personal injuries while relying on a complete release given by defendant to defeat defendant's counterclaim for property damages. Leach v. Robertson, 49 N.C. App. 455, 271 S.E.2d 405 (1980).

Evidence of Settlement Offer From Insurance Company Held Inadmissible. — Judgment for a driver in an injured party's personal injury action was affirmed; pursuant to G.S. 8C-1, N.C. R. Evid. 411, and G.S. 1-540.2, a letter from the driver's insurer indicating that the insurer would consider settling claims arising from the accident was inadmissible as proof that the driver was liable for the accident. Garrett v. Smith, 163 N.C. App. 760, 594 S.E.2d 232, 2004 N.C. App. LEXIS 574 (2004).

§ 1-540.3. Advance payments.

(a) In any claim, potential civil action or action in which any person claims to have sustained bodily injuries, advance or partial payment or payments to any such person claiming to have sustained bodily injuries or to the personal representative of any person claimed to have sustained fatal injuries may be made to such person or such personal representative by the person or party against whom such claim is made or by the insurance carrier for the person, party, corporation, association or entity which is or may be liable for such injuries or death. Such advance or partial payment or payments shall not constitute an admission of liability on the part of the person, party, corporation, association or entity on whose behalf the payment or payments are made or by the insurance carrier making the payments. It shall be incompetent for any party in a civil action to offer into evidence, through any witness either by oral testimony or paper writing, the fact of the advance or partial payment or payments made by or on behalf of the opposing party. The receipt of the advance or partial payment or payments shall not in and of itself act as a bar, release, accord and satisfaction, or a discharge of any claims of the person or representative receiving the advance or partial payment or payments, unless by the terms of a properly executed settlement agreement it is specifically stated that the acceptance of said payment or payments constitutes full settlement of all claims and causes of action for personal injuries or wrongful death, as applicable.

(b) In any civil action for personal injuries or wrongful death the person or party against whom claim is made for such injuries or death and by or on whose behalf advance or partial payment or payments have been made to the party asserting the claim shall file with the Court and serve upon opposing counsel a motion setting out the date and amount of payment or payments and praying that said sums be credited upon any judgment recovered by the opposing party against the party on whose behalf the payment or payments were made. Prior to the entry of judgment, the trial judge shall conduct a hearing and may consider affidavits, oral testimony, depositions, and any other competent evidence, and shall enter his findings of fact and conclusions of law as to whether the advance or partial payment or payments were made by or on behalf of the person or party claiming to have made such payment(s) to the party asserting the claim for injuries or wrongful death. Upon a finding that the advance or partial payment or payments were made by or on behalf of the person or party claiming to have made such payment(s), all such payments shall be credited by the trial judge upon any judgment rendered in favor of the person or representative who received the payment or payments. Advance payments made by one joint tort-feasor shall not inure to the benefit or credit of any joint tort-feasor not making such payments.

No claim for reimbursement may be made or allowed by or on behalf of the person or party making such advance payment or payments against the person or party to whom such payment or payments are made except a claim based on fraud.

The making of any advance payment shall not affect in any way whatsoever the running of the statute of limitations. (1971, c. 854.)

CASE NOTES

Legislative Purpose. — The obvious purpose of the legislature in enacting this section was to alleviate the harsh consequences of application of the accord and satisfaction doctrine to personal injury cases and to encourage the making of partial payments to the claimant prior to an agreement on a final settlement. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981), overruled on other grounds, Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987).

Effect of Section. — As a result of this statute, seriously injured persons who require long-term medical treatment can now accept piecemeal payments from an insurer before any determination of liability, and those payments represent neither an admission of liability on the part of the insurer nor full satisfaction of the injured party's claims. Under the present law, acceptance of partial or advance payments, absent a properly executed full settlement agreement, does not bar the party receiving the payments from suing on the underlying claim. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981).

This section, by its express terms, applies only to partial or advance payment and prohibits claims for reimbursement only when the payment made was partial or advance; it does not affect the power of a trial judge to order reimbursement when the payment or payments made were in final settlement of all claims. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981), overruled on other grounds, Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987).

Intent of Parties Determines Whether Payment Is Partial or Final. — Although this section is concerned solely with advance or partial payments, it nowhere defines those terms or indicates how the character of the payment is to be determined. Whether the payment was partial or final under the statute depends upon the intent of the parties giving and receiving it. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981), overruled on other grounds, Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987).

And the determination of intent is a question of fact and, therefore, can be resolved only by the trier of fact unless the evidence of intent is undisputed. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981), overruled on other grounds, Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987).

Issue of Fact as to Intent Created Absent Settlement Agreement. — Absent a properly executed settlement agreement, a claimant's testimony that he or she, at the time of the agreement, intended the settlement to be partial or advance creates an issue of fact and is enough to take the case to the jury. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981), overruled on other grounds, Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987).

Reimbursement Order Held Improper Where Issue of Fact Existed. — In an action to recover for personal injuries sustained by plaintiff in an automobile accident, where there was an issue of fact as to whether a payment made to plaintiff by defendants' insurer was a partial or final settlement, the trial court's reimbursement order, with which plaintiff did not comply, was improperly entered, since under this section acceptance of partial or advance payments, absent a properly executed full settlement agreement, does not bar the party receiving the payments from suing on the underlying claims. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981), overruled on other grounds, Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987).

Insurer's Duty to Defend Insured Broader Than Duty to Indemnify. — Insurer's duty to defend its insured is separate from and broader than the insurer's duty to indemnify the insured. Brown v. Lumbermens Mut. Cas. Co., 90 N.C. App. 464, 369 S.E.2d 367 (1988), aff'd, 326 N.C. 387, 390 S.E.2d 150 (1990).

Insurance company was required to continue defending insured until a settlement or judgment was reached despite having paid its policy limits under this section. Brown v. Lumbermens Mut. Cas. Co., 90 N.C. App. 464, 369 S.E.2d 367 (1988), aff'd, 326 N.C. 387, 390 S.E.2d 150 (1990).

No claim for reimbursement may be made or allowed by the party making the advance payment against the recipient, except for fraud. Gunn v. Whichard, 707 F. Supp. 196 (E.D.N.C. 1988).

Cited in Thornburg v. Lancaster, 47 N.C. App. 131, 266 S.E.2d 738 (1980); Brown v. Lumbermens Mut. Cas. Co., 326 N.C. 387, 390 S.E.2d 150 (1990).

§§ 1-541 through 1-543: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For provisions similar to those of the repealed sections, see G.S. 1A-1, Rule 68.

ARTICLE 44A.

Tender.

§ 1-543.1. Service of order of tender; return.

In all matters in which it is proper or necessary to make or serve a tender, the clerk of the superior court in the county in which the tender is to be made shall, upon request of the tendering party, direct the sheriff of said county to serve an order of tender, together with the property to be tendered, upon the party or parties upon whom said tender is to be made. In the event said property is incapable of being manually tendered, said order of tender shall so state and service of said order tendering same shall have the same legal effect as if the property had been manually tendered. Within five days after receipt of the order, the sheriff shall make his return thereon, showing upon whom the same was served, the date and hour of service, the property tendered, and whether or not said tender was accepted, or that, after due diligence, the party or parties upon whom service was to be made could not be found within the county. He shall then return said order of tender to the clerk who issued it, and this shall constitute proper tender. Nothing in this section shall be construed to prevent other methods of tender or tender by any party to an action in open court upon any other party to said action. (1965, c. 699.)

§§ 1-543.2 through 1-543.9: Reserved for future codification purposes.

ARTICLE 44B.

Structured Settlement Protection Act.

§ 1-543.10. Title.

This Article may be cited as the North Carolina Structured Settlement Protection Act. (1999-367, s. 1.)

Editor's Note. — Session Laws 1999-367, s. 3, made this Article effective October 1, 1999, and applicable to any transfer of structured settlement payment rights under a transfer agreement entered into on or after that date, provided that this act shall not apply to any transfer of structured settlement payment rights under a structured settlement agreement entered into or effective prior to that date where the transfer does not contravene the terms of the structured settlement. Section 3 further provides: "Nothing contained herein shall imply that any transfer under a transfer agreement reached prior to October 1, 1999, is effective."

§ 1-543.11. Definitions.

For purposes of this Article:

(1) "Annuity issuer" means an insurer that has issued an annuity or insurance contract used to fund periodic payments under a structured settlement;

(2) "Discounted present value" means the fair present value of future payments, as determined by discounting such payments to the present utilizing the tables adopted in Article 5 of Chapter 8 of the General Statutes;

(3) "Independent professional advice" means advice of an attorney, certified public accountant, actuary, or other licensed or registered professional or financial adviser:

a. Who is engaged by a payee to render advice concerning the legal, tax, and financial implications of a transfer of structured settlement payment rights;

b. Who is not in any manner affiliated with or compensated by the transferee of such transfer; and

c. Whose compensation for rendering such advice is not affected by whether a transfer occurs or does not occur;

(4) "Interested parties" means, with respect to any structured settlement, the payee, any beneficiary designated under the annuity contract to receive payments following the payee's death, the annuity issuer, the structured settlement obligor, and any other party that has continuing rights or obligations under the terms of the structured settlement;

(5) "Payee" means an individual who is receiving tax-free damage payments under a structured settlement and proposes to make a transfer of payment rights thereunder;

(6) "Qualified assignment agreement" means an agreement providing for a qualified assignment within the meaning of section 130 of the Internal Revenue Code, United States Code Title 26, as amended from time to time;

(7) "Responsible administrative authority" means, with respect to a structured settlement, any government authority vested by law with exclusive jurisdiction over the settled claim resolved by such structured settlement;

(8) "Settled claim" means the original tort claim resolved by a structured settlement;

(9) "Structured settlement" means an arrangement for periodic payment of damages for personal injuries established by settlement or judgment in resolution of a tort claim;

(10) "Structured settlement agreement" means the agreement, judgment, stipulation, or release embodying the terms of a structured settlement, including the rights of the payee to receive periodic payments;

(11) "Structured settlement obligor" means, with respect to any structured settlement, the party that has the continuing periodic payment obligation to the payee under a structured settlement agreement or a qualified assignment agreement;

(12) "Structured settlement payment rights" means rights to receive periodic payments (including lump-sum payments) under a structured settlement, whether from the settlement obligor or the annuity issuer, where:
   a. The payee is domiciled in this State;
   b. The structured settlement agreement was approved by a court or responsible administrative authority in this State; or
   c. The settled claim was pending before the courts of this State when the parties entered into the structured settlement agreement;

(13) "Terms of the structured settlement" include, with respect to any structured settlement, the terms of the structured settlement agreement, the annuity contract, any qualified assignment agreement, and any order or approval of any court or responsible administrative authority or other government authority authorizing or approving such structured settlement; and

(14) "Transfer" means any sale, assignment, pledge, hypothecation, or other form of alienation or encumbrance made by a payee for consideration;

(15) "Transfer agreement" means the agreement providing for transfer of structured settlement payment rights from a payee to a transferee. (1999-367, s. 1.)

Editor's Note. — Subdivision (13), defining "terms of the structured settlement," and (14), defining "transfer," were designated as such at the direction of the Revisor of Statutes, the designations in Session Laws 1999-367, s. 1, having been (14) and (13), respectively.

§ 1-543.12. Structured settlement payment rights.

No direct or indirect transfer of structured settlement payment rights shall be effective, and no structured settlement obligor or annuity issuer shall be required to make any payment directly or indirectly to any transferee of structured settlement payment rights unless the transfer has been authorized in advance in a final order of a court of competent jurisdiction or a responsible administrative authority based on express findings by such court or responsible administrative authority that:

(1) The transfer complies with the requirements of this Article [of] law;

(2) Not less than 10 days prior to the date on which the payee first incurred any obligation with respect to the transfer, the transferee has provided to the payee a disclosure statement in bold type, no smaller than 14 point setting forth:
   a. The amounts and due dates of the structured settlement payments to be transferred;
   b. The aggregate amount of such payments;
   c. The discounted present value of such payments;
   d. The gross amount payable to the payee in exchange for such payments;

e. An itemized listing of all brokers' commissions, service charges, application fees, processing fees, closing costs, filing fees, administrative fees, legal fees, notary fees and other commissions, fees, costs, expenses, and charges payable by the payee or deductible from the gross amount otherwise payable to the payee;

f. The net amount payable to the payee after deduction of all commissions, fees, costs, expenses, and charges described in sub-subdivision e. of this subdivision;

g. The quotient (expressed as a percentage) obtained by dividing the net payment amount by the discounted present value of the payments;

h. The discount rate used by the transferee to determine the net amount payable to the payee for the structured settlement payments to be transferred; and

i. The amount of any penalty and the aggregate amount of any liquidated damages (inclusive of penalties) payable by the payee in the event of any breach of the transfer agreement by the payee;

(3) The transfer is in the best interest of the payee;

(4) The payee has received independent professional advice regarding the legal, tax, and financial implications of the transfer;

(5) The transferee has given written notice of the transferee's name, address, and taxpayer identification number to the annuity issuer and the structured settlement obligor and has filed a copy of such notice with the court or responsible administrative authority;

(6) The discount rate used in determining the net amount payable to the payee, as provided in subdivision (2) of this section, does not exceed an annual percentage rate of prime plus five percentage points calculated as if the net amount payable to the payee, as provided in sub-subdivision (2)f. of this section, was the principal of a consumer loan made by the transferee to the payee, and if the structured settlement payments to be transferred to the transferee were the payee's payments of principal plus interest on such loan. For purposes of this subdivision, the prime rate shall be as reported by the Federal Reserve Statistical Release H.15 on the first Monday of the month in which the transfer agreement is signed by both the payee and the transferee, except when the transfer agreement is signed prior to the first Monday of that month then the prime rate shall be as reported by the Federal Reserve Statistical Release H.15 on the first Monday of the preceding month;

(7) Any brokers' commissions, service charges, application fees, processing fees, closing costs, filing fees, administrative fees, notary fees and other commissions, fees, costs, expenses, and charges payable by the payee or deductible from the gross amount otherwise payable to the payee do not exceed two percent (2%) of the net amount payable to the payee;

(8) The transfer of structured settlement payment rights is fair and reasonable; and

(9) Notwithstanding a provision of the structured settlement agreement prohibiting an assignment by the payee, the court may order a transfer of periodic payment rights provided that the court finds that the provisions of this Article are satisfied.

If the court or responsible administrative authority authorizes the transfer pursuant to this section, the court or responsible administrative authority shall order the structured settlement obligor to execute an acknowledgment of assignment letter on behalf of the transferee for the amount of the structured settlement payment rights to be transferred; provided, however, structured settlement payment rights arising from a claim pursuant to Chapter 97 shall not be authorized. (1999-367, s. 1; 1999-456, s. 67.)

CASE NOTES

Transfer Invalidated. — Approval of a factoring company's application to receive assignment of payment rights under annuities issued under settlement agreements was erroneous where the the transfers contravened G.S. 1-543.15(a) because they required an annuitant to waive the right to independant professional advice and contravened G.S. 1-543.12, which prohibited transfers of payments that have arisen under North Carolina's Workers' Compensation Act. In re Application for Approval, 133 Wn. App. 350, 136 P.3d 765, 2006 Wash. App. LEXIS 1119 (2006).

§ 1-543.13. Jurisdiction.

(a) Where the structured settlement agreement was entered into after commencement of litigation or administrative proceedings in this State, the court or administrative agency where the action was pending shall have exclusive jurisdiction over any application for authorization under this Article of a transfer of structured settlement payment rights.

(b) Where the structured settlement agreement was entered into prior to the commencement of litigation or administrative proceedings, or after the commencement of litigation outside this State, the Superior Court Division of the General Court of Justice shall have nonexclusive original jurisdiction over any application for authorization under this Article of a transfer of structured settlement payment rights. (1999-367, s. 1.)

§ 1-543.14. Procedure for approval of transfers.

(a) Where the structured settlement agreement was entered into after the commencement of litigation or administrative proceedings in this State, the application for authorization of a transfer of structured settlement rights shall be filed with the court or administrative agency where the settled claim was pending as a motion in the cause.

(b) Where the structured settlement agreement was entered into prior to the commencement of litigation or administrative proceedings, or after the commencement of litigation or administrative proceedings outside this State, the application for authorization of a transfer of structured settlement payment rights shall be filed in the superior court with proper venue pursuant to Article 7 of this Chapter. The nature of the action shall be a special proceeding governed by the provisions of Article 33 of this Chapter.

(c) Not less than 30 days prior to the scheduled hearing on any application for authorization of a transfer of structured settlement payment rights under this Article, the transferee shall file with the proper court or responsible administrative authority and serve on any other government authority which previously approved the structured settlement, on all interested parties as defined in G.S. 1-543.11(4), and on the Attorney General, a notice of the proposed transfer and the application for its authorization, including in such notice:

(1) A copy of the transferee's application;
(2) A copy of the transfer agreement;
(3) A copy of the disclosure statement required under G.S. 1-543.12(a)(2);
(4) Notification that any interested party is entitled to support, oppose, or otherwise respond to the transferee's application, either in person or by counsel, by submitting written comments to the court or responsible administrative authority or by participating in the hearing; and

(5) Notification of the time and place of the hearing and notification of the manner in which and the time by which written responses to the application must be filed in order to be considered by the court or responsible administrative authority.

(d) The Attorney General shall have standing to raise, appear, and be heard on any matter relating to an application for authorization of a transfer of structured settlement payment rights under this Article. (1999-367, s. 1.)

§ 1-543.15. No waiver; penalties.

(a) The provisions of this Article may not be waived.

(b) Any payee who has transferred structured settlement payment rights to a transferee without complying with this Article may bring an action against the transferee to recover actual monetary loss or for damages up to five thousand dollars ($5,000) for the violation by the transferee, or bring actions for both. The payee is entitled to attorneys' fees and costs incurred to enforce this Article. In addition, all unpaid structured settlement payment rights transferred in violation of this Article by any transferee shall be reconveyed to the payee.

(c) No payee who proposes to make a transfer of structured settlement payment rights shall incur any penalty, forfeit any application fee or other payment, or otherwise incur any liability to the proposed transferee based on any failure of such transfer to satisfy the conditions of this Article. (1999-367, s. 1.)

CASE NOTES

Transfer Invalidated. — Approval of a factoring company's application to receive assignment of payment rights under annuities issued under settlement agreements was erroneous where the the transfers contravened G.S. 1-543.15(a) because they required an annuitant to waive the right to independant professional advice and contravened G.S. 1-543.12, which prohibited transfers of payments that have arisen under North Carolina's Workers' Compensation Act. In re Application for Approval, 133 Wn. App. 350, 136 P.3d 765, 2006 Wash. App. LEXIS 1119 (2006).

ARTICLE 45.

Arbitration and Award.

§§ 1-544 through 1-567: Repealed by Session Laws 1973, c. 676, s. 1.

Cross References. — For present provisions covering the subject matter of the repealed sections, see G.S. 1-569.1 et seq.

ARTICLE 45A.

Arbitration and Award.

§§ 1-567.1 through 1-567.20: Repealed by Session Laws 2003-345, s. 1, effective January 1, 2004, and applicable to agreements to arbitrate made on or after that date.

Cross References. — As to present similar provisions, see Article 45C of Chapter 1, G.S. 1-569.1, et seq.

§§ 1-567.21 through 1-567.29: Reserved for future codification purposes.

ARTICLE 45B.

International Commercial Arbitration and Conciliation.

Part 1. General Provisions.

§ 1-567.30. Preamble and short title.

It is the policy of the State of North Carolina to promote and facilitate international trade and commerce, and to provide a forum for the resolution of disputes that may arise from participation therein. Pursuant to this policy, the purpose of this Article is to encourage the use of arbitration or conciliation as a means of resolving such disputes, to provide rules for the conduct of arbitration or conciliation proceedings, and to assure access to the courts of this State for legal proceedings ancillary to such arbitration or conciliation. This Article shall be known as the North Carolina International Commercial Arbitration and Conciliation Act. (1991, c. 292, s. 1; 1997-368, ss. 1, 2, 5.)

§ 1-567.31. Scope of application.

(a) This Article applies to international commercial arbitration and conciliation, subject to any applicable international agreement in force between the United States of America and any other nation or nations, or any federal statute.

(b) The provisions of this Article, except G.S. 1-567.38, 1-567.39, and 1-567.65, apply only if the place of arbitration is in this State.

(c) An arbitration or conciliation is international if:

(1) The parties to the arbitration or conciliation agreement have their places of business in different nations when the agreement is concluded; or

(2) One or more of the following places is situated outside the nations in which the parties have their places of business:

  a. The place of arbitration or conciliation if determined pursuant to the arbitration agreement;

  b. Any place where a substantial part of the obligations of the commercial relationship is to be performed; or

  c. The place with which the subject matter of the dispute is most closely connected; or

(3) The parties have expressly agreed that the subject matter of the arbitration or conciliation agreement relates to more than one nation.

(d) For the purposes of subsection (c) of this section:

(1) If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration or conciliation agreement;

(2) If a party does not have a place of business, reference is to be made to the party's domicile.

(e) An arbitration or conciliation, respectively, is deemed commercial for the purposes of this Article if it arises out of a relationship of a commercial nature, including, but not limited to the following:

(1) A transaction for the exchange of goods and services;
(2) A distribution agreement;
(3) A commercial representation or agency;
(4) An exploitation agreement or concession;
(5) A joint venture or other related form of industrial or business cooperation;
(6) The carriage of goods or passengers by air, sea, land, or road;
(7) A contract or agreement relating to construction, insurance, licensing, factoring, leasing, consulting, engineering, financing, or banking;
(8) The transfer of data or technology;
(9) The use or transfer of intellectual or industrial property, including trade secrets, trademarks, trade names, patents, copyrights, and software programs;
(10) A contract for the provision of any type of professional service, whether provided by an employee or an independent contractor.

(f) This Article shall not affect any other law in force by virtue of which certain disputes may not be submitted to arbitration, conciliation, or mediation, or may be submitted to arbitration, conciliation, or mediation only according to provisions other than those of this Article.

(g) This Article shall not apply to any agreement providing explicitly that it shall not be subject to the North Carolina International Commercial Arbitration and Conciliation Act. This Article shall not apply to any agreement executed prior to June 13, 1991. (1991, c. 292, s. 1; 1997-141, s. 1; 1997-368, s. 6.)

§ 1-567.32. Definitions and rules of interpretation.

(a) For the purposes of this Article:
(1) "Arbitral award" means any decision of an arbitral tribunal on the substance of a dispute submitted to it, and includes an interlocutory, or partial award;
(2) "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
(3) "Arbitration" means any arbitration whether or not administered by a permanent arbitral institution;
(4) "Party" means a party to an arbitration agreement;
(5) "Superior court" means the superior court of any county in this State selected pursuant to G.S. 1-567.36.

(b) Where a provision of this Article, except G.S. 1-567.58, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination.

(c) Where a provision of this Article refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement.

(d) Where a provision of this Article, other than in G.S. 1-567.55(1) and G.S. 1-567.62(b)(1), refers to a claim, it also applies to a counterclaim, and where it refers to a defense, it also applies to a defense to such counterclaim. (1991, c. 292, s. 1.)

§ 1-567.33. Receipt of written communications or submissions.

(a) Unless otherwise agreed by the parties, any written communication or submission is deemed to have been received if it is delivered to the addressee personally or if it is delivered at the addressee's place of business, domicile or mailing address and the communication or submission is deemed to have been received on the day it is so delivered. Delivery by facsimile transmission shall constitute valid receipt if the communication or submission is in fact received.

(b) If none of the places referred to in subsection (a) can be found after making reasonable inquiry, a written communication or submission is deemed to have been received if it is sent to the addressee's last known place of business, domicile or mailing address by registered mail or any other means which provide a record of the attempt to deliver it.

(c) The provisions of this Article do not apply to a written communication or submission relating to a court, administrative or special proceeding. (1991, c. 292, s. 1.)

§ 1-567.33A. Severability.

In the event any provision of this act is held to be invalid, the court's holding as to that provision shall not affect the validity or operation of other provisions of the act; and to that end the provisions of the act are severable. (1991, c. 292, s. 1; 1997-368, s. 3.)

Editor's Note. — This section was formerly codified as G.S. 1-567.68. It was recodified as G.S. 1-567.33A by Session Laws 1997-368, s. 3, effective October 1, 1997, and applicable to any international commercial disputes that are subject on or after that date to conciliation pursuant to Article 45B of Chapter 1 of the General Statutes, as amended by that act.

Part 2. International Commercial Arbitration.

§ 1-567.34. Waiver of right to object.

A party who knows that any provision of this Article or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating an objection to such noncompliance without undue delay or, if a time limit is provided therefor, within that period of time, shall be deemed to have waived any right to object. (1991, c. 292, s. 1.)

§ 1-567.35. Extent of court intervention.

In matters governed by this Article, no court shall intervene except where so provided in this Article or applicable federal law or any applicable international agreement in force between the United States of America and any other nation or nations. (1991, c. 292, s. 1.)

§ 1-567.36. Venue and jurisdiction of courts.

(a) The functions referred to in G.S. 1-567.41(c) and (d), 1-567.43(a), 1-567.44(b), 1-567.46(c), and 1-567.57 shall be performed by the superior court in:

(1) The county where the arbitration agreement is to be performed or was made;

(2) If the arbitration agreement does not specify a county where the agreement is to be performed and the agreement was not made in any county in the State of North Carolina, the county where any party to the court proceeding resides or has a place of business;

(3) In any case not covered by subdivisions (1) or (2) of this subsection, in any county in the State of North Carolina.

(b) All other functions assigned by this Article to the superior court shall be performed by the superior court of the county in which the place of arbitration is located. (1991, c. 292, s. 1.)

§ 1-567.37. Definition and form of arbitration agreement.

(a) An "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether or not contractual. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(b) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, facsimile transmission, or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

(c) Such arbitration agreement shall be valid, enforceable and irrevocable, except with the consent of all the parties, without regard to the justiciable character of the controversy. (1991, c. 292, s. 1.)

§ 1-567.38. Arbitration agreement and substantive claim before court.

(a) When a party to an international commercial arbitration agreement as defined in this Article commences judicial proceedings seeking relief with respect to a matter covered by the agreement to arbitrate, any other party to the agreement may apply to the superior court for an order to stay the proceedings and compel arbitration.

(b) Arbitration proceedings may begin or continue, and an award may be made, while an action described in subsection (a) is pending before the court. (1991, c. 292, s. 1.)

§ 1-567.39. Interim relief and the enforcement of interim measures.

(a) In the case of an arbitration where the arbitrator or arbitrators have not been appointed, or where the arbitrator or arbitrators are unavailable, a party may seek interim relief directly from the superior court as provided in subsection (c). Enforcement shall be granted as provided by the law applicable to the type of interim relief sought.

(b) In all other cases, a party shall seek interim measures under G.S. 1-567.47 from the arbitral tribunal and shall have no right to seek interim relief from the superior court, except that a party to an arbitration governed by this Article may request from the superior court enforcement of an order of an arbitral tribunal granting interim measures under G.S. 1-567.47.

(c) In connection with an agreement to arbitrate or a pending arbitration, the superior court may grant, pursuant to subsection (a) of this section:

(1) An order of attachment or garnishment;
(2) A temporary restraining order or preliminary injunction;
(3) An order for claim and delivery;
(4) The appointment of a receiver;
(5) Delivery of money or other property into court;
(6) Any other order that may be necessary to ensure the preservation or availability either of assets or of documents, the destruction or absence of which would be likely to prejudice the conduct or effectiveness of the arbitration.

(d) In considering a request for interim relief or the enforcement of interim measures, the court shall give preclusive effect to any finding of fact of the arbitral tribunal in the proceeding, including the probable validity of the claim that is the subject of the interim relief sought or the interim measures granted.

(e) Where the arbitral tribunal has not ruled on an objection to its jurisdiction, the court shall not grant preclusive effect to the tribunal's findings until the court has made an independent finding as to the jurisdiction of the arbitral tribunal. If the court rules that the arbitral tribunal did not have jurisdiction, the application for interim relief or the enforcement of interim measures shall be denied. Such a ruling by the court that the arbitral tribunal lacks jurisdiction is not binding on the arbitral tribunal or subsequent judicial proceedings.

(f) The availability of interim relief under this section may be limited by prior written agreement of the parties. (1991, c. 292, s. 1.)

§ 1-567.40. Number of arbitrators.

There shall be one arbitrator unless the parties agree on a greater number of arbitrators. (1991, c. 292, s. 1.)

§ 1-567.41. Appointment of arbitrators.

(a) A person of any nationality may be an arbitrator.

(b) The parties may agree on a procedure of appointing the arbitral tribunal subject to the provisions of subsections (d) and (e) of this section.

(c)(1) If an agreement is not made under subsection (b) of this section, in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within 30 days of their appointment, the appointment shall be made, upon request of a party, by the superior court.

(2) In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, a sole arbitrator shall be appointed, upon request of a party, by the superior court.

(3) In an arbitration involving more than two parties, if no agreement is reached under subsection (b) of this section, the superior court, on request of a party, shall appoint one or more arbitrators, as provided in G.S. 1-567.40.

(d) The superior court, on request of any party, may take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment, if, under an appointment procedure agreed upon by the parties:

(1) A party fails to act as required under such procedure; or

(2) The parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or

(3) A third party, including an institution, fails to perform any function entrusted to it under such procedure.

(e) A decision of the superior court on a matter entrusted by subsection (c) or (d) of this section shall be final and not subject to appeal.

(f) The superior court, in appointing an arbitrator, shall consider:

(1) Any qualifications required of the arbitrator by the agreement of the parties;

(2) Such other considerations as are likely to secure the appointment of an independent and impartial arbitrator;

(3) In the case of a sole or third arbitrator, the advisability of appointing an arbitrator of a nationality other than those of the parties.

(g) The parties may agree to employ an established arbitration institution to conduct the arbitration. If they do not so agree, the superior court may in its discretion designate an established arbitration institution to conduct the arbitration.

(h) Unless otherwise agreed, an arbitrator shall be entitled to compensation at an hourly or daily rate which reflects the size and complexity of the case, and the experience of the arbitrator. If the parties are unable to agree on such a rate, the rate shall be determined by the arbitral institution chosen pursuant to subsection (g) of this section or by the arbitral tribunal, in either case subject to the review of the superior court upon the motion of any dissenting party. (1991, c. 292, s. 1; 1993, c. 553, s. 6.)

§ 1-567.42. Grounds for challenge.

(a) Except as otherwise provided in this Article, all persons whose names have been submitted for consideration for appointment or designation as arbitrators, or who have been appointed or designated as such, shall make a disclosure to the parties within 15 days of such submission, appointment, or designation of any information which might cause their impartiality to be questioned including, but not limited to, any of the following instances:

(1) The person has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) The person served as a lawyer in the matter in controversy, or the person is or has been associated with another who has participated in the matter during such association, or has been a material witness concerning it;

(3) The person served as an arbitrator in another proceeding involving one or more of the parties to the proceeding;

(4) The person, individually or as a fiduciary, or such person's spouse or minor child residing in such person's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) The person, his or her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person meets any of the following conditions:
  a. The person is or has been a party to the proceeding, or an officer, director, or trustee of a party;
  b. The person is acting or has acted as a lawyer in the proceeding;
  c. The person is known to have an interest that could be substantially affected by the outcome of the proceeding;
  d. The person is likely to be a material witness in the proceeding;

(6) The person has a close personal or professional relationship with a person who meets any of the following conditions:
  a. The person is or has been a party to the proceeding, or an officer, director, or trustee of a party;
  b. The person is acting or has acted as a lawyer or representative in the proceeding;
  c. The person is or expects to be nominated as an arbitrator or conciliator in the proceeding;
  d. The person is known to have an interest that could be substantially affected by the outcome of the proceeding;
  e. The person is likely to be a material witness in the proceeding.

(b) The obligation to disclose information set forth in subsection (a) of this section is mandatory and cannot be waived as to the parties with respect to persons serving either as sole arbitrator or as the chief or prevailing arbitrator. The parties may otherwise agree to waive such disclosure.

(c) From the time of appointment and throughout the arbitral proceedings, an arbitrator shall disclose to the parties without delay any circumstances referred to in subsection (a) of this section which were not previously disclosed.

(d) Unless otherwise agreed by the parties or the rules governing the arbitration, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality, or as to his or her possession of the qualifications upon which the parties have agreed.

(e) A party may challenge an arbitrator appointed by it, or in whose appointment it has participated only for reasons of which it becomes aware after the appointment has been made. (1991, c. 292, s. 1.)

§ 1-567.43. Challenge procedure.

(a) The parties may agree on a procedure for challenging an arbitrator, subject to the provisions of subsection (c) of this section.

(b) If there is no agreement under subsection (a) of this section, a party challenging an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in G.S. 1-567.42(a), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(c) If a challenge under any procedure agreed upon by the parties or under the procedure of subsection (b) of this section is not successful, the challenging party may, within 30 days after having received notice of the decision rejecting the challenge, request the superior court to decide on the challenge, which decision shall be final and subject to no appeal. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue to conduct the arbitral proceedings and make an award. (1991, c. 292, s. 1.)

§ 1-567.44. Failure or impossibility to act.

(a) The mandate of an arbitrator terminates if the arbitrator becomes unable to perform the arbitrator's functions or for other reasons fails to act without undue delay or the arbitrator withdraws or the parties agree to the termination.

(b) If a controversy remains concerning any of the grounds referred to in subsection (a) of this section, a party may request the superior court to decide on the termination of the mandate. The decision of the superior court shall be final and not subject to appeal.

(c) If under this section or under G.S. 1-567.43, an arbitrator withdraws or otherwise agrees to the termination of his or her mandate, no acceptance of the validity of any ground referred to in this section or G.S. 1-567.43(b) shall be implied in consequence of such action. (1991, c. 292, s. 1.)

§ 1-567.45. Appointment of substitute arbitrator.

(a) Where the mandate of an arbitrator terminates for any reason, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(b) Unless otherwise agreed by the parties:

(1) Where the number of arbitrators is less than three and an arbitrator is replaced, any hearings previously held shall be repeated;

(2) Where the presiding arbitrator is replaced, any hearings previously held shall be repeated;

(3) Where the number of arbitrators is three or more and an arbitrator other than the presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(c) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section is not invalid because there has been a change in the composition of the tribunal. (1991, c. 292, s. 1.)

§ 1-567.46. Competence of arbitral tribunal to rule on its jurisdiction.

(a) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms a part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause, unless the arbitral tribunal finds that the arbitration clause was obtained by fraud, whether in the inducement or in the factum.

(b) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. However, a party is not precluded from raising such a plea by the fact that the party has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. In either case, the arbitral tribunal may admit a later plea if it considers the delay justified.

(c) The arbitral tribunal may rule on a plea referred to in subsection (b) of this section either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, after having received notice of that ruling, any party may request the superior court to decide the matter. The decision of the superior court shall be final and not subject to appeal. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. (1991, c. 292, s. 1.)

§ 1-567.47. Power of arbitral tribunal to order interim measures.

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, including an interim measure analogous to any type of interim relief specified in G.S. 1-567.39(c). The arbitral tribunal may require any party to provide appropriate security, including security for costs as provided in G.S. 1-567.61(h)(2), in connection with such measure. (1991, c. 292, s. 1.)

§ 1-567.48. Equal treatment of parties; representation by attorney.

(a) The parties shall be treated with equality and each party shall be given a full opportunity to present its case.

(b) A party has the right to be represented by an attorney at any proceeding or hearing under this Article. A waiver of this right prior to the proceeding or hearing is ineffective. (1991, c. 292, s. 1; 1997-141, s. 2.)

§ 1-567.49. Determination of rules of procedure.

(a) Subject to the provisions of this Article, the parties may agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(b) If there is no agreement under subsection (a) of this section, the arbitral tribunal may, subject to the provisions of this Article, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to order such discovery as it deems necessary and to determine the admissibility, relevance, materiality, and weight of any evidence. Evidence need not be limited by the rules of evidence applicable in judicial proceedings, except as to immunities and privilege. Each party shall have the burden of proving the facts relied on to support its claim, setoff, or defense. (1991, c. 292, s. 1.)

§ 1-567.50. Place of arbitration.

(a) The parties may agree on the place of arbitration. If the parties do not agree, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(b) Notwithstanding the provisions of subsection (a) of this section, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property, or documents. (1991, c. 292, s. 1.)

§ 1-567.51. Commencement of arbitral proceedings.

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. (1991, c. 292, s. 1.)

§ 1-567.52. Language.

(a) The parties may agree on the language or languages to be used in the arbitral proceedings. If the parties do not agree, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision, or other communication by the arbitral tribunal.

(b) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

(c) The arbitral tribunal may employ one or more translators at the expense of the parties. (1991, c. 292, s. 1.)

§ 1-567.53. Statements of claim and defense.

(a) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting its claim, the points at issue and the relief or remedy sought, and the respondent shall state its defenses and counterclaims or setoffs in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence the party will submit.

(b) Unless otherwise agreed by the parties, either party may amend or supplement a claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

(c) If there are more than two parties to the arbitration, each party shall state its claims, setoffs, and defenses as provided in subsection (a) of this section. (1991, c. 292, s. 1.)

§ 1-567.54. Hearings and written proceedings.

(a) Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(b) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property, or documents.

(c) All statements, documents, or other information supplied to the arbitral tribunal by one party shall be served on the other party and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be served on the parties. The arbitral tribunal shall direct the timing of such service to protect the parties from undue surprise.

(d) Unless otherwise agreed by the parties, all oral hearings and meetings in arbitral proceedings shall be held in camera. Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by the arbitrator or arbitrators. Unless otherwise agreed by the parties, or required by applicable law, the arbitral tribunal and the parties shall keep confidential all matters relating to the arbitration and the award.

(e) The parties may agree on:

(1) The attendance of a court reporter,
(2) The creation of a transcript of proceedings, or
(3) The making of an audio or video record of proceedings, at the expense of the parties.

Any party may provide for any of the actions specified in subdivisions (1) through (3) of this subsection at that party's own expense.

(f) After asking the parties if they have any further testimony or evidentiary submissions and upon receiving negative replies or being satisfied that the record is complete, the arbitral tribunal may declare the hearings closed. The arbitral tribunal may reopen the hearings, upon terms it considers just, at any time before the award is made. (1991, c. 292, s. 1.)

§ 1-567.55. Default of a party.

Unless otherwise agreed by the parties, where, without showing sufficient cause:

(1) The claimant fails to submit a statement of claim in accordance with G.S. 1-567.53(a), the arbitral tribunal shall terminate the proceedings;
(2) The respondent fails to submit a statement of defense in accordance with G.S. 1-567.53(c), the arbitral tribunal shall continue to conduct

the proceedings without treating such failure in itself as an admission of the claimant's allegations;

(3) Any party fails to appear at a hearing or to produce documentary evidence as directed by the arbitral tribunal, the arbitral tribunal may continue to conduct the proceedings and make the award on the evidence before it. (1991, c. 292, s. 1.)

§ 1-567.56. Expert appointed by arbitral tribunal.

(a) Unless otherwise agreed by the parties, the arbitral tribunal:

(1) May appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(2) May require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods, or other property for the expert's inspection.

(b) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to question the expert and to present expert witnesses on the points at issue. (1991, c. 292, s. 1.)

§ 1-567.57. Court assistance in obtaining discovery and taking evidence.

(a) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the superior court assistance in obtaining discovery and taking evidence. The court may execute the request within its competence and according to its rules on discovery and taking evidence, and may impose sanctions for failure to comply with its orders. A subpoena may be issued as provided by G.S. 8-59, in which case the witness compensation provisions of G.S. 6-51, 6-53, and 7A-314 shall apply.

(b) If the parties to two or more arbitration agreements agree, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those agreements, the superior court, upon application by a party, may do any of the following:

(1) Order the arbitrations to be consolidated on terms the court considers just and necessary;

(2) If all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal as provided by G.S. 1-567.41; and

(3) If all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary. (1991, c. 292, s. 1; 1999-185, s. 2.)

§ 1-567.58. Rules applicable to substance of dispute.

(a) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given country or political subdivision thereof shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country or political subdivision and not to its conflict of laws rules.

(b) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(c) The arbitral tribunal shall decide ex aequo et bono (on the basis of fundamental fairness), or as amiable compositeur (as an "amicable compounder"), only if the parties have expressly authorized it to do so.

(d) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. (1991, c. 292, s. 1; c. 761, s. 1.)

§ 1-567.59. Decision making by panel of arbitrators.

Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members. However, questions of procedure may be decided by a presiding arbitrator, if authorized by the parties or all members of the arbitral tribunal. (1991, c. 292, s. 1.)

§ 1-567.60. Settlement.

(a) An arbitral tribunal may encourage settlement of the dispute and, with the agreement of the parties, may use mediation, conciliation, or other procedures at any time during the arbitral proceedings to encourage settlement.

(b) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(c) An award on agreed terms shall be made in accordance with the provisions of G.S. 1-567.61 and shall state that it is an arbitral award. Such an award shall have the same status and effect as any other award on the substance of the dispute. (1991, c. 292, s. 1.)

§ 1-567.61. Form and contents of award.

(a) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(b) The award shall not state the reasons upon which it is based, unless the parties have agreed that reasons are to be given.

(c) The award shall state its date and the place of arbitration as determined in accordance with G.S. 1-567.50. The award shall be considered to have been made at that place.

(d) After the award is made, a copy signed by the arbitrator or arbitrators in accordance with subsection (a) of this section shall be delivered to each party.

(e) The award may be denominated in foreign currency, by agreement of the parties or in the discretion of the arbitral tribunal if the parties are unable to agree.

(f) Unless otherwise agreed by the parties, the arbitral tribunal may award interest.

(g) The arbitral tribunal may award specific performance in its discretion to a party requesting an award of specific performance.

(h)(1) Unless otherwise agreed by the parties, the awarding of costs of an arbitration shall be at the discretion of the arbitral tribunal.

(2) In making an order for costs, the arbitral tribunal may include as costs:

a. The fees and expenses of the arbitrator or arbitrators, expert witnesses, and translators;

b. Fees and expenses of counsel and of the institution supervising the arbitration, if any; and

c. Any other expenses incurred in connection with the arbitral proceedings.

(3) In making an order for costs, the arbitral tribunal may specify:
  a. The party entitled to costs;
  b. The party who shall pay the costs;
  c. The amount of costs or method of determining that amount; and
  d. The manner in which the costs shall be paid. (1991, c. 292, s. 1.)

§ 1-567.62. Termination of proceedings.

(a) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with subsection (b) of this section.

(b) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings if:

(1) The claimant withdraws the claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on the respondent's part in obtaining a final settlement of the dispute;
(2) The parties agree on the termination of the proceedings; or
(3) The arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(c) Subject to the provisions of G.S. 1-567.63, the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings. (1991, c. 292, s. 1.)

§ 1-567.63. Correction and interpretation of awards; additional awards.

(a) Within 30 days of receipt of the award, unless another period of time has been agreed upon by the parties:

(1) A party may request the arbitral tribunal to correct in the award any computation, clerical or typographical errors or other errors of a similar nature;
(2) A party may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers such request to be justified, it shall make the correction or give the interpretation within 30 days of receipt of the request. Such correction or interpretation shall become part of the award.

(b) The arbitral tribunal may correct any error of the type referred to in subsection (a) of its own initiative within 30 days of the date of the award.

(c) Unless otherwise agreed by the parties, within 30 days of receipt of the award, a party may request the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within 60 days after the date of receipt of the request.

(d) The arbitral tribunal may extend, if necessary, the period within which it shall make a correction interpretation, or an additional award under subsection (a) or (c).

(e) The provisions of G.S. 1-567.61 shall apply to a correction or interpretation of the award or to an additional award made under this section. (1991, c. 292, s. 1.)

§ 1-567.64. Modifying or vacating of awards.

Subject to the relevant provisions of federal law or any applicable international agreement in force between the United States of America and any other nation or nations, an arbitral award may be vacated by a court only upon a showing that the award is tainted by illegality, or substantial unfairness in the conduct of the arbitral proceedings. In determining whether an award is so tainted, the superior court shall have regard to the provisions of this Article, and of G.S. 1-569.23 and G.S. 1-569.24, but shall not engage in de novo review of the subject matter of the dispute giving rise to the arbitration proceedings. (1991, c. 292, s. 1; 2003-345, s. 3.)

§ 1-567.65. Confirmation and enforcement of awards.

Subject to the relevant provisions of federal law or any applicable international agreement in force between the United States of America and any other nation or nations, upon application of a party, the superior court shall confirm an arbitral award, unless it finds grounds for modifying or vacating the award under G.S. 1-567.64. An award shall not be confirmed unless the time for correction and interpretation of awards prescribed by G.S. 1-567.63 shall have expired or been waived by all the parties. Upon the granting of an order confirming, modifying, or correcting an award, judgment or decree shall be entered in conformity therewith and enforced as any other judgment or decree. The superior court may award costs of the application and of the subsequent proceedings. (1991, c. 292, s. 1.)

§ 1-567.66. Applications to superior court.

Except as otherwise provided, an application to the superior court under this Article shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action. (1991, c. 292, s. 1.)

§ 1-567.67. Appeals.

(a) An appeal may be taken from:

(1) An order denying an application to compel arbitration made under G.S. 1-567.38;

(2) An order granting an application to stay arbitration made under G.S. 1-567.38;

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of this Article.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action. (1991, c. 292, s. 1.)

§ 1-567.68: Recodified as G.S. 1-567.33A by Session Laws 1997-368, s. 3.

§§ 1-567.69 through 1-567.77: Reserved for future codification purposes.

Part 3. International Commercial Conciliation.

§ 1-567.78. Appointment of conciliators.

(a) The parties may select or permit an arbitral tribunal or other third party to select one or more persons to serve as the conciliators.

(b) The conciliator shall assist the parties in an independent and impartial manner in the parties' attempt to reach an amicable settlement of their dispute. The conciliator shall be guided by principles of objectivity, fairness, and justice and shall give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned, and the circumstances surrounding the dispute, including any previous practices between the parties.

(c) The conciliator may conduct the conciliation proceedings in a manner that the conciliator considers appropriate, considering the circumstances of the case, the wishes of the parties, and the desirability of a prompt settlement of the dispute. Except as otherwise provided by this Article, other provisions of the law of this State governing procedural matters do not apply to conciliation proceedings brought under this Part. (1997-368, s. 7.)

Editor's Note. — Session Laws 1997-368, s. 7, enacted this section as G.S. 1-567.68; it was recodified as G.S. 1-567.78 at the direction of the Revisor of Statutes.

§ 1-567.79. Representation.

The parties may appear in person or be represented or assisted by any person of their choice. (1997-368, s. 7.)

Editor's Note. — Session Laws 1997-368, s. 7, enacted this section as G.S. 1-567.69; it was recodified as G.S. 1-567.79 at the direction of the Revisor of Statutes.

§ 1-567.80. Report of conciliators.

(a) At any time during the proceedings, a conciliator may prepare a draft conciliation agreement and send copies to the parties, specifying the time within which the parties must signify their approval. The draft conciliation agreement may include the assessment and apportionment of costs between the parties.

(b) A party is not required to accept a settlement proposed by the conciliator. (1997-368, s. 7.)

Editor's Note. — Session Laws 1997-368, s. 7, enacted this section as G.S. 1-567.70; it was recodified as G.S. 1-567.80 at the direction of the Revisor of Statutes.

§ 1-567.81. Confidentiality.

(a) Evidence of anything said or of an admission made in the course of a conciliation is not admissible, and disclosure of that evidence shall not be compelled in any arbitration or civil action in which, under law, testimony may be compelled to be given. This subsection does not limit the admissibility of evidence when all parties participating in conciliation consent to its disclosure.

(b) If evidence is offered in violation of this section, the arbitral tribunal or the court shall make any order it considers appropriate to deal with the matter, including an order restricting the introduction of evidence or dismissing the case.

(c) Unless the document otherwise provides, a document prepared for the purpose of, in the course of, or pursuant to the conciliation, or a copy of such document, is not admissible in evidence, and disclosure of the document shall not be compelled in any arbitration or civil action in which, under law, testimony may be compelled. (1997-368, s. 7.)

Editor's Note. — Session Laws 1997-368, s. 7, enacted this section as G.S. 1-567.71; it was recodified as G.S. 1-567.81 at the direction of the Revisor of Statutes.

§ 1-567.82. Stay of arbitration; resort to other proceedings.

(a) The agreement of the parties to submit a dispute to conciliation is considered an agreement between or among those parties to stay all judicial or arbitral proceedings from the beginning of conciliation until the termination of conciliation proceedings.

(b) All applicable limitation periods, including periods of prescription, are tolled or extended on the beginning of conciliation proceedings under this Part as to all parties to the conciliation proceedings until the tenth day following the date of termination of the proceedings. For purposes of this section, conciliation proceedings are considered to have begun when the parties have all agreed to participate in the conciliation proceedings. (1997-368, s. 7.)

Editor's Note. — Session Laws 1997-368, s. 7, enacted this section as G.S. 1-567.72; it was recodified as G.S. 1-567.82 at the direction of the Revisor of Statutes.

§ 1-567.83. Termination of conciliation.

(a) A conciliation proceeding may be terminated as to all parties by any one of the following means:

(1) On the date of the declaration, a written declaration of the conciliators that further efforts at conciliation are no longer justified.

(2) On the date of the declaration, a written declaration of the parties addressed to the conciliators that the conciliation proceedings are terminated.

(3) On the date of the agreement, a conciliation agreement signed by all of the parties.

(4) On the date of the order, order of the court when the matter submitted to conciliation is in litigation in the courts of this State.

(b) A conciliation proceeding may be terminated as to particular parties by any one of the following means:

(1) On the date of the declaration, a written declaration of the particular party to the other parties and the conciliators that the conciliation proceedings are to be terminated as to that party.

(2) On the date of the agreement, a conciliation agreement signed by some of the parties.

(3) On the date of the order, order of the court when the matter submitted to conciliation is in litigation in the courts of this State. (1997-368, s. 7.)

Editor's Note. — Session Laws 1997-368, s. 7, enacted this section as G.S. 1-567.73; it was recodified as G.S. 1-567.83 at the direction of the Revisor of Statutes.

§ 1-567.84. Enforceability of decree.

If the conciliation proceeding settles the dispute and the result of the conciliation is in writing and signed by the conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal under this Article and has the same force and effect as a final award in arbitration. (1997-368, s. 7.)

Editor's Note. — Session Laws 1997-368, s. 7, enacted this section as G.S. 1-567.74; it was recodified as G.S. 1-567.84 at the direction of the Revisor of Statutes.

§ 1-567.85. Costs.

(a) On termination of the conciliation proceeding, the conciliators shall set the costs of the conciliation and give written notice of the costs to the parties. For purposes of this section, "costs" includes all of the following:
(1) A reasonable fee to be paid to the conciliators.
(2) Travel and other reasonable expenses of the conciliators.
(3) Travel and other reasonable expenses of witnesses requested by the conciliators, with the consent of the parties.
(4) The cost of any expert advice requested by the conciliators, with the consent of the parties.
(5) The cost of any court.

(b) Costs shall be borne equally by the parties unless a conciliation agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party. (1997-368, s. 7.)

Editor's Note. — Session Laws 1997-368, s. 7, enacted this section as G.S. 1-567.75; it was recodified as G.S. 1-567.85 at the direction of the Revisor of Statutes.

§ 1-567.86. Effect on jurisdiction.

Requesting conciliation, consenting to participate in the conciliation proceedings, participating in conciliation proceedings, or entering into a conciliation agreement does not constitute consenting to the jurisdiction of any court in this State if conciliation fails. (1997-368, s. 7.)

Editor's Note. — Session Laws 1997-368, s. 7, enacted this section as G.S. 1-567.76; it was recodified as G.S. 1-567.86 at the direction of the Revisor of Statutes.

§ 1-567.87. Immunity of conciliators and parties.

(a) A conciliator, party, or representative of a conciliator or party, while present in this State for the purpose of arranging for or participating in conciliation under this Part, is not subject to service of process on any civil matter related to the conciliation.

(b) A person who serves as a conciliator shall have the same immunity as judges from civil liability for their official conduct in any proceeding subject to this Part. This qualified immunity does not apply to acts or omissions which occur with respect to the operation of a motor vehicle. (1997-368, s. 7.)

Editor's Note. — Session Laws 1997-368, s. 7, enacted this section as G.S. 1-567.77; it was recodified as G.S. 1-567.87 at the direction of the Revisor of Statutes.

§ 1-568: Repealed by Session Laws 1951, c. 760, s. 2.

Editor's Note. — This repealed section was formerly located in Article 46 of Chapter 1. It was moved to its current location in this Article at the direction of the Revisor of Statutes in order to make room for Article 45C of Chapter 1, consisting of G.S. 1-569.1 through 1-569.30, as enacted by Session Laws 2003-345, s. 2.

§§ 1-568.1 through 1-568.27: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to depositions and discovery, see G.S. 1A-1, Rules 26 to 37.

Editor's Note. — These repealed sections were formerly located in Article 46 of Chapter 1. They were moved to their current location in this Article at the direction of the Revisor of Statutes in order to make room for Article 45C of Chapter 1, consisting of G.S. 1-569.1 through 1-569.30, as enacted by Session Laws 2003-345, s. 2.

§ **1-569:** Repealed by Session Laws 1951, c. 760, s. 2.

Editor's Note. — This repealed section was formerly located in Article 46 of Chapter 1. It was moved to its current location in this Article at the direction of the Revisor of Statutes in order to make room for Article 45C of Chapter 1, consisting of G.S. 1-569.1 through 1-569.30, as enacted by Session Laws 2003-345, s. 2.

ARTICLE 45C.

Revised Uniform Arbitration Act.

§ 1-569.1. Definitions.

The following definitions apply in this Article:

(1) "Arbitration organization" means an association, agency, board, commission, or other entity that is neutral and initiates, sponsors, or administers an arbitration proceeding or is involved in the appointment of an arbitrator.

(2) "Arbitrator" means an individual appointed to render an award, alone or with others, in a controversy that is subject to an agreement to arbitrate.

(3) "Court" means a court of competent jurisdiction in this State.

(4) "Knowledge" means actual knowledge.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(6) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. (2003-345, s. 2)

Editor's Note. — Session Laws 2003-345, s. 4, made this Article effective January 1, 2004, and applicable to agreements to arbitrate made on or after that date. Agreements to arbitrate made before January 1, 2004, shall be governed by Article 45A of Chapter 1, subject to the provisions of G.S. 1-569.3(b) as enacted in this act [Session Laws 2003-345].

Session Laws 2003-345 repealed G.S. 1-567.1 to 1-567.20, the Uniform Arbitration Act, and added G.S. 1-569.1 et seq., the Revised Uniform Arbitration Act. Where applicable, the historical citations and case notes under the former sections have been transferred to the corresponding new sections.

Cross References. — As to arbitration of labor disputes, see G.S. 95-36.1 through 95-36.9.

Legal Periodicals. — For article, "Mediation and Arbitration of Separation and Divorce Agreements," see 15 Wake Forest L. Rev. 467 (1979).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1088 (1981).

For note discussing arbitration of domestic cases, see 4 Campbell L. Rev. 203 (1981).

For note on arbitration and punitive damages, in light of Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986), see 64 N.C.L. Rev. 1145 (1986).

For article, "Court-Ordered Arbitration Comes to North Carolina and the Nation," see 21 Wake Forest L. Rev. 901 (1986).

For survey of North Carolina construction law, with particular reference to arbitration, see 21 Wake Forest L. Rev. 633 (1986).

For note, "No Frills Justice: North Carolina Experiments with Court-Ordered Arbitration," see 66 N.C.L. Rev. 395 (1988).

For article, "Arbitration and Constitutional Rights," see 71 N.C.L. Rev. 81 (1992).

CASE NOTES

Editor's Note. — *The cases below were decided under former Article 45A of Chapter 1.*

Effect of Article. — This Article provides that parties may agree in writing to submit to arbitration "any controversy" then existing between them or include in any written contract a provision for settlement by arbitration of "any controversy" arising between them relating to the contract or nonperformance thereof. Such agreement or provision is valid, enforceable and irrevocable except with the consent of the parties, without regard to the justiciable character of the controversy. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

This Article provides only two exceptions to which it will not apply: (1) any agreement or provision to arbitrate in which it is stipulated that it will not apply and (2) arbitration agreements between employers and employees or between their respective representatives, unless the agreement provides that it will apply. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Held Not Applicable. — Under prior law motion by city manager for a protective order prohibiting his deposition was denied. The city manager was neither an arbitrator nor neutral; accordingly, his decisions were not made under the auspices of G.S. 1-567.1 et seq. MCI Constr., LLC v. Hazen & Sawyer, P.C., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 15318 (M.D.N.C. Aug. 29, 2003).

The purpose of arbitration is to reach a final settlement of disputed matters without litigation. McNeal v. Black, 61 N.C. App. 305, 300 S.E.2d 575 (1983).

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of an award. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Read in its entirety, the Uniform Arbitration Act appears to create a system of problem resolution with minimal judicial intervention. This Act provides a means by which parties can agree contractually to limit judicial intervention into their disputes. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Legislative Intent. — Read as a whole, the Uniform Arbitration Act provides parties with a means to bypass the morass of judicial litigation, while still maintaining the judicial doors ajar for recalcitrant disputes. Hence, it would appear that the legislature intended the courts to send certain predetermined issues to arbitration and then to step back until the arbitration proceeding is complete. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Purpose Behind Enactment of Uniform Act. — The principle legislative purpose behind enactment of the Uniform Arbitration Act is to provide and encourage an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation, and without the primary expense of litigation — attorneys' fees. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Federal Arbitration Act. — Federal Arbitration Act (FAA), 9 U.S.C.S. § 1 et seq., preempts conflicting state law, including any state statutes that render arbitration agreements unenforceable, and state courts cannot apply state statutes that invalidate arbitration agreements; where a trial court did not specifically address whether the arbitration clause at issue in an employment agreement was governed by the FAA or by the North Carolina Uniform Arbitration Act on appeal of the trial court's order, the case was remanded for a finding as to this issue. Sillins v. Ness, 164 N.C. App. 755, 596 S.E.2d 874, 2004 N.C. App. LEXIS 1139 (2004).

Confirmation of Arbiter's Decision. — An agreement to arbitrate does not cut off a party's access to the courts. On the contrary, an action compelled to arbitration must have the arbiter's decision confirmed by the court. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Court Must Order Arbitration on Motion of Party. — As long as the statutory requirements of the Uniform Arbitration Act, (former G.S. 1-567.1 through 1-567.20) have been met and an order compelling arbitration would not prejudice a party to the contract who opposes the motion according to the standard set forth in this opinion, a court must order arbitration on motion of a party to the contract. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Filing of Pleadings Does Not Constitute Waiver of Arbitration Provision. — The mere filing of pleadings by both parties to a contract containing an arbitration agreement does not constitute waiver of the arbitration provision as a matter of law. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

General contract law governs the issue of the existence of an agreement to arbitrate. Southern Spindle & Flyer Co. v. Milliken & Co., 53 N.C. App. 785, 281 S.E.2d 734 (1981), cert. denied, 304 N.C. 729, 288 S.E.2d 381 (1982).

Though the act requires that certain disputes be removed from direct judicial supervision, the court that compels arbitration does not lose jurisdiction. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

"Hands-off" Period. — The act creates a process whereby the existence of an agreement to arbitrate requires a court to compel arbitration on one party's motion and then requires the court to step back and take a "hands-off" attitude during the arbitration proceeding. The trial court then reenters the dispute arena to confirm, modify, deny or vacate the arbiter's award. At no time does the trial court lose jurisdiction. However, during the "hands-off" period, the trial court must not interfere with the arbitration proceeding. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Binding arbitration is not available in this State by court order in a civil action for alimony, custody and child support. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

But May Be Had by Agreement. — Since the parties may settle spousal support by agreement, there exists no prohibition to their entering into binding arbitration under this Article to settle the issue of spousal support. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Once a civil action has been filed and is pending, the court has no authority to order binding arbitration, even with the parties' consent. But ordinarily, with the parties' consent, the judge can refer these issues to a referee. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

While in the absence of court proceedings, parties may settle their disputes by arbitration, once the issues are brought into court, the court may not delegate its duty to resolve those issues to arbitration. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Power of Court to Modify Award. — While provisions of a valid arbitration award concerning alimony may by agreement be made binding on the parties and nonmodifiable by the courts, provisions of the award concerning custody and child support continue to be within the court's jurisdiction and are modifiable pursuant to G.S. 50-13.7. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Just as parents cannot by agreement deprive the courts of their duty to promote the best interests of their children, they cannot do so by arbitration. Hence those provisions of an arbitration award concerning custody and child support, like those provisions in a separation agreement, will remain reviewable and modifiable by the court. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

To Add An Award of Attorney's Fees. — Under the Uniform Arbitration Act, former G.S. 1-567.1 et seq. [now G.S. 1-569.1 et seq.], there is no authority for an arbitrator or a court to award attorney's fees after an original arbitration award is made. Vanhoy v. Duncan Contractors, Inc., 153 N.C. App. 320, 569 S.E.2d 715, 2002 N.C. App. LEXIS 1122 (2002).

Section Held Inapplicable to Brokerage Dispute. — Court's vacatur of arbitration panel's award in a brokerage agreement dispute was unsupported by the evidence and prejudicial where the FAA, not the NCUAA, applied to resolving plaintiffs' motion to vacate the arbitration award and where the conclusions of law were unsupported by the findings. Carpenter v. Brooks, 139 N.C. App. 745, 534 S.E.2d 641, 2000 N.C. App. LEXIS 1033 (2000), cert. denied, 353 N.C. 261, 546 S.E.2d 91 (2000).

Attempt to Frustrate Federal Arbitration by Filing State Action. — Where a construction contract contained a broad arbitration clause, the "reactive" filing of a state declaratory action by one party, asserting the nonarbitrability of a dispute before the other party had any real opportunity to seek arbitration, could not frustrate the right of the other party to an order of arbitration by the federal district court pursuant to the Federal Arbitration Act. Mercury Constr. Corp. v. Moses H. Cone Mem. Hosp., 656 F.2d 933 (4th Cir. 1981), rehearing denied, 664 F.2d 936 (4th Cir. 1981), aff'd, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

Strict Confidentiality Not Required. — Nothing in the North Carolina statutes governing arbitration requires strict confidentiality. Industrotech Constructors, Inc. v. Duke Univ., 67 N.C. App. 741, 314 S.E.2d 272 (1984).

Cited in Carroll v. Ferro, 179 N.C. App. 402, 633 S.E.2d 708, 2006 N.C. App. LEXIS 1904 (2006); Faison & Gillespie v. Lorant, 187 N.C. App. 567, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007); Blanton v. Isenhower, — N.C. App. —, 674 S.E.2d 694, 2009 N.C. App. LEXIS 360 (2009).

§ 1-569.2. Notice.

(a) Except as otherwise provided in this Article, a person gives notice to another person by taking action that is reasonably necessary to inform the other person in the ordinary course, whether or not the other person acquires knowledge of the notice.

(b) A person has notice if the person has knowledge of the notice or has received notice.

(c) A person receives notice when it comes to the person's attention or the notice is delivered at the person's place of residence or place of business or at another location held out by the person as a place of delivery of communications. (2003-345, s. 2.)

CASE NOTES

Adequate Notice Given. — Arbitrator complied with the notice requirement G.S. 1-569.2 under circumstances in which a notice containing the hearing date, time, and place was sent to the record address for the contractors, which was the home address of one of the contractors; the arbitrator also sent the notice to the contractors' former attorney, who never formally withdrew from the case but did send a letter to the arbitrator stating he was no longer representing the contractors, and also sent a notice the person identified as the contractors' new counsel. Actual receipt was not required by the statute. Linsenmayer v. Omni Homes, Inc., — N.C. App. —, 668 S.E.2d 388, 2008 N.C. App. LEXIS 2018 (2008).

§ 1-569.3. When Article applies.

(a) This Article governs an agreement to arbitrate made on or after January 1, 2004.

(b) This Article governs an agreement to arbitrate made before January 1, 2004, if all parties to the agreement or to the arbitration proceeding agree in a record that this Article applies.

(c) This Article does not govern arbitrations under Article 1H of Chapter 90 of the General Statutes. (1973, c. 676, s. 1; 2003-345, s. 2; 2007-541, s. 2.)

Cross References. — As to voluntary arbitration of negligent health care claims, see Article 1H of Chapter 90, G.S. 90-21.60 et seq.

Effect of Amendments. — Session Laws 2007-541, s. 2, effective January 1, 2008, and applicable to agreements to arbitrate entered into on or after that date, added subsection (c).

CASE NOTES

Editor's Note. — Most of the cases below were decided under former Article 45A of Chapter 1.

Insured Did Not Waive Right to Arbitrate. — Arbitration clauses in insurance policies issued in 2001 were enforceable under former G.S. 1-567.2(a) and under former G.S. 1-567.3(a), (e), upon motion by the insured in a declaratory judgment action filed by the insurers that issued the policies, an order directing the parties to arbitration should have been entered; the insured did not waive her right to arbitrate by including the insurers as defendants in a personal injury action the insured filed in Florida, and the $3,402.24 the insurers spent in defending that action did not constitute prejudice to the insurers that could cause a waiver of the right to arbitrate. N.C. Farm Bureau Mut. Ins. Co. v. Sematoski, — N.C. App. —, 672 S.E.2d 90, 2009 N.C. App. LEXIS 119 (2009).

Construction With Federal Arbitration Act. — As an insured's policies were issued in 2001 by North Carolina corporations that had their principle places of business in North Carolina, and as the policies were issued in North Carolina on vehicles housed and driven in North Carolina, the policies did not affect commerce outside of North Carolina; thus under former G.S. 1-567.19 and G.S. 1-569.3, the North Carolina Uniform Arbitration Act as opposed to the Federal Arbitration Act, 9 U.S.C.S. § 1 et seq., applied to the arbitration clauses contained within the policies. N.C. Farm Bureau Mut. Ins. Co. v. Sematoski, — N.C. App. —, 672 S.E.2d 90, 2009 N.C. App. LEXIS 119 (2009).

The Uniform Arbitration Act provides only two exceptions to which it will not apply: (1) Any agreement or provision to arbitrate in which it is stipulated that it will not apply and (2) Arbitration agreements between employers and employees or between their respective representatives, unless the agreement provides that it will apply. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

Agreements to arbitrate future disputes are now, by virtue of this section which was effective August 1, 1973, binding and irrevocable. Sims v. Ritter Constr., Inc., 62 N.C. App. 52, 302 S.E.2d 293 (1983).

Arbitration Agreement Entered Into Before January 1, 2004. — Although G.S. 1-567.2 to G.S. 1-567.20 were repealed, G.S. 1-567.2 remained applicable to an arbitration dispute between the parties because the agreement between the parties containing an arbitration provision was entered into before January 1, 2004. Edwards v. Taylor, — N.C. App. —, 643 S.E.2d 51, 2007 N.C. App. LEXIS 805 (2007).

Arbitration Agreement Entered Into After January 1, 2004. — Because a consent order submitting a dispute between a church and a contractor was entered after January 1, 2004, the Revised Uniform Arbitration Act, G.S. 1-569.3(b), was not applicable, only G.S. 1-569.3(a) applied, and the parties did not attempt to waive any of the provisions of Article 45C of Chapter 1 of the North Carolina General Statutes but expressly agreed to their application; there is no conflict between G.S. 1-569.3(b) and G.S. 1-569.4(c) because G.S. 1-569.3(a) applies to agreements to arbitrate made on or after January 1, 2004, G.S. 1-569.3(b) applies to agreements to arbitrate made before January 1, 2004, and G.S. 1-569.4(c) does not list G.S. 1-569.3(b) as one of the "nonwaivable" provisions contained in Article 45C but lists only G.S. 1-569.3(a). D&R Constr. Co. v. Blanchard's Grove Missionary Baptist Church, — N.C. App. —, 667 S.E.2d 305, 2008 N.C. App. LEXIS 1811 (2008).

Trial court's order denying an employer's motion to refer a contract claim to arbitration was affirmed because, despite contrary contract language, since the contract was entered into after 1 January 2004, the Revised Uniform Arbitration Act applied, and the only reason that the trial court could have denied the motion under G.S. 1-569.7(a) was that there was no enforceable agreement. Griessel v. Temas Eye Ctr., P.C., — N.C. App. —, 678 S.E.2d 773, 2009 N.C. App. LEXIS 1083 (July 7, 2009).

Applicability by Agreement of the Parties. — Pursuant to G.S. 1-569.3, the Revised Uniform Arbitration Act controlled an appeal of an order compelling further arbitration. The parties had not assigned error to the trial court's use of the Act as the applicable law and both parties had also cited the Act as applicable law in various documents, including memorandum of law and briefs to the court. Bullard v. Tall House Bldg. Co., — N.C. App. —, 676 S.E.2d 96, 2009 N.C. App. LEXIS 531 (2009).

Applicability to Underinsured Motorist Claim. — Trial court did not err in applying the Uniform Arbitration Act, former G.S. 1-567.1 et seq., to an injured person's underinsured motorist insurance claim; where fees were addressed in the arbitration agreement, the trial court did not err in refusing to award costs or interest to the injured person on the arbitration award, since costs or interest did not fit into a trial court's authority to modify an arbitration award. Eisinger v. Robinson, 164 N.C. App. 572, 596 S.E.2d 831, 2004 N.C. App. LEXIS 1001 (2004).

Applied in In re W. W. Jarvis & Sons, — N.C. App. —, 671 S.E.2d 534, 2009 N.C. App. LEXIS 8 (2009).

Cited in Moose v. Versailles Condo. Ass'n, 171 N.C. App. 377, 614 S.E.2d 418, 2005 N.C. App. LEXIS 1199 (2005).

§ 1-569.4. Effect of agreement to arbitrate; nonwaivable provisions.

(a) Except as otherwise provided in subsections (b) and (c) of this section, a party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of this Article to the extent provided by law.

(b) Before a controversy arises that is subject to an agreement to arbitrate, a party to the agreement may not:

(1) Waive or agree to vary the effect of the requirements of G.S. 1-569.5(a), 1-569.6(a), 1-569.8, 1-569.17(a), 1-569.17(b), 1-569.26, or 1-569.28;

(2) Agree to unreasonably restrict the right under G.S. 1-569.9 to notice of the initiation of an arbitration proceeding;

(3) Agree to unreasonably restrict the right under G.S. 1-569.12 to disclosure of any facts by a neutral arbitrator; or

(4) Waive the right under G.S. 1-569.16 of a party to an agreement to arbitrate to be represented by an attorney at any proceeding or hearing under this Article, but an employer and a labor organization may waive the right to representation by a lawyer in a labor arbitration.

(c) A party to an agreement to arbitrate or to an arbitration proceeding may not waive, or the parties shall not vary the effect of, the requirements of this section or G.S. 1-569.3(a), 1-569.7, 1-569.14, 1-569.18, 1-569.20(d), 1-569.20(e), 1-569.22, 1-569.23, 1-569.24, 1-569.25(a), 1-569.25(b), 1-569.29, 1-569.30, 1-569.31. Any waiver contrary to this section shall not be effective but shall not have the effect of voiding the agreement to arbitrate. (2003-345, s. 2.)

CASE NOTES

Applicability. — Trial court's order denying an employer's motion to refer a contract claim to arbitration was affirmed because, despite contrary contract language, since the contract was entered into after 1 January 2004, the Revised Uniform Arbitration Act applied, and the only reason that the trial court could have denied the motion under G.S. 1-569.7(a) was that there was no enforceable agreement. Griessel v. Temas Eye Ctr., P.C., — N.C. App. —, 678 S.E.2d 773, 2009 N.C. App. LEXIS 1083 (July 7, 2009).

Insured Did Not Waive Right to Arbitrate. — Arbitration clauses in insurance policies issued in 2001 were enforceable under former G.S. 1-567.2(a) and under former G.S. 1-567.3(a), (e), upon motion by the insured in a declaratory judgment action filed by the insurers that issued the policies, an order directing the parties to arbitration should have been entered; the insured did not waive her right to arbitrate by including the insurers as defendants in a personal injury action the insured filed in Florida, and the $3,402.24 the insurers spent in defending that action did not constitute prejudice to the insurers that could cause a waiver of the right to arbitrate. N.C. Farm Bureau Mut. Ins. Co. v. Sematoski, — N.C. App. —, 672 S.E.2d 90, 2009 N.C. App. LEXIS 119 (2009).

No Conflict Between G.S. 1-569.3(b) and G.S. 1-569.4(c). — Because a consent order submitting a dispute between a church and a contractor was entered after January 1, 2004, the Revised Uniform Arbitration Act, G.S. 1-569.3(b), was not applicable, only G.S. 1-569.3(a) applied, and the parties did not attempt to waive any of the provisions of Article 45C of Chapter 1 of the North Carolina General Statutes but expressly agreed to their application; there is no conflict between G.S. 1-569.3(b) and G.S. 1-569.4(c) because G.S. 1-569.3(a) applies to agreements to arbitrate made on or after January 1, 2004, G.S. 1-569.3(b) applies to agreements to arbitrate made before January 1, 2004, and G.S. 1-569.4(c) does not list G.S. 1-569.3(b) as one of the "nonwaivable" provisions contained in Article 45C but lists only G.S. 1-569.3(a). D&R Constr. Co. v. Blanchard's Grove Missionary Baptist Church, — N.C. App. —, 667 S.E.2d 305, 2008 N.C. App. LEXIS 1811 (2008).

§ 1-569.5. Application for judicial relief.

(a) Except as otherwise provided in G.S. 1-569.28, an application for judicial relief under this Article shall be made by motion to the court and heard in the manner provided by law or rule of court for making and hearing motions.

(b) Unless a civil action involving the agreement to arbitrate is pending, notice of an initial motion to the court under this Article shall be served in the manner provided by law for the service of a summons in a civil action. Otherwise, notice of the motion shall be given in the manner prescribed by law or rule of court for serving motions in pending cases. (1927, c. 94, s. 5; 1973, c. 676, s. 1; 2003-345, s. 2.)

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under prior law.*

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of an award. McNeal v. Black, 61 N.C. App. 305, 300 S.E.2d 575 (1983).

The proper procedure for staying litigation and compelling arbitration is by a proper motion. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Failure to Apply for Arbitration. — Where defendants made no explicit reference to an arbitration clause in their answer to the breach of contract suit filed against them, and did not premise their motion to dismiss under G.S. 1A-1, Rule 12(b)(6) upon the existence of the arbitration clause, they failed to apply to the court for arbitration in order to exercise the contractual remedy to which they were entitled. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Denial of Arbitration Held Proper. — Competent evidence supported the trial court's finding that there was no agreement to arbitrate between the parties; while the seller contended that it faxed the buyer both the front of the one page purchase order, which included a notation that the agreement was subject to the terms and conditions on the face and reverse thereof, and a copy of the back side of the purchase order, which contained the arbitration clause, and that the buyer faxed back a signed copy of the purchase order front page, the buyer contended that it never received a copy of the conditions page of the purchase order or any other document referencing arbitration. Evangelistic Outreach Ctr. v. Gen. Steel Corp., 181 N.C. App. 723, 640 S.E.2d 840, 2007 N.C. App. LEXIS 399 (2007).

Service. — Although service is required to be made by registered mail or certified mail return receipt requested, plaintiff's motion, based on improper service, to dismiss defendants' appeal from an arbitration award was dismissed where plaintiff was not prejudiced by service, which was accomplished through first-class mail. Palmer v. Duke Power Co., 129 N.C. App. 488, 499 S.E.2d 801 (1998).

§ 1-569.6. Validity of agreement to arbitrate.

(a) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for revoking a contract.

(b) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(c) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(d) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders. (1927, c. 94, s. 1; 1973, c. 676, s. 1; 1975, c. 19, s. 1; 2003-345, s. 2.)

Legal Periodicals. — For article, "Mediation and Arbitration of Separation and Divorce Agreements," see 15 Wake Forest L. Rev. 467 (1979).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

For note discussing arbitration of domestic cases, see 4 Campbell L. Rev. 203 (1981).

For note and comment, "FAA and Arbitration Clauses—How Far Can It Reach? The Effect of Allied-Bruce Terminix, Inc. v. Dobson," see 19 Campbell L. Rev. 607 (1997).

CASE NOTES

Editor's Note. *— Many of the cases cited below were decided under prior law.*

Public Policy Favors Arbitration. — There exists in North Carolina a strong public policy in favor of settling disputes by arbitration. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

There is a strong public policy favoring the settlement of disputes by arbitration, and doubts concerning the scope of arbitrable issues will be resolved in favor of the party seeking arbitration. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

Legislative Intent. — By enacting this Article the legislature intended to encourage parties to submit disputed matters to arbitration when it is feasible and expedient for them to do so. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Effect of Article. — This Article provides that parties may agree in writing to submit to arbitration "any controversy" then existing between them or include in any written contract a provision for settlement by arbitration of "any controversy" arising between them relating to the contract or nonperformance thereof. Such agreement or provision is valid, enforceable and irrevocable except with the consent of the parties, without regard to the justiciable character of the controversy. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982).

This section provides that a contract provision requiring that the parties settle disputes by arbitration is valid, enforceable, and irrevocable unless the parties agree to the contrary. Johnston County v. R.N. Rouse & Co., 331 N.C. 88, 414 S.E.2d 30 (1992).

Court Must Order Arbitration on Motion of Party. — As long as the statutory requirements of the Uniform Arbitration Act, (see now Revised Uniform Arbitration Act, G.S. 1-569.1 et seq.) have been met and an order compelling arbitration would not prejudice a party to the contract who opposes the motion according to the standard set forth in this opinion, a court must order arbitration on motion of a party to the contract. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Trial court erred in denying the seller's motion to stay proceedings pending arbitration, as the seller and buyer had a valid agreement to arbitrate contained in their executed contract, and the arbitration clause was enforceable despite the fact that it did not set forth all of the particulars concerning the arbitration since gap-filling provisions could be used to determine those matters once the dispute was submitted to arbitration. Goldstein v. Am. Steel Span, Inc., 181 N.C. App. 534, 640 S.E.2d 740, 2007 N.C. App. LEXIS 248 (2007).

An agreement to arbitrate a dispute is not an unenforceable contract requiring waiver of a jury; thus, the trial court erred in concluding that because arbitration provision did not provide for trial of facts by a jury that it was unconscionable and unenforceable under G.S. 22B-10, and in violation of N.C. Const., art. I, §§ 18 and 25. Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

Party Must Be Content with Results. — Public policy includes the judicial admonition that a party who has accepted this form of adjudication must be content with the results. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Valid Agreement Must Exist. — Public policy favors settling disputes by means of arbitration; however, before a dispute can be settled in this manner, there must first exist a valid agreement to arbitrate. Routh v. Snap-On Tools Corp., 108 N.C. App. 268, 423 S.E.2d 791 (1992).

A party seeking to compel arbitration had to show that the parties mutually agreed to arbitrate their disputes. Milon v. Duke Univ., 145 N.C. App. 609, 551 S.E.2d 561, 2001 N.C. App. LEXIS 738 (2001), cert. denied, 354 N.C. 364, 556 S.E.2d 573 (2001).

Burden on Party Seeking Arbitration. — The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. Routh v. Snap-On Tools Corp., 108 N.C. App. 268, 423 S.E.2d 791 (1992).

Valid Agreement Found. — Agreement in construction contract between general contractor to painting subcontractor held a valid written agreement to arbitrate disputes under this section. Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

Where parties, as evidenced by their signatures on termite contract, agreed to submit any disputes for arbitration in clear and unambiguous language, a valid agreement to arbitrate existed despite the fact it was not independently negotiated. Red Springs Presbyterian Church v. Terminix Co., 119 N.C. App. 299, 458 S.E.2d 270 (1995).

Valid Agreement Not Found. — Trial court correctly rejected plaintiff's contention that, as a third-party beneficiary of an arbitration agreement between insurer and defendant city, he was entitled to have his claim for bodily injury against the city resolved through arbitration, where the city's policy did not include an agreement to arbitrate, but only stated that the definition of "suit" under the policy included "an arbitration proceeding in which such damages are claimed." Thompson v. Norfolk S. Ry., 140 N.C. App. 115, 535 S.E.2d 397, 2000 N.C. App. LEXIS 1100 (2000).

Arbitration as Matter of Contract. — By statute, the right of arbitration is made a matter of contract; and it is only by agreement of the parties that a proceeding under it may be had. This is but the adoption of the common law in this respect, for it has been held uniformly in this State that a submission to arbitration was a contract resulting from the agreement to refer, and that it was governed by the general law concerning contracts. Sprinkle v. Sprinkle, 159 N.C. 81, 74 S.E. 739 (1912).

Where the contract between the parties contained an agreement to submit any controversy to arbitration, such agreement, pursuant to the former version of this section, was valid, enforceable and irrevocable. Therefore, it was error for the court to withdraw the matter from arbitration and place it on the trial calendar.

Sims v. Ritter Constr., Inc., 62 N.C. App. 52, 302 S.E.2d 293 (1983).

The law of contracts governs the issue of whether there exists an agreement to arbitrate. Routh v. Snap-On Tools Corp., 108 N.C. App. 268, 423 S.E.2d 791 (1992).

Scope of Arbitration Topics. — There is no legislative bar to arbitrating claims which are based on tortious conduct or unfair and deceptive trade practices and claims for punitive damages as long as they arise out of or relate to a contract that provides for arbitration on its breach. Miller v. Two State Constr. Co., 118 N.C. App. 412, 455 S.E.2d 678 (1995).

Whether Claim Is Arbitrable Controlled by Language in Agreement. — The determination of whether a particular claim is arbitrable is controlled by the language of the parties' agreement. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

But the Contract Is Not a Defense to the Cause of Action Itself. — The agreement of the parties to arbitrate is a contract. The relation of the parties is contractual. Their rights and liabilities are controlled by the law of contract. A breach of the contract may give rise to a cause of action for damages, but the contract itself is not a defense against a suit on the cause of action the parties agreed to arbitrate. In an action on the contract the courts will not decree specific performance of the agreement. Neither will they, by indirection, compel specific performance by refusing to entertain the suit until after arbitration is had under the agreement. Skinner v. Gaither Corp., 234 N.C. 385, 67 S.E.2d 267 (1951).

It is generally accepted that it is competent to contract that the amount of damages may be recovered, or the existence of any fact which may enter into the right to recover, shall be submitted to arbitration, provided the right of action is not embraced in the agreement. Nelson v. Atlantic Coast Line R.R., 157 N.C. 194, 72 S.E. 998 (1911).

An unfair and deceptive practices claim pursuant to § 75-1.1 is proper for arbitration. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

There is no legislative bar to arbitration of claims based on tortious conduct or unfair and deceptive practices, or of claims for punitive damages, as long as they arise out of or relate to the contract or its breach. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

The legislature has not indicated that the arbitration of claims for punitive damages is against public policy as it has not exempted such claims from the Uniform Arbitration Act. In light of the strong policy in this state favoring arbitration, such claims are arbitrable. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

Arbitration Not Binding for Child Support or Custody. — Because all awards or orders concerning child support or custody are reviewable and modifiable, any arbitration concerning these issues is not binding. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Filing of Pleadings Does Not Constitute Waiver of Arbitration Provisions. — The mere filing of pleadings by both parties to a contract containing an arbitration agreement does not constitute waiver of the arbitration provision as a matter of law. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

The mere filing of pleadings by both parties does not constitute waiver of an arbitration provision. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

A party does not impliedly waive his right to arbitration when he pursues an action in court by filing a complaint. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Although arbitration is a contractual right which may be waived, the mere filing of a complaint or answer does not result in waiver of arbitration, absent evidence showing prejudice to the adverse party. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

Nor Does Filing a Claim of Lien. — Plaintiff's filing of a claim of lien and his institution of suit to enforce it does not prohibit him from pursuing his claim for arbitration. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

A party waives arbitration when it engages in conduct inconsistent with arbitration which results in prejudice to the party opposing arbitration. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

Home buyers impliedly waived their contractual right to compel arbitration when they took advantage of and benefitted from a discovery procedure without leave of the arbitrator, and because the contractor was prejudiced in time and cost spent, as well as a lack of reciprocal discovery. Douglas v. McVicker, 150 N.C. App. 705, 564 S.E.2d 622, 2002 N.C. App. LEXIS 641 (2002).

Close Scrutiny of Waiver Required. — As North Carolina maintains a strong public policy favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right. Sullivan v. Bright, 129 N.C. App. 84, 497 S.E.2d 118 (1998).

The party opposing arbitration must

prove that it was prejudiced by its adversary's delay or by actions of the adversary which were incompatible with arbitration. Sullivan v. Bright, 129 N.C. App. 84, 497 S.E.2d 118 (1998).

A party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration. Servomation Corp. v. Hickory Constr. Co., 316 N.C. 543, 342 S.E.2d 853 (1986).

In an action to vacate an arbitrator's award under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, the most clearly analogous state statute of limitations was determined to be the 90-day limitation provided in former G.S. 1-567.13(b) [see now G.S. 1-569.23(b)], for vacating an award, rather than the 10-day limitation set forth in G.S. 95-36.9(c) for a stay of proceedings, notwithstanding the provision in this section that the Uniform Arbitration Act shall not apply "to arbitration agreements between employers and employees or between their respective representatives," since former G.S. 1-567.13(b) [see now G.S. 1-569.23(b)] was the statute of limitations most analogous for the determination of timeliness. Gencorp, Inc. v. Local 850, United Rubber Workers of Am., 622 F. Supp. 216 (W.D.N.C. 1985).

Standard Form Provisions. — For discussion of interpretation of building contract containing standard form provisions issued by the American Institute of Architects (AIA) and the United States Department of Commerce Economic Development Administration (EDA), see Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

As to necessity for writing under prior law, see Crissman v. Crissman, 27 N.C. 498 (1845); Gaylord v. Gaylord, 48 N.C. 368 (1856); Fort v. Allen, 110 N.C. 183, 14 S.E. 685 (1892).

Denial of Arbitration Held Proper. — Where defendants had been prejudiced by plaintiff's use of judicial discovery procedures and because defendants had expended significant amounts of money in defense of plaintiff's suit before plaintiff belatedly demanded arbitration trial, court did not err in denying arbitration. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

Cited in MCI Constructors, Inc. v. Hazen & Sawyer, P.C., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 17866 (M.D.N.C. Mar. 9, 2009).

§ 1-569.7. Motion to compel or stay arbitration.

(a) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:

(1) If the refusing party does not appeal or does not oppose the motion, the court shall order the parties to arbitrate; and

(2) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate.

(b) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate.

(c) If the court finds that there is no enforceable agreement to arbitrate, it shall not, pursuant to subsection (a) or (b) of this section, order the parties to arbitrate.

(d) The court shall not refuse to order arbitration because the claim subject to arbitration lacks merit or because grounds for the claim have not been established.

(e) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in a court, a motion under this section shall be made in that court. Otherwise a motion under this section may be made in any court as provided in G.S. 1-569.27.

(f) If a party makes a motion to the court to order arbitration, the court on just terms shall stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(g) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim. (1973, c. 676, s. 1; 2003-345, s. 2.)

Legal Periodicals. — For article, "Mediation and Arbitration of Separation and Divorce Agreements," see 15 Wake Forest L. Rev. 467 (1979).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under prior law.*

This section provides means for a party to seek court determination of whether an agreement to arbitrate exists. Blow v. Shaughnessy, 68 N.C. App. 1, 313 S.E.2d 868, cert. denied, 311 N.C. 751, 321 S.E.2d 127 (1984).

Effect of Section. — This section provides the means by which a party on notice of intent to arbitrate may object to or seek to stay a demand for arbitration on the grounds that there is no agreement to arbitrate. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

The only prerequisite to invoking this Act is that there be a valid written agreement to arbitrate the dispute. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

No grounds for denying motion to submit to arbitration. — Trial court's order denying an employer's motion to refer a contract claim to arbitration was affirmed because, despite contrary contract language, since the contract was entered into after 1 January 2004, the Revised Uniform Arbitration Act applied, and the only reason that the trial court could have denied the motion under G.S. 1-569.7(a) was that there was no enforceable agreement. Griessel v. Temas Eye Ctr., P.C., — N.C. App. —, 678 S.E.2d 773, 2009 N.C. App. LEXIS 1083 (July 7, 2009).

Judge Must Decide Whether Valid Arbitration Agreement Exists. — By the plain terms of this section the judge is required to summarily determine whether, as a matter of law, a valid arbitration agreement exists. The trial judge erred by applying a summary judgment standard of whether there was a genuine issue of material fact with regard to the validity and enforceability of the parties' agreement. Routh v. Snap-On Tools Corp., 101 N.C. App. 703, 400 S.E.2d 755 (1991).

And This Determination Shall Precede Others Such as Waiver and Public Policy. — The court erred in determining that defendant waived the right to arbitrate and that the arbitration provision was void and unenforceable as against public policy before determining whether plaintiff's assertion that the arbitration agreement was not even incorporated in the contract was, in fact, true. CIT Group/Sales Fin., Inc. v. Bray, 141 N.C. App. 542, 539 S.E.2d 690, 2000 N.C. App. LEXIS 1311 (2000).

Without Such Determination, Order Is Not Appealable. — Where the trial court had not yet summarily determined the issue of whether the parties had entered into an enforceable contract providing for arbitration, the trial court's order enjoining arbitration was not appealable. Lee County Bd. of Educ. v. Adams Elec., Inc., 106 N.C. App. 139, 415 S.E.2d 576 (1992).

The proper procedure for staying litigation and compelling arbitration is by a proper motion. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Stay of Action Pending Arbitration. — Trial court properly granted a builder's motion to stay an action alleging breach of implied and express warranties pending arbitration pursuant to G.S. 1-569.7; home owners agreed to an arbitration clause, which covered all of the owners' claims, and was thus enforceable. Bass v. Pinnacle Custom Homes, Inc., 163 N.C. App. 171, 592 S.E.2d 606, 2004 N.C. App. LEXIS 303 (2004), cert. denied sub nom. Bass v. Pinnacle Custom Homes, 358 N.C. 542, 598 S.E.2d 381 (2004).

Failure To Assert Arbitration Right. — Purchasers of a used vehicle chose to file suit against a car dealership rather than seek arbitration pursuant to the agreement; it was incumbent upon the dealership to assert its right to arbitrate, and because it failed to do so, the court was not compelled to enforce the arbitration agreement. Blankenship v. Town & Country Ford, Inc., 155 N.C. App. 161, 574 S.E.2d 132, 2002 N.C. App. LEXIS 1599 (2002), cert. denied, appeal dismissed, 357 N.C. 61, 579 S.E.2d 384 (2003).

Motion to Dismiss Showing Arbitration Agreement. — Defendant's motion to dismiss pursuant to Rule 12(b)(6) based on "the terms and provisions of the parties Employment Agreement which provides for binding arbitration" would be treated as an application to stay litigation and compel arbitration pursuant to subsection (a) of this section; hence, court would vacate the order of dismissal and remand the matter to the trial court for further appropriate proceedings. Novacare Orthotics & Prosthetics E., Inc. v. Speelman, 137 N.C. App. 471, 528 S.E.2d 918, 2000 N.C. App. LEXIS 407 (2000).

Court's inquiry under this section not limited to question of whether agreement to arbitrate exists. Blow v. Shaughnessy, 68 N.C. App. 1, 313 S.E.2d 868, cert. denied, 311 N.C. 751, 321 S.E.2d 127 (1984).

Upon proof of arbitration agreement the court may still determine preliminary questions of res judicata and the preliminary question of waiver. Cyclone Roofing Co. v. David M. LaFave Co., 67 N.C. App. 278, 312 S.E.2d 709, rev'd on other grounds, 312 N.C. 224, 321 S.E.2d 872 (1984).

The trial court has authority to act both before and after, rather than during the arbitration proceeding. This interpretation is supported by the fact that the act will not permit an arbitration proceeding to be stayed for any reason other than to determine whether the prerequisite agreement to arbitrate exists or if the contract was induced by fraud. Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Court Can Delay Arbitration Ruling. — While the trial court should rule on the motion to compel arbitration without undue delay, where depositions had already been scheduled and noticed, it was no abuse of discretion for the trial court to enter an order requiring the completion of scheduled discovery prior to ruling on the motion to compel arbitration. McCrary v. Byrd, 136 N.C. App. 487, 524 S.E.2d 817, 2000 N.C. App. LEXIS 57 (2000).

Issues Determinable by Court. — The scope of an arbitration award and its res judicata effect are issues properly determinable by the court and not the arbitrators. C & O Dev. Co. v. American Arbitration Ass'n, 48 N.C. App. 548, 269 S.E.2d 685 (1980), cert. denied, 301 N.C. 719, 274 S.E.2d 227 (1981).

It was within the authority of the trial court to determine whether the subject matter of the demand for arbitration had been previously litigated between the parties and reduced to a judgment binding upon them. C & O Dev. Co. v. American Arbitration Ass'n, 48 N.C. App. 548, 269 S.E.2d 685 (1980), cert. denied, 301 N.C. 719, 274 S.E.2d 227 (1981).

Retention of Jurisdiction. — For examples of situations in arbitration disputes in which the court retains jurisdiction over the proceeding, see this section. Sims v. Ritter Constr., Inc., 62 N.C. App. 52, 302 S.E.2d 293 (1983).

Application by defendants to the court for arbitration pursuant to this section would not "oust" the trial court of jurisdiction, as there is a distinction between a lack of jurisdiction and exercising existing jurisdiction to enforce an agreement under the Uniform Arbitration Act (see now the Revised Uniform Arbitration Act, G.S. 1-569.1, et seq.), and nothing contained in the language of the act indicates that the court does not retain jurisdiction once a party invokes his privilege to arbitrate. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

A superior court judge cannot lift a stay granted by another superior court judge on a case which has been referred to arbitration by consent order and "discontinued." Henderson v. Herman, 104 N.C. App. 482, 409 S.E.2d 739 (1991), cert. denied, 330 N.C. 851, 413 S.E.2d 551 (1992).

Determination of Valid Arbitration Agreement Required. — The trial court erred in failing to summarily determine whether, as a matter of law, a valid arbitration agreement existed between partners to a joint venture, where the plaintiff partners brought an action against the defendant partners for statutory violations, fraud, unfair and deceptive trade practices, and breach of contract. Burke v. Wilkins, 131 N.C. App. 687, 507 S.E.2d 913 (1998).

Where defendants, a bank and others, filed a motion seeking a stay of plaintiff stockholder's civil court proceedings against them on the ground that the parties had previously agreed to arbitrate the controversy at issue, and the stockholder, in response, denied the existence of the arbitration agreement, the trial court, pursuant to former G.S. 1-567.3(a) [see now G.S. 1-569.7], committed reversible error by denying the motion for a stay without first determining whether the parties had an agreement to arbitrate. Barnhouse v. Am. Express Fin. Advisors, Inc., 151 N.C. App. 407, 566 S.E.2d 130, 2002 N.C. App. LEXIS 778 (2002).

Standard Form Provisions. — For discussion of interpretation of building contract containing standard form provisions issued by the American Institute of Architects (AIA) and the United States Department of Commerce Economic Development Administration (EDA), see Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Limited Participation in Arbitration Not Waiver. — Where plaintiff filed its objection before the hearing was commenced and followed the correct procedure by applying for a court order to stay the arbitration proceeding pursuant to a former version of this section, plaintiff's limited participation in the arbitration before it filed its amended answer did not operate as a waiver of its right to object. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Filing of Pleadings Does Not Waive Arbitration Provision. — To hold that the mere filing of pleadings or other motions in a pending lawsuit constitutes waiver of a contractual arbitration provision would make parts of this section nonsensical. For example, G.S. 1-567.3(c) [see now G.S. 1-569.7(c)] provides that if an issue subject to a contractual provision to arbitrate is involved in a pending lawsuit, any party to the contract can apply to the court for an order directing arbitration. This indicates that the General Assembly contemplated the possibility that a party would apply for arbitration after a lawsuit had begun. By expressly providing that a party may apply for an order compelling arbitration after suit has begun and by providing that in such a case the court must order arbitration in accordance with subsection (a) of this section, it is clear that the Legislature could not have intended that the mere filing of pleadings causes a waiver of a contractual arbitration provision. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Although Right to Arbitrate May Be Impliedly Waived. — Although subsections (a) and (d) of former G.S. 1-567.3 [see now subsections (a) and (e) of this section] authorized the court to stay litigation and compel arbitration where parties have contracted to arbitrate their disputes, the right to arbitrate, as other contract rights, may be impliedly waived through the conduct of a party to the contract clearly indicating such purpose. Servomation Corp. v. Hickory Constr. Co., 70 N.C. App. 309, 318 S.E.2d 904 (1984), cert. granted and case remanded for reconsideration in light of Cyclone Roofing Co. v. La Fave Company, 312 N.C. 224, 321 S.E.2d 872 (1984).

Participation in Mediation Not Implied Waiver. — When defendant pleaded the right to arbitration as an affirmative defense and moved for arbitration in his answer, defendant put plaintiff on notice that he was claiming the right, and defendant's subsequent participation in mediation, absent a specific waiver of arbitration, was not "inconsistent with arbitration" and did not constitute an implied waiver of arbitration. O'Neal Constr., Inc. v. Leonard S. Gibbs Grading, Inc., 121 N.C. App. 577, 468 S.E.2d 248 (1996).

How Right to Arbitration May Be Waived. — A party impliedly waives his contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Where defendants made no explicit reference to an arbitration clause in their answer to the breach of contract suit filed against them, and did not premise their motion to dismiss under G.S. 1A-1, Rule 12(b)(6) upon the existence of the arbitration clause, they failed to apply to the court for arbitration in order to exercise the contractual remedy to which they were entitled. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Effect of Participation in Arbitration Without Protest. — Consent to submission of a matter to arbitration and participation in the arbitration hearing, without making any objection, demand for jury trial or motion to stay the proceedings, results in a waiver of the right to subsequently challenge the arbitration process. McNeal v. Black, 61 N.C. App. 305, 300 S.E.2d 575 (1983).

Parties who agree to abide by the decision of a panel of arbitrators will not generally be heard to attack the regularity or fairness of an award. McNeal v. Black, 61 N.C. App. 305, 300 S.E.2d 575 (1983).

Objections to Arbitration. — This provision clearly contemplates that objections to arbitration proceedings may be raised after the institution of the proceedings. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Objection Held Timely. — Where plaintiff raised its objection before the hearing on the merits and before the selection of arbitrators was complete, the objection was timely. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Motion to Compel Arbitration Was Timely. — Trial court erred in denying an insured's motion to compel arbitration pursuant to G.S. 1-567.3 of an underinsured motorist claim pursuant to G.S. 20-279.21; the contractual period to request arbitration did not begin to run until the insured settled a liability claim with another company, and therefore the arbitration request was timely pursuant to the terms of the contract and G.S. 1-52(16). Register v. White, 160 N.C. App. 657, 587 S.E.2d 95, 2003 N.C. App. LEXIS 1933 (2003), cert. granted, 358 N.C. 155, 590 S.E.2d 862 (2003), aff'd, 358 N.C. 691, 599 S.E.2d 549 (2004).

Order compelling arbitration was interlocutory and did not affect a substantial right. North Carolina Elec. Membership Corp. v. Duke Power Co., 95 N.C. App. 123, 381 S.E.2d 896, cert. denied, 325 N.C. 709, 388 S.E.2d 461 (1989).

Denial of Arbitration Held Proper. — Where defendants had been prejudiced by plaintiff's use of judicial discovery procedures and because defendants had expended significant amounts of money in defense of plaintiff's suit before plaintiff belatedly demanded arbitration trial court did not err in denying arbitration. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

Competent evidence supported the trial court's finding that there was no agreement to arbitrate between the parties; while the seller contended that it faxed the buyer both the front of the one page purchase order, which included a notation that the agreement was subject to the terms and conditions on the face and reverse thereof, and a copy of the back side of the purchase order, which contained the arbitration clause, and that the buyer faxed back a signed copy of the purchase order front page, the buyer contended that it never received a copy of the conditions page of the purchase order or any other document referencing arbitration. Evangelistic Outreach Ctr. v. Gen. Steel Corp., 181 N.C. App. 723, 640 S.E.2d 840, 2007 N.C. App. LEXIS 399 (2007).

A motion seeking a stay of trial pending arbitration was not a "dispositive" motion precluded by the trial court's Scheduling Order; defendant's motion to arbitrate which was filed outside the deadline for the filing of dispositive motions and which disposed of the issues in the case, did not dispose of the case itself because the plaintiff had the option to return to court to modify, correct or vacate the arbitrator's award pursuant to former G.S. 1-567.13 and 1-567.14. Smith v. Young Moving & Storage, Inc., 141 N.C. App. 469, 540 S.E.2d 383, 2000 N.C. App. LEXIS 1297 (2000), aff'd, 353 N.C. 521, 546 S.E.2d 87 (2001).

Request in Contractors' Answer Prayer Did Not Qualify as "Motion" to Compel Arbitration. — Trial court properly maintained its existing jurisdiction until contractors filed a motion to compel arbitration and properly entered summary judgment for plaintiffs on the issue of liability because the contractors' request in their answer prayer did not qualify as a "motion" to compel arbitration in accordance with G.S. 1-569.7. Linsenmayer v. Omni Homes, Inc., — N.C. App. —, 668 S.E.2d 388, 2008 N.C. App. LEXIS 2018 (2008).

Remand Required When Trial Court Did Not State Reasons for Denial of Motion. — When the trial court denied defendants' motion to stay the proceedings and to compel arbitration, but did not state the grounds for its decision, reversal and remand was required because meaningful appellate review of the decision was impossible. Steffes v. DeLapp, 177 N.C. App. 802, 629 S.E.2d 892, 2006 N.C. App. LEXIS 1176 (2006).

§ 1-569.8. Provisional remedies.

(a) Before an arbitrator is appointed and is authorized and able to act, the court, upon motion of a party to an arbitration proceeding and for good cause shown, may enter an order for provisional remedies to protect the effectiveness of the arbitration proceeding to the same extent and under the same conditions as if the controversy were the subject of a civil action.

(b) After an arbitrator is appointed and is authorized and able to act:

(1) The arbitrator may issue orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitration proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and

(2) A party to an arbitration proceeding may move the court for a provisional remedy if the matter is urgent and the arbitrator is not able to act in a timely manner or the arbitrator cannot provide an adequate remedy.

(c) A party does not waive the right to arbitrate by making a motion under subsection (a) or (b) of this section. (2003-345, s. 2.)

CASE NOTES

Provisional Remedies Properly Granted. — Given the difficulties and the danger of the dissipation of the assets at stake, there was good cause for the grant of provisional relief under G.S. 1-569.8(a) to an insurer as: (1) even though the Federal Arbitration Act (FAA) applied, the North Carolina Revised Uniform Arbitration Act (RUAA), G.S. 1-569.1 et seq., was not entirely preempted; (2) the application of the provisional remedies of the RUAA did not undermine the FAA's purpose, and G.S. 1-569.8(a) allowed the grant of provisional remedies to protect the integrity of the arbitration process; (3) the order was subject to modification, supplementation, or vacation by the arbitrator; and (4) the order did not address the merits of the dispute, and the order was temporary, modifiable, and without prejudice to the parties' positions before the arbitration panel. Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co., 184 N.C. App. 292, 647 S.E.2d 102, 2007 N.C. App. LEXIS 1473 (2007).

§ 1-569.9. Initiation of arbitration.

(a) A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested, and obtained, or by service as authorized for the commencement of a civil action. The notice shall describe the nature of the controversy and the remedy sought.

(b) Unless a person objects for lack or insufficiency of notice under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing, the person, by appearing at the hearing, waives any objection to lack or insufficiency of notice. (2003-345, s. 2.)

§ 1-569.10. Consolidation of separate arbitration proceedings.

(a) Except as otherwise provided in subsection (c) of this section, upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

(1) There are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration with a third person;

(2) The claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

(3) The existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and

(4) Prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

(b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.

(c) The court shall not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation. (2003-345, s. 2.)

§ 1-569.11. Appointment of arbitrator; service as a neutral arbitrator.

(a) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method shall be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. An arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed pursuant to the agreed method.

(b) An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party shall not serve as an arbitrator required by an agreement to be neutral. (1927, c. 94, s. 4; 1973, c. 676, s. 1; 2003-345, s. 2.)

§ 1-569.12. Disclosure by arbitrator.

(a) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:

(1) A financial or personal interest in the outcome of the arbitration proceeding; and

(2) An existing or past relationship with any of the parties to the agreement to arbitrate or to the arbitration proceeding, their counsel or representatives, a witness, or other arbitrators.

(b) An arbitrator has a continuing obligation to disclose to all parties to the agreement to arbitrate and to the arbitration proceeding and to any other arbitrators any facts that the arbitrator learns after accepting appointment which a reasonable person would consider likely to affect the impartiality of the arbitrator.

(c) If an arbitrator discloses a fact required by subsection (a) or (b) of this section to be disclosed and a party timely objects to the appointment or continued service of the arbitrator based upon the fact disclosed, the objection may be a ground under G.S. 1-569.23(a)(2) for vacating an award made by the arbitrator.

(d) If the arbitrator did not disclose a fact as required by subsection (a) or (b) of this section, upon timely objection by a party, the court under G.S. 1-569.23(a)(2) may vacate an award.

(e) An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under G.S. 1-569.23(a)(2).

(f) If the parties to an arbitration proceeding agree to the procedures of an arbitration organization or any other procedures for challenges to arbitrators before an award is made, substantial compliance with those procedures is a condition precedent to a motion to vacate an award on that ground under G.S. 1-569.23(a)(2). (2003-345, s. 2.)

§ 1-569.13. Action by majority.

If there is more than one arbitrator, the powers of an arbitrator shall be exercised by a majority of the arbitrators, but all of them shall conduct the hearing under G.S. 1-569.15(c). (1973, c. 676, s. 1; 2003-345, s. 2.)

§ 1-569.14. Immunity of arbitrator; competency to testify; attorneys' fees and costs.

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by G.S. 1-569.12 shall not cause any loss of immunity under this section.

(d) In a judicial, administrative, or similar proceeding, an arbitrator or representative of an arbitration organization is not competent to testify and shall not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration proceeding to the same extent as a judge of a court of this State acting in a judicial capacity. This subsection shall not apply:

(1) To the extent necessary to determine the claim of an arbitrator, arbitration organization, or representative of the arbitration organization against a party to the arbitration proceeding; or

(2) To a hearing on a motion to vacate an award under G.S. 1-569.23(a)(1) or (a)(2) if the movant makes a prima facie showing that a ground for vacating the award exists.

(e) If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization arising from the services of the arbitrator, organization, or representative, or if a person seeks to compel an arbitrator or a representative of an arbitration organization to testify or produce records in violation of subsection (d) of this section, and the court decides that the arbitrator, arbitration organization, or representative of an arbitration organization is immune from civil liability or that the arbitrator or representative of the organization is not competent to testify, the court shall award to the arbitrator, organization, or representative reasonable attorneys' fees, costs, and other reasonable expenses of litigation.

(f) Immunity under this section shall not apply to acts or omissions that occur with respect to the operation of a motor vehicle. (2003-345, s. 2.)

§ 1-569.15. Arbitration process.

(a) An arbitrator may conduct an arbitration in the manner the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

(b) An arbitrator may decide a request for summary disposition of a claim or particular issue:

(1) If all interested parties agree; or

(2) Upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the proceeding and the other parties have a reasonable opportunity to respond.

(c) If an arbitrator orders a hearing, the arbitrator shall set a time and place and give notice of the hearing not less than five days before the hearing begins. Unless a party to the arbitration proceeding objects to the lack or insufficiency of notice not later than the beginning of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but shall not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified did not appear. The court, upon request, may direct the arbitrator to conduct the hearing promptly and render a timely decision.

(d) At a hearing under subsection (c) of this section, a party to the arbitration proceeding may be heard, present evidence material to the controversy, and cross-examine witnesses appearing at the hearing.

(e) If an arbitrator ceases to or is unable to act during the arbitration proceeding, a replacement arbitrator shall be appointed in accordance with G.S. 1-569.11 to continue the proceeding and to resolve the controversy.

(f) The rules of evidence shall not apply in arbitration proceedings, except as to matters of privilege or immunities. (1927, c. 94, ss. 6, 7; 1973, c. 676, s. 1; 2003-345, s. 2.)

Legal Periodicals. — For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under prior law.*

The award on its face ought to show that the arbitrators have acted upon all the matters submitted. Crisp v. Love, 65 N.C. 126 (1871).

It has always been necessary for arbitrators to pass on all the points particularly referred to them. Osborne v. Calvart, 83 N.C. 365 (1880).

But if the submission covered all matters in difference without specifying them, the arbitrators could make an award of only such things as they had notice, and the award was good. Walker v. Walker, 60 N.C. 255 (1864).

Passing on Matters Not Submitted. — Matters passed on by the arbitrators but not submitted to them rendered the award void in the absence of waiver as by the voluntary introduction of evidence on matters not submitted. Robertson v. Marshall, 155 N.C. 167, 71 S.E. 67 (1911).

The power of the arbitrators is derived from the submission and the award must be made in strict accordance with it, and must not go beyond what is embraced in it. Cullifer v. Gilliam, 31 N.C. 126 (1848); Cutler v. Cutler, 169 N.C. 482, 86 S.E. 301 (1915).

Where the decision of submitted questions involved the decision of other questions not submitted, the decision of the latter was not error. Zell v. Johnston, 76 N.C. 302 (1877).

Arbitrators May Not Seek Evidence Outside Hearing. — The arbitrators have no right to consider facts excepting as submitted in the evidence at the hearings and it is misconduct for them to seek outside evidence by independent investigation. Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter, 291 N.C. 208, 230 S.E.2d 380 (1976).

And Such Action Violates Arbitration Agreement. — Actions of the arbitrators in gathering evidence outside the scheduled hearings and without notice to the parties is a violation of this article and hence of the arbitration agreement. Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter, 291 N.C. 208, 230 S.E.2d 380 (1976).

Right to Notice. — A party to an arbitration agreement has the right, both at common law and by statute, to notice and an opportunity to present evidence as to all matters submitted, and in the absence of notice the award is not binding upon him and does not estop him from instituting action in the superior court. Grimes v. Homes Ins. Co., 217 N.C. 259, 7 S.E.2d 557 (1940), decided under prior law.

Trial court properly denied a paving company's motion to dismiss a petition to confirm an arbitration award in favor of a construction company; the parties agreed to follow the rules of an arbitration organization, the case manager for the arbitration organization served notice to the paving company by means which were permitted by the organization's rules in effect at the time, and the trial court was allowed to examine the record and correct a clerical error in the name of the construction company in the award outside of the 90-day correction period provided by former G.S. 1-567.14 [see now G.S. 1-569.24]. Marolf Constr. Inc. v. Allen's Paving Co., 154 N.C. App. 723, 572 S.E.2d 861, 2002 N.C. App. LEXIS 1535 (2002), cert. denied, 356 N.C. 673, 572 S.E.2d 861, cert. denied, 356 N.C. 673, 577 S.E.2d 625 (2003).

Notice Found Sufficient to Alert Defendants of Joint and Several Liability. — Where defendants, who were general partners, were sued individually and the prayer for relief asked for enforcement of arbitration award against all defendants jointly and severally, the individual defendants were on notice that plaintiff's complaint sought to hold them liable for any award made in the arbitration. With that knowledge, defendants filed an answer requesting that the action be stayed pending determination of the claims in the arbitration proceeding. Therefore, defendants were on notice that the arbitration proceeding would affect them individually, and not only as partners, even though the defendants were not named individually in the arbitration proceeding. George W. Kane, Inc. v. Bolin Creek West Assocs., 95 N.C. App. 135, 381 S.E.2d 832 (1989).

Misconduct by Arbitrators Shown. — Appellants sufficiently met their heavy burden under former G.S. 1-567.13 [see now G.S. 1-569.23] in demonstrating arbitrator's misconduct where the evidence showed that during the arbitration of a construction contract dispute, the arbitration panel collectively harassed and badgered witness and appellant's attorney, refused to hear evidence, and constantly used profanity and sarcastic comments during the proceedings. Wildwoods of Lake Johnson Assocs. v. L.P. Cox Co., 88 N.C. App. 88, 362 S.E.2d 615 (1987), cert. denied, 322 N.C. 838, 371 S.E.2d 285 (1988).

§ 1-569.16. Representation by lawyer.

A party to an arbitration proceeding may be represented by an attorney or attorneys. (1927, c. 94, s. 9; 1973, c. 676, s. 1; 2003-345, s. 2.)

§ 1-569.17. Witnesses; subpoenas; depositions; discovery.

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena shall be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost-effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit any discovery the arbitrator decides is appropriate under the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.

(d) If an arbitrator permits discovery under subsection (c) of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the protection of records and other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost-effective. A subpoena or discovery-related order issued by an arbitrator in another state shall be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

(h) An arbitrator shall not have the authority to hold a party in contempt of any order the arbitrator makes under this section. A court may hold parties in contempt for failure to obey an arbitrator's order, or an order made by the court, pursuant to this section, among other sanctions imposed by the arbitrator or the court. (1927, c. 94, ss. 10, 11; 1973, c. 676, s. 1; 2003-345, s. 2.)

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under prior law.*

As to procedure under common law, see McCrae v. Robeson, 6 N.C. 127 (1812); Pierce v. Perkins, 17 N.C. 250 (1832); Hurdle v. Stallings, 109 N.C. 6, 13 S.E. 720 (1891).

An award is ordinarily presumed to be valid and the party trying to set aside the award has the burden of demonstrating an objective basis which supports his allegation that one of the arbitrators acted improperly. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Discovery Limited. — Unless the parties specifically agree on a method of discovery in an arbitration proceeding, this section will govern the discovery process. Palmer v. Duke Power Co., 129 N.C. App. 488, 499 S.E.2d 801 (1998).

The discovery procedures available during arbitration are limited by statute. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

Contrary to a civil case at law, where there exists a broad right to discovery, discovery during arbitration is at the discretion of the arbitrator and further requires that the deponent cannot be subpoenaed or is unable to attend the hearings. Prime S. Homes, Inc. v. Byrd, 102 N.C. App. 255, 401 S.E.2d 822 (1991).

Use of civil discovery constituted waiver of right to compel arbitration; therefore, the trial court properly denied a property management company's motion to compel arbitration of an action by property owners seeking to recover for damages to the property, as the company engaged in extensive discovery which was not permissible pursuant to G.S. 1-569.17. Moose v. Versailles Condo. Ass'n, 171 N.C. App. 377, 614 S.E.2d 418, 2005 N.C. App. LEXIS 1199 (2005).

§ 1-569.18. Judicial enforcement of preaward ruling by arbitrator.

(a) If an arbitrator makes a preaward ruling in favor of a party to the arbitration proceeding, the party may request the arbitrator to incorporate the ruling into an award under G.S. 1-569.19. A prevailing party may make a motion to the court for an expedited order to confirm the award under G.S. 1-569.22, in which case the court shall summarily decide the motion. The court shall issue an order to confirm the award unless the court vacates, modifies, or corrects the award under G.S. 1-569.23 or G.S. 1-569.24.

(b) An arbitrator's ruling under subsection (a) of this section that denies a request for a preaward ruling is not subject to trial court review. A party whose request under subsection (a) of this section for a preaward ruling has been denied by an arbitrator may seek relief under G.S. 1-569.20 and G.S. 1-569.21 from any final award the arbitrator renders.

(c) There is no right of appeal from trial court orders and judgments on preaward rulings by an arbitrator after a trial court award under this section, G.S. 1-569.19, and G.S. 1-569.28. (2003-345, s. 2.)

§ 1-569.19. Award.

(a) An arbitrator shall make a record of an award. The record shall be signed or otherwise authenticated as authorized by federal or State law by any arbitrator who concurs with the award. The arbitrator or the arbitration organization shall give notice of the award, including a copy of the award, to each party to the arbitration proceeding.

(b) An award shall be made within the time specified by the agreement to arbitrate or, if not specified therein, within the time ordered by the court. The court may extend or the parties to the arbitration proceeding may agree in a record to extend the time. The court or the parties may extend the time within or after the time specified or ordered. A party waives any objection that an award was not timely made unless that party gives notice of the objection to the arbitrator before receiving notice of the award. (1927, c. 94, ss. 8, 14; 1973, c. 676, s. 1; 2003-345, s. 2.)

CASE NOTES

Editor's Note. — Some of the cases cited below were decided under prior law.

Procedure Must Be Strictly Followed. — Both statutory provisions (former G.S. 1-567.13 and 1-567.14) establish that an application for vacating or modifying an award must be made within 90 days after delivery of a copy of the award to the applicant. Service of the award must be by either personal delivery or registered mail. Where a statute prescribes a specific mode of notice, that method must be strictly followed where notice must be relied upon to divest the recipient of a right. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

As this section is a prerequisite to the vacating or modifying of the arbitrators' award, service of the award of arbitrators by regular mail did not commence the running of the 90-day period as prescribed by former G.S. 1-567.13. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

What Sums May Be Awarded. — On arbitration of claim of contractor for balance due, if any, on contract, and damages due by contractor and claimed by owner arising from deficiencies in design and construction of a building, the arbitrators had authority to award sums, costs of delays caused by owner, certain fees and expenses of arbitration, with the exception of attorney's fees, and compensation for transferring the proprietary right to the design of knitting and seaming vacuum system, under the provisions of the parties' contract and the Uniform Arbitration Act (former G.S. 1-567.1 through 1-567.20). G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

Form of Award. — There has never been any requirement in this State as to the form of the award, this having been left to the choice of the arbitrators unless the agreement specified a form. Ball-Thrash Co. v. McCormack, 172 N.C. 677, 90 S.E. 916 (1916), decided under former law.

"Making" and "Delivery" of Award Distinguished. — The Uniform Arbitration Act treats the "making" of the award and the "delivery" of the award to the parties as two separate and distinct provisions. Poe & Sons v. University of N.C., 248 N.C. 617, 104 S.E.2d 189 (1958), decided under former law.

Delivery. — Trial court properly denied a paving company's motion to dismiss a petition to confirm an arbitration award in favor of a construction company; the parties agreed to follow the rules of an arbitration organization, and the case manager for the arbitration organization served the paving company by means which were permitted by the organization's rules in effect at the time, and this constituted proper service pursuant to former G.S. 1-567.6 and former G.S. 1-567.9 [see now G.S. 1-569.15 and 1-569.19]. Marolf Constr. Inc. v. Allen's Paving Co., 154 N.C. App. 723, 572 S.E.2d 861, 2002 N.C. App. LEXIS 1535 (2002), cert. denied, 356 N.C. 673, 572 S.E.2d 861, cert. denied, 356 N.C. 673, 577 S.E.2d 625 (2003).

Cited in Faison & Gillespie v. Lorant, 187 N.C. App. 567, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

§ 1-569.20. Change of award by arbitrator.

(a) On motion to an arbitrator by a party to an arbitration proceeding, the arbitrator may modify or correct an award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);
(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or
(3) To clarify the award.

(b) A motion under subsection (a) of this section shall be made and notice given to all parties within 20 days after the moving party receives notice of the award.

(c) A party to the arbitration proceeding shall give notice of any objection to the motion within 10 days after receipt of the notice.

(d) If a motion to the court is pending under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may submit the claim to the arbitrator to consider whether to modify or correct the award:

(1) Upon a ground stated in G.S. 1-569.24(a)(1) or (a)(3);
(2) Because the arbitrator had not made a final and definite award upon a claim submitted by the parties to the arbitration proceeding; or
(3) To clarify the award.

(e) An award modified or corrected pursuant to this section is subject to G.S. 1-569.19(a), 1-569.22, 1-569.23, and 1-569.24. (1973, c. 676, s. 1; 2003-345, s. 2.)

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under prior law.*

Errors of law or fact are generally insufficient to invalidate an award fairly and honestly made. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Since the purpose of arbitration is to settle matters in controversy and avoid litigation, parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Arbitrators Had No Authority to Modify Award. — Arbitrators had no authority under this section to modify award on the grounds that they "used the wrong formula" to calculate it. The use of an incorrect formula to determine an award is not an "evident miscalculation of figures" as defined in former G.S. 1-567.14(a)(1) [see now G.S. 1-569.24]. North Blvd. Plaza v. North Blvd. Assocs., 136 N.C. App. 743, 526 S.E.2d 203, 2000 N.C. App. LEXIS 144 (2000).

To Grant Attorney's Fees to the Prevailing Party. — Where an arbitrator originally failed to award attorney's fees to the prevailing party in accordance with the parties' contract, the arbitrator lacked authority under former G.S. 1-567.10 [see now G.S. 1-569.20] of the Uniform Arbitration Act to issue a modified award to include an award of attorney's fees, as the grant of attorney's fees in the modified award did not constitute a clarification of the original award, and the failure to include attorney's fees in the original award did not constitute a mistake subject to modification under either former G.S. 1-567.14(a)(1) or (3) [see now G.S. 1-569.24]. Vanhoy v. Duncan Contractors, Inc., 153 N.C. App. 320, 569 S.E.2d 715, 2002 N.C. App. LEXIS 1122 (2002).

Cited in Faison & Gillespie v. Lorant, 187 N.C. App. 567, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

§ 1-569.21. Remedies; fees and expenses of arbitration proceeding.

(a) An arbitrator may award punitive damages or other exemplary relief if:

(1) The arbitration agreement provides for an award of punitive damages or exemplary relief;

(2) An award for punitive damages or other exemplary relief is authorized by law in a civil action involving the same claim; and

(3) The evidence produced at the hearing justifies the award under the legal standards otherwise applicable to the claim.

(b) An arbitrator may award reasonable expenses of arbitration if an award of expenses is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding. An arbitrator may award reasonable attorneys' fees if:

(1) The arbitration agreement provides for an award of attorneys' fees; and

(2) An award of attorneys' fees is authorized by law in a civil action involving the same claim.

(c) As to all remedies other than those authorized by subsections (a) and (b) of this section, an arbitrator may order any remedies the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The fact that a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under G.S. 1-569.22 or for vacating an award under G.S. 1-569.23.

(d) An arbitrator's expenses and fees, together with other expenses, shall be paid as provided in the award.

(e) If an arbitrator awards punitive damages or other exemplary relief under subsection (a) of this section, the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief. (1973, c. 676, s. 1; 2003-345, s. 2.)

CASE NOTES

Editor's Note. *— Most of the cases cited below were decided under prior law.*

Prejudgment Interest. — In striking the prejudgment interest awarded by an arbitrator, a trial court erroneously concluded that the arbitrator exceeded his authority under G.S. 1-596.24(a)(2) of North Carolina's Revised Uniform Arbitration Act (RUAA); in confirming the arbitrator's decision on appeal, the reviewing court found that by inviting the arbitrator to award discretionary relief it deemed just and proper, coupled with incorporation of rules under the RUAA, including the remedies provided under G.S. 1-569.21(c), and incorporations of the rules of the American Arbitration Association, the parties permitted the arbitrator to award remedies it deemed just and appropriate under the circumstances, and the arbitrator's award did not exceed the authority expressly conferred on him by the parties' private arbitration agreement. Faison & Gillespie v. Lorant, 187 N.C. App. 567, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

Legislative Intent Regarding Attorneys' Fees. — The specific, uncomplicated language of this section clearly reflects the legislative intent that attorneys' fees are not to be awarded for work performed in arbitration proceedings, unless the parties specifically agree to and provide for such fees in the arbitration agreement. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Counsel fees are not a subject of arbitration, even where the contract provides that the owner will pay reasonable attorneys' fees incurred by the contractor for the collection of any defaulted payment due to the contractor by the owner as a result of the contract. In North Carolina, such attorneys' fees are collectible only under G.S. 6-21.2. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

Attorneys' fees are not a subject of arbitration even if the contract in dispute provides for such fees. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

This section excludes attorneys' fees from an award to be rendered by the arbitrators since such fees are only collectible under G.S. 6-21.2. An award of arbitration specifically awarded attorneys' fees and exceeded the arbitrators' authority. Therefore, the trial court properly denied motion to confirm the arbitrators' award. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Attorney's Fees Not Included. — Since this section has no application to work performed by an attorney before a case is referred to arbitration, the award of attorney's fees under G.S. 6-21.1 was proper. Lucas v. City of Charlotte, 123 N.C. App. 140, 472 S.E.2d 203 (1996).

Court May Not Expand Award to Include Attorneys' Fees. — The Arbitration Act does not permit an arbitration award, duly made under the act, to be expanded by the court of jurisdiction on confirmation to include attorneys' fees for work conducted in the arbitration proceeding. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Attorney's Fees Are Allowed If Parties' Arbitration Agreement Allows an Award of Such Fees. — Where the parties to an arbitration proceeding specifically agree to the provision of attorneys fees in an arbitration agreement, an arbitrator may award such fees in an arbitration award. Vanhoy v. Duncan Contractors, Inc., 153 N.C. App. 320, 569 S.E.2d 715, 2002 N.C. App. LEXIS 1122 (2002).

Agreement Held Not to Provide for Attorneys' Fees. — Where the only mention of attorneys' fees in agreement was under a section which dealt solely with indemnification of either party in the event of incurred liability or obligation to a third party, the reference was not sufficient to show that the parties' "agreement to arbitrate" provided otherwise in negating the prohibition and exclusion of counsel fees contained in this section. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Costs Not Awarded. — Trial court did not err in applying the former Uniform Arbitration Act to an injured person's underinsured motorist insurance claim; where fees were addressed in the arbitration agreement, the trial court did not err in refusing to award costs or interest to the injured person on the arbitration award, since costs or interest did not fit into a trial court's authority to modify an arbitration award. Eisinger v. Robinson, 164 N.C. App. 572, 596 S.E.2d 831, 2004 N.C. App. LEXIS 1001 (2004).

Treble Damages Properly Awarded. — Arbitration award in contract dispute which included treble damages was proper because the arbitration clause at issue stated that arbitration was the proper avenue should any dispute arise relative to the performance of the contract; "any dispute" included plaintiffs' claim that the contractors were liable for unfair and deceptive trade practices, which allowed for an award of treble damages pursuant to G.S. 75-16. Linsenmayer v. Omni Homes, Inc., — N.C. App. —, 668 S.E.2d 388, 2008 N.C. App. LEXIS 2018 (2008).

Findings in Arbitration Award Sufficient to Support Award of Treble Damages. — There was no error in the absence of specific findings in an arbitration award that would justify treble damages as the trial court previously found for plaintiffs on the issue of liability for unfair and deceptive trade practices and found treble damages to be statutorily appropriate; under G.S. 75-16, the arbitrator was bound by law to treble the damages and was not required to make findings already established by the trial court. Linsenmayer v. Omni Homes, Inc., — N.C. App. —, 668 S.E.2d 388, 2008 N.C. App. LEXIS 2018 (2008).

§ 1-569.22. Confirmation of award.

After a party to an arbitration receives notice of an award, the party may make a motion to the court for an order confirming the award. Upon motion of a party for an order confirming the award, the court shall issue a confirming order unless the award is modified or corrected pursuant to G.S. 1-569.20 or G.S. 1-569.24 or is vacated pursuant to G.S. 1-569.23. (1927, c. 94, s. 15; 1973, c. 676, s. 1; 2003-345, s. 2.)

Legal Periodicals. — For note on the admission of an arbitrator's depositions and testimony to prove misconduct or fraud on the part of arbitrators, see 13 Wake Forest L. Rev. 803 (1977).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under prior law.*

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of an award. McNeal v. Black, 61 N.C. App. 305, 300 S.E.2d 575 (1983).

Arbitration Not Infallible. — While the public policy of this State favors confirmation of arbitration awards, such awards are not infallible. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

An award is conclusive on matters of law and fact if decided in accordance with the legal construction of the contract in which the arbitrators derive their authority. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Errors of law or fact are generally insufficient to invalidate an award fairly and honestly made. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

In as much as the purpose of arbitration is to settle matters in controversy and avoid litigation, parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 460, 307 S.E.2d 362 (1983).

Ambiguous Term in Arbitration Award. — Where a trial court is asked to interpret an ambiguous term in an arbitration award that has been confirmed following the expiration of the periods for vacating or modifying or correcting the award, such matter may be determined by the trial court only where the ambiguity may be resolved from the record; however, where the ambiguity is not resolved by the record, the only proper method by which to resolve the matter is to remand the matter to the arbitration panel for clarification of the disputed term. General Accident Ins. Co. of Am. v. MSL Enters., Inc., 143 N.C. App. 453, 547 S.E.2d 97, 2001 N.C. App. LEXIS 312 (2001).

The vacating of an arbitration award renders the consideration of an application to confirm moot. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

Trial judge was required to either (1) confirm award in the appraisers' report, (2) vacate the award after finding one of the statutory grounds for vacating, or (3) modify the award so as to effect the intent of the parties and then confirm the award as modified. Hooper v. Allstate Ins. Co., 124 N.C. App. 185, 476 S.E.2d 380 (1996).

Cited in Faison & Gillespie v. Lorant, 187 N.C. App. 567, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

§ 1-569.23. Vacating award.

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was:

a. Evident partiality by an arbitrator appointed as a neutral arbitrator;

b. Corruption by an arbitrator; or

c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) An arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to G.S. 1-569.15 so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) An arbitrator exceeded the arbitrator's powers;

(5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing; or

(6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in G.S. 1-569.9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

(b) A motion under this section shall be filed within 90 days after the moving party receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the moving party receives notice of a modified or corrected award pursuant to G.S. 1-569.20, unless the moving party alleges that the award was procured by corruption, fraud, or other undue means, in which case the motion shall be made within 90 days after the ground is known, or by the exercise of reasonable care would have been known, by the moving party.

(c) If the court vacates an award on a ground other than that set forth in subdivision (a)(5) of this section, it may order a rehearing. If the award is vacated on a ground stated in subdivision (1) or (2) of subsection (a) of this section, the rehearing shall be before a new arbitrator. If the award is vacated on a ground stated in subdivision (3), (4), or (6) of subsection (a) of this section, the rehearing may be held before the arbitrator who made the award or the arbitrator's successor. The arbitrator shall render the decision in the rehearing within the same time as the time provided in G.S. 1-569.19(b) for an award.

(d) If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award pursuant to G.S. 1-569.24 is pending. (1927, c. 94, s. 16; 1973, c. 676, s. 1; 2003-345, s. 2.)

Legal Periodicals. — For note on the admission of an arbitrator's depositions and testimony to prove misconduct or fraud on the part of arbitrators, see 13 Wake Forest L. Rev. 803 (1977).

For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

CASE NOTES

Editor's Note. *— Many of the cases cited below were decided under prior law.*

Sections 1-567.13 and 1-567.14 [see now G.S. 1-569.23 and 1-569.24] provide exclusive grounds and procedures for vacating, modifying, or correcting an arbitration award.

Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982); G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987); Sentry Bldg. Sys. v. Onslow County Bd. of Educ., 116 N.C. App. 442, 448 S.E.2d 145 (1994).

When a customer sued a storage company regarding missing property, and the dispute was subject to arbitration under the parties' contract, the a letter from the customer's counsel proposing a settlement, and the company's acceptance of the proposal, created a settlement agreement between the parties that was properly enforced by an arbitrator, under former G.S. 1-567.13 (now G.S. 1-569.23), notwithstanding the customer's refusal to sign the settlement; in addition, a provision in the settlement agreement that the company would pay the customer a certain sum within 30 days of executing settlement documents did not mean that execution of these documents was a condition precedent to the creation of a valid settlement agreement between the parties, as the execution of settlement documents did not affect whether there was such an agreement between them. Smith v. Young Moving & Storage, Inc., 167 N.C. App. 487, 606 S.E.2d 173, 2004 N.C. App. LEXIS 2328 (2004).

Section 1-567.13 [now G.S. 1-569.23] provides the exclusive grounds and procedure for vacating an award, while former G.S. 1-567.14 [see now G.S. 1-569.24] provides the exclusive grounds and procedure for modifying or correcting an award. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Compliance with former § 1-567.9 [see now G.S. 1-569.19] is mandatory. — Both statutory provisions (G.S. 1-567.13 and 1-567.14) [see now G.S. 1-569.23 and 1-569.24] establish that an application for vacating or modifying an award must be made within 90 days after delivery of a copy of the award to the applicant. Service of the award must be by either personal delivery or registered mail. Where a statute prescribes a specific mode of notice, that method must be strictly followed where notice must be relied upon to divest the recipient of a right. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

As former G.S. 1-567.9 [see now G.S. 1-569.19] is a prerequisite to the vacating or modifying of the arbitrators' award, service of the award of arbitrators by regular mail did not commence the running of the 90-day period as prescribed by this section. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Plaintiff was barred from raising the validity of an arbitration award on appeal where nothing in the record indicated that he took advantage of the procedure set out in this section or that he otherwise challenged the validity of the award at the trial level. Murakami v. Wilmington Star News, Inc., 137 N.C. App. 357, 528 S.E.2d 68, 2000 N.C. App. LEXIS 329 (2000).

No Right of Appeal. — If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party. There is no right of appeal, and the court has no power to revise the decisions of judges who are of the parties' own choosing. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 347 S.E.2d 457 (1986).

Attacks on Regularity or Fairness of Awards Generally. — The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of an award. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981); McNeal v. Black, 61 N.C. App. 305, 300 S.E.2d 575 (1983); In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983); G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

Consent to submission of a matter to arbitration and participation in the arbitration hearing, without making any objection, demand for jury trial or motion to stay the proceedings, results in a waiver of the right to subsequently challenge the arbitration process. McNeal v. Black, 61 N.C. App. 305, 300 S.E.2d 575 (1983).

Arbitration is intended to be a final settlement of disputes without litigation. Parties agreeing to abide by a decision of a panel of arbitrators will not be heard to attack the fairness of such an award. Carteret County v. United Contractors, 120 N.C. App. 336, 462 S.E.2d 816 (1995).

Errors of law or fact are generally insufficient to invalidate an award fairly and honestly made. In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Argument that an arbitrator who errs as a matter of law exceeds his powers and that as a result the award can be vacated was without merit, as such argument was inconsistent with the general rule that errors of law or fact, or an erroneous decision of matters submitted to arbitration, are insufficient to invalidate an award fairly and honestly made. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 347 S.E.2d 457 (1986).

The trial court did not err in refusing to vacate the arbitration award under this section where plaintiff's only contention was that the arbitrator made mistakes of law, because an arbitrator is not bound by substantive law or rules of evidence. Sholar Bus. Assocs., Inc. v. Davis, 138 N.C. App. 298, 531 S.E.2d 236, 2000 N.C. App. LEXIS 607 (2000).

When a customer suing a storage company regarding missing property sought to vacate an arbitrator's award in favor of the company enforcing a settlement agreement created by the company's acceptance of the customer's settlement proposal, the customer's arguments that (1) there was no binding and enforceable settlement between the parties, (2) the arbitrator did not properly identify conditions precedent, and (3) North Carolina law mandated that arbitration was compellable and irrevocable except with the consent of the parties, were not grounds to vacate the arbitration award under former G.S. 1-567.13 (now G.S. 1-569.23), as the award could not be vacated since the arbitrator erred as to law or fact, and such mistakes are the misfortune of the party. Smith v. Young Moving & Storage, Inc., 167 N.C. App. 487, 606 S.E.2d 173, 2004 N.C. App. LEXIS 2328 (2004).

Ambiguous Term In Arbitration Award. — Where a trial court is asked to interpret an ambiguous term in an arbitration award that has been confirmed following the expiration of the periods for vacating or modifying or correcting the award, such matter may be determined by the trial court only where the ambiguity may be resolved from the record; however, where the ambiguity is not resolved by the record, the only proper method by which to resolve the matter is to remand the matter to the arbitration panel for clarification of the disputed term. General Accident Ins. Co. of Am. v. MSL Enters., Inc., 143 N.C. App. 453, 547 S.E.2d 97, 2001 N.C. App. LEXIS 312 (2001).

The discovery of new evidence is not grounds for vacating or refusing to enforce the arbitrator's award. Wilks v. American Bakeries Co., 563 F. Supp. 560 (W.D.N.C. 1983).

Only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by reviewing courts. If an arbitrator makes a mistake, either as to law or fact, unless it is an evident mistake in the description of any person, thing or property referred to in the award, it is the misfortune of the party. There is no right of appeal and the court has no power to revise the decisions of judges who are of the parties own choosing. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake is a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus arbitration instead of ending would tend to increase litigation. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Grounds Alleged for Modification Held Not Proper. — Allegations of the "fundamental unfairness" of the panel's makeup are not proper grounds for modification under former G.S. 1-567.14 [see now G.S. 1-569.24]. Carteret County v. United Contractors, 120 N.C. App. 336, 462 S.E.2d 816 (1995).

Plaintiff's failure to produce certain documents during discovery proceedings conducted before the agreement to arbitrate did not constitute fraud, corruption, or undue means that would provide the basis for vacating an arbitration award under this section. Palmer v. Duke Power Co., 129 N.C. App. 488, 499 S.E.2d 801 (1998).

An arbitration award is ordinarily presumed valid. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

And the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the arbitrators acted improperly. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

An arbitration award is presumed valid and the burden of proving specific grounds for vacating an award rests on the party attacking it. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 347 S.E.2d 457 (1986).

An award is ordinarily presumed to be valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the grounds for setting it aside exists. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

Record Must Show That Arbitrators Exceeded Authority. — Before an award can be vacated on grounds that the arbitrators exceeded their authority, the record must objectively disclose that the arbitrators did exceed their authority in some respect. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

Where a claim for personal injuries was properly before the arbitrator, he could dispense with it as he saw fit, and his denial of that claim, regardless of the reason, could not be considered outside his scope of authority. Howell v. Wilson, 136 N.C. App. 827, 52 S.E.2d 194, 2000 N.C. App. LEXIS 157 (2000).

Arbitrators Generally Required to Be Impartial. — An arbitrator is a person selected by the mutual consent of the parties, to determine matters in controversy between them, whether they be matters of law or fact. He is invested with judicial functions, limited by the terms of the submission (and by statute), and he must be incorrupt and impartial, and not exceed or fall short of his duty; if he acts otherwise, his award may be set aside. Crisp v. Love, 65 N.C. 126 (1871), decided under prior law.

Public policy generally requires that arbitrators be impartial and that they have no connection with the parties involved or the subject matter of the dispute. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

But May Be Acquainted with Case or Parties. — This section by its terms, does not necessarily prevent parties from accepting arbitrators who they know are acquainted in some way with the case or the parties. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Defendant was not entitled to have an arbitration award set aside under subdivision (a)(2) of this section because the arbitrator appointed by plaintiff had prior knowledge of the facts and a business connection with plaintiff where the written arbitration agreement between the parties shows that defendant accepted the arbitrator appointed by plaintiff with full knowledge of his business dealings with plaintiff and the possible bias that could result from that connection. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

In a 1987 arbitration proceeding, where the neutral arbitrator's firm had done work for defendant in 1965 and 1968, and the arbitrator himself had performed some consulting work for defendant in 1979 and 1980 for a fee of $797.29, these facts, coupled with plaintiff's constructive knowledge of these contacts, would not require vacation of the award or deposition of the arbitrators. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Partiality of Arbitrator Not Appointed as Neutral. — This section does not provide relief from an award when there is "evident partiality" by an arbitrator who is not appointed as a neutral or umpire. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Fact that arbitrator had appeared as an expert witness for clients of opposing counsel's former law firm was alone insufficient to establish an objective basis for believing that the arbitrator was biased. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 318 N.C. 287, 347 S.E.2d 457, 347 S.E.2d 457 (1986).

Inappropriate Relationships of Arbitrator. — Trial court erred in not granting motion to amend or open judgment under G.S. 1A-1-59 where arbitrator failed to disclose numerous social, business, and professional relationships with partners in law firm representing insurance company. William C. Vick Constr. Co. v. North Carolina Farm Bureau Fed'n, 123 N.C. App. 97, 472 S.E.2d 346 (1996).

Waiver of Disability of Arbitrator. — The disability of an arbitrator is waived if the complaining party had prior knowledge of it. Thomas v. Howard, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

Waiver of Untimeliness of Award. — Business partner's and limited liability companies' failure to object to the untimeliness of an arbitration award before entry constituted a waiver, regardless of whether they based their claim on 9 USCS § 10 or former G.S. 1-567.13 (now G.S. 1-569.23). Carroll v. Ferro, 179 N.C. App. 402, 633 S.E.2d 708, 2006 N.C. App. LEXIS 1904 (2006).

Parties May Depose Arbitrators. — Where an objective basis exists for a reasonable belief that misconduct has occurred, the parties to the arbitration may depose the arbitrators relative to that misconduct. Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter, 291 N.C. 208, 230 S.E.2d 380 (1976).

A party to an arbitration may depose the arbitrator relative to alleged misconduct only when an objective basis exists for a reasonable belief that misconduct has occurred. Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, cert. denied, 317 N.C. 714, 347 S.E.2d 457 (1986).

It was proper to depose arbitrator where there was a basis for believing that misconduct had occurred based on discovery of undisclosed relationship with attorney for insurance company. William C. Vick Constr. Co. v. North Carolina Farm Bureau Fed'n, 123 N.C. App. 97, 472 S.E.2d 346 (1996).

And such depositions are admissible in a proceeding under this section to vacate an award. Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter, 291 N.C. 208, 230 S.E.2d 380 (1976).

An arbitrator must act within the scope of the authority conferred on him by the arbitration agreement, and his award is subject to attack on the ground that he exceeded his authority under a mistake of law and upon other grounds. Calvine Cotton Mills, Inc. v. Textile Workers Union, 238 N.C. 719, 79 S.E.2d 181 (1953), decided under former law.

An act of an arbitrator in gathering evidence outside the scheduled hearing and without notice to the parties would be in violation of the

North Carolina Uniform Arbitration Act (former G.S. 1-567.1 through 1-567.20) and hence of the arbitration agreement. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

The obligation of arbitrators is to act fairly and impartially and to determine the cause upon the evidence adduced before them at the hearing. They have no right to consider facts excepting as submitted in the evidence at the hearings and it is misconduct for them to seek outside evidence by independent investigation. An arbitrator acts in a quasi-judicial capacity and must render a faithful, honest and disinterested opinion upon the testimony submitted to him. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

Estoppel, Election, And Parol Evidence. — The trial court did not err in failing to vacate the award of arbitrator where the arbitrator failed to rule on estoppel, election, and parol evidence issues and failed to make findings of fact or conclusions of law. The parties agreed to arbitrate in accordance with the Commercial Arbitration Rules of the American Arbitration Association and the AAA rules do not require findings of fact or conclusions of law. Sholar Bus. Assocs., Inc. v. Davis, 138 N.C. App. 298, 531 S.E.2d 236, 2000 N.C. App. LEXIS 607 (2000).

To establish grounds for vacating an arbitration award the moving party must prove not only the existence of fraudulent conduct, but also that the award was procured by corruption, fraud or other undue means. Trafalgar House Constr., Inc. v. MSL Enters., Inc., 128 N.C. App. 252, 494 S.E.2d 613 (1998).

Nexus Between Fraud and Decision. — It is appropriate to interpret this section as requiring a nexus between the alleged fraud and the basis for the panel's decision. Trafalgar House Constr., Inc. v. MSL Enters., Inc., 128 N.C. App. 252, 494 S.E.2d 613 (1998).

Ex parte acts by arbitrators constitute misconduct. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

Misconduct of Arbitrators Shown. — Appellants sufficiently met their heavy burden under this section in demonstrating arbitrator's misconduct, where the evidence showed that during the arbitration of a construction contract dispute, the arbitration panel collectively harassed and badgered witness and appellant's attorney, refused to hear evidence, and constantly used profanity and sarcastic comments during the proceedings. Wildwoods of Lake Johnson Assocs. v. L.P. Cox Co., 88 N.C. App. 88, 362 S.E.2d 615 (1987), cert. denied, 322 N.C. 838, 371 S.E.2d 285 (1988).

Misconduct of Arbitrators Not Shown. — Defendants failed to carry their burden of proving that an arbitrator was partial, corrupt or acted in a way constituting misconduct, thus prejudicing the rights of defendants, when he made a casual remark to a witness outside the hearing room. Creative Homes & Millwork, Inc. v. Hinkle, 109 N.C. App. 259, 426 S.E.2d 480 (1993).

What Errors May Be Corrected on Review. — Only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by reviewing courts. If an arbitrator makes a mistake, either as to law or fact, unless it is an evident mistake in the description of any person, thing or property referred to in the award, it is the misfortune of the party. There is no right of appeal and the court has no power to revise the decisions of judges who are of the parties own choosing. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Assuming arguendo that an arbitrator erred in his application of the law, this did not constitute him exceeding his authority to warrant vacatur of an arbitration award under 9 USCS § 10 or former G.S. 1-567.13 (now G.S. 1-569.23). Carroll v. Ferro, 179 N.C. App. 402, 633 S.E.2d 708, 2006 N.C. App. LEXIS 1904 (2006).

Where a motion to vacate is granted, the determination of a motion to confirm an award is rendered moot. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

The vacating of an arbitration award does not deny a motion to confirm, but renders the consideration of an application to confirm moot. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

In an action to vacate an arbitrator's award under § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185, the most clearly analogous state statute of limitations was determined to be the 90-day limitation provided in subsection (b), for vacating an award, rather than the 10-day limitation set forth in G.S. 95-36.9(c) for a stay of proceedings, notwithstanding the provision in former G.S. 1-567.2 that the Uniform Arbitration Act shall not apply "to arbitration agreements between employers and employees or between their respective representatives," since subsection (b) was the statute of limitations most analogous for the determination of timeliness. Gencorp, Inc. v. Local 850, United Rubber Workers of Am., 622 F. Supp. 216 (W.D.N.C. 1985).

Confirmation of Arbitration Award Prior to 90 Day Period. — There was no error in trial court's granting defendant's motion to confirm an arbitration award prior to the expiration of the 90-day period prescribed in this section. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

Confirmation of Arbitration Award Proper. — Since there was no error in the arbitration proceeding or award, there was no error in the trial court's confirmation of that award. Linsenmayer v. Omni Homes, Inc., — N.C. App. —, 668 S.E.2d 388, 2008 N.C. App. LEXIS 2018 (2008).

Award Contrary to Contract. — Arbitrators' decision to award interest at 8% per diem was inconsistent with the parties' contract. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Trial judge was required to either (1) confirm award in the appraisers' report, (2) vacate the award after finding one of the statutory grounds for vacating, or (3) modify the award so as to effect the intent of the parties and then confirm the award as modified. Hooper v. Allstate Ins. Co., 124 N.C. App. 185, 476 S.E.2d 380 (1996).

Insurance carrier waived its right to object to an uninsured motorist arbitration award on the basis that neither the trial court nor the arbitrators found that an abandoned truck was uninsured, where it entered into a consent decree compelling arbitration before seeking a determination of that issue; in any event, these were not proper bases to overturn the award. Miller v. Roca & Son, Inc., 167 N.C. App. 91, 604 S.E.2d 318, 2004 N.C. App. LEXIS 2057 (2004).

A motion seeking a stay of trial pending arbitration was not a "dispositive" motion precluded by the trial court's Scheduling Order; defendant's motion to arbitrate which was filed outside the deadline for the filing of dispositive motions and which disposed of the issues in the case, did not dispose of the case itself because the plaintiff had the option to return to court to modify, correct or vacate the arbitrator's award pursuant to former G.S. 1-567.13 and 1-567.14 [see now G.S. 1-569.23 and 1-569.24]. Smith v. Young Moving & Storage, Inc., 141 N.C. App. 469, 540 S.E.2d 383, 2000 N.C. App. LEXIS 1297 (2000), aff'd, 353 N.C. 521, 546 S.E.2d 87 (2001).

Applied in Faison & Gillespie v. Lorant, 187 N.C. App. 567, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

Cited in Bullard v. Tall House Bldg. Co., — N.C. App. —, 676 S.E.2d 96, 2009 N.C. App. LEXIS 531 (2009).

§ 1-569.24. Modification or correction of award.

(a) Upon motion made within 90 days after the moving party receives notice of the award pursuant to G.S. 1-569.19 or within 90 days after the moving party receives notice of a modified or corrected award pursuant to G.S. 1-569.20, the court shall modify or correct the award if:

(1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(2) The arbitrator has made an award on a claim not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the claims submitted; or

(3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(b) If a motion made under subsection (a) of this section is granted, the court shall modify and confirm the award as modified or corrected. Otherwise, unless a motion to vacate is pending, the court shall confirm the award.

(c) A motion to modify or correct an award pursuant to this section may be joined with a motion to vacate the award. (1927, c. 94, s. 17; 1973, c. 676, s. 1; 2003-345, s. 2.)

Legal Periodicals. — For note on the admission of an arbitrator's depositions and testimony to prove misconduct or fraud on the part of arbitrators, see 13 Wake Forest L. Rev. 803 (1977).

CASE NOTES

Editor's Note. — *Most of the cases cited below were decided under prior law.*

Former §§ 1-567.13 and 1-567.14 [now 1-569.23 and 1-569.24] provide exclusive

grounds and procedures for vacating, modifying, or correcting an arbitration award. Crutchley v. Crutchley, 306 N.C. 518, 293 S.E.2d 793 (1982); G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987); Sentry Bldg. Sys. v. Onslow County Bd. of Educ., 116 N.C. App. 442, 448 S.E.2d 145 (1994).

Former G.S. 1-567.13 [see now G.S. 1-569.23] provides the exclusive grounds and procedure for vacating an award while this section provides the exclusive grounds and procedure for modifying or correcting an award. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

To establish grounds for vacating an arbitration award the moving party must prove not only the existence of fraudulent conduct, but also that the award was procured by corruption, fraud or other undue means. Trafalgar House Constr., Inc. v. MSL Enters., Inc., 128 N.C. App. 252, 494 S.E.2d 613 (1998).

Strict Compliance with Notice Procedure is Required. — As former G.S. 1-567.9 [see now G.S. 1-569.19] is a prerequisite to the vacating or modifying of the arbitrators' award, service of the award of arbitrators by regular mail did not commence the running of the 90-day period as prescribed by former G.S. 1-567.13. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Former §§ 1-567.13 and 1-567.14 [now G.S. 1-569.23 and 1-569.24] establish that an application for vacating or modifying an award must be made within 90 days after delivery of a copy of the award to the applicant. Service of the award must be by either personal delivery or registered mail. Where a statute prescribes a specific mode of notice, that method must be strictly followed where notice must be relied upon to divest the recipient of a right. J.M. Owen Bldg. Contractors v. College Walk, Ltd., 101 N.C. App. 483, 400 S.E.2d 468 (1991).

Scope of Judicial Review. — Judicial review of an arbitration award is confined to determination of whether there exists one of the specific grounds for vacation of an award under the arbitration statute. Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

Errors of Law or Fact Generally Insufficient to Invalidate Award. — Ordinarily, an award is not vitiated or rendered subject to impeachment because of a mistake or error of the arbitrators as to the law or facts. The general rule is that errors of law of fact, or an erroneous decision of matters submitted to the judgment of the arbitrators, are insufficient to invalidate an award fairly and honestly made. Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 255 S.E.2d 414 (1979); In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

Ambiguous Term In Arbitration Award. — Where a trial court is asked to interpret an ambiguous term in an arbitration award that has been confirmed following the expiration of the periods for vacating or modifying or correcting the award, such matter may be determined by the trial court only where the ambiguity may be resolved from the record; however, where the ambiguity is not resolved by the record, the only proper method by which to resolve the matter is to remand the matter to the arbitration panel for clarification of the disputed term. General Accident Ins. Co. of Am. v. MSL Enters., Inc., 143 N.C. App. 453, 547 S.E.2d 97, 2001 N.C. App. LEXIS 312 (2001).

What Errors May Be Corrected on Review. — Only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by reviewing courts. If an arbitrator makes a mistake, either as to law or fact, unless it is an evident mistake in the description of any person, thing or property referred to in the award, it is the misfortune of the party. There is no right of appeal and the court has no power to revise the decisions of judges who are of the parties own choosing. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake is a sufficient ground for setting aside an award, it opens the door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus arbitration instead of ending would tend to increase litigation. Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984).

Correction After 90-Day Period. — Where the 90-day limitation provided by to former G.S. 1-567.14 [see now G.S. 1-569.24] for correction of arbitration awards has expired, the trial court may examine the record and correct a clerical error; a clerical error is an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination. Marolf Constr. Inc. v. Allen's Paving Co., 154 N.C. App. 723, 572 S.E.2d 861, 2002 N.C. App. LEXIS 1535 (2002), cert. denied, 356 N.C. 673, 572 S.E.2d 861, cert. denied, 356 N.C. 673, 577 S.E.2d 625 (2003).

Prejudgment Interest. — In striking the prejudgment interest awarded by an arbitrator, a trial court erroneously concluded that the arbitrator exceeded his authority under G.S.

1-596.24(a)(2) of North Carolina's Revised Uniform Arbitration Act (RUAA); in confirming the arbitrator's decision on appeal, the reviewing court found that by inviting the arbitrator to award discretionary relief it deemed just and proper, coupled with incorporation of rules under the RUAA, including the remedies provided under G.S. 1-569.21(c), and incorporations of the rules of the American Arbitration Association, the parties permitted the arbitrator to award remedies it deemed just and appropriate under the circumstances, and the arbitrator's award did not exceed the authority expressly conferred on him by the parties' private arbitration agreement. Faison & Gillespie v. Lorant, 187 N.C. App. 567, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

Trial court did not err in denying a passenger's request for prejudgment interest on his underinsured motorist arbitration award because, inter alia, implicit in the passenger's request for prejudgment interest existed a request to modify the arbitration award, and the circumstances of G.S. 1-569.24 were the only circumstances in which a trial court was permitted to modify an arbitration award; G.S. 1-569.25 and G.S. 24-5(b) did not expand the limited circumstances in which a trial court was required to modify an arbitration award. Blanton v. Isenhower, — N.C. App. —, 674 S.E.2d 694, 2009 N.C. App. LEXIS 360 (2009).

Modification or Correction to Award Prejudgment Interest Not Authorized. — Where neither the arbitration agreement nor the arbitration award provided for prejudgment interest, the trial court was obligated to confirm the award as written and, accordingly, even if the arbitrator's failure to include prejudgment interest was a mistake of law or fact, such mistake could not be corrected by the trial court on a motion for modification or correction. Palmer v. Duke Power Co., 129 N.C. App. 488, 499 S.E.2d 801 (1998).

But Prejudgment Interest Authorized Where in Parties' Agreement. — Trial court did not impermissibly modify arbitration award under G.S. 1-569.24 when it calculated prejudgment interest under G.S. 24-5(b) but merely enforced the award as written, since both the arbitration agreement as understood between the parties and the arbitration award as drafted by the arbitrator contemplated an award of prejudgment interest. Lovin v. Byrd, 178 N.C. App. 381, 631 S.E.2d 58, 2006 N.C. App. LEXIS 1395 (2006).

Court May Not Add Attorneys' Fees Not Contained in Award. — There is no provision or authority in this section or elsewhere in the Uniform Arbitration Act allowing a court to increase an award by adding attorneys' fees not contained in the award. Nucor Corp. v. General Bearing Corp., 333 N.C. 148, 423 S.E.2d 747 (1992), reh'g denied, 333 N.C. 349, 426 S.E.2d 708 (1993).

Arbitrator May Not Alter Award to Include Attorneys' Fees. — Where an arbitrator originally failed to award attorney's fees to the prevailing party in accordance with the parties' contract, the arbitrator lacked authority under former G.S. 1-567.10 [see now G.S. 1-569.20] of the Uniform Arbitration Act to issue a modified award to include an award of attorney's fees, as the grant of attorney's fees in the modified award did not constitute a clarification of the original award, and the failure to include attorney's fees in the original award did not constitute a mistake subject to modification under either former G.S. 1-567.14(a)(1) or (3) [see now this section]. Vanhoy v. Duncan Contractors, Inc., 153 N.C. App. 320, 569 S.E.2d 715, 2002 N.C. App. LEXIS 1122 (2002).

The obligation of arbitrators is to act fairly and impartially and to determine the cause upon the evidence adduced before them at the hearing. They have no right to consider facts excepting as submitted in the evidence at the hearings and it is misconduct for them to seek outside evidence by independent investigation. An arbitrator acts in a quasi-judicial capacity and must render a faithful, honest and disinterested opinion upon the testimony submitted to him. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

An act of an arbitrator in gathering evidence outside the scheduled hearing and without notice to the parties would be in violation of the North Carolina Uniform Arbitration Act (see now the Revised Uniform Arbitration Act G.S. 1-569.1, et seq.) and hence of the arbitration agreement. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

Ex parte acts by arbitrators constitute misconduct. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

Arbitrator Exceeded His Authority. — Arbitration agreement did not contemplate liquidated damages due for a delay in starting construction of facility and plaintiff never made a request for damages caused by a delay in beginning construction; therefore, defendant demonstrated an objective basis in the record for concluding that the arbitrator in fact exceeded his authority by awarding upon a matter not submitted to him, and the award would be modified accordingly. FCR Greensboro, Inc. v. C & M Invs. of High Point, Inc., 119 N.C. App. 575, 459 S.E.2d 292 (1995).

When Fairness or Regularity of Award May Be Impeached. — The purpose of arbitration is to settle matters in controversy and avoid litigation. It is well established that parties to an arbitration will not generally be heard to impeach the regularity or fairness of the award. Exceptions are limited to such situations as those involving fraud, misconduct, bias, exceeding of powers and clear illegality. Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 255 S.E.2d 414 (1979); In re Boyte, 62 N.C. App. 682, 303 S.E.2d 418, cert. denied and appeal dismissed, 309 N.C. 461, 307 S.E.2d 362 (1983).

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and the parties, who have agreed to abide by the decision of the arbitrators, will not generally be heard to attack the regularity or fairness of an award. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

Allegations of Unfairness Not Proper Grounds for Modification. — Allegations of the "fundamental unfairness" of the panel's makeup are not proper grounds for modification under this section. Carteret County v. United Contractors, 120 N.C. App. 336, 462 S.E.2d 816 (1995).

Burden of Proving Invalidity of Award. — An award is ordinarily presumed to be valid, and the party seeking to set it aside has the burden of demonstrating an objective basis which supports his allegations that one of the grounds for setting it aside exists. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., 85 N.C. App. 684, 355 S.E.2d 815, cert. denied, 320 N.C. 798, 361 S.E.2d 75, aff'd, 94 N.C. App. 769, 381 S.E.2d 718 (1987).

Failure to Timely Challenge Award or Establish Grounds Required. — Arbitration award in a divorce case was affirmed where a husband failed to timely challenge the award as required by G.S. 1-567.14, and where the husband failed to establish any of the grounds required for vacating, modifying, or correcting the award as delineated by G.S. 1-567.13. Semon v. Semon, 161 N.C. App. 137, 587 S.E.2d 460, 2003 N.C. App. LEXIS 1991 (2003).

Subdivision (a)(1) Directed Toward Mathematical Errors Only. — In providing in this section that awards could be modified or corrected for "evident miscalculation of figures," the legislature had reference only to mathematical errors committed by arbitrators which would be patently clear to a reviewing court. This section is not an avenue for litigants to persuade courts to review the evidence and then reach a different result because it might be interpreted differently; such an interpretation of the statute would completely frustrate the underlying purposes of the arbitration process. Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

Use of Wrong Formula Is Not an "Evident Miscalculation." — Arbitrators had no authority under former G.S. 1-567.10 [see now G.S. 1-569.20] to modify award on the grounds that they "used the wrong formula" to calculate it. The use of an incorrect formula to determine an award is not an "evident miscalculation of figures" as defined in subsection (a)(1) of the former version of this section. North Blvd. Plaza v. North Blvd. Assocs., 136 N.C. App. 743, 526 S.E.2d 203, 2000 N.C. App. LEXIS 144 (2000).

Court's Power Under Subdivision (a)(3) Limited. — The provision of this section which allows courts to modify or correct an award which is "imperfect in a matter of form" does not permit the court to substitute its interpretation for that of the arbitrators. Carolina Va. Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 255 S.E.2d 414 (1979).

Waiver After 90-Day Period. — Where plaintiff filed a motion requesting modification of an order confirming an arbitration award and the award itself so as to increase the amount for alimony and child support more than 90 days after delivery of a copy of the award, he waived his ability to contend that the award was imperfect. Crutchley v. Crutchley, 53 N.C. App. 732, 281 S.E.2d 744 (1981), rev'd on other grounds, 306 N.C. 518, 293 S.E.2d 793 (1982).

Trial judge was required to either (1) confirm award in the appraisers' report, (2) vacate the award after finding one of the statutory grounds for vacating, or (3) modify the award so as to effect the intent of the parties and then confirm the award as modified. Hooper v. Allstate Ins. Co., 124 N.C. App. 185, 476 S.E.2d 380 (1996).

Refusal to Modify Award Upheld. — Where neither party requested an explanation of award prior to the appointment of the arbitrators and plaintiff did not allege in its motion to modify that modification was necessary to correct any clerical, typographical, technical, or computational errors under Arbitration Rule 44, the court did not abuse its discretion in refusing to modify or clarify the award. Trafalgar House Constr., Inc. v. MSL Enters., Inc., 128 N.C. App. 252, 494 S.E.2d 613 (1998).

Trial court did not err in applying the former Uniform Arbitration Act to an injured person's underinsured motorist insurance claim; where fees were addressed in the arbitration agreement, the trial court did not err in refusing to award costs or interest to the injured person on the arbitration award, since costs or interest did not fit into a trial court's authority to modify an arbitration award. Eisinger v. Robinson, 164 N.C. App. 572, 596 S.E.2d 831, 2004 N.C. App. LEXIS 1001 (2004).

Remand with Instructions to Trial Court. — Nothing in a trial court's order modifying an arbitrator's award indicated that the court considered the proper standard for modifying or correcting the award, and nothing in the order indicated that the trial court determined that there were grounds under either 9 USCS § 11 or former G.S. 1-567.14 (now G.S. 1-569.24) supporting modification or correction of the award; accordingly, the trial court's ruling modifying the award was reversed and the case was remanded. Carroll v. Ferro, 179 N.C. App. 402, 633 S.E.2d 708, 2006 N.C. App. LEXIS 1904 (2006).

A motion seeking a stay of trial pending arbitration was not a "dispositive" motion precluded by the trial court's Scheduling Order; defendant's motion to arbitrate which was filed outside the deadline for the filing of dispositive motions and which disposed of the issues in the case, did not dispose of the case itself because the plaintiff had the option to return to court to modify, correct or vacate the arbitrator's award pursuant to former G.S. 1-567.13 and 1-567.14. Smith v. Young Moving & Storage, Inc., 141 N.C. App. 469, 540 S.E.2d 383, 2000 N.C. App. LEXIS 1297 (2000), aff'd, 353 N.C. 521, 546 S.E.2d 87 (2001).

§ 1-569.25. Judgment on award; attorneys' fees and litigation expenses.

(a) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity with the order. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(b) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(c) On motion of a prevailing party to a contested judicial proceeding under G.S. 1-569.22, 1-569.23, or 1-569.24, the court may award reasonable attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award. (1927, c. 94, ss. 19, 21; 1973, c. 676, s. 1; 2003-345, s. 2.)

CASE NOTES

Editor's Note. *— The cases cited below were decided under prior law.*

The purpose of arbitration is to reach a final settlement of disputed matters without litigation, and it is well established that the parties, who have agreed to abide by the decision of a panel of arbitrators, will not generally be heard to attack the regularity or fairness of an award. McNeal v. Black, 61 N.C. App. 305, 300 S.E.2d 575 (1983).

The scope of an arbitration award and its res judicata effect are matters for judicial determination. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

The doctrine of res judicata applies to a judgment entered on an arbitration award as it does to any other final judgment. Thus, a judgment entered on an arbitration award is conclusive of all rights, questions, and facts in issue, as to the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action arising out of the same cause of action or dispute. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

And Judgment Operates as an Estoppel. — A judgment entered on an arbitration award, like any other final judgment, operates as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

Prejudgment Interest Not Allowed. — Trial court did not err in denying a passenger's request for prejudgment interest on his underinsured motorist arbitration award because, inter alia, implicit in the passenger's request for prejudgment interest existed a request to modify the arbitration award, and the circumstances of G.S. 1-569.24 were the only circumstances in which a trial court was permitted to modify an arbitration award; G.S. 1-569.25 and G.S. 24-5(b) did not expand the limited circumstances in which a trial court was required to modify an arbitration award. Blanton v. Isenhower, — N.C. App. —, 674 S.E.2d 694, 2009 N.C. App. LEXIS 360 (2009).

§ 1-569.26. Jurisdiction.

(a) A court of this State having jurisdiction over the controversy and the parties to an agreement to arbitrate may enforce the agreement to arbitrate.

(b) An agreement to arbitrate providing for arbitration in this State confers exclusive jurisdiction on the court to enter judgment on an award under this Article. (1927, c. 94, s. 3; 1973, c. 676, s. 1; 2003-345, s. 2.)

CASE NOTES

Editor's Note. *— The cases cited below were decided under prior law.*

Contracts to submit future disputes to arbitration, and thus oust the jurisdiction of the courts, are invalid, and the courts will not specifically, or by indirection, compel performance of such contracts by refusing to entertain a suit until after arbitration. McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

When a cause of action has arisen the courts cannot be ousted of their jurisdiction by an agreement, previously entered into, to submit the rights and liabilities of the parties to arbitration or to some other tribunal named in the agreement. Skinner v. Gaither Corp., 234 N.C. 385, 67 S.E.2d 267 (1951); McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

Courts have uniformly held to the doctrine that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements, previously entered into, to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been also generally held that the agreement to submit the particular question of the amount of loss or damage of the assured under an insurance policy is not against public policy and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination of the legal liability of the insurer. Pioneer Mfg. Co. v. Phoenix Assurance Co., 106 N.C. 28, 10 S.E. 1057 (1890); Braddy v. New York Bowery Fire Ins. Co., 115 N.C. 354, 20 S.E. 477 (1894); Kelly v. Trimont Lodge, No. 249, 154 N.C. 97, 69 S.E. 764 (1910).

Application by defendants to the court for arbitration pursuant to former G.S. 1-567.3 [see now G.S. 1-569.7] would not "oust" the trial court of jurisdiction, as there is a distinction between a lack of jurisdiction and exercising existing jurisdiction to enforce an agreement under the Uniform Arbitration Act [see now G.S. 1-569.1, et seq.], and nothing contained in the language of the act indicates that the court does not retain jurisdiction once a party invokes his privilege to arbitrate. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

§ 1-569.27. Venue.

A motion pursuant to G.S. 1-569.5 shall be made in the court of the county in which the agreement to arbitrate specifies the arbitration hearing is to be held or, if the hearing has been held, in the court of the county in which it was held. Otherwise, the motion may be made in the court of any county in which an adverse party resides or has a place of business or, if no adverse party has a residence or place of business in this State, in the court of any county in this State. All subsequent motions shall be made in the court hearing the initial motion unless the court otherwise directs. (2003-345, s. 2.)

§ 1-569.28. Appeals.

(a) An appeal may be taken from:

(1) An order denying a motion to compel arbitration;
(2) An order granting a motion to stay arbitration;
(3) An order confirming or denying confirmation of an award;
(4) An order modifying or correcting an award;
(5) An order vacating an award without directing a rehearing; or
(6) A final judgment entered pursuant to this Article.

(b) An appeal under this section shall be taken as from an order or a judgment in a civil action. (1927, c. 94, s. 22; 1973, c. 676, s. 1; 2003-345, s. 2.)

Legal Periodicals. — For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

Editor's Note. — *Some of the cases cited below were decided under prior law.*

Legislative Intent. — The Legislature did not intend for an appeal to lie from an arbitration order which vacates an award, but directs a rehearing. In re State, 72 N.C. App. 149, 323 S.E.2d 466 (1984), cert. denied, 313 N.C. 507, 329 S.E.2d 396 (1985).

The right to appeal from an order staying arbitration has no greater latitude than the right to appeal from any other civil judgment or order. Peloquin Assocs. v. Polcaro, 61 N.C. App. 345, 300 S.E.2d 477 (1983).

No Right to Appeal from Order Compelling Arbitration. — Trial court's explicit grant of a motion to compel arbitration was not an order that was listed in G.S. 1-569.28(a) as an appealable order; it was explicitly recognized not to have a right of appeal within North Carolina case law. Bullard v. Tall House Bldg. Co., — N.C. App. —, 676 S.E.2d 96, 2009 N.C. App. LEXIS 531 (2009).

Interlocutory order compelling further arbitration was not appealable. The order was not certified for immediate appeal, it did not impair a substantial right, and it was not listed in G.S. 1-569.28(a) as appealable. Bullard v. Tall House Bldg. Co., — N.C. App. —, 676 S.E.2d 96, 2009 N.C. App. LEXIS 531 (2009).

List enumerated in G.S. 1-569.28(a) included the only possible routes for appeal under the Revised Uniform Arbitration Act. The use of the word "may" in the statute was construed as permissive and not mandatory; thus, the orders and judgment enumerated in G.S. 1-569.28(a) were the only situations where an appeal could be taken under the Act, although an appeal was not required. Bullard v. Tall House Bldg. Co., — N.C. App. —, 676 S.E.2d 96, 2009 N.C. App. LEXIS 531 (2009).

Order directing further arbitration was not a final judgment, and thus G.S. 1-569.28(a)(6) did not apply to render the order appealable. Bullard v. Tall House Bldg. Co., — N.C. App. —, 676 S.E.2d 96, 2009 N.C. App. LEXIS 531 (2009).

No Right to Appeal from Denial of Application to Stay Arbitration. — This section does not permit an appeal to be taken from the denial of an application to stay arbitration. Ruffin Woody & Assocs. v. Person County, 92 N.C. App. 129, 374 S.E.2d 165 (1988), cert. denied, 324 N.C. 337, 378 S.E.2d 799 (1989).

This statute does not provide for an immediate appeal from an order compelling arbitration. Laws v. Horizon Hous., Inc., 137 N.C. App. 770, 529 S.E.2d 695, 2000 N.C. App. LEXIS 534 (2000).

Presumption on Appeal. — Where parties to an action in ejectment consented to arbitration on questions of boundaries and an order was made accordingly, but the record disclosed no evidence upon which the arbitrators based their decision, the courts would assume that there was evidence to support their action. Bryson v. Higdon, 222 N.C. 17, 21 S.E.2d 836 (1942), decided under former law.

Determination As to Existence of Enforceable Contract Must Be Made. — Where the trial court had not yet summarily determined the issue of whether the parties had entered into an enforceable contract providing for arbitration, the trial court's order enjoining arbitration was not appealable. Lee County Bd. of Educ. v. Adams Elec., Inc., 106 N.C. App. 139, 415 S.E.2d 576 (1992).

Failure to Appeal Denial of Motion to Compel Arbitration. — Surety waived any right to arbitrate the subcontractor's action on the payment bonds because, although the surety was not required under G.S. 1-277(a) to immediately appeal the denial of its motion to compel, the surety prejudiced the subcontractor and waived the right to arbitrate by failing to appeal or take exception to the order and actively litigating the dispute by seeking multiple extensions, engaging in discovery, and participating in a full bench trial. Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co., — N.C. App. —, 665 S.E.2d 505, 2008 N.C. App. LEXIS 1628 (2008).

§ 1-569.29. Uniformity of application and construction.

In applying and construing this Article, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. (1927, c. 94, s. 23; 1973, c. 676, s. 1; 2003-345, s. 2.)

Legal Periodicals. — For comment on the enforceability of arbitration clauses in North Carolina separation agreements, see 15 Wake Forest L. Rev. 487 (1979).

§ 1-569.30. Relationship to federal Electronic Signatures in Global and National Commerce Act.

The provisions of this Article governing the legal effect, validity, and enforceability of electronic records or electronic signatures, and of contracts performed with the use of these records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, et seq., or as otherwise authorized by federal or State law governing these electronic records or electronic signatures. (2003-345, s. 2.)

§ 1-569.31. Short title.

This Article may be cited as the Revised Uniform Arbitration Act. (2003-345, s. 2.)

CASE NOTES

Cited in Faison & Gillespie v. Lorant, 187 N.C. App. 567, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007).

ARTICLE 46.

Examination Before Trial.

§§ 1-570 through 1-576: Repealed by Session Laws 1951, c. 760, s. 2.

Editor's Note. — Repealed G.S. 1-568, 1-568.1 through 1-568.27, and 1-569 were formerly located in this Article. They were moved to their current location in Article 45B of Chapter 1 at the direction of the Revisor of Statutes in order to make room for Article 45C of Chapter 1, consisting of G.S. 1-569.1 through 1-569.30, as enacted by Session Laws 2003-345, s. 2.

ARTICLE 47.

Motions and Orders.

§§ 1-577 through 1-584: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to motions generally, see G.S. 1A-1, Rule 7.

ARTICLE 48.

Notices.

§§ 1-585 through 1-589: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to service of pleadings and other papers, see G.S. 1A-1, Rule 5. As to service of subpoenas, see G.S. 1A-1, Rule 45.

§ 1-589.1. Withholding information necessary for service on law-enforcement officer prohibited.

When service of subpoena, or any other court process, is sought upon any law-enforcement officer of the State or of any political subdivision thereof pursuant to the provisions of G.S. 1-589, or of any other statute, it shall be unlawful for any officer or employee of the agency by whom the officer sought to be served is employed willfully to withhold the address or telephone number of the officer sought to be served with subpoena or other process. (1967, c. 456.)

Editor's Note. — Section 1-589, referred to in this section, was repealed by Session Laws 1967, c. 954, s. 4.

§§ 1-590 through 1-592: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to service of subpoenas, see G.S. 1A-1, Rule 45.

Article 49.

Time.

§ 1-593. How computed.

The time within which an act is to be done, as provided by law, shall be computed in the manner prescribed by Rule 6(a) of the Rules of Civil Procedure. (C.C.P., s. 348; Code, s. 596; Rev., s. 887; C.S., s. 922; 1957, c. 141; 1967, c. 954, s. 3.)

Editor's Note. — The Rules of Civil Procedure are found in G.S. 1A-1.

CASE NOTES

Applied in Murdock v. Chatham County, — N.C. App. —, 679 S.E.2d 850, 2009 N.C. App. LEXIS 1164 (July 21, 2009);

Jackson v. Stanwood Corp., 38 N.C. App. 479, 248 S.E.2d 576 (1978).

Cited in Robbins v. Bowman, 9 N.C. App. 416, 176 S.E.2d 346 (1970); Harris v. Latta, 298 N.C. 555, 259 S.E.2d 239 (1979); City of Durham v. Keen, 40 N.C. App. 652, 253 S.E.2d 585 (1979); Anderson v. Gooding, 300 N.C. 170, 265 S.E.2d 201 (1980).

§ 1-594. Computation in publication.

Except as otherwise expressly provided, the time for publication of legal notices shall be computed in the manner prescribed by Rule 6 of the North Carolina Rules of Civil Procedure. (C.C.P., s. 359; Code, s. 602; Rev., s. 888; C.S., s. 923; 1979, c. 579, s. 2.)

Editor's Note. — The Rules of Civil Procedure, referred to above, are found in G.S. 1A-1.

CASE NOTES

Applied in City of Durham v. Keen, 40 N.C. App. 652, 253 S.E.2d 585 (1979).

Cited in Harris v. Latta, 298 N.C. 555, 259 S.E.2d 239 (1979).

Article 50.

General Provisions as to Legal Advertising.

§ 1-595. Advertisement of public sales.

When a statute or written instrument stipulates that an advertisement of a sale shall be made for any certain number of weeks, a publication once a week for the number of weeks so indicated is a sufficient compliance with the requirement, unless contrary provision is expressly made by the terms of the instrument. (1909, cc. 794, 875; C.S., s. 924.)

CASE NOTES

Notice of Sale Under Mortgage Essential. — Powers of sale in a mortgage are contractual, and it is essential to the validity of a sale under a power to comply fully with the requirements of giving notice of the sale. Jenkins v. Griffin, 175 N.C. 184, 95 S.E. 166 (1918).

Where a mortgage of lands provided that notice of the sale under the power thereof given in the conveyance should be published in a newspaper, etc., "for a time not less than thirty days prior to the date of the sale," by the agreement the advertisement should have been inserted in the newspaper once a week for four consecutive weeks, and not consecutively for 30 days, and an allowance made in the superior court for an advertisement for 30 consecutive days was erroneous. Raleigh Sav. Bank & Trust Co. v. Leach, 169 N.C. 706, 86 S.E. 701 (1915).

Burden of Proof. — The presumption of law is in favor of regularity in the execution of the power of sale; and if there was any failure to advertise properly, the burden of showing such failure is on the person setting it up. Jenkins v. Griffin, 175 N.C. 184, 95 S.E. 166 (1918).

§ 1-596. Charges for legal advertising.

The publication of all advertising required by law to be made in newspapers in this State shall be paid for at not to exceed the local commercial rate of the newspapers selected. Any public or municipal officer or board created by or existing under the laws of this State that is now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates.

No newspaper in this State shall accept or print any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commercial rate for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a Class 1 misdemeanor. (1919, c. 45, ss. 1, 2; C.S., s. 2586; 1945, c. 635; 1949, c. 205, s. 11/2; 1993, c. 539, s. 3; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Nash: 1949, c. 205, s. 2. Mitchell: 1979, 2nd Sess., c. 1170.

OPINIONS OF ATTORNEY GENERAL

Legal advertisements published in a newspaper which failed to file the rate schedule required by this section are not invalidated because of the failure to file. See opinion of Attorney General to Grady Joseph Wheeler, Jr., City Attorney, Graham, North Carolina, 54 N.C.A.G. 36 (1985).

§ 1-597. Regulations for newspaper publication of legal notices, advertisements, etc.

Whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper, such publication, advertisement or notice shall be of no force and effect unless it shall be published in a newspaper with a general circulation to actual paid subscribers which newspaper at the time of such publication, advertisement or notice, shall have been admitted to the United States mails in the Periodicals class in the county or political subdivision where such publication, advertisement or notice is required to be published, and which shall have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least 25 of the 26 consecutive weeks immediately preceding the date of the first publication of such advertisement, publication or notice; provided that in the event that a newspaper otherwise meeting the qualifications and having the characteristics prescribed by G.S. 1-597 to 1-599, should fail for a period not exceeding four weeks in any calendar year to publish one or more of its issues such newspaper shall nevertheless be deemed to have complied with the requirements of regularity and continuity of publication prescribed herein. Provided further, that where any city or town is located in two or more adjoining counties, any newspaper published in such city or town shall, for the purposes of G.S. 1-597 to 1-599, be deemed to be admitted to the mails, issued and published in all such counties in which such town or city of publication is located, and every publication, advertisement or notice required to be published in any such city or town or in any of the counties where such city or town is located shall be valid if published in a newspaper published, issued and admitted to the mails anywhere within any such city or town, regardless of whether the newspaper's plant or the post office where the newspaper is admitted to the mails is in such county or not, if the newspaper otherwise meets the qualifications and requirements of G.S. 1-597 to 1-599. This provision shall be retroactive to May 1, 1940, and all publications, advertisements and notices published in accordance with this provision since May 1, 1940, are hereby validated.

Notwithstanding the provisions of G.S. 1-599, whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper qualified for legal advertising in a county and there is no newspaper qualified for legal advertising as defined in this section in such county, then it shall be deemed sufficient compliance with such laws, order or judgment by publication of such notice or any other such paper, document or legal advertisement of any kind or description in a newspaper published in an adjoining county or in a county within the same district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be; provided, if the clerk of the superior court finds as a fact that such newspaper otherwise meets the requirements of this section and has a general circulation in such county where no newspaper is published meeting the requirements of this section. (1939, c. 170, s. 1; 1941, c. 96; 1959, c. 350; 1985, c. 689, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 41; 1997-9, s. 1.)

Local Modification. — Chatham: 1981, c. 893; McDowell: 1981, c. 893; towns of Mint Hill and Matthews: 1987, c. 425; 1987 (Reg. Sess., 1988), c. 1042, s. 5.

CASE NOTES

Legislative Intent. — The legislature intended that this section apply to all legal notices required to be published in newspapers. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

The term "general circulation," when applied to newspapers, refers not so much to the numerical or geographic distribution of the newspaper as it does to the contents of the paper itself. The primary consideration is whether the newspaper contains information of general interest. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

A newspaper of general circulation is a publication to which the general public would resort in order to be informed of the news and intelligence of the day, editorial opinions, and advertisements, and thereby to render it probable that a "notice" would be brought to the attention of the general public. Great S. Media, Inc. v. McDowell County, 50 N.C. App. 705, 275 S.E.2d 226, aff'd, 304 N.C. 427, 284 S.E.2d 457 (1981).

Whether a newspaper is one of general circulation is not determined merely by the number of its subscribers, but by the diversity of those subscribers, and even if the newspaper is of particular interest to a particular class of persons, if it contains news of a general character and interest to the community, although that news may be limited in amount, the newspaper qualifies as one of general circulation. Great S. Media, Inc. v. McDowell County, 50 N.C. App. 705, 275 S.E.2d 226, aff'd, 304 N.C. 427, 284 S.E.2d 457 (1981).

The "general circulation" provision in former subsection (d) of § 105-369 (see now subsection (c)) does not conflict with its counterpart in this section. It simply specifies the geographic area, i.e., "the taxing unit" in which there must be a newspaper of general circulation and the times at which publication must be made. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

What Newspapers May Publish Notices of Tax Lien Sales. — In order to qualify to publish notices of tax lien sales a newspaper must meet the "general circulation" requirements of both former subsection (d) of G.S. 105-369 (see now subsection (c)) and this section. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

Reading both this section and former subsection (d) of G.S. 105-369 (see now subsection (c)) together and giving effect to each, in order for a newspaper to qualify to publish notices of tax lien sales it must be a newspaper of "general circulation to actual paid subscribers" in the taxing unit. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

For a newspaper to be one of general circulation to actual paid subscribers in the taxing unit, as is required by this section and former subsection (d) of G.S. 105-369 (see now subsection (c)), it must meet a four-pronged test: first, it must have a content that appeals to the public generally; second, it must have more than a de minimis number of actual paid subscribers in the taxing unit; third, its paid subscriber distribution must not be entirely limited geographically to one community, or section, of the taxing unit; fourth, it must be available to anyone in the taxing unit who wishes to subscribe to it. Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

Notice Ineffective Unless Published as Provided. — The publication of a notice of sale under a power contained in a deed of trust is wholly ineffective unless it is published in a newspaper having a general circulation within the county where the land to be sold is located to subscribers who have actually paid the subscription price therefor. Jones v. Percy, 237 N.C. 239, 74 S.E.2d 700 (1953), decided under former law.

Cited in Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965); Love v. Nationwide Mut. Ins. Co., 45 N.C. App. 444, 263 S.E.2d 337 (1980); County of Wayne ex rel. Williams v. Whitley, 72 N.C. App. 155, 323 S.E.2d 458 (1984); Haas v. Warren, 341 N.C. 148, 459 S.E.2d 254 (1995).

§ 1-598. Sworn statement prima facie evidence of qualifications; affidavit of publication.

Whenever any owner, partner, publisher, or other authorized officer or employee of any newspaper which has published a notice or any other paper, document or legal advertisement within the meaning of G.S. 1-597 has made a written statement under oath taken before any notary public or other officer or person authorized by law to administer oaths, stating that the newspaper in which such notice, paper, document, or legal advertisement was published, was, at the time of such publication, a newspaper meeting all of the requirements and qualifications prescribed by G.S. 1-597, such sworn written statement shall be received in all courts in this State as prima facie evidence that such newspaper was at the time stated therein a newspaper meeting the requirements and qualifications of G.S. 1-597. When filed in the office of the clerk of the superior court of any county in which the publication of such notice, paper, document or legal advertisement was required or authorized, any such sworn statement shall be deemed to be a record of the court, and such record or a copy thereof duly certified by the clerk shall be prima facie evidence that the newspaper named was at the time stated therein a qualified newspaper within the meaning of G.S. 1-597. Nothing in this section shall preclude proof that a newspaper was or is a qualified newspaper within the meaning of G.S. 1-597 by any other competent evidence. Any such sworn written statement shall be prima facie evidence of the qualifications on any newspaper at the time of any publication of any notice, paper, document, or legal advertisement published in such newspaper at any time from and after the first day of May, 1940.

The owner, a partner, publisher or other authorized officer or employee of any newspaper in which such notice, paper, document or legal advertisement is published, when such newspaper is a qualified newspaper within the meaning of G.S. 1-597, shall include in the affidavit of publication of such notice, paper, document or legal advertisement a statement that at the time of such publication such newspaper was a qualified newspaper within the meaning of G.S. 1-597. (1939, c. 170, s. 11/2; 1947, c. 213, ss. 1, 2.)

CASE NOTES

Applied in Brock v. North Carolina Property Tax Comm'n, 29 N.C. App. 324, 224 S.E.2d 295 (1976).

§ 1-599. Application of two preceding sections.

The provisions of G.S. 1-597 and G.S. 1-598 shall not apply in counties wherein only one newspaper is published, although it may not be a newspaper having the qualifications prescribed by G.S. 1-597; nor shall the provisions of G.S. 1-597 and G.S. 1-598 apply in any county wherein none of the newspapers published in such county has the qualifications and characteristics prescribed in G.S. 1-597. (1939, c. 170, ss. 2, 41/2; 1941, c. 49; 1985, c. 609, s. 1.)

Local Modification. — Towns of Mint Hill and Mathews: 1987 (Reg. Sess., 1988), c. 1042, s. 5.

CASE NOTES

Cited in Great S. Media, Inc. v. McDowell County, 304 N.C. 427, 284 S.E.2d 457 (1981).

§ 1-600. Proof of publication of notice in newspaper; prima facie evidence.

(a) Publication of any notice permitted or required by law to be published in a newspaper may be proved by a printed copy of the notice together with an affidavit made before some person authorized to administer oaths, of the publisher, proprietor, editor, managing editor, business or circulation manager, advertising, classified advertising or any other advertising manager or foreman of the newspaper, showing that the notice has been printed therein and the date or dates of publication. If the newspaper is published by a corporation, the affidavit may be made by one of the persons hereinbefore designated or by the president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer of the corporation.

(b) Such affidavit and copy of the notice shall constitute prima facie evidence of the facts stated therein concerning publication of such notice.

(c) The method of proof of publication of a notice provided for in this section is not exclusive, and the facts concerning such publication may be proved by any competent evidence. (1951, c. 1005, s. 2; 1957, c. 204.)

§ 1-601. Certain legal advertisements validated.

Legal advertisements published prior to June 1, 1983, by a newspaper that met every requirement for publication of legal notices and advertisements under G.S. 1-597 when the advertisement was published except that the newspaper had a second class United States mail permit in a county adjacent to the county in which the advertisement was published instead of the county in which it was published may not be held to be invalid because of the lack of a second class United States mail permit in the proper county. (1983, c. 582, s. 2.)

§§ 1-602 through 1-604: Reserved for future codification purposes.

ARTICLE 51.

False Claims Act.

§ 1-605. Short title; purpose.

(a) This Article shall be known and may be cited as the False Claims Act.

(b) The purpose of this Article is to deter persons from knowingly causing or assisting in causing the State to pay claims that are false or fraudulent and to provide remedies in the form of treble damages and civil penalties when money is obtained from the State by reason of a false or fraudulent claim. (2009-554, s. 1.)

Editor's Note. — Session Laws 2009-554, s. 4, made this Article effective January 1, 2010, and applicable to acts committed on or after that date. A civil action may be filed after January 1, 2010, under Section 1 of this act based on acts committed prior to that date if the activity would also be covered under Part 7 of Article 2 of Chapter 108A of the General Statutes and if the limitation period set forth in G.S. 1-615(a) and G.S. 108A-70.13 has not lapsed.

This Article was enacted as Article 52 by Session Laws 2009-554, s. 1. It has been renumbered as Article 51 at the direction of the Revisor of Statutes.

§ 1-606. Definitions.

The following words and phrases when used in this act have the following meanings, unless the context clearly indicates otherwise:

(1) "Attorney General." — The Attorney General of North Carolina, or any deputy, assistant, or associate attorney general.

(2) "Claim." — Any request or demand, whether under a contract or otherwise, for money or property and whether or not the State has title to the money or property that (i) is presented to an officer, employee, or agent of the State or (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the State's behalf or to advance a State program or interest and if the State government:
   a. Provides or has provided any portion of the money or property that is requested or demanded; or
   b. Will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

   A claim does not include requests or demands for money or property that the State has paid to an individual as compensation for State employment or as an income subsidy with no restrictions on that individual's use of the money or property.

(3) "Judiciary." — A justice or judge of the General Court of Justice or clerk of court.

(4) "Knowing" and "knowingly." — Whenever a person, with respect to information, does any of the following:
   a. Has actual knowledge of the information.
   b. Acts in deliberate ignorance of the truth or falsity of the information.
   c. Acts in reckless disregard of the truth or falsity of the information.

   Proof of specific intent to defraud is not required.

(5) "Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(6) "Obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

(7) "Public employee," "public official," and "public employment" includes federal, State, and local employees and officials.

(8) "Senior executive branch official." — The Governor, Lieutenant Governor, member of the Council of State, or head of department as defined in G.S. 143B-3. (2009-554, s. 1.)

Editor's Note. — The definitions in subdivisions (5) and (6) were enacted by Session Laws 2009-554, s. 1, in reverse order, and were redesignated at the direction of the Revisor of Statutes to preserve alphabetical order.

§ 1-607. False claims; acts subjecting persons to liability for treble damages; costs and civil penalties; exceptions.

(a) Liability. — Any person who commits any of the following acts shall be liable to the State for three times the amount of damages that the State sustains because of the act of that person. A person who commits any of the following acts also shall be liable to the State for the costs of a civil action brought to recover any of those penalties or damages and shall be liable to the State for a civil penalty of not less than five thousand five hundred dollars ($5,500) and not more than eleven thousand dollars ($11,000) for each violation:

(1) Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval.

(2) Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.

(3) Conspires to commit a violation of subdivision (1), (2), (4), (5), (6), or (7) of this section.
(4) Has possession, custody, or control of property or money used or to be used by the State and knowingly delivers or causes to be delivered less than all of that money or property.
(5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the State and, intending to defraud the State, makes or delivers the receipt without completely knowing that the information on the receipt is true.
(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any officer or employee of the State who lawfully may not sell or pledge the property.
(7) Knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the State, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the State.

(b) Damages Limitation. — Notwithstanding the provisions of subsection (a) of this section, the court may limit the damages assessed under subsection (a) of this section to not less than two times the amount of damages that the State sustains because of the act of the person described in that subsection and may assess no civil penalty if the court finds all of the following:

(1) The person committing the violation furnished officials of the State who are responsible for investigating false claims violations with all information known to that person about the violation within 30 days after the date on which the person first obtained the information.
(2) The person fully cooperated with any investigation of the violation by the State.
(3) At the time the person furnished the State with information about the violation, no criminal prosecution, civil action, or administrative action has commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

(c) Exclusion. — This section does not apply to claims, records, or statements made under Chapter 105 of the General Statutes. (2009-554, s. 1.)

§ 1-608. Civil actions for false claims.

(a) Responsibilities of the Attorney General. — The Attorney General diligently shall investigate a violation under G.S. 1-607. If the Attorney General finds that a person has violated or is violating G.S. 1-607, the Attorney General may bring a civil action under this section against that person.

(b) Actions by Private Persons. — A person may bring a civil action for a violation of G.S. 1-607 or under G.S. 108A-70.12 for the person and for the State, as follows:

(1) The action shall be brought in the name of the State, and the person bringing the action shall be referred to as the qui tam plaintiff. Once filed, the action may be dismissed voluntarily by the person bringing the action only if the court and Attorney General have given written consent to the dismissal.
(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Attorney General pursuant to applicable rules of the North Carolina Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 120 days, and shall not be served on the defendant until the court so orders. The State may

elect to intervene and proceed with the action within 120 days after it receives both the complaint and the material evidence and information.

(3) The State may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under subdivision (2) of this subsection. Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 30 days after the complaint is unsealed and served upon the defendant pursuant to the North Carolina Rules of Civil Procedure.

(4) Before the expiration of the 120-day period or any extensions obtained under subdivision (3) of this subsection, the State shall:

a. Proceed with the action, in which case the action shall be conducted by the State; or

b. Notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, the federal False Claims Act, 31 U.S.C. § 3729 et seq., or any similar provision of law in any other state, no person other than the State may intervene or bring a related action based on the facts underlying the pending action; provided, however, that nothing in this subdivision prohibits a person from amending a pending action in another jurisdiction to allege a claim under this subsection.

(c) The Attorney General may retain a portion of the damages recovered for a State agency out of the proceeds of the action or settlement under this Article as reimbursement for costs incurred by the Attorney General in investigating and bringing a civil action under this Article, including reasonable attorneys' fees and investigative costs. Retained funds shall be used by the Attorney General to carry out the provisions of this Article. (2009-554, s. 1.)

§ 1-609. Rights of the parties to qui tam actions.

(a) If the State proceeds with an action under G.S. 1-608(b), it shall have the primary responsibility for prosecuting the action and shall not be bound by an act of the qui tam plaintiff. The qui tam plaintiff shall have the right to continue as a party to the action, subject to the limitations set forth in subsections (b) through (e) of this section.

(b) The State may dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified by the State of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity for a hearing on the motion.

(c) The State may settle the action with the defendant, notwithstanding the objections of the qui tam plaintiff, if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, the hearing may be heard in camera.

(d) Upon a showing by the State that the qui tam plaintiff's unrestricted participation during the course of the litigation would interfere with or unduly delay the State's prosecution of the case or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as any of the following:

(1) Limiting the number of witnesses the qui tam plaintiff may call.

(2) Limiting the length of the testimony of those witnesses.

(3) Limiting the qui tam plaintiff's cross-examination of witnesses.

(4) Otherwise limiting the participation by the qui tam plaintiff in the litigation.

(e) Upon a showing by the defendant that the qui tam plaintiff's unrestricted participation during the course of the litigation would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the qui tam plaintiff in the litigation.

(f) If the State elects not to proceed with the action, the qui tam plaintiff shall have the right to conduct the action. If the State so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts at the State's expense. When a qui tam plaintiff proceeds with the action, the court, without limiting the status and rights of the qui tam plaintiff, may permit the State to intervene at a later date upon a showing of good cause.

(g) Whether or not the State proceeds with the action, upon a showing by the State that certain actions of discovery by the qui tam plaintiff would interfere with the State's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 120 days. Such a showing shall be conducted in camera. The court may extend the 120-day period upon a further showing in camera that the State has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigations or proceedings.

(h) Notwithstanding the provisions of G.S. 1-608(b), the State may elect to pursue its claim through any alternate remedy available to the State, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the qui tam plaintiff shall have the same rights in that proceeding as the qui tam plaintiff would have had if the action had continued under this section. Any finding of fact or conclusion of law made in the other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of this subsection, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the State, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review. (2009-554, s. 1.)

§ 1-610. Award to qui tam plaintiff.

(a) Except as otherwise provided in this section, if the State proceeds with an action brought by a qui tam plaintiff under G.S. 1-608(b), the qui tam plaintiff shall receive at least fifteen percent (15%) but not more than twenty-five percent (25%) of the proceeds of the action or settlement of the claim, depending upon the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action.

(b) Where the action is one which the court finds to be based primarily on disclosures of specific information, other than information provided by the qui tam plaintiff, relating to allegations or transactions (i) in a criminal, civil, or administrative hearing at the State or federal level, (ii) in a congressional, legislative, administrative, General Accounting Office, or State Auditor's report, hearing, audit, or investigation, or (iii) from the news media, the court may award such sums as it considers appropriate, but in no case more than ten percent (10%) of the proceeds, taking into account the significance of the information and the role of the qui tam plaintiff in advancing the case to litigation.

(c) Any payment to a qui tam plaintiff under subsection (a) or (b) of this section shall be made from the proceeds.

(d) The qui tam plaintiff also shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(e) If the State does not proceed with an action under this Article, the qui tam plaintiff shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall not be less than twenty-five percent (25%) and not more than thirty percent (30%) of the proceeds of the action or settlement and shall be paid out of the proceeds. The qui tam plaintiff also shall receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(f) Whether or not the State proceeds with the action, if the court finds that the qui tam plaintiff planned and initiated the violation of G.S. 1-607 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the qui tam plaintiff would otherwise receive under subsection (a), (b), or (e) of this section, taking into account the role of the qui tam plaintiff in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the qui tam plaintiff is convicted of criminal conduct arising from his or her role in the violation of G.S. 1-607, the qui tam plaintiff shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such a dismissal shall not prejudice the right of the State to continue the action.

(g) If the State does not proceed with the action and the qui tam plaintiff conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the qui tam plaintiff was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment. (2009-554, s. 1.)

§ 1-611. Certain actions barred.

(a) No court shall have jurisdiction over an action brought under G.S. 1-608(b) against a member of the General Assembly, a member of the judiciary, or a senior executive branch official acting in their official capacity if the action is based on evidence or information known to the State when the action was brought.

(b) In no event may a person bring an action under G.S. 1-608(b) that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the State is already a party.

(c) No civil action may be brought under this Article by a person who is or was a public employee or public official if the allegations of such action are based substantially upon either of the following:

(1) Allegations of wrongdoing or misconduct which such person had a duty or obligation to report or investigate within the scope of his or her public employment or office.

(2) Information or records to which the person had access as a result of his or her public employment or office.

(d) No court shall have jurisdiction over an action under G.S. 108A-70.12 based upon the public disclosure of allegations or transactions (i) in a criminal, civil, or administrative hearing at the State or federal level, (ii) in a congressional, legislative, administrative, General Accounting Office, or State Auditor's report, hearing, audit, or investigation, or (iii) from the news media, unless the action is brought by the Attorney General, or the person bringing the action is an original source of the information. For purposes of this section, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the State before filing an action under G.S. 108A-70.12 that is based on the information. (2009-554, s. 1.)

§ 1-612. State not liable for certain expenses.

The State is not liable for expenses that a person incurs in bringing an action under G.S. 1-608(b). (2009-554, s. 1.)

§ 1-613. Private action for retaliation action.

Any employee, contractor, or agent who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of an action under this Article, or in furtherance of other efforts to stop one or more violations of G.S. 1-607, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this Article, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee, contractor, or agent may bring an action in superior court for the relief provided in this section. (2009-554, s. 1.)

§ 1-614. Civil investigative demand.

(a) A civil investigative demand is an administrative subpoena. Whenever the Attorney General has reason to believe that a person has information or is in possession, custody, or control of any document or other object relevant to an investigation or that would lead to the discovery of relevant information in an investigation of a violation of G.S. 1-607, the Attorney General may issue in writing and cause to be served upon the person, before bringing or intervening or making an election in an action under G.S. 1-608 or other false claims law, a civil investigative demand requiring the person to produce any documents or objects for their inspection and copying.

(b) The civil investigative demand shall comply with all of the following:

(1) Be served upon the person in the manner required for service of process in civil actions and may be served by the Attorney General or investigator assigned to the North Carolina Department of Justice.

(2) Describe the nature of the conduct constituting the violation under investigation.

(3) Describe the class or classes of any documents or objects to be produced with sufficient definiteness to permit them to be fairly identified.

(4) Prescribe a reasonable date and time at which the person shall produce any document or object.

(5) Advise the person that objections to or reasons for not complying with the demand may be filed with the Attorney General on or before that date and time.

(6) Designate a person to whom any document or object shall be produced.

(7) Contain a copy of subsections (b) and (c) of this section.

(c) The date within which any document or object must be produced shall be more than 30 days after the civil investigative demand has been served upon the person.

(d) A civil investigative demand may include an express demand for any product of discovery. A product of discovery includes the original or duplicate of any deposition, interrogatory, document, thing, examination, or admission, that is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature, and any digest, compilation, and index of any product of discovery. Whenever a civil investigative demand is an express demand for any product of discovery, a copy of the demand shall be served on the person from whom the discovery was obtained, and the Attorney General shall notify the person to whom the demand is issued of the date on which the copy was served. A demand for a product of discovery shall not be returned or returnable until 30 days after a copy of the demand has been served on the person from whom the discovery was obtained. Within 30 days after service of the demand, the person from whom the discovery was obtained or the person on whom the demand was served will serve on the Attorney General a copy of any protective order that prevents or restrains disclosure of the product of discovery to the Attorney General. The Attorney General may petition the court that issued the protective order to modify the order to allow compliance with the demand. Disclosure of any product of discovery pursuant to any express demand does not constitute a waiver of any right or privilege that the person making the disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(e) The production of documents and objects in response to a civil investigative demand served under this section shall be made under a sworn certificate by the person to whom the demand is directed, or in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to the production and authorized to act on behalf of the person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available. Upon written agreement between the person served with the civil investigative demand and the Attorney General, the person may substitute copies for originals of all or any part of the documents requested.

(f) If a person objects to or otherwise fails to comply with a civil investigative demand served upon the person under subsection (a) of this section, the Attorney General may file an action in superior court for an order to enforce the demand. Venue for the action to enforce the demand shall be in either Wake County or the county in which the person resides, is found, or transacts business. Notice of a hearing on the action to enforce the demand and a copy of the action shall be served upon the person in the same manner as prescribed in the Rules of Civil Procedure. If the court finds that the demand is proper, that there is reasonable cause to believe that there may have been a violation of G.S. 1-607, and that the information sought or document or object demanded is relevant to the violation, the court shall order the person to comply with the demand, subject to modifications the court may prescribe.

(g) If the person fails to comply with an order entered pursuant to subsection (f) of this section, the court may do any of the following:

(1) Adjudge the person to be in contempt of court.

(2) Grant injunctive relief against the person to whom the demand is issued to restrain the conduct which is the subject of the investigation.

(3) Grant any other relief as the court may deem proper.

(h) A petition for an order of the court to modify or set aside a civil investigative demand issued under this section may be filed by any person who has received a civil investigative demand or in the case of an express demand for any product of discovery, the person on whom the discovery was obtained. The petition may be filed in superior court in either Wake County or the county in which the person resides, is found, or transacts business, or, in the case of a petition to modify an express demand for any product of discovery, the petition shall be filed in the court in which the proceeding was pending when the product of discovery was obtained. Any petition under this subsection must be filed within 30 days after the date of service of the civil investigative demand or before the return date specified in the demand, whichever date is earlier, or within a longer period as may be prescribed in writing by the investigator identified in the demand. The petition shall specify each ground upon which the petitioner relies in seeking relief and may be based upon any failure to comply with the provisions of this section or upon any constitutional or other legal right or privilege of the person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(i) Any documents and objects produced pursuant to this section may be used in connection with any civil action brought under G.S. 1-608 and for any use that is consistent with the law, and the regulations and policies of the Attorney General, including use in connection with internal Attorney General memoranda and reports; communications between the Attorney General and a federal, State, or local governmental agency, or a contractor of a federal, State, or local governmental agency, undertaken in furtherance of an Attorney General investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding applications, motions, memoranda, and briefs submitted to a court or other tribunal; and communications with government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case, or proceeding. Any documents and objects obtained by the Attorney General under this section may be shared with any qui tam relator if the Attorney General determines it is necessary as part of any false claims act investigation. Before using or sharing documents and objects obtained by the Attorney General under this section with any person, the Attorney General may require that the person agree to an order of the court protecting the documents or objects, or any information contained in the documents or objects, from disclosure by that person. In the case of documents or objects the producing party has designated as a trade secret or other confidential research, development, or commercial information, the Attorney General shall either (i) require that the person with whom documents or objects are shared be prohibited from disclosing the documents or objects, or any information contained in the documents or objects, or (ii) petition the court for an order directing the producing party to either appear and support the designation or withdraw the designation.

(j) The Attorney General may designate an employee of the North Carolina Department of Justice to serve as a custodian of documents and objects.

(k) Except as otherwise provided in this section, no documents or objects, or copies thereof, while in the possession of the North Carolina Department of Justice, shall be available for examination by any person other than an employee of the North Carolina Department of Justice. The prohibition in the preceding sentence on the availability of documents or objects shall not apply if consent is given by the person who produced the documents or objects, or, in the case of any product of discovery produced pursuant to an express demand, consent is given by the person from whom the discovery was obtained, or prevent disclosure to any other federal or State agency for use by that agency in furtherance of its statutory responsibilities upon application made by the Attorney General to the superior court showing substantial need for the use of the documents or objects by any agency in furtherance of its statutory responsibilities.

(*l*) While in the possession of the custodian and under reasonable terms and conditions as the Attorney General shall prescribe, documents or objects shall be available for examination by the person who produced the documents or objects, or by a representative of that person authorized by that person to examine the documents or objects.

(m) If any documents or objects have been produced by any person in the course of any investigation pursuant to a civil investigative demand under this section, and any case or proceeding before any court arising out of the investigation, or any proceeding before any agency involving the documents or objects, has been completed, or no case or proceeding in which the documents or objects may be used has been commenced within a reasonable time after completion of the investigation, the custodian shall, upon written request of the person who produced the documents or objects, return to the person any documents or objects that have not passed into the control of any court or agency.

(n) The North Carolina Rules of Civil Procedure shall apply to this section to the extent that the rules are not inconsistent with the provisions of this section. (2009-554, s. 1.)

§ 1-615. False claims procedure.

(a) Statute of Limitations. — A civil action under G.S. 1-608 may not be brought (i) more than six years after the date on which the violation of G.S. 1-607 was committed or (ii) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the State of North Carolina charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(b) If the Attorney General elects to intervene and proceed with an action brought under G.S. 1-608(b), the State may file its own complaint or amend the complaint of a person who has brought an action under G.S. 1-608(b) to clarify or add detail to the claims with respect to which the State is intervening and to add any additional claims with respect to which the State contends it is entitled to relief. For statute of limitations purposes, any such State pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the State arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(c) Burden of Proof. — In any action brought under G.S. 1-608, the State or the qui tam plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Estoppel. — Notwithstanding any other provision of law, a final judgment rendered in favor of the State in a criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action that involves the same transaction as in the criminal proceeding and which is brought under G.S. 1-608.

(e) Venue. — Venue for any action brought pursuant to G.S. 1-608 shall be in either Wake County or in any county in which a claim originated, or in which any statement or record was made, or acts done, or services or property rendered in connection with any act constituting part of the violation of this Article.

(f) Service on Federal, State, or Local Authorities. — With respect to the United States or any State or local government that is named as a co-plaintiff in an action brought under G.S. 1-608, a seal on the action ordered by the court under G.S. 1-608(b) shall not preclude the State or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of the co-plaintiff government to investigate and prosecute such actions on behalf of that co-plaintiff government, except that the seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

(g) A civil action may not be brought under both this Article and Part 7 of Article 2 of Chapter 108A of the General Statutes. (2009-554, s. 1.)

§ 1-616. Remedies under other laws; severability of provisions; liberality of legislative construction; adoption of legislative history.

(a) Remedies Under Other Laws. — The provisions of this Article are not exclusive, and the remedies provided for in this Article shall be in addition to any other remedies provided for in any other law or available under common law. No criminal or administrative action need be brought against any person as a condition for establishing civil liability under this section.

(b) If any provision of this Article or the application of this Article to any person or circumstance is held to be unconstitutional, the remainder of this Article and the application of the provision to other persons or circumstances shall not be affected by that holding.

(c) This Article shall be interpreted and construed so as to be consistent with the federal False Claims Act, 31 U.S.C. § 3729, et seq., and any subsequent amendments to that act. (2009-554, s. 1.)

§ 1-617. Reporting.

(a) In reporting on the terms and disbursements set forth in any settlement agreement or final order or judgment in a case filed under this Article as required by G.S. 114-2.5, the report shall include the percentage of the proceeds and the amount paid to any qui tam plaintiff under G.S. 1-610.

(b) On or before February 1 of each year, the Attorney General shall submit to the Joint Legislative Commission on Governmental Operations and the Chairs of the Appropriations Subcommittees on Justice and Public Safety of the House of Representatives and the Senate a report on the number of qui tam cases under this Article pending in the State and the number of qui tam cases pending in other jurisdictions involving the State, the number of qui tam cases under this Article that were settled, the number of qui tam cases in which judgment was entered, and the amount of proceeds paid to qui tam plaintiffs during the previous calendar year. (2009-554, s. 1.)

§ 1-618. Rules.

The Attorney General may adopt rules necessary to carry out the purposes set forth in this Article. (2009-554, s. 1.)

Chapter 1A.

Rules of Civil Procedure.

Sec.
1A-1. Rules of Civil Procedure.

Article 1.

Scope of Rules—One Form of Action.

Rule
1. Scope of rules.
2. One form of action.

Article 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

3. Commencement of action.
4. Process.
5. Service and filing of pleadings and other papers.
6. Time.

Article 3.

Pleadings and Motions.

7. Pleadings allowed; motions.
8. General rules of pleadings.
9. Pleading special matters.
10. Form of pleadings.
11. Signing and verification of pleadings.
12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading.
13. Counterclaim and crossclaim.
14. Third-party practice.
15. Amended and supplemental pleadings.
16. Pre-trial procedure; formulating issues.

Article 4.

Parties.

17. Parties plaintiff and defendant; capacity.
18. Joinder of claims and remedies.
19. Necessary joinder of parties.
20. Permissive joinder of parties.
21. Procedure upon misjoinder and nonjoinder.
22. Interpleader.
23. Class actions.
24. Intervention.
25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

Article 5.

Depositions and Discovery.

26. General provisions governing discovery.
27. Depositions before action or pending appeal.
28. Persons before whom depositions may be taken.

Rule
29. Stipulations regarding discovery procedure.
30. Depositions upon oral examination.
31. Depositions upon written questions.
32. Use of depositions in court proceedings.
33. Interrogatories to parties.
34. Production of documents and things and entry upon land for inspection and other purposes.
35. Physical and mental examination of persons.
36. Requests for admission; effect of admission.
37. Failure to make discovery; sanctions.

Article 6.

Trials.

38. Jury trial of right.
39. Trial by jury or by the court.
40. Assignment of cases for trial; continuances.
41. Dismissal of actions.
42. Consolidation; separate trials.
43. Evidence.
44. Proof of official record.
44.1. Determination of foreign law.
45. Subpoena.
46. Objections and exceptions.
47. Jurors.
48. Juries of less than twelve — majority verdict.
49. Verdicts.
50. Motion for a directed verdict and for judgment notwithstanding the verdict.
51. Instructions to jury.
52. Findings by the court.
53. Referees.

Article 7.

Judgment.

54. Judgments.
55. Default.
56. Summary judgment.
57. Declaratory judgments.
58. Entry of judgment.
59. New trials; amendment of judgments.
60. Relief from judgment or order.
61. Harmless error.
62. Stay of proceedings to enforce a judgment.
63. Disability of a judge.

Article 8.

Miscellaneous.

64. Seizure of person or property.
65. Injunctions.

Rule
66, 67. [Omitted.]
68. Offer of judgment and disclaimer.
68.1. Confession of judgment.
69. [Omitted.]
70. Judgment for specific acts; vesting title.
71 through 83. [Omitted.]
84. Forms.

§ 1A-1. Rules of Civil Procedure.

The Rules of Civil Procedure are as follows:

Cross References. — As to civil procedure, see also Chapter 1. As to instructions, generally, see G.S. 1-181, G.S. 1A-1, Rule 51, and Rule 10(b) of the North Carolina Rules of Appellate Procedure.

Editor's Note. — The official Comments printed under the individual Rules in this Chapter have been printed by the publisher as received, without editorial change. However, official Comments have not been received in conjunction with all amendments to the Rules, and therefore, subsequent amendments to the Rules may not be reflected in some instances.

Chapter 1A of the General Statutes was added by Session Laws 1967, c. 954. Sections 5, 6 and 7 of c. 954 read as follows:

"*Sec. 5.* All those portions of chapter 1 of the General Statutes of North Carolina not repealed by this act, not amended by this act, or not in conflict with this act, are hereby reenacted.

"*Sec. 6.* All provisions of the General Statutes of North Carolina which refer to sections repealed or amended by this act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose.

"*Sec. 7.* None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1969, c. 803, amended Session Laws 1967, c. 954, s. 10, to read as follows: "Sec. 10. This act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date."

Session Laws 2007-323, s. 14.17(b), which expires June 30, 2009, provides: "The Administrative Office of the Courts may conduct a pilot project in multiple counties to evaluate a system for the electronic filing, case processing, and case management of civil cases and special proceedings filed in the General Court of Justice. The Administrative Office of the Courts may designate the case types that will be subject to mandatory electronic filing, case processing, and case management during the pilot project. No county may be selected without the concurrence of the senior resident superior court judge, the chief district court judge, and the clerk of superior court. Notwithstanding the requirements of Chapters 1A and Chapter 7A of the General Statutes, the North Carolina Supreme Court and the Administrative Office of the Courts shall establish rules, costs, procedures, and specifications for electronic filing, case processing, and case management under the pilot. However, Rule 4 of the Rules of Civil Procedure shall govern service of process of pleadings that are currently required to be served pursuant to Rule 4 of the Rules of Civil Procedure. The terms of any contract entered into for the purpose of implementing the provisions of this subsection shall provide that the State retains the ownership of all electronic data received by the vendor as part of the pilot project."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium." Session Laws 2007-323, s. 32.5 is a severability clause.

Session Laws 2007-323, s. 32.5 is a severability clause.

Legal Periodicals. — For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

Applied in Pritchett & Burch, PLLC v. Boyd, 169 N.C. App. 118, 609 S.E.2d 439, 2005 N.C. App. LEXIS 540 (2005); McKyer v. McKyer, 182 N.C. App. 456, 642 S.E.2d 527, 2007 N.C. App. LEXIS 648 (2007); Integon Nat'l Ins. Co. v. Ward, 184 N.C. App. 532, 646 S.E.2d 395, 2007 N.C. App. LEXIS 1463 (2007); Harrell v. Bowen, 362 N.C. 142, 655 S.E.2d 350, 2008 N.C. LEXIS 26 (2008); Williams v. Cathy, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 43491 (W.D.N.C. June 2, 2008); Gregory v. W.A. Brown & Sons, — N.C. App. —, 664 S.E.2d 589, 2008 N.C. App. LEXIS 1543 (2008); S.B. Simmons Landscaping & Excavating, Inc. v. Boggs, — N.C. App. —, 665 S.E.2d 147, 2008 N.C. App. LEXIS 1537 (2008).

Cited in Wood v. Guilford County, 143 N.C. App. 507, 546 S.E.2d 641, 2001 N.C. App. LEXIS 307 (2001); State ex rel. Barker v. Ellis, 144 N.C. App. 135, 547 S.E.2d 166, 2001 N.C. App. LEXIS 327; Hearne v. Statesville Lodge No. 687, 143 N.C. App. 560, 546 S.E.2d 414, 2001 N.C. App. LEXIS 308 (2001); Morin v. Sharp, 144 N.C. App. 369, 549 S.E.2d 871, 2001 N.C. App. LEXIS 414 (2001); Bacon v. Lee, 353 N.C. 696, 549 S.E.2d 840, 2001 N.C. LEXIS 831 (2001); Eli Research Inc. v. United Communs. Group, LLC, 312 F. Supp. 2d 748, 2004 U.S. Dist. LEXIS 5792 (M.D.N.C. 2004); In re Foreclosure of Lien by Ridgeloch Homeowners Ass'n, 182 N.C. App. 464, 642 S.E.2d 532, 2007 N.C. App. LEXIS 653 (2007); Carter v. Marion, 183 N.C. App. 449, 645 S.E.2d 129, 2007 N.C. App. LEXIS 1089 (2007); Handa v. Munn, 182 N.C. App. 515, 642 S.E.2d 540, 2007 N.C. App. LEXIS 658 (2007).

ARTICLE 1.

Scope of Rules—One Form of Action.

Rule 1. Scope of rules.

These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute. They shall also govern the procedure in tort actions brought before the Industrial Commission except when a differing procedure is prescribed by statute. (1967, c. 954, s. 1; 1971, c. 818.)

COMMENT

This rule gives literal expression to the scope of intended application, but that scope can be appreciated only by a consideration of the rules themselves and the new jurisdiction statute (G.S. 1-75.1 et seq.), the statutes left undisturbed by Session Laws 1967, c. 954, the statutes amended in s. 3 of c. 954, and those statutes repealed in s. 4 of c. 954. In general it can be said that to the extent a specialized procedure has heretofore governed, it will continue to do so.

Local Modification. — New Hanover: 1979, c. 354.

Legal Periodicals. — For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969).

For article on the legislative changes to the new rules of civil procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For article on the former North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

For survey of North Carolina construction law, with particular reference to civil procedure and evidence, see 21 Wake Forest L. Rev. 633 (1986).

CASE NOTES

Applicability of Rules. — The North Carolina Rules of Civil Procedure do not apply to actions brought pursuant to the provisions of G.S. 128-16 through 128-20. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

While the North Carolina Rules of Civil Procedure govern civil proceedings generally, they do not apply when a differing procedure is prescribed by statute; a trial court's denial of a corporation's motion to intervene in a case seeking review of an annexation ordinance was proper, since the corporation failed to comply with G.S. 160A-50 procedures by moving to intervene six months after the ordinance was adopted. Gates Four Homeowners Ass'n v. City of Fayetteville, 170 N.C. App. 688, 613 S.E.2d 55, 2005 N.C. App. LEXIS 1088 (2005).

Trustee removal proceedings are held in an estate matter and not in a special proceeding or in a civil action, and clerks of court are not required to also make decisions regarding discovery and other issues of law arising during estate matters; instead, the clerks of superior courts hear the matters before them summarily, and are responsible for determining questions of fact rather than providing judgment in favor of one party or the other. In re Estate of Newton, 173 N.C. App. 530, 619 S.E.2d 571, 2005 N.C. App. LEXIS 2120 (2005), cert. denied, — N.C. —, 625 S.E.2d 786 (2005).

Award of sanctions and attorney fees was proper in an estate proceeding because, pursuant to G.S. 1A-1-1 the North Carolina Rules of Civil Procedure applied to all actions and proceedings of a civil nature; the estate proceeding was a "proceeding of a civil nature," and the North Carolina Rules of Civil Procedure applied. In re Estate of Rand, — N.C. App. —, 645 S.E.2d 174, 2007 N.C. App. LEXIS 1091 (2007).

G.S. 1A-1, N.C. R. Civ. P. 52 was inapplicable in a proceeding regarding attorney's fees because G.S. 6-19.1 prescribed the procedure to be followed for awarding attorney fees in the very specific setting before the courts. Early v. County of Durham, Dep't of Soc. Servs., — N.C. App. —, 667 S.E.2d 512, 2008 N.C. App. LEXIS 1818 (2008).

Timeliness. — Father's answer contained his motion to change venue and thus, the motion came almost two months after service of the complaint and summons, well outside the 30-day "time of answering" period; accordingly, any objection concerning venue has been waived. Chillari v. Chillari, 159 N.C. App. 670, 583 S.E.2d 367, 2003 N.C. App. LEXIS 1515 (2003).

Application of Rules to All Cases from Effective Date. — The clear intent of the General Assembly in Session Laws 1969, c. 803, was to apply the new rules from the effective date to all civil cases, and not to permit the confusion which would be attendant upon trying to apply different procedures to cases begun before and to cases begun after the effective date. Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

The rules are the same in both district and superior courts and the inherent powers of these courts are the same as far as procedural matters are concerned. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

The canon of interpretation of the rules is one of liberality, and the general policy of the rules is to disregard technicalities and form and determine the rights of litigants on the merits. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

The North Carolina Rules of Civil Procedure are modeled after the federal rules. In most instances they are verbatim copies with the same enumerations. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

But Federal Rules and North Carolina Rules Not Always the Same. — On dismissal of negligent employment and Civil Right Violation claims, defendants' motions for costs and fees were not time-barred. The 14-day rule in Rule 54(d)(2)(B), F.R.Civ.P., clearly does not apply to litigation pending in North Carolina state courts, and the North Carolina Rules of Civil Procedure contain neither a counterpart to federal Rule 54(d)(2)(B) nor a deadline for filing a motion for costs and fees. Okwara v. Dillard Dep't Stores, 136 N.C. App. 587, 525 S.E.2d 481, 2000 N.C. App. LEXIS 117 (2000).

Consideration of Decisions Under Federal Rules and New York Rules. — Since the federal and, presumably, the New York rules are the source of these rules, the Supreme Court will look to the decisions of those jurisdictions for enlightenment and guidance to develop the philosophy of the new rules. Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971).

Although these rules differ somewhat from the federal rules, the federal rules are one of the sources of the North Carolina rules; and decisions under them are pertinent for guidance and enlightenment to develop the philosophy of the new rules. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

Section 8-83 is not a "differing procedure" from that of § 1A-1, Rule 32 within the contemplation of the language of this rule. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Actions for Alimony. — Actions for permanent alimony are unquestionably of a civil nature, and there is no "differing procedure" prescribed by statute which governs the action. Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

Revenue Proceedings. — The Rules of Civil Procedure do not apply to proceedings before the State Board of Assessment (now Department of Revenue). In re Valuation of Property Located at 411-417 W. Fourth St., 282 N.C. 71, 191 S.E.2d 692 (1972).

Foreclosure of Deed of Trust. — Foreclosure of a deed of trust under the power of sale contained therein is not an action or proceeding subject to the Rules of Civil Procedure. Furst v. Loftin, 29 N.C. App. 248, 224 S.E.2d 641 (1976), overruled on other grounds, Connolly v. Potts, 63 N.C. App. 547, 306 S.E.2d 123 (1983).

Dismissal of a Teacher. — The procedures prescribed by former G.S. 115-142 (now G.S. 115C-325) for the dismissal of a career teacher are essentially administrative rather than judicial. The board is not bound by the formal rules of evidence which would ordinarily obtain in a proceeding in a trial court; nor are the Rules of Civil Procedure applicable. Baxter v. Poe, 42 N.C. App. 404, 257 S.E.2d 71, cert. denied, 298 N.C. 293, 259 S.E.2d 298 (1979).

Adoption Proceedings. — The Rules of Civil Procedure and the provisions of G.S. 1-393 et seq., apply to adoption proceedings. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rehearing denied, 327 N.C. 488, 397 S.E.2d 214 (1990).

Juvenile Proceedings. — Actions under the Juvenile Code, § 7A-516 et seq. [see now G.S. 7B-100], are in the nature of civil actions. As such, proceedings in juvenile matters are to be governed by the Rules of Civil Procedure, unless otherwise provided by the Juvenile Code or some other statute. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Procedural validity of a dispositional order in a juvenile proceeding would be evaluated in light of the Rules of Civil Procedure and G.S. 7A-651 [see now G.S. 7B-905 and G.S. 7B-2512]. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Private Condemnation Proceedings. — Section 40A-12, together with G.S. 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by Chapter 40A. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Appeals of Annexation Ordinances. — Petitioners' motion under G.S. 1A-1-24(a) to intervene in another party's petition for review of an annexation ordinance was properly denied, because G.S. 1A-1-24(a) does not apply to appeals of annexation ordinances under G.S. 160A-50(a). Home Builders Ass'n of Fayetteville N.C., Inc. v. City of Fayetteville, 170 N.C. App. 625, 613 S.E.2d 521, 2005 N.C. App. LEXIS 1072 (2005).

Special Proceedings. — Even where an action is a special proceeding, the Rules of Civil Procedure are made applicable by G.S. 1-393, which provides that the Rules of Civil Procedure and the provisions of Chapter 1 on civil procedure are applicable to special proceedings, except as otherwise provided. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

The Rules of Civil Procedure apply to special proceedings, just as they do to civil actions, unless the governing statute sets out a different procedure. Charns v. Brown, 129 N.C. App. 635, 502 S.E.2d 7, 1998 N.C. App. 668 (1998), cert. denied, 349 N.C. 228, 515 S.E.2d 701 (1998).

Removal of Officers. — The North Carolina Rules of Civil Procedure do not apply to actions brought pursuant to the provisions of G.S. 128-16 through 128-20, relating to removal of unfit officers. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Rules of Civil Procedure are not strictly applicable to proceedings under the Workers' Compensation Act, § 97-1 et seq. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Applied in Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972); In re Will of Mucci, 287 N.C. 26, 213 S.E.2d 207 (1975); Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978); In re Underwood, 38 N.C. App. 344, 247 S.E.2d 778 (1978); Campbell v. City of Greensboro, 70 N.C. App. 252, 319 S.E.2d 323 (1984); In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987); Sprinkle v. N.C. Wildlife Res. Comm'n, 165 N.C. App. 721, 600 S.E.2d 473, 2004 N.C. App. LEXIS 1513 (2004).

Cited in Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971); Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978); Mack Fin. Corp. v. Harnett Transf., Inc., 42 N.C. App. 116, 256 S.E.2d 491 (1979); Weber v. Buncombe County Bd. of Educ., 46 N.C. App. 714, 266 S.E.2d 42 (1980); Macon v. Edinger, 303 N.C. 274, 278 S.E.2d 256 (1981); State ex rel. Ingram v. North Carolina Farm Bureau Ins. Agency, Inc., 303 N.C. 287, 278 S.E.2d 248 (1981); Shugar v. Guill, 304 N.C. 332, 283 S.E.2d 507 (1981); Long v. Reeves, 77 N.C. App. 830, 336 S.E.2d 98 (1985); Sides v. Duke Univ., 74 N.C. App. 331, 328 S.E.2d 818 (1985); In re Greene, 328 N.C. 639, 403 S.E.2d 257 (1991); Garrity v. Morrisville Zoning Bd. of Adjustment, 115 N.C. App. 273, 444 S.E.2d 653 (1994); Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998); In re Brown, 141 N.C. App. 550, 539 S.E.2d 366, 2000 N.C. App. LEXIS 1310 (2000); Slavin v. Town of Oak Island, 160 N.C. App. 57, 584 S.E.2d 100, 2003 N.C. App. LEXIS 1670 (2003).

Rule 2. One form of action.

There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action. (1967, c. 954, s. 1.)

COMMENT

This rule, drawn substantially without change from North Carolina Const., Art. IV, § 1, and from former § 1-9, preserves the fundamental reform of 1868, providing for the abolition of the forms of action and for the fusion of law and equity.

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Application of Section. — The argument that the general rule establishing one form of action requires that a lien be enforced by commencing an action under this rule overlooks the familiar rule of construction that a particular statute controls a general one with reference to the same subject matter. For example, G.S. 44A-13(a) specifically directs that a lien against property vested in a trustee in bankruptcy shall be enforced in accordance with the orders of the bankruptcy court. Therefore, G.S. 44A-13(a) controls over this rule. RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

Sections 45-21.34 and 45-21.35 must be considered in pari materia with § 1A-1, Rules 2, 3, and 65. Swindell v. Overton, 62 N.C. App. 160, 302 S.E.2d 841 (1983), rev'd on other grounds, 310 N.C. 707, 314 S.E.2d 512 (1984).

Applied in Swenson v. All Am. Assurance Co., 33 N.C. App. 458, 235 S.E.2d 793 (1977); Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873 (1993); Sprinkle v. N.C. Wildlife Res. Comm'n, 165 N.C. App. 721, 600 S.E.2d 473, 2004 N.C. App. LEXIS 1513 (2004).

Cited in Bradley v. Bradley, 12 N.C. App. 8, 182 S.E.2d 201 (1971); Langdon v. Hurdle, 15 N.C. App. 158, 189 S.E.2d 517 (1972); In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987); Morrow v. Morrow, 103 N.C. App. 787, 407 S.E.2d 286 (1991); Roberts v. Young, 120 N.C. App. 720, 464 S.E.2d 78 (1995); Huff v. Autos Unlimited, Inc., 124 N.C. App. 410, 477 S.E.2d 86 (1996); In re McKinney, 158 N.C. App. 441, 581 S.E.2d 793, 2003 N.C. App. LEXIS 1191 (2003); Skinner v. Preferred Credit, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005).

II. DECISIONS UNDER PRIOR LAW.

***Editor's Note.** — The cases cited below were decided under former § 1-9.*

One Form of Action for Torts and Contracts. — Although there is but one form of action, there are still torts and contracts just as there were prior to the Code of Civil Procedure, but there are not several forms of action as there used to be, and pleadings are not suited for different forms of action as they used to be, but are all suited to one form, whether the subject of the action be a tort or a contract. Bitting v. Thaxton, 72 N.C. 541 (1875).

Separate Legal and Equitable Principles. — Although one tribunal deals out both law and equity, the principles of law and equity remain separate and distinct, and it is just as important to keep them separate. Jordan v. Lanier, 73 N.C. 90 (1875). See Kiff v. Weaver, 94 N.C. 274 (1886).

The plaintiff can allege a legal or an equitable cause of action, or can combine them as he may elect. Wilson v. Waldo, 221 F. 505 (W.D.N.C. 1915), rev'd on other grounds, 231 F. 654 ((4th Cir. 1916)).

Any defense, either legal or equitable, may be set up by the defendant in an action by the endorsee upon a nonnegotiable note. Thompson v. Osborne, 152 N.C. 408, 67 S.E. 1029 (1910).

Common-Law Forms Immaterial. — Since the old technical distinctions in the forms of actions were abolished by former § 1-9, it was immaterial whether the plaintiff's remedy under the old practice was trespass or case. Sneeden v. Harris, 109 N.C. 349, 13 S.E. 920 (1891).

An exception to a complaint that it was for money had and received and as such could not be maintained unless the money had been actually received by the defendant was not maintainable under former § 1-9, regardless of the common-law practice. Staton v. Webb, 137 N.C. 35, 49 S.E. 55 (1904).

ARTICLE 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

(a) A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing.

A civil action may also be commenced by the issuance of a summons when

(1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and

(2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

The summons and the court's order shall be served in accordance with the provisions of Rule 4. When the complaint is filed it shall be served in accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate.

(b) The clerk shall maintain as prescribed by the Administrative Office of the Courts a separate index of all medical malpractice actions, as defined in G.S. 90-21.11. Upon the commencement of a medical malpractice action, the clerk shall provide a current copy of the index to the senior regular resident judge of the district in which the action is pending. (1967, c. 954, s. 1; 1987, c. 859, s. 2.)

COMMENT

Any system of procedure must provide an easily identifiable moment in time when it is possible definitely to say that an action has been "commenced." Under prior practice, former §§ 1-14 and 1-88 combined to say that in most cases an action was commenced with the issuance of summons. The exceptions related to actions in which service of summons was made by publication or was made outside the State pursuant to former § 1-98 and 1-104. In those cases, actions were deemed commenced when the affidavit required by these sections was filed. Under the federal rules, an action is commenced with the filing of a complaint with the court.

As can be seen, the General Statutes Commission preferred for the usual case the federal rule. The commission did so because it wished to take away the special consideration then accorded out-of-state defendants. But more importantly the Commission wished to remove a potential trap for an unwary plaintiff in a North Carolina federal court. A recent case in the Eastern District is illustrative. A plaintiff filed a complaint in the federal court for wrongful death five days before the statute of limitations had run. Because of a failure to post the required bond, summons was not issued until over a month later. The defendant moved to dismiss, relying on the statute. The plaintiff, of course, was relying on the federal rule as he was plainly in time if that rule applied. But the federal court quite properly held that the federal rule did not apply and that North Carolina practice as to when an action was commenced would govern. Thus the action was dismissed. Rios v. Drennan, 209 F. Supp. 927 (E.D.N.C. 1962). The court was faithfully following the United States Supreme Court's decision in Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487 (1938), and its progeny, particularly Ragan v. Merchants Transf. & Whse. Co., 337 U.S. 530, 69 S. Ct. 1233, 93 L. Ed. 1520 (1949). The basic notion of the Rios and Ragan cases is that a federal court, irrespective of the federal rules, cannot give to a claim in a diversity action a "longer life . . . than it would have had in the state court. . . ." While one may sympathize with the plaintiff in the Rios case in his reliance on the federal rule, still it is clear that his reliance was misplaced. The trap which ensnared him would exist so long as the federal and State practices varied. The Commission believed this variance should be eliminated.

The Commission was not unmindful of the fact that there may be emergencies in which there is no time to prepare a complaint. To take care of these situations, the Commission incorporated in the second paragraph the essence of the first part of former § 1-121, allowing the commencement of an action by the issuance of a summons on application for permission to delay filing of a complaint and an appropriate order by the clerk.

It will be observed that the Commission did not at this point make any provision for discovery prior to filing a complaint. That problem is dealt with in Rule 27 (b) which provides in appropriate cases for discovery without action.

The second sentence of the first paragraph provides the same method formerly provided by § 1-88.1 for making a prima facie case in respect to the date of filing of the complaint. Rule 4(a) makes that method available also in respect to the date of issuance of a summons.

Legal Periodicals. — For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

For case law survey as to statutes of limitations, see 44 N.C.L. Rev. 906 (1966).

For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969).

For article on jurisdiction and process, see 5 Wake Forest Intra. L. Rev. 46 (1969).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

CASE NOTES

I. In General.
II. Commencement By Issuance of Summons.
III. Decisions under Prior Law.

I. IN GENERAL.

Construction With Other Rules. — N.C. R. Civ. P. 3 states that the summons and complaint shall be served in accordance with the statute of limitations as provided in N.C. R. Civ. P. 4, but the rule does not state that the failure to do so renders a suit abated or the commencement void. Melvin v. Wal-Mart Stores, Inc., 338 F. Supp. 2d 622, 2004 U.S. Dist. LEXIS 20220 (M.D.N.C. 2004).

Sections 45-21.34 and 45-21.35 must be considered in pari materia with § 1A-1, Rules 2, 3, and 65. Swindell v. Overton, 62 N.C. App. 160, 302 S.E.2d 841 (1983), rev'd on other grounds, 310 N.C. 707, 314 S.E.2d 512 (1984).

42 U.S.C.S. § 2000e-5(f)(1) does not specify that the filing of a complaint is necessary to commence an action; accordingly, a plaintiff may initiate an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., in a North Carolina state court utilizing either means set forth in N.C. R. Civ. P. 3. Lassiter v. LabCorp Occupational Testing Servs., 337 F. Supp. 2d 746, 2004 U.S. Dist. LEXIS 19216 (M.D.N.C. 2004).

Due process requires that a party be properly notified of the proceeding against him. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983), overruled on other grounds, Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

Legislative intent behind the amendment to N.C. R. Civ. P. 3, which eliminated the requirement of a summons, was to allow an action to be commenced solely by filing a complaint, and to thereby protect similarly situated plaintiffs in federal court who do not have a summons issued within the statute of limitations. Melvin v. Wal-Mart Stores, Inc., 338 F. Supp. 2d 622, 2004 U.S. Dist. LEXIS 20220 (M.D.N.C. 2004).

This rule requires only filing of the complaint, not service, within the 20-day period. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

The delayed service of complaint does not constitute a link in the chain of process. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

Complaint or Summons as Condition Precedent to Issuance of Injunction. — The filing of a complaint or the issuance of summons pursuant to this rule is a condition precedent to the issuance of an injunction or restraining order. Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461, cert. denied, 278 N.C. 701, 181 S.E.2d 601 (1971).

This rule and G.S. 1A-1, Rule 65(b) must be construed in pari materia; temporary restraining order procedure under G.S. 1A-1, Rule 65(b) is permissible only after an action is commenced as provided by this rule. Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461, cert. denied, 278 N.C. 701, 181 S.E.2d 601 (1971).

Where there was no complaint and the record failed to disclose that a summons was ever issued, an action was not properly instituted and the superior court did not have jurisdiction; therefore, the court's temporary restraining order was void, and disobedience of it was not punishable. Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461, cert. denied, 278 N.C. 701, 181 S.E.2d 601 (1971).

Under North Carolina statutes and procedure, an injunction is not a cause of action or a lawsuit in and of itself, but is a remedy which is ancillary to a pending suit; where no complaint or summons has been filed, no action has been instituted, and there is no pending action to which an injunction can be ancillary. Lynch v. Snepp, 350 F. Supp. 1134 (W.D.N.C. 1972), cert. denied, 415 U.S. 983, 94 S. Ct. 1576, 39 L. Ed. 2d 880 (1974), rev'd on other grounds, 472 F.2d 769 (4th Cir. 1973).

"Affidavit" Not a Complaint. — A document denominated an affidavit did not purport to be a complaint and could not be held to be one, where, among other things, (1) it was not properly captioned as required by G.S. 1A-1, Rule 10(a); (2) it was not signed by an attorney of record as required by G.S. 1A-1, Rule 11(a); and (3) there was no demand for relief made in the document as required by G.S. 1A-1, Rule 8(a)(2). Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461, cert. denied, 278 N.C. 701, 181 S.E.2d 601 (1971).

Where plaintiff commenced an action by issuance of summons in accordance with former procedure, but had not yet filed a complaint, the subsequent enactment of the Rules of Civil Procedure, under which an action is commenced by filing a complaint, did not require that she recommence her action in accordance with this rule. Williams v. Blount, 14 N.C. App. 139, 187 S.E.2d 464 (1972).

The usual and most frequently employed methods for service of process on a natural person are personal service and substituted personal service. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974) (1974).

Filing of Action to Enforce Lien Against Bankrupt. — By filing its claim of lien in a bankruptcy proceeding within 180 days after last providing labor or materials, construction company satisfied the requirement of G.S. 44A-13(a) that the action for enforcement of the lien be commenced within the 180-day period. RDC, Inc. v. Brookleigh Builders, Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

The actions of a state officer pursuant to this rule cannot operate to extend the statute of limitations as provided for by Congress in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), and applied by the Supreme Court. Cannon v. Kroger Co., 647 F. Supp. 82 (M.D.N.C. 1986), aff'd, 832 F.2d 303 (4th Cir. 1987), rehearing denied, 837 F.2d 660 (4th Cir. 1988).

Expiration of Statute of Limitations. — Summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c) was properly granted in a child's claim against the father alleging fraud, among other things; because the claim accrued when the child was a minor, the child was required under G.S. 1-17(a), 1-52 to file the claim within three years of reaching majority, which the child failed to do, as the summons and complaint, which began the lawsuit pursuant to G.S. 1A-1, N.C. R. Civ. P. 3, were not issued until after the deadline passed. Beall v. Beall, 156 N.C. App. 542, 577 S.E.2d 356, 2003 N.C. App. LEXIS 188 (2003).

Extension of Time. — Plaintiff commenced the action before the statute of limitations expired, by filing an application and order extending time to file a complaint. Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

Extension of Time Granted for Settling Case on Appeal. — Although company's challenge to its disqualification from the food stamp program was timely under the state procedural rules, those rules directly conflicted with the federal statute that limited the government's waiver of immunity; under the Supremacy Clause, 7 U.S.C.S. 2023(a)'s limitations period had to prevail over the longer period allowed under N.C. R. Civ. P. 3(a). Henderson Fruit & Produce Co. v. United States, 181 F. Supp. 2d 566, 2001 U.S. Dist. LEXIS 23353 (E.D.N.C. 2001).

Expiration of Time Extension. — When plaintiffs failed to file their complaint before the extension of time expired, their action abated, and the three-year statute of limitations had run. The trial court could not extend their time in which to file their complaint under N.C.R.Civ.P., Rule 6(b) thus reviving the original action and avoiding the statute of limitations. Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993).

Period for Filing in Federal Court Not Extended Under This Section. — Statutory period for filing an action in federal district court alleging that an employer has breached its contractual obligations toward an employee under a collective bargaining agreement in violation of § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and that the employee's union, by failing to protect its member's rights, has failed to satisfy the duty of fair representation implied by the National Labor Relations Act, 29 U.S.C. § 151 et seq., could not be extended by the alternative means of commencing an action available under this rule. Cannon v. Kroger Co., 832 F.2d 303 (4th Cir. 1987), rehearing denied, 837 F.2d 660 (4th Cir. 1988).

Extension of Time in Which to File Claim Under Americans With Disabilities

Act. — N.C. R. Civ. P. 3, allowing a civil action to be commenced by the issuance of a summons rather than the filing of a complaint, can properly be used in North Carolina state courts to extend the time in which to file claims under the Americans with Disabilities Act of 1990, 42 U.S.C.S. § 12101 et seq. Sheaffer v. County of Chatham, 337 F. Supp. 2d 709, 2004 U.S. Dist. LEXIS 18982 (M.D.N.C. 2004).

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run out, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order. The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Plaintiff's second complaint, therefore, constituted a new action which plaintiff failed to file within the three years required by the statute of limitations. Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

Special Proceedings. — When the State sought the production of a deceased client's statements to his attorney, in a murder investigation, and the State did not convene an investigative grand jury, under G.S. § 15A-623(h), or strictly comply with G.S. 1A-1, N.C. R. Civ. P. 3, it, nonetheless, filed its petition in the superior court, which was the proper court to hear a "special proceeding," under G.S. 7A-246, and it could, to accommodate the exigent circumstances presented, hear the matter. In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

Applied in Bradley v. Bradley, 12 N.C. App. 8, 182 S.E.2d 201 (1971); Gower v. Aetna Ins. Co., 13 N.C. App. 368, 185 S.E.2d 722 (1972); Atkinson v. Tarheel Homes & Realty Co., 14 N.C. App. 638, 188 S.E.2d 703 (1972); Swenson v. All Am. Assurance Co., 33 N.C. App. 458, 235 S.E.2d 793 (1977); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978); Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp., 36 N.C. App. 778, 245 S.E.2d 234 (1978); In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818 (1979); Atkins v. Nash, 61 N.C. App. 488, 300 S.E.2d 880 (1983); White v. Graham, 72 N.C. App. 436, 325 S.E.2d 497 (1985); Adams v. Brooks, 73 N.C. App. 624, 327 S.E.2d 19 (1985); Smith v. Starnes, 74 N.C. App. 306, 328 S.E.2d 20 (1985); Harris v. Scotland Neck Rescue Squad, Inc., 75 N.C. App. 444, 331 S.E.2d 695 (1985); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986); In re Lynette H., 323 N.C. 598, 374 S.E.2d 272 (1988); State ex rel. Eure v. Lawrence, 93 N.C. App. 446, 378 S.E.2d 207 (1989); City of Raleigh v. College Campus Apts., Inc., 94 N.C. App. 280, 380 S.E.2d 163 (1989); Sellers v. High Point Mem. Hosp., 97 N.C. App. 299, 388 S.E.2d 197, cert. denied, 326 N.C. 598, 393 S.E.2d 882 (1990); Chaplain v. Chaplain, 101 N.C. App. 557, 400 S.E.2d 121 (1991); In re McKinney, 158 N.C. App. 441, 581 S.E.2d 793, 2003 N.C. App. LEXIS 1191 (2003); Spencer v. Town of Chapel Hill, 290 F. Supp. 2d 655, 2003 U.S. Dist. LEXIS 20700 (M.D.N.C. 2003); Bryson v. Cort, — N.C. App. —, 668 S.E.2d 84, 2008 N.C. App. LEXIS 1981 (2008).

Cited in Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); Cogdill v. Scates, 290 N.C. 31, 224 S.E.2d 604 (1976); McCoy v. McCoy, 29 N.C. App. 109, 223 S.E.2d 513 (1976); Byrd v. Trustees of Watts Hosp., 29 N.C. App. 564, 225 S.E.2d 329 (1976); Benson v. Benson, 39 N.C. App. 254, 249 S.E.2d 877 (1978); Troy's Stereo Ctr., Inc. v. Hodson, 39 N.C. App. 591, 251 S.E.2d 673 (1979); Hall v. Lassiter, 44 N.C. App. 23, 260 S.E.2d 155 (1979); Williams v. Burroughs Wellcome Co., 46 N.C. App. 459, 265 S.E.2d 633 (1980); Collins v. Edwards, 54 N.C. App. 180, 282 S.E.2d 559 (1981); Stevens v. Johnson, 50 N.C. App. 536, 274 S.E.2d 281 (1981); Terry v. Lowrance Hosp., 54 N.C. App. 663, 284 S.E.2d 128 (1981); Roshelli v. Sperry, 57 N.C. App. 305, 291 S.E.2d 355 (1982); Evans v. Chipps, 56 N.C. App. 232, 287 S.E.2d 426 (1982); Boyd v. Boyd, 61 N.C. App. 334, 300 S.E.2d 569 (1983); Roshelli v. Sperry, 63 N.C. App. 509, 305 S.E.2d 218 (1983); Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786 (1984); Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984); Estrada v. Burnham, 74 N.C. App. 557, 328 S.E.2d 611 (1985); Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985); Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985); In re King, 79 N.C. App. 139, 339 S.E.2d 87 (1986); Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987); Pinewood Manor Mobile Homes, Inc. v. North Carolina Manufactured Hous. Bd., 84 N.C. App. 564, 353 S.E.2d 231 (1987); Fox v. Barrett, 90 N.C. App. 135, 367 S.E.2d 412 (1988); Kohn v. Mug-A-Bug, 94 N.C. App. 594, 380 S.E.2d 548 (1989); Porter v. Groat, 713 F. Supp. 893 (M.D.N.C. 1989); Morrow v. Morrow, 103 N.C. App. 787, 407 S.E.2d 286 (1991); Lusk v. Crawford Paint Co., 106 N.C. App. 292, 416 S.E.2d 207 (1992); Saieed v. Bradshaw, 110 N.C. App. 855, 431 S.E.2d 233 (1993); Clark v. Velsicol Chem. Corp., 110 N.C. App. 803, 431 S.E.2d 227 (1993); Food Serv. Specialists v. Atlas Restaurant Mgt., Inc., 111 N.C. App. 257, 431 S.E.2d 878 (1993); In re Estate of Neisen, 114 N.C. App. 82, 440 S.E.2d 855 (1994); Roberts v. Young, 120 N.C. App. 720, 464 S.E.2d 78 (1995); Walker Frames v. Shively, 123 N.C. App. 643, 473 S.E.2d 776

(1996); Timour v. Pitt County Mem. Hosp., 131 N.C. App. 548, 508 S.E.2d 329 (1998); Howard, Stallings, From & Hutson, P.A. v. Douglas, 143 N.C. App. 122, 545 S.E.2d 470, 2001 N.C. App. LEXIS 234 (2001); State ex rel. Barker v. Ellis, 144 N.C. App. 135, 547 S.E.2d 166, 2001 N.C. App. LEXIS 327; Conner Bros. Mach. Co. v. Rogers, 177 N.C. App. 560, 629 S.E.2d 344, 2006 N.C. App. LEXIS 1058 (2006); Baldwin v. Wilkie, 179 N.C. App. 567, 635 S.E.2d 431, 2006 N.C. App. LEXIS 1977 (2006).

II. COMMENCEMENT BY ISSUANCE OF SUMMONS.

The intent of this rule is to require plaintiff to alert defendant by giving preliminary notice of the nature of the claim and the purpose of the suit; the ultimate factual averments will follow in a complaint to be filed later. Morris v. Dickson, 14 N.C. App. 122, 187 S.E.2d 409 (1972).

The requirement that a summons be issued and served in accordance with G.S. 1A-1, Rule 4, along with the court's order granting permission to file a complaint within 20 days, is intended to ensure that the defendant will have notice of the commencement of an action against him. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

This rule appears to incorporate the provisions of former § 1-121. Morris v. Dickson, 14 N.C. App. 122, 187 S.E.2d 409 (1972).

And Procedure Under This Rule and Former Statute Is Similar. — Although this rule is phrased differently from former G.S. 1-121, the procedure for serving a summons with an order allowing a delay in filing the complaint is very similar under both the rule and the former statute. Hasty v. Carpenter, 40 N.C. App. 261, 252 S.E.2d 274, cert. denied, 297 N.C. 453, 256 S.E.2d 806 (1979).

In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983), overruled on other grounds, Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

Unbroken Chain of Summonses Needed. — Because plaintiff failed to serve defendants with process within the time allowed and did not create an unbroken chain of summonses referring back to the original summons as required by N.C. R. Civ. P. 3 and 4, her action was properly dismissed as time-barred under G.S. 1-52. Robertson v. Price, 187 N.C. App. 180, 652 S.E.2d 352, 2007 N.C. App. LEXIS 2240 (2007).

Failure to Serve Complaint Does Not Result in Abatement. — This rule provides that the action shall abate if the complaint is not filed within the period specified in the clerk's order. It does not provide that the action shall abate if the complaint is not served on the defendant. Hasty v. Carpenter, 40 N.C. App. 261, 252 S.E.2d 274, cert. denied, 297 N.C. 453, 256 S.E.2d 806 (1979).

But Defendant Need Not Plead Until Complaint Is Served. — This rule has not overruled Braswell v. Atlantic Coast Line R.R., 233 N.C. 640, 65 S.E.2d 226 (1951), which held that when the complaint is filed within the prescribed time the action is not subject to be dismissed, but a defendant is not compelled to plead until the complaint is served on him, and no default judgment may be had until the complaint is served. Hasty v. Carpenter, 40 N.C. App. 261, 252 S.E.2d 274, cert. denied, 297 N.C. 453, 256 S.E.2d 806 (1979).

The order under this rule extending time for filing the complaint need not be served with each subsequent summons to constitute effective process. Section 1A-1, Rule 4 does ordinarily require the service of the summons and the complaint together. By extension, then, service "in accordance with the provisions of G.S. 1A-1, Rule 4" would require service of the summons and order together. However, to continue to slavishly apply this rule long after filing of the complaint would entirely ignore the purpose of the rules and the functions of the various forms of process. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

Validity of Order Extending Time for Filing Complaint. — An order extending the time within which to file a complaint was not rendered invalid by the fact that the application for the extension did not request permission to file the complaint "within 20 days" and that the order did not state the nature and purpose of the action. Morris v. Dickson, 14 N.C. App. 122, 187 S.E.2d 409 (1972).

Summons Issued Prior to Grant of Extension. — An action is not commenced under the delayed service provision of this rule until (1) an application is made to the court for permission to file a complaint within 20 days, (2) the court enters an order granting the extension, and (3) a summons is issued pursuant to that order. Hence, a summons issued on the day that an application for extension was filed, but not issued pursuant to an order entered by the clerk granting the application for extension, did not commence plaintiff's action under G.S. 95-243 for retaliatory employment discrimination for purposes of the statute of limitations. Telesca v. SAS Inst. Inc., 133 N.C. App. 653, 516 S.E.2d 397, 1999 N.C. App. LEXIS 612, cert. denied, 351 N.C. 120, 540 S.E.2d 749 (1999).

An alias or pluries summons is not ineffective where it does not refer back to the process next preceding it, the delayed service of complaint, but refers instead to the original summons. The General Assembly, by adopting a less stringent standard of service for complaints filed under the late-filing provisions of this rule, clearly did not intend the delayed service of the complaint to be a link in the chain of process. This is especially true in light of the fact that the present option of service by mail for the late complaint constitutes a departure from the former practice requiring formal service. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

Designation of incorrect county in summons rendered the summons voidable rather than void. The incorrect county designation amounted to an irregularity or error in form which could be corrected by amendment, and the trial court erred in granting defendant's motion to dismiss plaintiff's claim due to the incorrect designation of the county on the civil summons form. Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

III. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-14, 1-88 and 1-89.*

As to meaning of word "issue" in relation to summons as affecting commencement of actions, see Williams v. Bray, 273 N.C. 198, 159 S.E.2d 556 (1968), decided under former § 1-88.

The issuance of a summons is not a judicial act which must be performed by the clerk in person, but is rather a ministerial act which may be done in his name by a deputy. Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953), decided under former § 1-89.

When Summons Sufficient to Confer Jurisdiction. — To confer jurisdiction, the process relied on must in fact issue from the court and show upon its face that it emanated therefrom and was intended to bring the defendant into court to answer the complaint of the plaintiff. And when this is clearly shown by evidence appearing on the face of the summons, ordinarily the writ will be deemed sufficient to meet the requirements of due process and bring the party served into court, and formal defects appearing on the face of the record will be treated as nonjurisdictional irregularities, subject to amendment. If, however, there is nothing upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons, but no summons at all. Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953), decided under former § 1-89.

If there has been no service of summons and no waiver by appearance, the court has no jurisdiction, and any judgment rendered would be void. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966), decided under former § 1-14.

But Personal Service, Acceptance of Service or Voluntary Appearance Gives Jurisdiction. — When the defendant has been duly served with summons personally within the State, or has accepted service, or has voluntarily appeared in court, jurisdiction over the person exists, and the court may proceed to render a personal judgment against the defendant. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966), decided under former § 1-14.

Conflict of Laws. — In an action in a United States district court in North Carolina for wrongful death under the Louisiana wrongful death statute, the procedural law of North Carolina and not the Federal Rules of Civil Procedure determined when the action was commenced. Rios v. Drennan, 209 F. Supp. 927 (E.D.N.C. 1962), decided under former § 1-14.

OPINIONS OF ATTORNEY GENERAL

In order for a court to revoke an irrevocable preneed contract a civil action must be initiated by the filing of a complaint with the necessary parties being the purchaser, the preneed funeral home license and, if other than the purchaser, the preneed funeral contract beneficiary. See opinion of Attorney General to Mr. William R. Hoke, Attorney for the North Carolina State Board of Mortuary Science, — N.C.A.G. — (November 3, 1995).

Rule 4. Process.

(a) *Summons — Issuance; who may serve.* — Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service. In this State, such proper person shall be the sheriff of the county where service is to be made or some other person duly authorized by law to serve summons. Outside this State, such proper person shall be anyone who is not a party and is not less than 21 years of age or anyone duly authorized to serve summons by the law of the place where service is to be made. Upon request of the plaintiff separate or additional summons shall be issued against any defendants. A summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so. The date the summons bears shall be prima facie evidence of the date of issue.

(b) *Summons — Contents.* — The summons shall run in the name of the State and be dated and signed by the clerk, assistant clerk, or deputy clerk of the court in the county in which the action is commenced. It shall contain the title of the cause and the name of the court and county wherein the action has been commenced. It shall be directed to the defendant or defendants and shall notify each defendant to appear and answer within 30 days after its service upon him and further that if he fails so to appear, the plaintiff will apply to the court for the relief demanded in the complaint. It shall set forth the name and address of plaintiff's attorney, or if there be none, the name and address of plaintiff. If a request for admission is served with the summons, the summons shall so state.

(c) *Summons — Return.* — Personal service or substituted personal service of summons as prescribed by Rule 4(j)(1) a and b must be made within 60 days after the date of the issuance of summons. When a summons has been served upon every party named in the summons, it shall be returned immediately to the clerk who issued it, with notation thereon of its service.

Failure to make service within the time allowed or failure to return a summons to the clerk after it has been served on every party named in the summons shall not invalidate the summons. If the summons is not served within the time allowed upon every party named in the summons, it shall be returned immediately upon the expiration of such time by the officer to the clerk of the court who issued it with notation thereon of its nonservice and the reasons therefor as to every such party not served, but failure to comply with this requirement shall not invalidate the summons.

(d) *Summons — Extension; endorsement, alias and pluries.* — When any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant by either of the following methods of extension:

(1) The plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Return of the summons so endorsed shall be in the same manner as the original process. Such endorsement may be secured within 90 days after the issuance of summons or the date of the last prior endorsement, or

(2) The plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

Provided, in tax and assessment foreclosures under G.S. 47-108.25 and G.S. 105-374, the first endorsement may be made at any time within two years after the issuance of the original summons, and subsequent endorsements may thereafter be made as in other actions; or an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action.

Provided, for service upon a defendant in a place not within the United States, the first endorsement may be made at any time within two years after the issuance of the original summons, and subsequent endorsements may thereafter be made at least once every two years; or an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action if sued out within two years of the last preceding summons in the chain of summonses or within two years of the last prior endorsement.

Provided, further, the methods of extension may be used interchangeably in any case and regardless of the form of the preceding extension.

(e) *Summons — Discontinuance.* — When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

(f) *Summons — Date of multiple summonses.* — If the plaintiff shall cause separate or additional summonses to be issued as provided in Rule 4(a), the date of issuance of such separate or additional summonses shall be considered the same as that of the original summons for purposes of endorsement or alias summons under Rule 4(d).

(g) *Summons — Docketing by clerk.* — The clerk shall keep a record in which he shall note the day and hour of issuance of every summons, whether original, alias, pluries, or endorsement thereon. When the summons is returned, the clerk shall note on the record the date of the return and the fact as to service or non-service.

(h) *Summons — When proper officer not available.* — If at any time there is not in a county a proper officer, capable of executing process, to whom summons or other process can be delivered for service, or if a proper officer refuses or neglects to execute such process, or if such officer is a party to or otherwise interested in the action or proceeding, the clerk of the issuing court, upon the facts being verified before him by written affidavit of the plaintiff or his agent or attorney, shall appoint some suitable person who, after he accepts such process for service, shall execute such process in the same manner, with like effect, and subject to the same liabilities, as if such person were a proper officer regularly serving process in that county.

(h1) *Summons — When process returned unexecuted.* — If a proper officer returns a summons or other process unexecuted, the plaintiff or his agent or attorney may cause service to be made by anyone who is not less than 21 years of age, who is not a party to the action, and who is not related by blood or marriage to a party to the action or to a person upon whom service is to be made. This subsection shall not apply to executions pursuant to Article 28 of Chapter 1 or summary ejectment pursuant to Article 3 of Chapter 42 of the General Statutes.

(i) *Summons — Amendment.* — At any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued.

(j) *Process — Manner of service to exercise personal jurisdiction.* — In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:

(1) Natural Person. — Except as provided in subdivision (2) below, upon a natural person by one of the following:

a. By delivering a copy of the summons and of the complaint to the natural person or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

e. By mailing a copy of the summons and of the complaint by signature confirmation as provided by the United States Postal Service, addressed to the party to be served, and delivering to the addressee.

(2) *Natural Person under Disability.* — Upon a natural person under disability by serving process in any manner prescribed in this section (j) for service upon a natural person and, in addition, where required by paragraph a or b below, upon a person therein designated.

a. Where the person under disability is a minor, process shall be served separately in any manner prescribed for service upon a natural person upon a parent or guardian having custody of the child, or if there be none, upon any other person having the care and control of the child. If there is no parent, guardian, or other person having care and control of the child when service is made upon the child, then service of process must also be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

b. If the plaintiff actually knows that a person under disability is under guardianship of any kind, process shall be served separately upon his guardian in any manner applicable and appropriate under this section (j). If the plaintiff does not actually know that a guardian has been appointed when service is made upon a person known to him to be incompetent to have charge of his affairs, then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

(3) The State. — Upon the State by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or to a deputy or assistant attorney general; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the Attorney General or to a deputy or assistant attorney general, delivering to the addressee, and obtaining a delivery receipt. As used in this subdivision, "delivery receipt" includes an electronic or facsimile receipt.

(4) An Agency of the State. —

a. Upon an agency of the State by personally delivering a copy of the summons and of the complaint to the process agent appointed by the agency in the manner hereinafter provided; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to said process agent; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the process agent, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-

subdivision, "delivery receipt" includes an electronic or facsimile receipt.

b. Every agency of the State shall appoint a process agent by filing with the Attorney General the name and address of an agent upon whom process may be served.

c. If any agency of the State fails to comply with paragraph b above, then service upon such agency may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General, or to a deputy or assistant attorney general; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the Attorney General or to a deputy or assistant attorney general, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

d. For purposes of this rule, the term "agency of the State" includes every agency, institution, board, commission, bureau, department, division, council, member of Council of State, or officer of the State government of the State of North Carolina, but does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.

(5) Counties, Cities, Towns, Villages and Other Local Public Bodies. —

a. Upon a city, town, or village by personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its mayor, city manager or clerk; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the mayor, city manager, or clerk, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

b. Upon a county by personally delivering a copy of the summons and of the complaint to its county manager or to the chairman, clerk or any member of the board of commissioners for such county; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to its county manager or to the chairman, clerk, or any member of this board of commissioners for such county; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the county manager or to the chairman, clerk, or any member of the board of commissioners of that county, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

c. Upon any other political subdivision of the State, any county or city board of education, or other local public district, unit, or body of any kind (i) by personally delivering a copy of the summons and of the complaint to an officer or director thereof, (ii) by personally delivering a copy of the summons and of the complaint to an agent or attorney-in-fact authorized by appointment or by statute to be served or to accept service in its behalf, (iii) by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent, or attorney-in-fact as specified in (i) and (ii), or (iv) by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, agent, or attorney-in-fact as specified in (i) and (ii), delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

d. In any case where none of the officials, officers or directors specified in paragraphs a, b and c can, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, such court or judge may grant an order that service upon the party sought to be served may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or any deputy or assistant attorney general of the State of North Carolina; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the Attorney General or any deputy or assistant attorney general of the State of North Carolina; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the Attorney General or any deputy or assistant attorney general of the State of North Carolina, delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

(6) Domestic or Foreign Corporation. — Upon a domestic or foreign corporation by one of the following:

a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office.

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.

d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, or agent to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

(7) Partnerships. — Upon a general or limited partnership:

a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf; by mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to any general partner, or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf; or by depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to any general partner or to any attorney-in-fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf, delivering to the addressee, and obtaining a delivery receipt; or by leaving copies thereof in the office of such general partner, attorney-in-fact or agent with the person who is apparently in charge of the office. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

b. If relief is sought against a partner specifically, a copy of the summons and of the complaint must be served on such partner as provided in this section (j).

(8) Other Unincorporated Associations and Their Officers. — Upon any unincorporated association, organization, or society other than a partnership by one of the following:

a. By delivering a copy of the summons and of the complaint to an officer, director, managing agent or member of the governing body of the unincorporated association, organization or society, or by leaving copies thereof in the office of such officer, director, managing agent or member of the governing body with the person who is apparently in charge of the office.

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the officer, director, agent or member of the governing body to be served as specified in paragraphs a and b.

d. By depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the officer, director, agent, or member of the governing body to be served as specified in paragraphs a. and b., delivering to the addressee, and obtaining a delivery receipt. As used in this sub-subdivision, "delivery receipt" includes an electronic or facsimile receipt.

(9) Foreign States and Their Political Subdivisions, Agencies, and Instrumentalities. — Upon a foreign state or a political subdivision, agency, or instrumentality thereof, pursuant to 28 U.S.C. § 1608.

(j1) *Service by publication on party that cannot otherwise be served.* — A party that cannot with due diligence be served by personal delivery, registered or certified mail, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) may be served by publication. Except in actions involving jurisdiction in rem or quasi in rem as provided in section (k), service of process by publication shall consist of publishing a notice of service of process by publication once a week for three successive weeks in a newspaper that is qualified for legal advertising in accordance with G.S. 1-597 and G.S. 1-598 and circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending. If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(a)(2), the circumstances warranting the use of service by publication, and information, if any, regarding the location of the party served.

The notice of service of process by publication shall (i) designate the court in which the action has been commenced and the title of the action, which title may be indicated sufficiently by the name of the first plaintiff and the first defendant; (ii) be directed to the defendant sought to be served; (iii) state either that a pleading seeking relief against the person to be served has been filed or has been required to be filed therein not later than a date specified in the notice; (iv) state the nature of the relief being sought; (v) require the defendant being so served to make defense to such pleading within 40 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of the first publication of notice, or the date when the complaint is required to be filed, whichever is later, and notify the defendant that upon his failure to do so the party seeking service of process by publication will apply to the court for the relief sought; (vi) in cases of attachment, state the information required by G.S. 1-440.14; (vii) be subscribed by the party seeking service or his attorney and give the post-office address of such party or his attorney; and (viii) be substantially in the following form:

NOTICE OF SERVICE OF PROCESS BY PUBLICATION
STATE OF NORTH CAROLINA ____________ COUNTY

In the ____________ Court

[Title of action or special proceeding] [To Person to be served]:
Take notice that a pleading seeking relief against you (has been filed) (is required to be filed not later than __________, ____) in the above-entitled (action) (special proceeding). The nature of the relief being sought is as follows: (State nature.)

You are required to make defense to such pleading not later than (__________, ____) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the _________ day of _________, ____

__________ (Attorney) (Party)
__________ (Address)

(j2) Proof of service. — Proof of service of process shall be as follows:

(1) Personal Service. — Before judgment by default may be had on personal service, proof of service must be provided in accordance with the requirements of G.S. 1-75.10(a)(1).

(2) Registered or Certified Mail, Signature Confirmation, or Designated Delivery Service. — Before judgment by default may be had on service by registered or certified mail, signature confirmation, or by a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) with delivery receipt, the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of G.S. 1-75.10(a)(4), 1-75.10(a)(5), or 1-75.10(a)(6), as appropriate. This affidavit together with the return receipt, copy of the proof of delivery provided by the United States Postal Service, or delivery receipt, signed by the person who received the mail or delivery if not the addressee raises a presumption that the person who received the mail or delivery and signed the receipt was an agent of

the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age and discretion residing in the addressee's dwelling house or usual place of abode. In the event the presumption described in the preceding sentence is rebutted by proof that the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein, the statute of limitation may not be pleaded as a defense if the action was initially commenced within the period of limitation and service of process is completed within 60 days from the date the service is declared invalid. Service shall be complete on the day the summons and complaint are delivered to the address. As used in this subdivision, "delivery receipt" includes an electronic or facsimile receipt provided by a designated delivery service.

(3) Publication. — Before judgment by default may be had on service by publication, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by publication, information, if any, regarding the location of the party served which was used in determining the area in which service by publication was printed and proof of service in accordance with G.S. 1-75.10(a)(2).

(j3) *Service in a foreign country.* — Unless otherwise provided by federal law, service upon a defendant, other than an infant or an incompetent person, may be effected in a place not within the United States:

(1) By any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) If there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

a. In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

b. As directed by the foreign authority in response to a letter rogatory or letter of request; or

c. Unless prohibited by the law of the foreign country, by

1. Delivery to the individual personally of a copy of the summons and the complaint and, upon a corporation, partnership, association or other such entity, by delivery to an officer or a managing or general agent;

2. Any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) By other means not prohibited by international agreement as may be directed by the court.

Service under subdivision (2)c.1. or (3) of this subsection may be made by any person authorized by subsection (a) of this Rule or who is designated by order of the court or by the foreign court.

On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, by the order of the court, or by the law of the foreign country.

Proof of service by mail shall include an affidavit or certificate of addressing and mailing by the clerk of court.

(j4) *Process or judgment by default not to be attacked on certain grounds.* — No party may attack service of process or a judgment of default on the basis that service should or could have been effected by personal service rather than service by registered or certified mail. No party that receives timely actual notice may attack a judgment by default on the basis that the statutory requirement of due diligence as a condition precedent to service by publication was not met.

(j5) *Personal jurisdiction by acceptance of service.* — Any party personally, or through the persons provided in Rule 4(j), may accept service of process by notation of acceptance of service together with the signature of the party accepting service and the date thereof on an original or copy of a summons, and such acceptance shall have the same force and effect as would exist had the process been served by delivery of copy and summons and complaint to the person signing said acceptance.

(j6) *Service by electronic mailing not authorized.* — Nothing in subsection (j) of this section authorizes the use of electronic mailing for service on the party to be served.

(k) *Process — Manner of service to exercise jurisdiction in rem or quasi in rem.* — In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for the exercise of jurisdiction in rem or quasi in rem as provided in G.S. 1-75.8, the manner of service of process shall be as follows:

(1) Defendant Known. — If the defendant is known, he may be served in the appropriate manner prescribed for service of process in section (j), or, if otherwise appropriate section (j1); except that the requirement for service by publication in (j1) shall be satisfied if made in the county where the action is pending and proof of service is made in accordance with section (j2).

(2) Defendant Unknown. — If the defendant is unknown, he may be designated by description and process may be served by publication in the manner provided in section (j1), except that the requirement for service by publication in (j1) shall be satisfied if made in the county where the action is pending and proof of service is made in accordance with section (j2). (1967, c. 954, s. 1; 1969, c. 895, ss. 1-4; 1971, c. 962; c. 1156, s. 2; 1975, cc. 408, 609; 1977, c. 910, ss. 1-3; 1981, c. 384, s. 3; c. 540, ss. 1-8; 1983, c. 679, ss. 1, 2; 1989, c. 330; c. 575, ss. 1, 2; 1995, c. 275, s. 1; c. 389, ss. 2, 3; c. 509, s. 135.1(e), (f); 1997-469, s. 1; 1999-456, s. 59; 2001-379, ss. 1, 2, 2.1, 2.2; 2005-221, ss. 1, 2; 2008-36, ss. 1-3, 5.)

COMMENT

Comment to Original Rule. — Preliminarily, it should be remarked that this rule is complementary to the jurisdiction statute (G.S. 1-75.1 et seq.) which the General Statutes Commission proposed for consideration contemporaneously with these rules. Both the statute and this rule are designed to take full advantage of the fairly recent developments in the law of jurisdiction. Generally, the statute prescribes the occasions on which North Carolina courts may exercise jurisdiction or, in other words, the grounds of jurisdiction. This rule, on the other hand, deals with the manner in which jurisdiction is exercised or asserted.

Section (a). — This section contemplates a continuance of the present practice of ordinarily having summons issue simultaneously with the filing of the complaint. The five-day period was inserted to mark the outer limits of tolerance in respect to delay in issuing the summons.

The first two sentences avoid any suggestion that the clerk shall personally deliver the summons to a process officer. North Carolina has operated successfully heretofore under language similar to that in the section and presumably will continue to be able to do so. The words "be issued" are inserted in lieu of the word "issue" for consistency.

Since under section (b) the summons is to be directed to the defendant rather than to a process officer, it is incumbent on the plaintiff to select the appropriate process officer. It will further be observed that no change is made as to who is a process officer in North Carolina.

For service outside the State, it seemed that the Commission might safely rely on the law of the place where service is attempted. Thus, in

New York, where private service of process is permissible, a North Carolina plaintiff could employ a private person to serve process.

It should be noticed that no formalities of any kind are necessary to authorize service anywhere, in or out of the State.

Section (b). — The Commission has mentioned already the principal change in the content of the summons; that is, that it shall be directed to the defendant rather than to a process officer. This makes it possible for one version of the summons to suffice wherever it is served, whether in this State or beyond its bounds. Service, however, must still be made by a proper person as defined by section (a).

Other changes are minor. The Commission abandoned the requirement contained in former § 1-89 that summons operative outside the county of issuance bear the seal of the issuing court. The Commission added specific requirements that summons bear the title of the action, the name of the issuing court, and the name and address of the plaintiff's attorney or, if there is no attorney, the name and address of the plaintiff.

Section (c). — The provisions for the return of summons are the same as those now prescribed except that the Commission extended the time in which a summons may be served to thirty (30) days [Now 60 days] whereas former § 1-89 prescribed a period of only twenty (20) days. The Commission entertained some question of whether or not the period for service might be still further enlarged but in any event it agreed that it would serve the interest of convenience for the summons to retain its full effectiveness for at least thirty (30) days. Thereby, the unnecessary exertion of securing an alias or pluries summons can frequently be avoided.

Section (d). — This section preserves unchanged the essence of former § 1-95. Alternative methods, either endorsement or the issuance of alias or pluries summons, are provided for continuing the life of an action after the time for service of summons has expired. The same time limits for securing the endorsement or alias or pluries summons are prescribed and the special treatment accorded tax suits is retained.

Section (e). — This section is similar to former § 1-96. Accordingly, an action will be discontinued under the new rules just as formerly. It will be observed that while under Rule 3 the commencement of an action is ordinarily tied to the filing of a complaint, the discontinuance of an action is tied to the failure in apt time to secure an endorsement or an alias or pluries summons. Further, it will be observed that in the special case of an action in which endorsement or the issuance of an alias or pluries summons is secured after the ninety (90) day period, in that case the action will be deemed commenced with the endorsement or the issuance of summons rather than with the filing of a complaint.

Section (f). — Self-explanatory.

Section (g). — Self-explanatory.

Section (h). — This section deals with the problem of the proper person to make service when for stated reasons action by the sheriff in a particular county may not be satisfactory. Formerly, § 1-91 provided for service by the sheriff of an adjoining county when there was not in the county where service was expected to be made a "proper officer" for service or in the case where a sheriff "neglects or refuses" to make service. Section 152-8 empowers the coroner when there is no person "qualified to act as sheriff" to execute all process. While the Commission proposed to leave § 152-8 in effect (§ 1-91 is repealed) it believed that the problem could be taken care of generally by the simple provisions of this section. The procedure outlined by the section does not differ in kind from that prescribed by § 152-8 when the coroner is interested in any action.

Section (i). — This section, in terms, does not provide for any greater liberality of amendment than did former § 1-163, which authorized the court to "amend any . . . process . . . by correcting a mistake in the name of a party, or a mistake in any other respect. . . ." But it does direct attention to what in the Commission's judgment should be the controlling factor: Is there material prejudice to substantial rights?

Section (j). — Some substantial changes were proposed in respect to the manner of service to exercise personal jurisdiction and they cannot be fully understood without considering the jurisdiction statute (G.S. 1-75.1 et seq.) and the ideas advanced in the commentary thereto. But it perhaps bears emphasis that in the vast majority of cases service is accomplished just as it then was; that is, by a sheriff or his deputy personally delivering a copy of the summons to the defendant and to an officer, director, managing agent or process agent when a partnership or corporation is the defendant.

Subsection (1)a. — This deals with natural persons except those under a disability. As indicated above, the normal procedure, when service is made within this State, will be delivery of summons and complaint to the defendant personally by the sheriff or other proper person as defined in section (a). When service is made outside the State, then service will be accomplished on delivery to the defendant personally of a copy of the summons and complaint by one authorized to serve process under the law of the place of service. Thus, if grounds exist under the jurisdiction statute (G.S. 1-75.1 et seq.) for the exercise or jurisdiction by a court of this State and if the defendant is in New York, since New York permits service by anyone over 18 years of age, the summons and complaint can be effectively served in New York by such a person. In the familiar case of the nonresident motorist, for example, the plaintiff's lawyer would simply place the summons and complaint in the hands of a New York process server. No special prayer for permission to make service in this manner is required nor is there any requirement that service be made on any functionary in North Carolina.

Subsection (1)b. — Here there is limited authorization for substituted service. While no permission of the court is required for resort to this type of service, it cannot be overemphasized that this type of service is available only when service cannot "with reasonable diligence" be made under paragraph a. A party would thus, if at all possible, prefer to effect service under paragraph a. If he does not, he faces the hazard in those cases where the defendant makes no appearance that a court will later find that service could "with reasonable diligence" have been made under paragraph a and the voiding of any judgment obtained. But although a party is faced with some uncertainty when he resorts to paragraph b, he surely would prefer this uncertainty to not being able to sue at all. Nor, in the absence of the defendant, is it possible altogether to relieve the uncertainty.

Subsection (1)c. — This is a continuation of the basic theme of giving the best notice to a defendant consistent with "reasonable diligence." If service may not be had under either paragraph a or paragraph b, then resort may be had to publication and mailing. Again, it is not necessary to have the court's permission for such service, but there must be filed with the court an affidavit that the defendant cannot be served under paragraphs a or b.

It will be observed that the defendant has until forty days after publication of the notice to answer. This will be the controlling time regulation, irrespective of Rule 12(a). The action will have commenced, of course, with the filing of the complaint.

Subsection (1)d. — Self-explanatory.

Subsection (2). — This subsection attempts to insure that a person under disability and anyone who may have custody of such person shall both be served except in the case of a minor 14 years of age and older. Paragraph b is an attempt to alleviate the situation where there is an unknown guardian. This section requires of the plaintiff what current decisions of the Supreme Court of the United States do. See Covey v. Town of Somers, 351 U.S. 141, 76 S. Ct. 724, 100 L. Ed. 1021 (1956).

Subsection (3). — Self-explanatory.

Subsection (4). — The Commission here proposed that State agencies be required to appoint process agents. The utility of this requirement is obvious. The definition of the term "agency of the State" gave the Commission some difficulty but the Commission believes the definition arrived at is a workable one.

Subsection (5). — Only paragraph d would seem to require comment. Isolated cases had been reported to the Commission where such a provision would be useful.

Subsection (6). — It should be emphasized that this subsection, along with the rest of this rule, is to be read in conjunction with the jurisdiction statute (G.S. 1-75.1 et seq.). Here we are dealing only with the manner of asserting jurisdiction. Service of a corporate officer within this State or elsewhere will not suffice to give jurisdiction unless there is a ground for jurisdiction as specified by the jurisdiction statute.

Paragraphs c and d in essence make available all present methods of obtaining service.

Subsection (7). — Self-explanatory.

Subsection (8). — It perhaps should be said here that this subsection does not deal in any way with the problem of capacity to be sued.

Section (k). — Here it will be seen that for in rem jurisdiction, as well as for in personam jurisdiction, the Commission proposed the best notice possible to the defendant consistent with "reasonable diligence." Thus, personal service is required where reasonably possible. If it is not reasonably possible, then substituted service may be resorted to. If substituted service is not possible, then service by publication may be had.

Comment to 1969 Amendment. — These amendments are designed to simplify service of process especially substituted service upon parties outside this State.

Section (a). — Personal service outside the State is generally made by someone authorized by the law of the place where service is made. This section now also permits service outside the State to be made by anyone not a party and not less than 21 years of age. Sometimes a party (or his attorney) will find it more convenient to make service himself or through an agent rather than to employ a foreign process server. The option is given, since there is no constitutional impediment. It should be exercised with discretion, however, since the word of a disinterested official would probably be given more credence in a dispute as to whether service was validly made.

Section (j). — This section, which governs the specific manner in which service upon a party is to be made, has been substantially amended with respect to substituted service upon parties outside this State. The section is divided into eight subsections, each of which details the manner of service upon a particular type of party. A new ninth subsection governs all service outside this State.

Subsection (1)a. — A process server is no longer required to make a diligent effort to serve a natural person personally. If the party is not at home, copies of the summons and the complaint may be left at his abode with some person of suitable age and discretion then residing therein.

Subsection (1)b. — This subsection now provides that a party or his agent may alternatively be served in any manner specified by any statute.

Subsection (2). — The exception to this subsection for a minor 14 years of age or older has been excised. Thus, all minors are persons under disability for purposes of the subsection.

Subsection (6)b. — This subsection now provides that a corporation or its agent may alternatively be served in a manner specified by any statute.

Subsection (8)b. — See comment to subsection (6)b.

Subsection (9). — This subsection governs all service of process upon parties not inhabitant of or found within this State or which cannot otherwise be diligently served within this State. Such parties may, at the option of the party seeking to make service, be served personally outside this State, as provided in paragraph a, or be served by registered mail as provided in paragraph b. If the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party personally or by registered mail, the party may alternatively be served by publication as provided in paragraph c. When service is to be made in a foreign country, the alternative provisions of paragraph d may be employed. Except as provided in paragraph d, permission of the court to make service outside this State is never required.

Subsection (9)a. — Personal service outside this State is to be made in the same way as personal service within this State. Before judgment by default may be had on such service, the party seeking the judgment must file an affidavit with the court containing proof of such service and showing the circumstances warranting its usage.

Subsection (9)b. — This paragraph replaces, in effect, the service provisions of the now repealed nonresident motor vehicles act. It applies, however, to all parties and not just to nonresident motor vehicle tort-feasors. Copies of the summons and the complaint are to be sent registered mail, return receipt requested, directly to the party to be served, and not to any state official or other intermediary. Service by registered mail is not effected unless the letter is actually delivered to the party. Ordinarily, proof of delivery will be the signed returned receipt itself. Any other evidence of actual delivery is also acceptable. If the mailing is returned stamped "delivery refused," "letter unclaimed," "addressee unknown at the address," or "addressee moved and left no forwarding address," service has not been effected. Before judgment by default may be had on such service, the party seeking the judgment must file with the court an affidavit containing proof of such service and showing the circumstances warranting its usage.

Subsection (9)c. — The mechanics of service by publication have not been substantially changed. The notice is to be published in a newspaper that is qualified for legal advertising in accordance with N.C.G.S. §§ 1-579 [now repealed], 1-598 and is published in the county where the action is pending. If no newspaper in the county qualifies, a qualified newspaper in an adjoining county or the same judicial district may be chosen. If the party's address is known or can with reasonable diligence be ascertained, a copy of the published notice is to be mailed to him. Upon completion of the publication, an affidavit containing proof of such service and showing the circumstances warranting its usage is to be filed with the court.

Subsection (9)d. — This paragraph establishes alternative procedures when service is to be made in a foreign country. It is based upon rule 4(i) of the Federal Rules of Civil Procedure, which is itself drawn from Section 2.01 of the Uniform Interstate and International Procedure Act. Under this paragraph one may enlist the assistance of a foreign government and its laws in making service on a defendant found within its territory, in order to insure the validity of the service and to avoid any objection by the foreign government that efforts to make service there constitute an encroachment on its sovereignty.

Subsection (9)e. — This paragraph prohibits a direct or collateral attack upon a default judgment obtained after service under this subsection (9) on the grounds that the subsection, or any other provision of section (j), required a different method of substituted or personal service. Since the various methods of substituted service provided for are all reasonably calculated to give notice of the pendency of the action, a party is not constitutionally entitled to be served under one rather than another, even though the statute itself so requires. Thus, to challenge an incorrect choice of a method of service under the statute, the party must appear in the action before judgment by default is rendered. Otherwise, the error is waived. Since this paragraph does not seek to bar constitutional objections to the service of process, it should be accorded full faith and credit by other states.

Editor's Note. — The subdivision (j)(9) designation was assigned by the Revisor of Statutes, the designation in Session Laws 1995, c. 389, s. 2 having been (j)(10).

Session Laws 2007-323, s. 14.17(b), which expires June 30, 2009, provides: "The Administrative Office of the Courts may conduct a pilot project in multiple counties to evaluate a system for the electronic filing, case processing, and case management of civil cases and special proceedings filed in the General Court of Justice. The Administrative Office of the Courts may designate the case types that will be subject to mandatory electronic filing, case processing, and case management during the pilot project. No county may be selected without the concurrence of the senior resident superior court judge, the chief district court judge, and the clerk of superior court. Notwithstanding the requirements of Chapters 1A and Chapter 7A of the General Statutes, the North Carolina Supreme Court and the Administrative Office of the Courts shall establish rules, costs, procedures, and specifications for electronic filing, case processing, and case management under the pilot. However, Rule 4 of the Rules of Civil Procedure shall govern service of process of pleadings that are currently required to be served pursuant to Rule 4 of the Rules of Civil Procedure. The terms of any contract entered into for the purpose of implementing the provisions of this subsection shall provide that the State retains the ownership of all electronic data received by the vendor as part of the pilot project."

Session Laws 2007-323, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2007'."

Session Laws 2007-323, s. 32.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2007-2009 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2007-2009 fiscal biennium."

Session Laws 2007-323, s. 32.5 is a severability clause.

Effect of Amendments. — Session Laws 2008-36, ss. 1, 2, 3, and 5, effective October 1, 2008, and applicable to receipts given on or after that date, in subdivision (j)(1), substituted "subdivision (2)" for "subsection (2)" in the introductory paragraph, in sub-subdivision (j)(1)d., added the last sentence, and in sub-subdivision (j)(1)e., deleted the former last sentence, which read: "Nothing in this sub-subdivision authorizes the use of electronic mailing for service on the party to be served."; in subdivision (j)(3) and sub-subdivisions (j)(4)a., (j)(4)c., (j)(5)a. through (j)(5)d., (j)(6)d., (j)(7)a., and (j)(8)d., added the last sentence; rewrote subdivision (j)(9); in subdivision (j1), in the last sentence of the first paragraph, substituted "G.S. 1-75.10(a)(2)" for "G.S. 1-75.10(2)"; in subdivision (j2)(1), substituted "G.S. 1-75.10(a)(1)" for "G.S. 1-75.10(1); in subdivision (j2)(2), substituted "G.S. 1-75.10(a)(4), 1-75.10(a)(5), or 1-75.10(a)(6)" for "G.S. 1-75.10(4), 1-75.10(5), or 1-75.10(6)" in the first sentence, substituted "receipt, copy of the proof of delivery provided by the United States Postal Service, or delivery receipt" for "or delivery receipt or copy of the proof of delivery provided by the United States Postal Service" in the second sentence, and added the last sentence; in subdivision (j2)(3), substituted "G.S. 1-75.10(a)(2)" for "G.S. 1-75.10(2)"; and added subsection (j6).

Legal Periodicals. — For article on jurisdiction and process, see 5 Wake Forest Intra. L. Rev. 46 (1969).

For article on legislative changes to the new rules of civil procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For note on constitutionality of constructive service of process on missing defendants, see 48 N.C.L. Rev. 616 (1970).

For article on modern statutory approaches to service of process outside the state, see 49 N.C.L. Rev. 235 (1971).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For note on Rule 4(b) and service of process on a corporate defendant, see 15 Wake Forest L. Rev. 105 (1979).

For article, "Foreign Corporations in North Carolina: The 'Doing Business' Standards of Qualification, Taxation, and Jurisdiction," see 16 Wake Forest L. Rev. 711 (1980).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For comment on jurisdiction based upon attachment, see 16 Wake Forest L. Rev. 377 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1041 (1981).

For survey of 1981 law on civil procedure, see 60 N.C.L. Rev. 1214 (1982).

For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For note, "The North Carolina Court of Appeals Provides a Solution to the Business Name Game," see 66 N.C.L. Rev. 1064 (1988).

For article, "Service of Process under Lemons

v. Old Hickory Council, Boy Scouts of America Inc.: Exalting Procedure Over Precedent?," see 67 N.C.L. Rev. 1211 (1989).

For 1997 legislative survey, see 20 Campbell L. Rev. 399.

CASE NOTES

I. In General.
II. Personal Service on Natural Persons.
  A. In General.
  B. Delivery to Person Residing at Defendant's Usual Abode.
  C. Service by Registered or Certified Mail.
III. Service on Counties, Municipalities and Other Local Public Bodies.
IV. Service on Corporations.
V. Service by Publication.
VI. Amendment of Summons.
VII. Discontinuance and Extensions.
VIII. Decisions under Prior Law.

I. IN GENERAL.

Editor's Note. — *Most of the cases below were decided prior to the 2001 amendment of Rule 4(c), which changed the time allowed for service of a summons under Rule 4(j)(1) a and b from 30 to 60 days after the date of issuance.*

Due process requires that a party be properly notified of the proceeding against him. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983), overruled on other grounds, Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

The purpose of service of a summons is to give notice to the party against whom the proceeding or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice. Farr v. City of Rocky Mount, 10 N.C. App. 128, 177 S.E.2d 763 (1970), cert. denied, 277 N.C. 725, 178 S.E.2d 831 (1971).

The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him. Wearring v. Belk Bros., 38 N.C. App. 375, 248 S.E.2d 90 (1978).

A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, it has fulfilled its purpose. Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983), rev'd on other grounds, 311 N.C. 536, 319 S.E.2d 912 (1984).

The G.S. 1A-1, Rule 3 requirement that a summons be issued and served in accordance with this rule, along with the court's order granting permission to file a complaint within 20 days, is intended to ensure that the defendant will have notice of the commencement of an action against him. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

Applicability of Federal Rule in Diversity Cases. — North Carolina's rules governing the issuance of a summons and the discontinuance of a lawsuit are procedural; therefore, because federal procedural rules govern diversity cases, Fed. R. Civ. P. 4 applied to plaintiff's diversity suit, and she had 120 days to have a summons issued and served upon a defendant rather than the five days allowed under N.C. R. Civ. P. 4. Melvin v. Wal-Mart Stores, Inc., 338 F. Supp. 2d 622, 2004 U.S. Dist. LEXIS 20220 (M.D.N.C. 2004).

The primary purpose of Rule 4 of the Federal Rules of Civil Procedure, which is similar to this rule, is to provide the mechanisms for bringing notice of the commencement of an action to a defendant's attention and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit. Wiles v. Welparnel Constr. Co., 295 N.C. 81, 243 S.E.2d 756 (1978).

The purpose behind this rule and G.S. 1-52(5) is to give notice to the party against whom an action is commenced within a reasonable time after the accrual of the cause of action. Adams v. Brooks, 73 N.C. App. 624, 327 S.E.2d 19 (1985), overruled on other grounds, Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986).

Construction With Other Rules. — N.C. R. Civ. P. 3 states that the summons and complaint shall be served in accordance with the statute of limitations as provided in N.C. R. Civ. P. 4, but the rule does not state that the failure to do so renders a suit abated or the commencement void. Melvin v. Wal-Mart Stores, Inc., 338 F. Supp. 2d 622, 2004 U.S. Dist. LEXIS 20220 (M.D.N.C. 2004).

Special Proceedings. — A summons is required for all contested special proceedings. Charns v. Brown, 129 N.C. App. 635, 502 S.E.2d 7, 1998 N.C. App. 668 (1998), cert. denied, 349 N.C. 228, 515 S.E.2d 701 (1998).

Compliance with Statutory Requirements Essential to Valid Service. — Where a statute provides for service of summons or notice in the progress of a cause by certain persons or by designated methods, the specified requirements must be complied with or there is no valid service. Guthrie v. Ray, 293 N.C. 67, 235 S.E.2d 146 (1977); Cromer v. Cromer, 49 N.C. App. 403, 271 S.E.2d 541 (1980), rev'd on other grounds, 303 N.C. 307, 278 S.E.2d 518 (1981).

Process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid even though a defendant had actual notice of the lawsuit. Roshelli v. Sperry, 57 N.C. App. 305, 291 S.E.2d 355 (1982).

If a statute specifies that certain requirements must be complied with in the process of serving summons, failure to follow these requirements results in a failure of service. Park v. Sleepy Creek Turkeys, Inc., 60 N.C. App. 545, 299 S.E.2d 670 (1983).

In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983), overruled on other grounds, Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

Failure to serve process in the manner prescribed by statute makes the service invalid, even though a defendant has actual notice of the lawsuit. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984). But see Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

When service of process is made pursuant to the forum state's law, both the service of process requirements and the personal jurisdiction requirements of state law must be met. Waller v. Butkovich, 584 F. Supp. 909 (M.D.N.C. 1984).

Although actual notice given in a manner other than that prescribed by statute cannot supply constitutional validity, if it names the parties in such terms that every intelligent person understands who is meant, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Trial court lacked subject matter jurisdiction of a neglect and dependency proceeding as the purported summonses to a mother and a father were not signed and dated by the clerk of court, or a deputy or assistant clerk of court, and were not legally issued under G.S. 7B-406(a) and G.S. 1A-1, Rule 4(b). In re K.J.L., — N.C. App. —, 670 S.E.2d 269, 2008 N.C. App. LEXIS 2229 (2008).

Summons delivered to each of two defendants directing the other defendant, rather than the defendant to whom delivered, to appear and answer was not service in accord with the statutory rules and as such was fatally defective, and no jurisdiction over defendants was obtained. Although both defendants may have had actual notice of the lawsuit, such notice cannot supply constitutional validity to service unless the service is in the manner prescribed by statute. Stone v. Hicks, 45 N.C. App. 66, 262 S.E.2d 318 (1980).

Summons Must Be Served Within 30 Days (Now 60 Days). — Under this rule, a summons must be served within 30 days (now 60 days) of its issuance. Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Trial court erred in denying the father's motion to set aside an order terminating his parental rights; since the father was not served within the time limit for serving process once a summons was issued and no extension of time was obtained, the trial court did not obtain personal jurisdiction over him in a case where the mother filed a petition to terminate the father's parental rights. In re A.B.D., 173 N.C. App. 77, 617 S.E.2d 707, 2005 N.C. App. LEXIS 1925 (2005).

Basis for 30 Day (Now 60 Day) Delivery. — This rule does not require delivery of the summons to the sheriff within 30 (now 60) days of its issuance in order that the summons may later serve as a basis for the issuance of an alias or pluries summons. Robinson v. Parker, 124 N.C. App. 164, 476 S.E.2d 406 (1996), decided prior to 2001 amendment to subsection (c).

Multiple Attempts at Service Within 30 (now 60) Days Permitted. — A successful service of process occurring within 30 days (now 60 days) after issuance of a summons is valid even if there has been a prior unsuccessful attempt at serving that same summons. An endorsement, alias summons or pluries summons are not necessary. Shiloh Methodist Church v. Keever Heating & Cooling Co., 127 N.C. App. 619, 492 S.E.2d 380 (1997), decided prior to 2001 amendment to subsection (c).

Where summons is not served within the statutory period, it loses its vitality and does not confer jurisdiction over the person of the defendant. There is no statutory authority for service of summons after the date fixed for its return. Cole v. Cole, 37 N.C. App. 737, 247 S.E.2d 16 (1978).

A summons must be served within 30 days (now 60 days) after the date of the issuance of the summons. However, the failure to make service within the time allowed does not invalidate the summons. The action may continue to exist as to the unserved defendant by two methods. First, within 90 days after the issuance of the summons or the date of the last prior endorsement, the plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Secondly, the plaintiff may sue out an alias or pluries summons at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement. If the 90-day period expires without the summons being served within the first 30 days (now 60 days) or revived within the remaining 60 days (now 30 days), the action is discontinued. If a new summons is issued, it begins a new action. County of Wayne ex rel. Williams v. Whitley, 72 N.C. App. 155, 323 S.E.2d 458 (1984), decided prior to 2001 amendment to subsection (c).

A summons not served within 30 days (now 60 days) loses its vitality and becomes functus officio, and service obtained thereafter does not confer jurisdiction on the trial court over the defendant. Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Although a summons not served within 30 days (now 60 days) becomes dormant and unservable, under Rule 4(c) it is not invalidated nor is the action discontinued. Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Failure to Serve Summons in Original Action Bars Subsequent Action. — Defective service in the alleged accident victims' original negligence action under G.S. 1A-1 and N.C. R. Civ. P. 4 resulted in the victims' subsequent refiled action, despite the voluntary dismissal by the victims of the original action under G.S. 1A-1 and N.C. R. Civ. P. 41(a) being brought after the statute of limitations under G.S. 1-52(16) ran. Camara v. Gbarbera, 191 N.C. App. 394, 662 S.E.2d 920, 2008 N.C. App. LEXIS 1325 (2008).

Tolling of Statute of Limitations. — Because the driver of an automobile was never properly served with the accident victim's first complaint under G.S. 1A-1, N.C. R. Civ. P. 4, the victim's voluntary dismissal without prejudice did not toll the statute of limitations under G.S. 1-52(5). Lawrence v. Sullivan, — N.C. App. —, 666 S.E.2d 175, 2008 N.C. App. LEXIS 1668 (2008).

Extension of Time. — G.S. 1A-1, N.C. R. Civ. P. 6(b) grants the trial courts broad authority to extend any time period specified in any of the Rules of Civil Procedure for the doing of any act, after expiration of such specified time, upon a finding of excusable neglect; therefore, pursuant to Rule 6(b) the trial courts may extend the time for service of process under G.S. 1A-1, N.C. R. Civ. P. 4(c). Wetchin v. Ocean Side Corp., 167 N.C. App. 756, 606 S.E.2d 407, 2005 N.C. App. LEXIS 12 (2005).

Trial court had the discretion to allow individuals an extension of time to serve a summons on a corporation because the alias and pluries summons was merely dormant, and not expired, when the individuals effectuated service. Wetchin v. Ocean Side Corp., 167 N.C. App. 756, 606 S.E.2d 407, 2005 N.C. App. LEXIS 12 (2005).

Section Not Applicable to Termination of Parental Right Proceeding Begun Within Two Years of Service. — Because the first termination of parental rights action against the mother had been dismissed, service in the instant action was proper under G.S. 1A-1-5, not G.S. 1A-1-4, as it was made less than two years after the original action began. In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

Failure to Deliver Summons to Sheriff. — There is no requirement under this rule that plaintiffs must prove good faith, excusable neglect, or even give any reason at all to justify their failure to promptly deliver the summons to the sheriff. Robinson v. Parker, 124 N.C. App. 164, 476 S.E.2d 406 (1996), decided prior to 2001 amendment to subsection (c).

Five Day Time Limit for Issuance of Summons Under Section (a). — The purpose of the provision in section (a) of this rule, requiring that the summons be issued "in any event within five days," and the legislative intent as reflected in the comment following this rule, was to establish an outer limit of five days after filing the complaint for issuance of summons. Roshelli v. Sperry, 57 N.C. App. 305, 291 S.E.2d 355 (1982).

Where a complaint has been filed and proper summons does not issue within the five days allowed under this rule, the action is deemed never to have commenced. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983), overruled on other grounds, Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

Although section (a) is clear and unambiguous in its requirement that upon the filing of the complaint, summons shall be issued forthwith, and in any event, within five days, the North Carolina Supreme Court has recognized that a properly issued and served second summons can revive and commence a new action on the date of its issuance. Stokes v. Wilson & Redding Law Firm, 72 N.C. App. 107, 323 S.E.2d 470 (1984), cert. denied, 313 N.C. 612, 332 S.E.2d 83 (1985).

Under section (a) of this rule, a summons must be issued within five days of the filing of the complaint. Where a complaint has been filed and a proper summons does not issue within the five days allowed under the rule, the action is deemed never to have commenced. County of Wayne ex rel. Williams v. Whitley, 72 N.C. App. 155, 323 S.E.2d 458 (1984).

Because plaintiff submitted copies of original summonses that were issued on the day that plaintiff's complaint was originally filed, there was no merit to defendants' argument that jurisdiction was never conferred due to failure to obtain summonses within five days as required by G.S. 1A-1, N.C. R. Civ. P. 4(a). Patterson v. Brown, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 9312 (W.D.N.C. Jan. 23, 2008).

Although a summons in a juvenile neglect proceeding was not properly signed pursuant to G.S. 7B-406 and 1A-1, N.C. R. Civ. P. 4(b), only personal jurisdiction, rather than subject matter jurisdiction, was implicated, and where the parents appeared in the neglect proceeding and they failed to object thereto, such defense was waived; a termination of parental rights in reliance on the neglect order was valid. In re K.J.L., 363 N.C. 343, 677 S.E.2d 835, 2009 N.C. LEXIS 626 (June 18, 2009).

Irregularity in Summons. — Where there was no confusion as to the identity of the actual defendant, as evidenced by the complaint and the caption of the summons, a slight irregularity was not fatal because the summons was properly directed to the city, and the city was properly named as the defendant. Steffey v. Mazza Constr. Group, Inc., 113 N.C. App. 538, 439 S.E.2d 241, cert. improvidently granted and appeal dismissed, 339 N.C. 734, 455 S.E.2d 155 (1995).

Merits Considered Where Dismissal for Failure to Timely Serve Notice Not Assigned as Error. — Even though the dismissal of a case for failure to timely serve notice of the lawsuit under G.S. 1A-1-4 was not assigned as an error, the merits of a patient's challenge were considered as the patient challenged the dismissal for failure to prosecute under G.S. 1A-1-41(b). Stocum v. Oakley, 185 N.C. App. 56, 648 S.E.2d 227, 2007 N.C. App. LEXIS 1685 (2007).

Service on Thirty-first Day Insufficient Under Section (c). — A pluries summons which was issued on June 16, 1977, and served on defendants on July 19, 1977, was insufficient to bring defendants into court, and entry of default on them was therefore invalid, as service was made on the thirty-first day, as computed under G.S. 1A-1, Rule 6, rather than within 30 days (now 60 days), as required by section (c) of this rule. Carolina Narrow Fabric Co. v. Alexandria Spinning Mills, Inc., 42 N.C. App. 722, 257 S.E.2d 654 (1979), decided prior to 2001 amendment to subsection (c).

Presumption of Service from Return of Officer. — When the return shows legal service by an authorized officer, nothing else appearing, the law presumes service. The service is deemed established unless, upon motion in the cause, the legal presumption is rebutted by evidence upon which a finding of nonservice is properly based. Guthrie v. Ray, 293 N.C. 67, 235 S.E.2d 146 (1977).

Return Not Set Aside on Testimony of One Witness. — An officer's return or a judgment based thereon may not be set aside unless the evidence consists of more than a single contradictory affidavit or the contradictory testimony of one witness and is clear and unequivocal. This does not place an undue burden on a person who in truth has not been legally served. Guthrie v. Ray, 293 N.C. 67, 235 S.E.2d 146 (1977).

Where defendant submitted only one witness affidavit disputing service of process, that one affidavit was insufficient to rebut the presumption that a return under G.S. 1A-1-4(j)(1)a. of valid service from a sheriff's deputy was proof of valid service. Dismissal of plaintiff's complaint under G.S. 1A-1-12(b)(4), (5), for insufficient service was improper. Saliby v. Conners, 171 N.C. App. 435, 614 S.E.2d 416, 2005 N.C. App. LEXIS 1258 (2005).

Nor on Affidavit of Person Allegedly Served. — The sheriff's return imports truth, and it cannot be overthrown or shown to be false by the affidavit, merely, of the person upon whom the service is alleged to have been made. Guthrie v. Ray, 293 N.C. 67, 235 S.E.2d 146 (1977).

Attack on Return Failing to Show Where Papers Were Left. — Homeowners were entitled to attack foreclosure proceeding against their property either by a motion in the cause or by an independent action where the officer's return was insufficient on its face to show service upon homeowner husband in that the return did not show the place where the papers were left. However, such defect was not necessarily fatal to the foreclosure proceedings, and the matter would be remanded for the trial judge to determine within his discretion whether the sheriff's return ought to be amended so as to comport with facts regarding the place and manner of service. Hassell v. Wilson, 301 N.C. 307, 272 S.E.2d 77 (1980).

Sheriff may be permitted to amend proof of service unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued. Williams v. Burroughs Wellcome Co., 46 N.C. App. 459, 265 S.E.2d 633 (1980).

A court may obtain personal jurisdiction over a defendant only by the issuance of summons and service of process by one of the statutorily specified methods. Glover v. Farmer, 127 N.C. App. 488, 490 S.E.2d 576 (1997), cert. denied, 347 N.C. 575, 502 S.E.2d 590 (1998).

Mistake in Name of Party Not Always Fatal. — Although service of process should correctly state the name of the parties, a mistake in the names is not always a fatal error, and as a general rule a mistake in the given name of a party who is served will not deprive the court of jurisdiction. Names are to designate persons, and where the identity is certain a variance in the name is immaterial. Also, error or defects in the pleadings not affecting substantial rights are to be disregarded. Jones

v. Whitaker, 59 N.C. App. 223, 296 S.E.2d 27 (1982).

If the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, or even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage of the suit. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Substitution in the case of a misnomer is not considered a substitution of new parties but merely a correction in the description of the party or parties actually served. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Deletion of "P.A." at end of law firm's name is a correction in the description of a party actually served instead of a substitution of new parties. Certainly the misdescription of the law firm as a "P.A." did not leave in doubt the identity of the party intended to be sued. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Correction of Mistake by Serving Officer. — The fact that the summons and complaint were directed to "Sherrie Sapp Whitaker" and the deputy sheriff changed the name from "Sherrie" to "Shirley" when he served the defendant was of no legal significance since the proper party was actually served. Under these circumstances, the defendant could not have suffered any prejudice. All that was required was that the proper party be properly served. Jones v. Whitaker, 59 N.C. App. 223, 296 S.E.2d 27 (1982).

Notice of Additional Claims to Party in Default. — A party who is in default for failure to appear is ordinarily not entitled to notice of additional pleadings in the case, but where a new or additional claim is asserted, service on the party, even though in default, is required in the same manner as provided by this rule for the service of summons. First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

Plaintiff who defaulted on original complaint which alleged that she was a resident of this State was entitled to notice of subsequent motion to declare that none of her property was exempt by virtue of non-residency, and an opportunity to contest the factual allegations as to her non-residency. Where she was given neither notice nor an opportunity to be heard, in violation of statutory and constitutional provisions, the order declaring that her property was not exempt was invalid, and she was entitled to relief therefrom pursuant to G.S. 1A-1, Rule 60(b)(4). First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

It is the service of process and not the return of the officer which confers jurisdiction on the court. Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979).

Challenge to Court's Determination of Jurisdiction and Authority. — When a defendant challenges the authority of a court on the ground that it has not acquired personal jurisdiction, the court's determination of its own jurisdiction may be questioned only by appeal and not collaterally. Gower v. Aetna Ins. Co., 281 N.C. 577, 189 S.E.2d 165 (1972).

A judgment by a court determining its statutory authority to dismiss an action in such a way as not to bar further litigation on the merits therein may be questioned only by appeal and not collaterally. Gower v. Aetna Ins. Co., 281 N.C. 577, 189 S.E.2d 165 (1972).

As to service on a nonresident motor vehicle operator involved in an accident under former subsection (j)(9) of this rule or G.S. 1-105, see House v. House, 22 N.C. App. 686, 207 S.E.2d 339 (1974).

Service by Person in Foreign Country. — Where no affidavit was offered as required by G.S. 1-75.10, the plaintiff was allowed to prove service by mail by "a certificate of addressing and mailing by the clerk of court" to enable the German court to obtain personal jurisdiction over defendant and the North Carolina trial court was, under comity of nations, within its power to enforce the German court's order determining defendant to be the father and ordering him to pay child support. State ex rel. Desselberg v. Peele, 136 N.C. App. 206, 523 S.E.2d 125, 1999 N.C. App. LEXIS 1307 (1999), cert. denied, 351 N.C. 479, 543 S.E.2d 509 (2000).

What Service Required Where Party Intervenes. — An intervenor party who is granted permission to intervene pursuant to G.S. 1A-1, Rule 24(b)(2) is not required to then issue a summons and complaint pursuant to this rule. The service, pursuant to G.S. 1A-1, Rule 5, of the motion to intervene accompanied with the complaint is sufficient service upon the party against whom relief is sought or denied in the intervenor's pleading and is sufficient process to acquire jurisdiction over the party if all other requisites for jurisdiction over the party are met. Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345, cert. denied, 300 N.C. 374, 267 S.E.2d 675 (1980), overruled on other grounds in Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

Service of the motion and proposed complaint pursuant to G.S. 1A-1, Rule 5 is sufficient service of process on defendant where the intervenor's complaint is not entirely independent of the original complaint and there is no objection that the intervenor's complaint could not be properly served on defendant in this jurisdiction. Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345, cert. denied, 300 N.C. 374, 267 S.E.2d 675 (1980), overruled on other grounds in Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

A party who intervenes pursuant to G.S. 1A-1, Rule 24 is not required to issue a summons and complaint pursuant to this rule. In re Baby Boy Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986), cert. denied, 318 N.C. 695, 351 S.E.2d 750 (1987).

Service of Notice of Motion for Enforcement of Alimony. — A plaintiff seeking enforcement of an order for alimony need not serve defendant with a new summons. Simply serving him with notice of the motion for enforcement is sufficient. Unless otherwise ordered by the court, G.S. 1A-1, Rule 5(b) allows service of notice of written motions by service on defendant's attorney of record. Miller v. Miller, 98 N.C. App. 221, 390 S.E.2d 352 (1990).

Notice Held Insufficient. — Institution of an action for "alimony without divorce" did not constitute notice that plaintiff was seeking a determination of the respective rights of plaintiff and defendant in a surplus that might result in the event of a foreclosure of a deed of trust. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

The order under § 1A-1, Rule 3 extending time for filing the complaint need not be served with each subsequent summons to constitute effective process. This rule does ordinarily require the service of the summons and the complaint together. By extension, then, service "in accordance with the provisions of Rule 4" would require service of the summons and order together. However, to continue to slavishly apply this rule long after filing of the complaint would entirely ignore the purpose of the rules and the functions of the various forms of process. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

Section 1A-1, Rule 3 requires only filing of the complaint, not service, within the 20-day period. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

The delayed service of complaint does not constitute a link in the chain of process. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

Delay in Substituting Correct Name Not Fatal. — Where plaintiffs sued and served the appropriate party, their delay in substituting the correct name of that party was not fatal. Tyson v. L'eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987).

The purpose of section (d) of this rule is only to keep the action alive by means of an endorsement on the original summons or by issuance of an alias or pluries summons in situations where the original, properly directed summons was not yet served. Roshelli v. Sperry, 63 N.C. App. 509, 305 S.E.2d 218, cert. denied, 309 N.C. 633, 308 S.E.2d 716 (1983).

An alias or pluries summons is not ineffective where it does not refer back to the process next preceding it, the delayed service of complaint, but referred instead to the original summons. The General Assembly, by adopting a less stringent standard of service for complaints filed under the late-filing provisions of G.S. 1A-1, Rule 3, clearly did not intend the delayed service of the complaint to be a link in the chain of process. This is especially true in light of the fact that the present option of service by mail for the late complaint constitutes a departure from the former practice requiring formal service. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, 312 N.C. 796, 325 S.E.2d 484 (1985).

Summons Held Valid. — Summons was valid process under this rule, whether the court treated the summons with which defendants were eventually served as an original summons or as an alias and pluries summons. CBP Resources, Inc. v. Ingredient Resource Corp., 954 F. Supp. 1106 (M.D.N.C. 1996).

Neglect Required for Appointment of Private Process Server. — Something more than mere failure to act is needed for conduct to constitute neglect under paragraph (h) of this rule. Williams v. Williams, 113 N.C. App. 226, 437 S.E.2d 884 (1994), aff'd, 339 N.C. 608, 453 S.E.2d 165 (1995).

Service on Local Union Did Not Effect Service on International Union. — In an employment discrimination action in which an employee attempted to serve process on an international union by mailing the summons and complaint to a local union's office, the international union was not properly served under Fed. R. Civ. P. 4(c)(2) and (e)(1) and N.C. R. Civ. P. 4(j)(8) because the unions were autonomous entities, the local union was not authorized to accept service of process on behalf of the international union, and the local union was not a mere agent of the international union. Hoyle v. UAW Local Union 5285, 444 F. Supp. 2d 467, 2006 U.S. Dist. LEXIS 54422 (W.D.N.C. 2006).

Alias Summons Against State. — A civil action may be continued in existence against any defendant by suing out an alias summons within 90 days of the last preceding summons. No special attention to this rule appears for suits against the State. The State, once it has consented to suit, occupies the same position as any other litigant. Barrus Constr. Co. v. North Carolina Dep't of Transp., 71 N.C. App. 700, 324 S.E.2d 1 (1984).

Service by Publication Prior to Issuance

of Alias Summons. — In personam jurisdiction can be obtained over a defendant through service of process by publication within 90 days of the issuance of the original summons, but before any issuance of an alias or pluries summons. County of Wayne ex rel. Williams v. Whitley, 72 N.C. App. 155, 323 S.E.2d 458 (1984).

Defense of Insufficient Service on "John Doe" Defendant Not Available to Insurance Company. — Where respondent was provided with appropriate notice of the action below, it could not attempt to defend its prior election not to provide a defense to a John Doe defendant by alleging that service of process on "John Doe" was insufficient. Sparks v. Nationwide Mut. Ins. Co., 99 N.C. App. 148, 392 S.E.2d 415 (1990).

Issuance of Second Summons. — Although summons was not properly issued at first, the issuance of a second summons commenced a new action on the date it was issued. Duncan v. Duncan, 102 N.C. App. 107, 401 S.E.2d 398 (1991).

60 Day "Saving Provision" in Subdivision (j2)(2). — A careful review of this saving provision indicates it is limited in scope and may only be employed where: (1) the original service was made by registered or certified mail upon a person residing in the addressee's dwelling house or usual place of abode; and (2) it later appears "the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein." Hanover Ins. Co. v. Amana Refrigeration, Inc., 106 N.C. App. 79, 415 S.E.2d 99, cert. denied, 332 N.C. 344, 421 S.E.2d 147 (1992).

The circumstance of the summons being placed in the court file subsequent to entry of judgment by default is insufficient to affect validity of either the summons or the judgment itself. Hocke v. Hanyane, 118 N.C. App. 630, 456 S.E.2d 858 (1995).

Mailing of Process. — In child custody cases where actual notice has been received, service of process is proper notwithstanding a person other than the clerk's office mailing the process. Tataragasi v. Tataragasi, 124 N.C. App. 255, 477 S.E.2d 239 (1996).

Applied in Bowdach v. Frontierland, Inc., 347 F. Supp. 237 (W.D.N.C. 1972); William R. Andrews Assocs. v. Sodibar Sys., 25 N.C. App. 372, 213 S.E.2d 411 (1975); City of Durham v. Lyckan Dev. Corp., 26 N.C. App. 210, 215 S.E.2d 814 (1975); William R. Andrews Assocs. v. Sodibar Sys., 28 N.C. App. 663, 222 S.E.2d 922 (1976); Swenson v. All Am. Assurance Co., 33 N.C. App. 458, 235 S.E.2d 793 (1977); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978); Sawyer v. Cox, 36 N.C. App. 300, 244 S.E.2d 173 (1978); Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp., 36 N.C. App. 778, 245 S.E.2d 234 (1978); Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 40 N.C. App. 675, 253 S.E.2d 621 (1979); Broughton v. DuMont, 43 N.C. App. 512, 259 S.E.2d 361 (1979); Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980); Wheeler v. Roberts, 45 N.C. App. 311, 262 S.E.2d 829 (1980); Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980); Quattrone v. Rochester, 46 N.C. App. 799, 266 S.E.2d 40 (1980); Ellis v. Kimbrough, 47 N.C. App. 179, 266 S.E.2d 758 (1980); Brown v. Brown, 47 N.C. App. 323, 267 S.E.2d 345 (1980); Canterbury v. Monroe Lange Hardwood Imports, 48 N.C. App. 90, 268 S.E.2d 868 (1980); Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212 (1981); Terry v. Lowrance Hosp., 54 N.C. App. 663, 284 S.E.2d 128 (1981); In re Annexation Ordinance No. 1219, 62 N.C. App. 588, 303 S.E.2d 380 (1983); House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983); Bush v. BASF Wyandotte Corp., 64 N.C. App. 41, 306 S.E.2d 562 (1983); DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984); Lessard v. Lessard, 68 N.C. App. 760, 316 S.E.2d 96 (1984); Blackwell v. Massey, 69 N.C. App. 240, 316 S.E.2d 350 (1984); Drummond v. Cordell, 72 N.C. App. 262, 324 S.E.2d 301 (1985); White v. Graham, 72 N.C. App. 436, 325 S.E.2d 497 (1985); VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985); North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985); City of Raleigh v. College Campus Apts., Inc., 94 N.C. App. 280, 380 S.E.2d 163 (1989); Copley Triangle Assocs. v. Apparel Am., Inc., 96 N.C. App. 263, 385 S.E.2d 201 (1989); Sellers v. High Point Mem. Hosp., 97 N.C. App. 299, 388 S.E.2d 197 (1990); In re Adoption of P.E.P., 100 N.C. App. 191, 395 S.E.2d 133 (1990); Warzynski v. Empire Comfort Sys., 102 N.C. App. 222, 401 S.E.2d 801 (1991); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993); City of Charlotte v. Noles, 143 N.C. App. 181, 544 S.E.2d 585, 2001 N.C. App. LEXIS 217 (2001); Gibby v. Lindsey, 149 N.C. App. 470, 560 S.E.2d 589, 2002 N.C. App. LEXIS 216 (2002); Elkins v. Broome, 213 F.R.D. 273, 2003 U.S. Dist. LEXIS 3096 (M.D.N.C. 2003); Young v. Hair, — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 6551 (E.D.N.C. Jan. 26, 2004).

Cited in Crabtree v. Coats & Burchard Co., 7 N.C. App. 624, 173 S.E.2d 473 (1970); Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); Atkinson v. Tarheel Homes & Realty Co., 14 N.C. App. 638, 188 S.E.2d 703 (1972); Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972); Golding v. Taylor, 19 N.C. App. 245, 198 S.E.2d 478 (1973); Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); Fagan v. Hazzard, 29 N.C. App. 618, 225 S.E.2d 640 (1976); First Nat'l Bank v. General Funding Corp., 30 N.C. App. 172, 226 S.E.2d 527 (1976); Stephenson v. Jordan Volkswagen, Inc., 428 F. Supp. 195 (W.D.N.C. 1977); Byrum v. Register's Truck & Equip. Co., 32 N.C. App. 135, 231 S.E.2d 39 (1977); Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978); Equilease Corp. v. Belk Hotel Corp., 42 N.C. App. 436, 256 S.E.2d 836 (1979); Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979); Gemini Enters., Inc. v. WFMY Television Corp., 470 F. Supp. 559 (M.D.N.C. 1979); Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E.2d 858 (1980); Modern Globe, Inc. v. Spellman, 45 N.C. App. 618, 263 S.E.2d 859 (1980); Collins v. Edwards, 54 N.C. App. 180, 282 S.E.2d 559 (1981); Southgate v. Russ, 52 N.C. App. 364, 278 S.E.2d 313 (1981); Johnston v. Gilley, 50 N.C. App. 274, 273 S.E.2d 513 (1981); Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981); Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521 (1981); Smith v. Smith, 56 N.C. App. 812, 290 S.E.2d 390 (1982); Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786 (1984); Estrada v. Burnham, 74 N.C. App. 557, 328 S.E.2d 611 (1985); C.W. Matthews Contracting Co. v. State, 75 N.C. App. 317, 330 S.E.2d 630 (1985); Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986); Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986); Phillips Factors Corp. v. Harbor Lane of Pensacola, Inc., 648 F. Supp. 1580 (M.D.N.C. 1986); Humphrey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987); Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643 (1988); Brookshire v. Brookshire, 89 N.C. App. 48, 365 S.E.2d 307 (1988); Reagan v. Hampton, 700 F. Supp. 850 (M.D.N.C. 1988); Federal Land Bank v. Lackey, 94 N.C. App. 553, 380 S.E.2d 538 (1989); In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989); Greenville Buyers Mkt. Assocs. v. St. Petersburg Fashions, Inc., 97 N.C. App. 136, 387 S.E.2d 234 (1990); Williamson v. Savage, 104 N.C. App. 188, 408 S.E.2d 754 (1991); Lusk v. Crawford Paint Co., 106 N.C. App. 292, 416 S.E.2d 207 (1992); Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429 (1993); Nissan Div. of Nissan Motor Corp. in United States v. Nissan, 111 N.C. App. 748, 434 S.E.2d 224 (1993); In re Baby Boy Dixon, 112 N.C. App. 248, 435 S.E.2d 352 (1993); McArdle Corp. v. Patterson, 115 N.C. App. 528, 445 S.E.2d 604 (1994); Jones v. Summers, 117 N.C. App. 415, 450 S.E.2d 920 (1994); Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994); Locklear v. Scotland Mem. Hosp., 119 N.C. App. 245, 457 S.E.2d 764 (1995); Better Bus. Forms, Inc. v. Davis, 120 N.C. App. 498, 462 S.E.2d 832 (1995); Hemmings v. Green, 122 N.C. App. 191, 468 S.E.2d 278 (1996); Walker Frames v. Shively, 123 N.C. App. 643, 473 S.E.2d 776 (1996); Tierney v. Garrard, 124 N.C. App. 415, 477 S.E.2d 73 (1996); Williams v. Hinton, 127 N.C. App. 421, 490 S.E.2d 239 (1997); Riddick v. Myers, 131 N.C. App. 871, 509 S.E.2d 469 (1998); Osborne v. Osborne, 129 N.C. App. 34, 497 S.E.2d 113 (1998); Goodwin v. Furr, 25 F. Supp. 2d 713 (M.D.N.C. 1998); State ex rel. Barker v. Ellis, 144 N.C. App. 135, 547 S.E.2d 166, 2001 N.C. App. LEXIS 327; Piedmont Rebar, Inc. v. Sun Constr., Inc., 150 N.C. App. 573, 564 S.E.2d 281, 2002 N.C. App. LEXIS 583 (2002); Old Salem Foreign Car Serv., Inc. v. Webb, 159 N.C. App. 93, 582 S.E.2d 673, 2003 N.C. App. LEXIS 1426 (2003); A.H. Beck Found. Co. v. Jones Bros., 166 N.C. App. 672, 603 S.E.2d 819, 2004 N.C. App. LEXIS 2023 (2004); Adams v. Bank United of Tex. FSB, 167 N.C. App. 395, 606 S.E.2d 149, 2004 N.C. App. LEXIS 2384 (2004); Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005); In re H.T., 180 N.C. App. 611, 637 S.E.2d 923, 2006 N.C. App. LEXIS 2497 (2006); Smith v. Jones, — N.C. App. —, 645 S.E.2d 198, 2007 N.C. App. LEXIS 1157 (2007); In re Summons Issued to Ernst & Young, LLP, 191 N.C. App. 668, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (2008); Cambridge Homes of N.C. L.P. v. Hyundai Constr., Inc., — N.C. App. —, 670 S.E.2d 290, 2008 N.C. App. LEXIS 2242 (2008); Sharyn's Jewelers, LLC v. Ipayment, Inc., — N.C. App. —, 674 S.E.2d 732, 2009 N.C. App. LEXIS 362 (2009); Insulation Sys. v. Fisher, — N.C. App. —, 678 S.E.2d 357, 2009 N.C. App. LEXIS 699 (2009).

II. PERSONAL SERVICE ON NATURAL PERSONS.

A. In General.

The purpose of section (d) of this rule is only to keep the action alive by means of an endorsement on the original summons or by issuance of an alias or pluries summons in situations where the original, properly directed summons was not yet served. Roshelli v. Sperry, 63 N.C. App. 509, 305 S.E.2d 218, cert. denied, 309 N.C. 633, 308 S.E.2d 716 (1983).

Section (j) of this rule is tied closely to the new jurisdiction statute, § 1-75.1 et seq., and the two are complementary to one another. While the jurisdiction statute greatly liberalizes the grounds for jurisdiction, the rules regarding service of process are tightened, to ensure, as much as possible, that the defendant receives actual notice of the controversy. Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971).

The service of process requirements of section (j) of this rule are mandatory. Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983), rev'd on other grounds, 311 N.C. 536, 319 S.E.2d 912 (1984).

Subdivision (j)(1)a must be strictly construed, and the prescribed procedure must be strictly followed; unless the specified requirements are complied with, there is no valid service. Guthrie v. Ray, 31 N.C. App. 142, 228 S.E.2d 471 (1976), rev'd on other grounds, 293 N.C. 67, 235 S.E.2d 146 (1977).

Rebuttable Presumption from Return Showing Legal Service Under Subdivision (j)(1)a. — When the officer's return on the summons shows legal service under subdivision (j)(1)a, a rebuttable presumption of valid service of process is credited. Guthrie v. Ray, 31 N.C. App. 142, 228 S.E.2d 471 (1976), rev'd on other grounds, 293 N.C. 67, 235 S.E.2d 146 (1977).

When the officer's return of the summons shows legal service a presumption of valid service of process is created. Greenup v. Register, 104 N.C. App. 618, 410 S.E.2d 398 (1991).

Evidence of Backdated Signature Voids Judgment. — Wife who agreed to husband's request that she backdate her signature on the "Acceptance of Service" submitted sufficient testimony that she did so in support of her motion to set aside a judgment of absolute divorce on the grounds that the trial court was without jurisdiction to adjudicate the absolute divorce prior to the expiration of the requisite 30 (now 60) days. Latimer v. Latimer, 136 N.C. App. 227, 522 S.E.2d 801, 1999 N.C. App. LEXIS 1313 (1999), decided prior to 2001 amendment to subsection (c).

Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed. Glover v. Farmer, 127 N.C. App. 488, 490 S.E.2d 576 (1997), cert. denied, 347 N.C. 575, 502 S.E.2d 590 (1998).

Where the employee failed to serve the individual employers with a copy of the summons and complaint, the trial court did not have personal jurisdiction over the individual employers, and thus the court's order setting aside a summary judgment was void ab initio and could be attacked at any time. Van Engen v. Que Scientific, Inc., 151 N.C. App. 683, 567 S.E.2d 179, 2002 N.C. App. LEXIS 871 (2002).

Minimum Contacts Analysis Not Necessary When Defendant Is Served Within State. — Although the minimum contacts analysis has been consistently applied to cases in which nonresident defendants were served with process outside this State, such minimum contacts analysis is not necessary when the defendant is personally served while present within this State. Lockert v. Breedlove, 321 N.C. 66, 361 S.E.2d 581 (1987).

Personal Service on Nonresident Within This State Is Sufficient. — The rule continues to be that personal service on a nonresident party, at a time when that party is present in the forum state, suffices in and of itself to confer personal jurisdiction over that party. Lockert v. Breedlove, 321 N.C. 66, 361 S.E.2d 581 (1987).

Service While Visiting Parents. — Service made at defendant's parents' house while defendant was visiting her parents was valid as defendant was "residing" at her parents home. Glover v. Farmer, 127 N.C. App. 488, 490 S.E.2d 576 (1997), cert. denied, 347 N.C. 575, 502 S.E.2d 590 (1998).

Service on Sole Proprietorship. — Service of process was defective where plaintiff failed to comply with the mandatory requirements of subdivision (j)(1) of this rule for service of process on a sole proprietorship, and attempted service instead on such proprietorship as an association under subdivision (j)(8) of this rule by delivering the complaint and summons by registered mail addressed to executive manager. The fact that executive manager signed the registered mail receipt and may have thereafter acquired actual notice of the lawsuit does not remedy the failure of plaintiff to comply with subdivision (j)(1) of this rule. Park v. Sleepy Creek Turkeys, Inc., 60 N.C. App. 545, 299 S.E.2d 670 (1983).

Service on Partners — Purpose of Subdivision (j)(7)b. — The purpose of subdivision (j)(7)b of this rule is to provide notice of the commencement of an action to the individual partner, so that he may protect his interests, and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 318 N.C. 511, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

Same — Service of Summons Prerequisite to Individual Liability. — Actual notice of a suit against the partnership will not cure the requirement that a partner must be served with a summons to be held individually liable. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 318 N.C. 511, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

Each partner in a partnership is jointly and severally liable for a tort committed in the course of the partnership business, and the injured party may sue all members of the partnership or any one of them at his election. But a partner who is not served with summons is not bound beyond his partnership assets. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 318 N.C. 511, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

General partner who was not made a party to the defendant's counterclaim or served with a copy of a summons, could not be held personally liable for a judgment against the partnership. Post & Front Properties, Ltd. v. Roanoke Constr. Co., 117 N.C. App. 93, 449 S.E.2d 765 (1994).

Same — Effect of Verification of Answer. — Defendant partner's verification of original answer where he was sued in his partnership capacity did not subject him to individual liability. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 318 N.C. 511, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

Same — Effect of Participation in Suit. — A partner who participates in a malpractice suit by acquainting himself with the facts of the pending suit and notifying his insurance carrier of the suit does not subject himself to individual liability when the Rules of Civil Procedure require that he be served with process individually before being held individually liable. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 318 N.C. 511, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

Alias and pluries summons served personally on a nonresident defendant while present in this State were held not to be issued on a different person and therefore related back to the original summons where the original summons had been properly served upon the Commissioner of Motor Vehicles pursuant to G.S. 1-105. Smith v. Schraffenberger, 90 N.C. App. 589, 369 S.E.2d 90, cert. denied, 323 N.C. 366, 373 S.E.2d 549 (1988).

General Appearance by Defendant Conferred Jurisdiction. — Even if the court had not already obtained jurisdiction over defendant by serving him with process by registered mail in compliance with this rule, by contesting both the notice to take his deposition and the show cause motion on grounds other than the court's lack of jurisdiction over him, defendant made a general appearance in the proceeding and thus submitted himself to the jurisdiction of the court. M.G. Newell Co. v. Wyrick, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

Nonresident Motorists. — In suits involving nonresident drivers of motor vehicles, service upon the nonresident driver may be accomplished by personal service pursuant to subsection (j) of this rule or by service upon the Commissioner of Motor Vehicles under G.S. 1-105. Smith v. Schraffenberger, 90 N.C. App. 589, 369 S.E.2d 90, cert. denied, 323 N.C. 366, 373 S.E.2d 549 (1988).

Where individuals are doing business as a partnership under a firm name, such firm is described in an action as a corporation, and process is served on a member of the partnership, members of the partnership may be substituted by amending the process and allowing the pleading to be amended. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Defendant was personally served with a summons, although that summons was addressed to another defendant, the caption of which listed his name first among the defendants being sued, and in fact his name appeared twice in the caption as he was named both individually and as a part of the law firm. Any person served in this manner would make further inquiry personally or through counsel if he had any doubt that he was being sued and would be required to answer the complaint when it was filed, which would have revealed the existence of a summons directed to him and purporting on its face to have been served upon him and would have established his duty to appear and answer. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Personal Out-of-State Service by Summons Upheld. — Where a third-party defendant, resident of California, allegedly committed a tort while working in North Carolina, personal service by summons delivered to him by a U.S. Marshall in California according to G.S. 1-75.3, G.S. 1-75.4 and subdivision (j)(1)a and former subdivision (j)(9)a of this rule satisfied the traditional notions of fair play and substantial justice required by the due process clause of U.S. Const., Amend. XIV. Bowdach v. Frontierland, Inc., 347 F. Supp. 233 (W.D.N.C. 1972).

Separate Houses on Same Farm. — Defendant and his parents shared the same dwelling and place of abode, for purposes of subdivision (j)(1)a of this rule, where they lived on the same farm, owned by the parents, although they occupied separate houses, about 60 to 100 yards apart. Bowers v. Billings, 80 N.C. App. 330, 342 S.E.2d 58 (1986).

Actions Constituting Effectual Service. — The placing of envelope addressed to defendant and containing summons and complaint on the seat of a nearby pickup truck, presumed to be defendant's but actually one driven by his employee, as defendant watched, after defendant refused to accept service of same, where defendant's employee found the envelope and delivered it to defendant's wife the next day, constituted effectual service on defendant, in view of the fact that service had previously been attempted upon him by certified mail, restricted delivery, which service had been refused. Currie v. Wood, 112 F.R.D. 408 (E.D.N.C. 1986).

Evidence was sufficient to find that the plaintiff exercised due diligence in attempting to ascertain the address or whereabouts of defendant where plaintiff's counsel attempted service at two available addresses, consulted the local telephone directory and the department of motor vehicles to obtain information, contacted the defendant's insurer and attorney seeking information as to defendant's whereabouts and finally wrote the California Department of Motor Vehicles based on a statement by defendant's sister that he was "out west, possibly California." Winter v. Williams, 108 N.C. App. 739, 425 S.E.2d 458 (1993).

Because G.S. 7B-1102(b) merely directed the Department of Social Services (DSS) to serve the motion and notice pursuant to G.S. 1A-1-4, and nowhere suggested that the DSS had to issue a summons instead of or in addition to those documents, there was violation because of a failure to issue a summons. In re D.R.S., 181 N.C. App. 136, 638 S.E.2d 626, 2007 N.C. App. LEXIS 23 (2007).

Waiver of Right to Challenge Jurisdiction. — Assuming, without deciding, that the service required by former G.S. 55-71(c), relating to determining the validity of the election or appointment of corporate directors or officers, had to be made in the manner required by section (j) of this rule, respondents waived their right to challenge personal jurisdiction where they each received a copy of the petition and notice of hearing from petitioner's counsel more than 10 days prior to the hearing, made a joint response to the petition requesting that the court declare the entire election void, but did not assert any defense of insufficiency of service of process, and appeared at the hearing and participated fully. Stancil v. Bruce Stancil Refrigeration, Inc., 81 N.C. App. 567, 344 S.E.2d 789, cert. denied, 318 N.C. 418, 349 S.E.2d 601 (1986), appeal dismissed, 94 N.C. App. 760, 381 S.E.2d 720 (1989).

Juvenile petition was filed June 11, 2004, and the summons was issued four days later, but the summons was returned by the sheriff on June 30, 2004, unserved; on July 8, 2004, the mother attended a hearing regarding the allegations her minor child was neglected and dependent. The mother was not only present in court, but also agreed to continue the matter until July 22, 2004, and there was no evidence that the mother raised any objection at that hearing regarding insufficient service of process or personal jurisdiction; thus, her actions amounted to waiver of her right to challenge the trial court's exercise of personal jurisdiction over her regardless of whether she was served with a juvenile summons in compliance with G.S. 1A-1-4. In re A.J.M., 177 N.C. App. 745, 630 S.E.2d 33, 2006 N.C. App. LEXIS 1220 (2006).

Forged Signature on Acceptance of Service. — Divorce judgment was declared void pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b) for lack of service when the wife proved that her signature was forged on the acceptance of service filed pursuant to G.S. 1A-1, N.C. R. Civ. P. 4(j5) and that she and her husband had continued to live and conduct themselves as husband and wife after the divorce. Freeman v. Freeman, 155 N.C. App. 603, 573 S.E.2d 708, 2002 N.C. App. LEXIS 1575 (2002), cert. denied, 357 N.C. 250, 582 S.E.2d 32 (2003).

Service Held Insufficient. — Where plaintiff apparently undertook to have defendant served pursuant to subdivision (j)(1) of this rule, but the receipt for certified mail included in the record stated that notice was sent to her in care of McBess Industries, and the record did not disclose that McBess Industries was an agent of defendant or that the receipt was signed by defendant or McBess Industries, defendant did not have proper notice of plaintiff's motion for summary judgment, and the judgment against her would be vacated. Oak Island Southwind Realty, Inc. v. Pruitt, 89 N.C. App. 471, 366 S.E.2d 489 (1988).

Where plaintiff did not deliver endorsed summons to some proper person for service as required by section (a) of this rule, unconscionable delay was most critical to defendant, and there was no contention that defendant was unavailable for service, the trial judge properly dismissed plaintiff's action pursuant to G.S. 1A-1, Rule 41(b) based upon plaintiff's violation of section (a) of this rule for the purposes of delay and in order to gain an unfair advantage over the defendant. Smith v. Quinn, 324 N.C. 316, 378 S.E.2d 28 (1989).

Trial court properly granted a driver's motion pursuant to G.S. 1A-1, N.C. R. Civ. P. 12, to dismiss a personal injury action arising from an automobile accident, because the injured party failed to properly serve the driver pursuant to G.S. 1A-1, N.C. R. Civ. P. 4, and the driver did not make a general appearance by requesting an extension of time pursuant to G.S. 1-75.7, so the trial court lacked personal jurisdiction. Zellars v. McNair, 166 N.C. App. 755, 603 S.E.2d 826, 2004 N.C. App. LEXIS 2024 (2004), cert. denied, — N.C. —, 614 S.E.2d 925 (2005).

Termination of a mother's parental rights pursuant to G.S. 7B-1111(a)(1) was vacated because the mother was not provided notice of the termination hearing as required by G.S. 7B-1106, as there was no evidence that the addresses to which notices were sent were the mother's dwelling, and this fact, along with the fact that the mother did not attend the hearing or respond in any way, refuted the presumption of valid service under G.S. 1A-1-4(j)(2). In re K.N., 181 N.C. App. 736, 640 S.E.2d 813, 2007 N.C. App. LEXIS 376 (2007).

B. Delivery to Person Residing at Defendant's Usual Abode.

Where service is had by leaving summons and complaint with a person other than named defendant, the substitute person must be a "person of suitable age and discretion," who lives with defendant in his "dwelling house or usual place of abode," and the summons must be left with the substitute person at such usual place of abode. If delivery is made elsewhere, the service is invalid. Guthrie v. Ray, 293 N.C. 67, 235 S.E.2d 146 (1977).

Where Plaintiff and Defendant Share Abode. — North Carolina's service of process statute does not permit a wife who sues her husband to accept service on his behalf when she lives in the same house as he does. Darby v. Darby, 135 N.C. App. 627, 521 S.E.2d 741, 1999

N.C. App. LEXIS 1188 (1999).

More Than One Dwelling House or Usual Place of Abode Possible. — It is unrealistic to interpret subdivision (j)(1)a of this rule so that the person to be served only has one dwelling house or usual place of abode at which process may be left. Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975), overruled on other grounds in Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

Separate Houses on Same Farm. — Defendant and his parents shared the same dwelling and place of abode, for purposes of subdivision (j)(1)a of this rule, where they lived on the same farm, owned by the parents, although they occupied separate houses, about 60 to 100 yards apart. Bowers v. Billings, 80 N.C. App. 330, 342 S.E.2d 58 (1986).

As to fifteen-year-old boy being "person of suitable age and discretion" within subdivision (j)(1)a of this rule, see Van Buren v. Glasco, 27 N.C. App. 1, 217 S.E.2d 579 (1975), overruled on other grounds in Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

Delivery to Relation of Defendants at Place of Business. — Delivery of summons to a person who was the son of one defendant and brother of the other at defendants' place of business instead of defendants' respective residences was not in compliance with subdivision (j)(1)a, and jurisdiction over defendants was not thereby obtained. Hall v. Lassiter, 44 N.C. App. 23, 260 S.E.2d 155 (1979), cert. denied, 299 N.C. 330, 265 S.E.2d 395 (1980).

Delivery to Mother in Another County. — Service of process on one defendant was invalid where summons and complaint were handed to his mother, also a defendant, with whom he resided in Union County, after she voluntarily accompanied a deputy sheriff from her residence to Mecklenburg County where she was served with process herself. Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

Delivery to Sister. — Where the evidence tended to show that service upon one of the individual defendants was attempted by delivering copies of the summons and complaint to his sister, who neither resided with him nor was present in his home when the papers were delivered to her, such evidence was sufficient to support the trial court's findings that defendant was not properly served. Tinkham v. Hall, 47 N.C. App. 651, 267 S.E.2d 588 (1980).

Delivery to Brother. — Testimony of deputy and his two returns of service were competent evidence which would support the trial court's finding that defendant resided at the address in question with his brother, and that his brother was a person of suitable age and discretion to accept service. Olschesky v. Houston, 84 N.C. App. 415, 352 S.E.2d 884 (1987).

Attempted service on defendant's wife at hospital at which defendant was a patient rather than at his dwelling house or usual place of abode failed to comply with subdivision (j)(1)a of this rule and was invalid. Stone v. Hicks, 45 N.C. App. 66, 262 S.E.2d 318 (1980).

C. Service by Registered or Certified Mail.

Service by Registered Mail Complies with Due Process. — Service by registered mail is reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections, and therefore complies with due process requirements. Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E.2d 676 (1974).

Contempt Statute Requirement Satisfied by Service Under Subdivision (j)(1)c. — Where, pursuant to subdivision (j)(1)c, court issued an order notifying a foreign attorney of contempt charges and allowing him 60 days to respond to the charges, and mailed the order to the attorney at the address he gave the court in a motion to be admitted in a case pro hac vice, this method of service was proper to comply with the requirement of G.S. 5A-15(a) that a copy of the order must be furnished to the person charged, where the court had personal jurisdiction as provided in G.S. 1-75.4. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23, rev'd on other grounds, 301 N.C. 621, 272 S.E.2d 834 (1980).

The language of former subdivision (j)(1)c and subsection (j)(9) of this rule makes no reference to home or office; it requires simply that a complaint sent by certified mail be addressed to the party to be served, and be delivered to the addressee only. Waller v. Butkovich, 584 F. Supp. 909 (M.D.N.C. 1984).

Service of Process by Registered Mail Held Proper. — Where the trial court had jurisdiction over nonresident defendant by reason of a contract to convey land situated in North Carolina, substituted service of process by registered mail, return receipt requested, was a proper means of acquiring personal jurisdiction over defendant, and the requirements of due process and notice were afforded him. Chadbourn, Inc. v. Katz, 21 N.C. App. 284, 204 S.E.2d 201, aff'd, 285 N.C. 700, 208 S.E.2d 676 (1974).

Service by Certified Mail on Prison Inmate. — In a proceeding for termination of paternal rights, certified mail return receipt and defendant father's filed petition showed sufficient compliance with the service of process rules to raise a rebuttable presumption of valid service, which defendant did not rebut, where: (1) copies of the summons and complaint were sent by certified mail to the correctional institution where defendant was an inmate; (2) a certified receipt was signed and returned, presumably by a prison employee of suitable age and discretion authorized to sign the receipt on behalf of defendant; and (3) 18 days after service, defendant filed a petition for appointment of counsel. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

Presumption of Service of Request Proper. — Plaintiff was presumed to have been properly served with request for admissions, despite denying receipt, where defendants presented a copy of a return receipt signed by the defendant's husband, plaintiff conceded it was sent to the correct address, and plaintiff made no attempt to rebut receipt when questioned by the trial court. Goins v. Puleo, 350 N.C. 277, 512 S.E.2d 748 (1999).

Service by Certified Letter Insufficient. — Where plaintiff's sole attempt at personal service of notice consisted of a certified letter mailed to the business address of a partnership, a postal box number, this solitary venture constituted neither application of "due diligence" as required by subsection (j1) nor a "reasonable and diligent effort" as required by G.S. 45-21.16(a). Barclays American/Mortgage Corp. v. BECA Enters., 116 N.C. App. 100, 446 S.E.2d 883 (1994).

Affidavit Mandatory. — Requirement of an affidavit containing information showing the circumstances warranting the use of service by registered mail under former subdivision (j)(9)b, which affidavit constituted proof of service, was mandatory. Dawkins v. Dawkins, 32 N.C. App. 497, 232 S.E.2d 456 (1977).

Affidavit by Spouse on Service Sufficient in Divorce Action. — District court properly acquired personal jurisdiction over a defending wife in a divorce action based on the husband's affidavit of service by certified mail and attachments thereto with the wife's signature appearing thereon that the summons and complaint were personally served upon the wife. Wilson v. Wilson, 191 N.C. App. 789, 666 S.E.2d 653, 2008 N.C. App. LEXIS 1479 (2008).

Service in Foreign Countries. — Service of summons addressed to the defendant in care of his mother at an address in South Africa, the home of defendant's brother, was sufficient where clerk's certificate reflected that the return receipt indicated the complaint and summons were in fact received at the stated address by the individual whose signature appeared thereon. Hocke v. Hanyane, 118 N.C. App. 630, 456 S.E.2d 858 (1995).

Reception by Agent. — The requirements for service of process were met, where service of process by certified mail addressed to the defendant at his law office was received and signed for by his employee and then directed to the defendant. Fender v. Deaton, 130 N.C. App. 657, 503 S.E.2d 707 (1998).

Regarding a breach of contract action filed against an individual and his business entities, where a civil summons addressed to the individual was sent to him via U.S. Postal Service by certified mail, return receipt requested; the summons was delivered and a signature was obtained on the registry receipt; and the medical center executed an affidavit attesting to such facts, attaching the registry receipt bearing a signature showing delivery of the summons, such uncontradicted evidence complied with the statutory requirements of G.S. 1A-1, Rule 4 and gave rise to the rebuttable presumption under G.S. 1A-1, Rule 4(j2)(2) of proper service. Granville Med. Ctr. v. Tipton, 160 N.C. App. 484, 586 S.E.2d 791, 2003 N.C. App. LEXIS 1826 (2003).

Reception by Mother. — Trial court erred in granting defendant's motion to dismiss plaintiff's negligence action for improper service of process because by filing a copy of the signed return receipt, along with an affidavit that comported with G.S. 1-75.10, plaintiff was entitled to a rebuttable presumption of valid service. Defendant did not state or otherwise present any evidence that his mother, who signed for the civil summons and complaint, was not authorized to accept service for him; the G.S. 1A-1-4(j)(1)(c) requirements for service of process were met. Carpenter v. Agee, 171 N.C. App. 98, 613 S.E.2d 735, 2005 N.C. App. LEXIS 1164 (2005).

For case holding that one can be held to answer without production of actual registry return receipt, see Sparrow v. Goodman, 376 F. Supp. 1268 (W.D.N.C. 1974), decided under former subsection (j)(9).

III. SERVICE ON COUNTIES, MUNICIPALITIES AND OTHER LOCAL PUBLIC BODIES.

Notice of Service. — Library patron's service to a regional library system was proper even though he misnamed the system because it was a simple misnomer and the system clearly had notice of the action and should have known that the action was brought against the system based on the enforcement of its Internet policy. Miller v. Northwest Region Library Bd., 348 F. Supp. 2d 563, 2004 U.S. Dist. LEXIS 25403 (M.D.N.C. 2004).

Service of process is not legally defective simply because the complaint misnames the defendant in some insignificant way, because a suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice, and the purpose of process is to bring parties into court; if the complaint names the defendant in such terms that every intelligent person understands who is meant, it has fulfilled its purpose, and courts should not put themselves in the position of failing to recognize what is apparent to everyone else. Miller v. Northwest Region Library Bd., 348 F. Supp. 2d 563, 2004 U.S. Dist. LEXIS

25403 (M.D.N.C. 2004).

Substituted Personal Service. — Subsection (j)(5) of this rule does not provide for substituted personal process on any persons other than those named in provisions (j)(5)a and (j)(5)d. Johnson v. City of Raleigh, 98 N.C. App. 147, 389 S.E.2d 849 (1990).

Personal Service on Acting City Manager. — Two affidavits relevant to personal delivery to acting city manager, one of those persons named in subdivision (j)(5)a of this rule, established valid service on city for purposes of a negligence action. Crabtree v. City of Durham, 136 N.C. App. 816, 526 S.E.2d 503, 2000 N.C. App. LEXIS 151 (2000).

County attorney is not authorized to accept service for the county. Service on the county manager or on the chairman, clerk or any member of the board of commissioners is necessary for service upon the county to be effective. In re Brunswick County, 81 N.C. App. 391, 344 S.E.2d 584 (1986).

Service by Mail. — Service is effected on local public units and bodies by mailing a copy of the summons and complaint to an officer, director, agent, or attorney of the body authorized to accept service on its behalf pursuant to G.S. 1A-1, Rule 4(j)(5)(c). Miller v. Northwest Region Library Bd., 348 F. Supp. 2d 563, 2004 U.S. Dist. LEXIS 25403 (M.D.N.C. 2004).

County Hospital Authority. — Defendant hospital's motion to dismiss for insufficiency of process and insufficiency of service of process would be denied without prejudice to file a renewed motion if plaintiffs did not properly serve defendant within ten days of filing of court's order, where defendant was misnamed, in that the caption read "Onslow Memorial Hospital, Incorporated," while defendant's actual name was the "Onslow County Hospital Authority," and where the complaint was served on the hospital administrator, who was not authorized to accept service for the hospital, since dismissal is not justified where it appears that service can be properly made. Coastal Neuro-Psychiatric Assocs. v. Onslow County Hosp. Auth., 607 F. Supp. 49 (E.D.N.C. 1985).

Leaving Process with Spouse Not Permitted Under Subdivision (j)(5)c. — The service of process in subdivision (j)(5)c of this rule explicitly requires personal service on certain named officials or agents, and does not permit leaving the process with other persons, even spouses, as is allowed where the action is against a "natural" person. Long v. Cabarrus County Bd. of Educ., 52 N.C. App. 625, 279 S.E.2d 95 (1981).

The court erred in exercising jurisdiction over the Employment Security Commission, which was never properly served with process, did not consent to personal jurisdiction, and did not voluntarily appear in the case. Croom v. State Dep't of Commerce, 143 N.C. App. 493, 547 S.E.2d 87, 2001 N.C. App. LEXIS 297 (2001).

Service Requirements for a Petition for Judicial Review of an Agency Decision—. — Conn. Gen. Stat. § 150B-46 deals with the service of a petition for judicial review of an agency decision, while G.S. 1A-1, N.C. R. Civ. P. 4 applies generally to service in all civil matters; since § 150B-46 is more specific and there is no legislative intent to the contrary, its terms control the service requirements for a petition for judicial review of an agency decision. Follum v. N.C. State Univ., — N.C. App. —, 679 S.E.2d 420, 2009 N.C. App. LEXIS 1173 (July 21, 2009).

IV. SERVICE ON CORPORATIONS.

Subdivision (j)(6)a is like federal Rule 4(d)(3) in that it provides for service on a foreign corporation by delivery of the summons to a "managing agent." Witcher v. Mac Tools, Inc., 62 F.R.D. 708 (M.D.N.C. 1974).

Subdivision (j)(6)a has the same scope as federal Rule 4(d)(3), as it only covers "managing agent," and not any other agent, either expressly or impliedly authorized. Witcher v. Mac Tools, Inc., 62 F.R.D. 708 (M.D.N.C. 1974).

Subdivision (j)(6)b Contrasted with Federal Rule. — While subdivision (j)(6)b of this rule permits service on a corporation by serving process upon an agent authorized by appointment or by law in a manner specified by any statute, the federal rule requires service on the corporation itself, "in the manner prescribed by any statute." Thus, under North Carolina law any statute setting forth alternative means of serving such an agent may be considered, while under federal law consideration is limited to statutes providing means of serving corporations. Great Dane Trailers, Inc. v. North Brook Poultry, Inc., 35 N.C. App. 752, 242 S.E.2d 533 (1978).

To Whom Process May Be Delivered for Service on Corporation. — When service of process is made upon a corporation, the summons must be served upon a person who is either an officer, director, or managing agent of the corporation, or one managing his office at the time, an agent expressly or impliedly appointed by the corporation to receive process, an agent specified by statute to receive service, an agent implied in law, or an agent by estoppel. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

When the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons, when properly served upon an officer, director or agent is adequate to bring the corporate defendant within the trial court's jurisdiction. Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983), rev'd on other grounds, 311 N.C. 536, 319 S.E.2d 912 (1984).

Plaintiff adequately complied with the service of process requirements outlined in sections (b) and (j) of this rule, where plaintiff attempted to serve defendant by its registered agent, an attorney, without specifically stating it was serving her as the agent of the defendant. RPR & Assocs. v. State, 139 N.C. App. 525, 534 S.E.2d 247, 2000 N.C. App. LEXIS 977 (2000), aff'd, 353 N.C. 543, 543 S.E.2d 480 (2001).

Defendant store's motion to dismiss stated with sufficient particularity the grounds alleged by citing G.S. 1A-1, Rule 12(b)(4) and 12(b)(5) and specified that plaintiffs, a husband and wife, failed to properly serve it as a corporation and instead served a mailroom employee; fact that the store filed the affidavit of the mailroom employee after its motion was insignificant, because the trial court gave plaintiffs the opportunity to respond and oppose the amended motion. Lane v. Winn-Dixie Charlotte, Inc., 169 N.C. App. 180, 609 S.E.2d 456, 2005 N.C. App. LEXIS 537 (2005).

Service against defendant employer was not effected sufficiently since the manager that accepted service was not in fact an appropriate agent to receive service (the manager did not have the broad executive responsibilities expected of an agent designated to receive service, nor did she serve as an officer or a managing or general agent of the employer). McDaniel v. Greyhound Lines, Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 58299 (W.D.N.C. July 7, 2008).

Amendment of Process to Change Party from Corporation to Individual. — In general, courts are more reluctant to permit amendment of process or pleadings to change a description of a party as an individual or partnership to that of a corporation than they are to permit amendment to change the description of a party as a corporation to that of an individual or partnership, because of the prescribed statutory method of serving a corporation. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Subsection (j)(6) contemplates service on agents either expressly or impliedly appointed by the corporation as agents to receive process. Simms v. Mason's Stores, Inc., 18 N.C. App. 188, 196 S.E.2d 545 (1973), rev'd on other grounds, 285 N.C. 145, 203 S.E.2d 769 (1974).

The phrase "an agent authorized . . . by law to be served" includes within its scope State statutes vesting authority in certain persons to receive process, agencies implied in law, and agencies by estoppel. Simms v. Mason's Stores, Inc., 18 N.C. App. 188, 196 S.E.2d 545 (1973), rev'd on other grounds, 285 N.C. 145, 203 S.E.2d 769 (1974).

Subdivision (j)(6)a does not require that the person upon whom summons is served be in fact in charge of the office of the officer, director or managing agent of the corporation, but merely that the person be "apparently in charge." Williams v. Burroughs Wellcome Co., 46 N.C. App. 459, 265 S.E.2d 633 (1980).

Under this rule, service may be had on a corporation by leaving a copy of the summons and complaint in the office of the president of the corporation with the person who is apparently in charge of the office. Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974).

Who Is "Managing Agent". — The question of who may be a "managing agent" upon whom service of process is authorized depends upon the facts and circumstances of the particular case, and the trial court's finding that a personnel manager was an employee in a "management position" of defendant does not resolve that question. Williams v. Burroughs Wellcome Co., 46 N.C. App. 459, 265 S.E.2d 633 (1980).

A general or managing agent must be invested with powers of discretion and must exercise judgment in his duties, rather than being under direct superior control as to the extent of his duty and the manner in which he executes it. Witcher v. Mac Tools, Inc., 62 F.R.D. 708 (M.D.N.C. 1974).

Managing Agent Must Have More Than Sporadic Authority. — It is reasonable to expect that a managing agent will have broad executive responsibilities and that his relationship will reflect a degree of continuity. Authority to act as agent sporadically or in a single transaction ordinarily does not satisfy this provision of the rule. Witcher v. Mac Tools, Inc., 62 F.R.D. 708 (M.D.N.C. 1974).

Local Distributor Not Managing Agent. — The role played by a local distributor in assigning territory and assisting the distributors within his overall territory, from whose sales he receives a commission as an independent contractor, does not make him a "managing agent" within the meaning of this rule. Witcher v. Mac Tools, Inc., 62 F.R.D. 708 (M.D.N.C. 1974).

Service on Security Officer of Corporation-Owned Store. — Attempted service upon defendant corporation in an assault action by delivery of summons and complaint to a security officer who was standing near a cash register in defendant's place of business, whom deputy sheriff had seen as a court witness for defendant, and on whom the deputy had served subpoenas on prior occasions, was void, and the trial court did not obtain jurisdiction over defendant thereby, since the security officer was not an officer, director or managing agent of defendant's store, nor was he a person apparently in charge in the manager's office, an agent authorized to accept service by appointment or an agent authorized to accept service by law under subsection (j)(6) of this rule. Simms v. Mason's Stores, Inc., 18 N.C. App. 188, 196 S.E.2d 545 (1973), rev'd on other grounds, 285 N.C. 145, 203 S.E.2d 769 (1974).

Substitute Service Improper. — Where plaintiff's attorney had actual knowledge of an address where defendant could be served and did not attempt to serve defendant at the known address, substitute service of process on the Secretary of State was ineffective and violated defendant's due process rights. Interior Distribs., Inc. v. Hartland Constr. Co., 116 N.C. App. 627, 449 S.E.2d 193 (1994).

Service on Division of Corporation Not Service on Corporation. — Complaint and summons directed to a defendant named as "MICHIGAN TOOL COMPANY, A Division of Ex-Cell-O Corporation" is not service on the entity Ex-Cell-O Corporation, even if the complaint and summons reach the hands of someone obligated to receive service in behalf of Ex-Cell-O, since Ex-Cell-O was not a named party defendant. Crawford v. Aetna Cas. & Sur. Co., 44 N.C. App. 368, 261 S.E.2d 25 (1979), cert. denied, 299 N.C. 329, 265 S.E.2d 394 (1980).

Service on Insurance Companies. — Although the Motor Vehicle Safety and Financial Responsibility Act, G.S. 20-279.1 et seq., does not expressly require that separate process be issued for an uninsured motorist carrier, it does specifically require that a "copy" of the summons and complaint be served on the insurer, and the appellate courts have required strict compliance with the statutes that provide for service of process on insurance companies. Thomas v. Washington, 136 N.C. App. 750, 525 S.E.2d 839, 2000 N.C. App. LEXIS 154 (2000).

Presumption of Proper Service Rebutted. — Defendant successfully rebutted presumption that plaintiff's attempted service was proper under subdivision (j)(6)c of this rule, because defendant proved that the person who received and signed for service was not acting as an agent for defendant and was not authorized to receive and sign for certified mail. Triad Motorsports, L.L.C. v. Pharbco Mktg. Group, Inc., 104 F. Supp. 2d 590, 2000 U.S. Dist. LEXIS 5123 (M.D.N.C. 2000).

Presumption of Proper Service Not Rebutted. — Corporation's affidavit, submitted pursuant to G.S. 1-75.10(4), was insufficient to rebut the presumption of service of process under G.S. 1A-1, N.C. R. Civ. P. 4(j)(2) because the corporation's evidence that service was not made was equivocal in nature; because 28 U.S.C.S. § 1446(b) was to be construed narrowly, the court refused to exercise its discretion in overlooking the 30-day time limit requirement for notice of removal, found that the corporation's notice was not timely, and granted the individuals' motion to remand. Cline v. Fairbanks Capital Corp., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 9146 (M.D.N.C. May 20, 2004).

Service Held Invalid. — Where the evidence tended to show that service of process upon corporate defendant was attempted by delivering copies of the summons and complaint to an individual who at that time was neither the agent of the corporate defendant nor authorized to receive service of process in its behalf, such evidence was sufficient to support the trial court's findings that defendant was not properly served. Tinkham v. Hall, 47 N.C. App. 651, 267 S.E.2d 588 (1980).

Court held that plaintiff, who served process on defendant's claims examiner via regular mail and received several letters from senior corporate counsel concerning suit, had not met the requirements of this section; she had at least four months to cure the defect in service prior to the expiration of the statute of limitations. Fulton v. Mickle, 134 N.C. App. 620, 518 S.E.2d 518 (1999).

Appellate court found that service of process was not sufficient to give the trial court personal jurisdiction over defendant where service was by mailing a copy of the summons and complaint by regular mail rather than certified mail, and mailing of the summons and complaint occurred before the documents had been filed or signed by the Clerk of Court. Thomas & Howard Co. v. Trimark Catastrophe Servs., Inc., 151 N.C. App. 88, 564 S.E.2d 569, 2002 N.C. App. LEXIS 684 (2002).

Determining Party to Whom Summons Directed. — Fundamental fairness requires that a summons should be of sufficient particularity so as to leave no reasonable doubt as to whom it is directed. However, this requirement does not force the courts to overlook the obvious when determining the validity of a summons. Wearring v. Belk Bros., 38 N.C. App. 375, 248 S.E.2d 90 (1978).

Where although the proper defendant in the case was misnamed in the captions on the summons and complaint as Inter-Regional Financial Group Leasing Company (an apparently nonexisting company), the summons was properly directed to IFG Leasing Company, and that was the enterprise that copies of the summons and complaint were properly served on three times, the misstatement of defendant's name in the captions was a harmless misnomer and without jurisdictional significance, and the court did not err in permitting the misnomer to be corrected by appropriate amendments. Paramore v. Inter-Regional Fin. Group Leasing Co., 68 N.C. App. 659, 316 S.E.2d 90 (1984).

Name of Corporate Defendant to Be Sufficiently Stated. — When the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons, when properly served upon an officer, director or agent specified in subsection (j)(6) is adequate to bring the corporate defendant within the trial court's jurisdiction. Wiles v. Welparnel Constr. Co., 295 N.C. 81, 243 S.E.2d 756 (1978), overruling the line of cases represented by Plemmons v. Improvement Co., 108 N.C. 614, 13 S.E. 188 (1891); Hassell v. Steamboat Co., 168 N.C. 296, 84 S.E. 363 (1915); Russell Manufacturing Co., 266 N.C. 531, 146 S.E.2d 459 (1966) and Ready Mix Concrete v. Sales Corp., 30 N.C. App. 526, 227 S.E.2d 301 (1976), to the extent that such cases are inconsistent with this holding; Gro-Mar Pub. Relations, Inc. v. Billy Jack Enter., Inc., 36 N.C. App. 673, 245 S.E.2d 782 (1978).

Process Held Sufficient to Show Suit Against Corporation. — In a negligence action against a corporation, there was no insufficiency in the service of process even though the directory paragraph of the summons contained the name of an officer of the corporation, where the caption of the summons and the complaint clearly indicated that the corporation was being sued. Wearring v. Belk Bros., 38 N.C. App. 375, 248 S.E.2d 90 (1978).

Where defendant insurance corporation's statutory agent for service of process in Connecticut was served with a copy of summons, service of process was sufficient to apprise defendant that it was the party being sued. Thus, if the court had jurisdiction over the defendant, the service of process was sufficient under subsection (j)(6) of this rule. Parris v. Garner Com. Disposal, Inc., 40 N.C. App. 282, 253 S.E.2d 29, cert. denied, 297 N.C. 455, 256 S.E.2d 808 (1979).

Where a corporation was not confused as to whether or not it was a party to the lawsuit, the requirements for service of process, as required under G.S. 1A-1, N.C. R. Civ. P. 4, were met. Wetchin v. Ocean Side Corp., 167 N.C. App. 756, 606 S.E.2d 407, 2005 N.C. App. LEXIS 12 (2005).

Accident victim obtained jurisdiction over a utility because service was properly established under G.S. 1A-1, N.C. R. Civ. P. 4(j2)(2), by the victim's sending the summons and complaint to the utility's registered agent, and receiving back the signed delivery receipt. Further, nothing in an affidavit filed by the utility overcame the presumption created by the rule. Ruiz v. Mecklenburg Utils., Inc., 189 N.C. App. 123, 657 S.E.2d 432, 2008 N.C. App. LEXIS 418 (2008).

Service on Wrong Agent Properly Kept Alive. — Suit which was properly instituted against corporate defendant within the statute of limitations period but which was served on the wrong agent was properly kept alive by alias and pluries summons until service was properly made upon a corporate officer. Tyson v. L'eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987).

When Service Binds Corporation. — Service of process upon a corporation's registered agent binds that corporation when the agent is served, not when the service actually comes to the attention of an officer or agent charged with defending actions against the corporation. Anderson Trucking Serv., Inc. v. Key Way Transp., Inc., 94 N.C. App. 36, 379 S.E.2d 665 (1989).

Initial Receipt of Summons by Employee. — Service upon registered agent was effective service upon company; it made no difference that the summons and complaint addressed to registered agent were initially received by employee of registered agent, since employee was authorized by registered agent to receive mail on his behalf. Anderson Trucking Serv., Inc. v. Key Way Transp., Inc., 94 N.C. App. 36, 379 S.E.2d 665 (1989).

Service on Agent Under Assumed Corporate Name. — Where at the time that plaintiffs instituted their action, corporation had not complied with G.S. 66-68, but was actively conducting business under an assumed name and holding itself out to the public and to its employees under that name, and where service of process was accomplished upon a corporate agent who might have been expected to know that the assumed name was a name used by the corporation, corporation was adequately served with sufficient legal process under its assumed name, and the trial court had jurisdiction. Tyson v. L'eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987).

Extraterritorial Service. — Since subsection (j)(6) of this rule permits out-of-state service of process, a plaintiff in a federal court case in North Carolina is entitled to reach beyond North Carolina borders to serve a corporate defendant. Southern Pride, Inc. v. Turbo Tek Enters., Inc., 117 F.R.D. 566 (M.D.N.C. 1987).

While plaintiff, after an unsuccessful attempt at federal mail service, was limited to the federal method of personal service, plaintiff was nonetheless permitted, under FRCP, Rule 4(e), to rely on subdivision (j)(6) of this rule as authority for extraterritorial service on defendant. Southern Pride, Inc. v. Turbo Tek Enters., Inc., 117 F.R.D. 566 (M.D.N.C. 1987).

Service on Franchisor Not Service on Franchisee. — Where complaint and summons named as defendant "Ramada Inn, Inc." (the franchisor), and not "Ramada Inn" (the trade name used by franchisee, a separate corporate entity), and service of process was accomplished upon the registered agent of Ramada Inn, Inc., such service could not be deemed to constitute service upon franchisee. Under these circumstances, franchisee was never made a party to the action. Hayman v.

Ramada Inn, Inc., 86 N.C. App. 274, 357 S.E.2d 394, petition denied as to additional issues, 320 N.C. 631, 360 S.E.2d 87 (1987).

Defective Service Defense Not Waived. — Where, after defendant was served, its counsel immediately notified plaintiff of defect in service, invited proper service upon it, and advised it how a correction could be made, and where a default judgment had not yet been entered, but only entry of default, plaintiff's claim that defendant had waived any defenses it might have had to lack of jurisdiction by reason of defective service would be rejected. United States ex rel. Combustion Sys. Sales, Inc. v. Eastern Metal Prods. & Fabricators, Inc., 112 F.R.D. 685 (M.D.N.C. 1986).

General Appearance Waives Right to Challenge Service of Process. — Where the person who was served with a summons directed to a corporation attended the Small Claims Division proceedings and fully participated on the corporation's behalf, the corporation made a general appearance and thus waived its right to challenge proper service of process; the trial court erred in reversing a judgment entered by a Small Claims Division magistrate based on invalid service. Woods v. Billy's Auto., 174 N.C. App. 808, 622 S.E.2d 193, 2005 N.C. App. LEXIS 2595 (2005).

Service on Other Defendant Did Not Relate Back to Original Summons. — Since the original summons was not directed to the corporation but to a different defendant, a later summons against the corporation did not relate back to the original summons, and since there was not a properly directed summons that was merely not served, G.S. 1A-1-4(d) did not apply and the later summons was not a valid alias or pluries summons; thus, service on the corporation fell outside of the authorized time and the case was not filed within the one year period required by G.S. 1A-1-41(a)(1). Stack v. Union Reg'l Mem'l Med. Ctr., Inc., 171 N.C. App. 322, 614 S.E.2d 378, 2005 N.C. App. LEXIS 1255 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 877 (2005).

V. SERVICE BY PUBLICATION.

Service of process by publication is in derogation of the common law. Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971); Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974) (1974); Emanuel v. Fellows, 47 N.C. App. 340, 267 S.E.2d 368, cert. denied, 301 N.C. 87, 273 S.E.2d 296 (1980).

Statutes authorizing substituted service of process, service of publication, or other particular methods of service are in derogation of the common law, are strictly construed, and must be followed with particularity. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984).

Thus, statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute. Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971); Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974) (1974); Emanuel v. Fellows, 47 N.C. App. 340, 267 S.E.2d 368, cert. denied, 301 N.C. 87, 273 S.E.2d 296 (1980).

This rule is appropriate only where a civil litigant's whereabouts are unknown, and the due diligence requirement contained therein is clear. In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, cert. denied and appeal dismissed, 314 N.C. 665, 335 S.E.2d 322 (1985).

Publication in County Where Action Is Pending. — Whereas defendant's last know address was in Wake County and despite reasonable efforts, plaintiff had "no reliable information" as to the defendant's whereabouts, publication was proper in the county in which the action was pending. Winter v. Williams, 108 N.C. App. 739, 425 S.E.2d 458 (1993).

Publication in County Where Action Not Pending. — Trial court did not have personal jurisdiction over a defendant because the notice of service by publication identified the wrong county as the county in which the action was filed. Connette v. Jones, — N.C. App. —, 674 S.E.2d 751, 2009 N.C. App. LEXIS 359 (2009).

Issuance of a summons is not essential to validity of service of process by publication upon a party to a civil action whose address, whereabouts, dwellinghouse or usual place of abode is unknown and cannot with due diligence be ascertained. McCoy v. McCoy, 29 N.C. App. 109, 223 S.E.2d 513 (1976), decided under former subdivision (j)(9)c.

Service by publication, begun more than 90 days after the last alias and pluries summons, will not revive an otherwise discontinued action. County of Wayne ex rel. Williams v. Whitley, 72 N.C. App. 155, 323 S.E.2d 458 (1984).

A change has been made by this rule in regard to the requirements of a mailing. Under the prior law the clerk of court, rather than the plaintiff, was the person required to mail a copy of the notice of service of process by publication to the defendant. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974) (1974).

When Mailing Notice of Service May Be Omitted. — The mailing of the notice of service of process by publication to defendant's address may be omitted only if the post-office address cannot be ascertained in the exercise of reasonable diligence. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974) (1974).

This rule does not require an order of publication to be supported by an affida-

vit. Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971).

But Plaintiff Must File Affidavit Showing Circumstances Warranting Service by Publication. — While this rule does not require an order of publication supported by an affidavit, in order to utilize service of process by publication it is necessary that plaintiff file with the court an affidavit showing the circumstances warranting such use. Edwards v. Edwards, 13 N.C. App. 166, 185 S.E.2d 20 (1971).

Mother failed to file an affidavit showing the circumstances warranting use of service by publication or showing her due diligence in attempting to locate the father; such failure constituted reversible error. Cotton v. Jones, 160 N.C. App. 701, 586 S.E.2d 806, 2003 N.C. App. LEXIS 1929 (2003).

Filing of Affidavit "Upon Completion of Such Service". — Where no prejudice to defendant was shown, an affidavit showing publication and mailing in accordance with G.S. 1-75.10(2) was filed "upon completion of such service," even though the affidavit was not filed until after a motion to quash had been filed and some six months after the last day of publication. Philpott v. Johnson, 38 N.C. App. 380, 247 S.E.2d 781 (1978).

Service by Publication Invalid Where Personal Service Possible. — Where plaintiff could have effected personal service of process by leaving copies of the summons and court order at defendant's residence with a person of suitable age and discretion living there, but chose instead to institute service of process by publication, defendant was not subject to service of process by publication under former subdivision (j)(9)c of this rule, and the attempted service of process by means of publication was void. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974) (1974).

Parental Rights Termination Case. — Where the "name or identity" of a respondent parent is known, but his or her whereabouts are unknown, the petitioner in a parental rights termination case must proceed under G.S. 7A-289.27 [see now G.S. 7B-1106] and must comply with section (j1) as regards service by publication, and specifically, with the due diligence requirement contained therein. In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, cert. denied and appeal dismissed, 314 N.C. 665, 335 S.E.2d 322 (1985).

Failure to attach custody order to petition to terminate parental rights or include statements within petition explaining petitioner's efforts to find parent, as required by G.S. 7A-289.25 [see now G.S. 7B-1104], where service was by publication, was not error which resulted in any prejudice to respondent, where service by publication complied with subdivision (j1) of this rule and informed respondent of the petition filed against her, her need to answer, the availability of counsel if she was indigent, and the telephone number of the Clerk of Juvenile Court if she needed further information. In re Joseph Children, 122 N.C. App. 468, 470 S.E.2d 539 (1996).

Service of petition and summons to terminate parental rights by publication must comply with G.S. 7A-289.27 [see now G.S. 7B-1106] and subdivision (j1) of this rule. In re Joseph Children, 122 N.C. App. 468, 470 S.E.2d 539 (1996).

Purported service by publication on respondent in a proceeding to terminate parental rights was invalid where petitioner filed no affidavit showing publication and mailing in accordance with G.S. 1-75.10(2) and the circumstances warranting the use of service by publication, and the trial court found merely that it appeared to be "impractical" to obtain personal service and that the sheriff was unable to find respondent at his last known address in the county, there being no determination that respondent could not after due diligence be served or that his whereabouts or usual abode and his post-office address could not be determined with due diligence. In re Philips, 18 N.C. App. 65, 196 S.E.2d 59 (1973).

Divorce Decree Held Invalid for Violation of Mailing Requirements. — In an action to set aside a divorce decree, where plaintiff failed to mail a copy of the notice of service by publication to the defendant at her Virginia residence, plaintiff violated the technical requirements of former subdivision (j)(9)c and this defect was sufficient to render the resulting divorce decree invalid. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Personal Notice to Purported Adverse Possessor Not Required. — Where a city, in a foreclosure action, gave personal notice to all the record owners of the property in question and notice by publication to all others having an interest in the disputed property who could not with due diligence be located, it was not required to give personal notice to a purported adverse possessor whose purported interest was not recorded. Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

Service by publication was void where plaintiff did not use diligence to ascertain addresses of the defendants, which were available to the plaintiff. See Fountain v. Patrick, 44 N.C. App. 584, 261 S.E.2d 514 (1980); In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, cert. denied and appeal dismissed, 314 N.C. 665, 335 S.E.2d 322 (1985).

But where defendant had actual notice of the proceedings against him, he was not allowed to attack a default judgment as void on the grounds of lack of jurisdiction due to a failure to use due diligence to obtain personal service before service by publication. Creasman v. Creasman, 152 N.C. App. 119, 566 S.E.2d

725, 2002 N.C. App. LEXIS 856 (2002).

Conclusory Findings of Fact As to Service By Publication. — Judgment granting a summary judgment divorce was vacated as a conclusory finding was made that a wife had been properly served and that the trial court had jurisdiction over her, without making the findings necessary to support the conclusions, despite the facts that: (1) the husband attempted to serve the complaints on the wife at two different addresses, (2) the husband's affidavit of service by publication failed to state that the husband mailed a notice of service by publication to the wife before the first publication, and (3) the husband mailed the notice of hearing to the wife at a different address than he used during the second attempt at service of the complaint; no findings were made as to the use of service by publication by the husband or his due diligence in attempting to serve the wife, or that the husband was not required to mail notice of the service by publication to the wife before the first publication. Agbemavor v. Keteku, 177 N.C. App. 546, 629 S.E.2d 337, 2006 N.C. App. LEXIS 1074 (2006).

VI. AMENDMENT OF SUMMONS.

This rule does not provide for any greater liberality of amendment than did former § 1-163. Grace v. Johnson, 21 N.C. App. 432, 204 S.E.2d 723 (1974), overruled on other grounds, Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

The power of the court to allow amendment of process is discretionary and permits amendment to correct a misnomer or mistake in the name of a party. Franklin v. Winn Dixie Raleigh, Inc., 117 N.C. App. 28, 450 S.E.2d 24 (1994), aff'd, 342 N.C. 404, 464 S.E.2d 46 (1995).

Limitation on Court's Discretion Under Section (i). — The broad discretionary power given the court by section (i) does not extend so far as to permit the court by amendment of its process to acquire jurisdiction over the person of a defendant where no jurisdiction had yet been acquired. Carl Rose & Sons Ready Mix Concrete v. Thorp Sales Corp., 30 N.C. App. 526, 227 S.E.2d 301 (1976), overruled on other grounds, Wiles v. Welparnel Constr. Co., 295 N.C. 81, 243 S.E.2d 756 (1978).

When Amendment of Summons Allowed. — Section (i) empowers the court to allow amendment of the summons at any time, in its discretion, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued. Grace v. Johnson, 21 N.C. App. 432, 204 S.E.2d 723 (1974), overruled on other grounds, Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

Amendment Improper. — The named defendant in the original summons and complaint, "Winn Dixie Store, Inc.", was not a mistake or misdescription permitting the amendment of the summons where the name was the correct name of the wrong corporate party defendant, this was a substantive mistake which was fatal to the action. Franklin v. Winn Dixie Raleigh, Inc., 117 N.C. App. 28, 450 S.E.2d 24 (1994), aff'd, 342 N.C. 404, 464 S.E.2d 46 (1995).

An amended summons which adds a new party-defendant must be served upon each of the defendants. Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983), rev'd on other grounds, 311 N.C. 536, 319 S.E.2d 912 (1984).

Amendment Held Appropriate. — Trial court failed to exercise its discretion in denying plaintiff's motion to amend his summons under subsection (1) to substitute the correct county on the summons when there was no showing of any material prejudice to defendants; therefore the case was remanded to the Court of Appeals. Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

Because an owner's G.S. 1A-1, N.C. R. Civ. P. 4(i), 15 motion to amend merely sought to correct the name of the guarantor, who was already before the court, and because the guarantor would have suffered no material prejudice by the amendment, the owner was entitled to amend the complaint to include the correct spelling of the guarantor's last name. Langley v. Baughman, — N.C. App. —, 670 S.E.2d 913, 2009 N.C. App. LEXIS 51 (2009).

VII. DISCONTINUANCE AND EXTENSIONS.

Extensions, Generally. — Section (c) of this rule requires that service of process occur within 30 days (now 60 days) after the issuance of the summons. The validity of the summons for service of process may be extended under section (d) of this rule by endorsement of the original summons or issuance of an alias or pluries summons within 90 days of the issuance or last prior endorsement of the original summons. As long as this chain of summonses is maintained, the service of summons will relate back to the original date of issuance. In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985), decided prior to 2001 amendment to subsection (c).

This rule specifically provides that where there is neither endorsement nor issuance of alias or pluries summons within 90 days after issuance of the last preceding summons, the action is discontinued as to any defendant not served within the time allowed and treated as if it had never been filed. Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, cert. denied, 332 N.C. 480, 420 S.E.2d 826 (1992).

Trial court erred in allowing plaintiffs' motion to retroactively extend the time period for issuing the alias and pluries summons since the action had been discontinued; trial courts do not have discretion pursuant to G.S. 1A-1, N.C. R. Civ. P. 6(b) to prevent a discontinuance of an action under G.S. 1A-1, N.C. R. Civ. P. 4(e) where there is neither an endorsement of the original summons nor issuance of an alias and pluries summons within ninety days after issuance of the last preceding summons. Russ v. Hedgecock, 161 N.C. App. 334, 588 S.E.2d 69, 2003 N.C. App. LEXIS 2042 (2003), cert. denied, 358 N.C. 545, 599 S.E.2d 407 (2004).

Section (e) of this rule controls in determining when an action is discontinued. Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986).

Section 1A-1, Rule 6(b) gives the trial courts the discretion to extend the time provided in section (c) of this rule for service of a summons. Lemons v. Old Hickory Council, 322 N.C. 271, 367 S.E.2d 655, rehearing denied, 322 N.C. 610, 370 S.E.2d 247 (1988).

By adopting G.S. 1A-1, Rule 6(b), the General Assembly has given the trial courts authority to breathe new life and effectiveness into a summons retroactively after it has become functus officio by virtue of not being served within the time prescribed. Lemons v. Old Hickory Council, 322 N.C. 271, 367 S.E.2d 655, rehearing denied, 322 N.C. 610, 370 S.E.2d 247 (1988).

Section 1A-1, Rule 41(b) and section (e) of this rule are not in conflict, and both can be given effect. Gower v. Aetna Ins. Co., 13 N.C. App. 368, 185 S.E.2d 722, aff'd, 281 N.C. 577, 189 S.E.2d 165 (1972).

Discretion of Court. — It is within the discretion of the trial court to extend time to amend a defective summons; thus, as plaintiff failed to show the trial court abused its discretion, the trial court's refusal to extend time was not error. Integon Gen. Ins. Co. v. Martin, 127 N.C. App. 440, 490 S.E.2d 242 (1997).

Chain of Summonses. — Case law has interpreted this section's reference to the chain of summonses as an implicit requirement that an alias or pluries summons contain a reference in its body to indicate its alleged relation to the original. Integon Gen. Ins. Co. v. Martin, 127 N.C. App. 440, 490 S.E.2d 242 (1997).

Where none of the succeeding summonses on their face referred to the original summons and the only indication that the succeeding summonses related to the original summons was that a copy of the complaint was attached to each of the summonses, the attached complaint did not cure the defective summons. Integon Gen. Ins. Co. v. Martin, 127 N.C. App. 440, 490 S.E.2d 242 (1997).

Because plaintiff failed to serve defendants with process within the time allowed and did not create an unbroken chain of summonses referring back to the original summons as required by N.C. R. Civ. P. 3 and 4, her action was properly dismissed as time-barred under G.S. 1-52. Robertson v. Price, 187 N.C. App. 180, 652 S.E.2d 352, 2007 N.C. App. LEXIS 2240 (2007).

"Discontinuance" is a term of art whose only application in the context of service of process is to an action that must cease for failure of the party to comply with section (d) of this rule. Thereafter a new action may be filed, but the date for purposes of the statute of limitations is that of the later filing. Snead v. Foxx, 329 N.C. 669, 406 S.E.2d 829 (1991).

Discontinuance Under Section (e) Not Analogous to Dismissal Under § 1A-1, Rule 41(b). — A discontinuance under section (e) of this rule is not analogous to a dismissal under G.S. 1A-1, Rule 41(b). Central Sys. v. General Heating & Air Conditioning Co., 48 N.C. App. 198, 268 S.E.2d 822, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

Subsequent Action Not Barred by Discontinuance Under Section (e). — The fact that an action was discontinued under section (e) of this rule for failure to serve defendant with summons within the time allowed after plaintiff had taken a voluntary dismissal under G.S. 1A-1, Rule 41 did not bar plaintiff from bringing another action for the same cause. Central Sys. v. General Heating & Air Conditioning Co., 48 N.C. App. 198, 268 S.E.2d 822, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

The commencement of service by publication pursuant to subsection (j)(1) of this rule is not sufficient to satisfy the requirements of section (e) of this rule. Brown v. Overby, 61 N.C. App. 329, 300 S.E.2d 565 (1983).

A discontinuance breaks the chain of summonses, and a summons endorsed more than 90 days after the issuance of the original summons does not relate back to the original date of filing of the complaint. In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985).

Where alias summons was issued more than 90 days after the date the original summons was issued, it did not comply with subsection (d)(2) of this rule, and thus the original summons could not serve as the basis for the issuance of an alias or pluries summons necessary to maintain an unbroken continuation of the action. Thus, under section (e) of this rule, the action would be deemed to have commenced against defendant on the date of issuance of the alias summons. Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987).

Relation Back After Ninety Days. — A summons issued more than 90 days after the issuance or endorsement of the previous summons does not relate back to the date of the prior summons, and, rather, issuance of the new summons commences an entirely new action. Reese v. Barbee, 129 N.C. App. 823, 501 S.E.2d 698 (1998), aff'd, 350 N.C. 60, 510 S.E.2d 374 (1999).

In a wrongful death case by the personal representative of the decedent, the case was properly dismissed because the representative failed to obtain a proper continuance of the time within which to serve the defendant an alias or pluries summon under G.S. 1A-1, N.C. R. Civ. P. 4(e), meaning that any alias summons would not relate back to the earlier summons and would represent the filing of a new complaint; any new complaint would be untimely under the two year statute of limitations for wrongful death under G.S. 1-53(4) and, therefore, dismissal of the complaint for failure to state a claim was proper. Draughon v. Harnett County Bd. of Educ., 166 N.C. App. 449, 602 S.E.2d 717, 2004 N.C. App. LEXIS 1784 (2004).

Discontinuance on Failure to Secure Extension of Time for Service. — Where plaintiff, presented with the return of her summons unserved, failed to continue her action by securing an endorsement upon the original summons for an extension of time within which to complete service of process pursuant to subsection (d)(1) of this rule, and did not sue out an alias or pluries summons returnable in the same manner as the original process pursuant to subsection (d)(2), the plaintiff's action was consequently discontinued 90 days after the date the original summons was issued. Snead v. Foxx, 329 N.C. 669, 406 S.E.2d 829 (1991), holding that plaintiff's action was barred by the statute of limitations.

Dismissal of a passenger's claim against an estate based on a decedent's ownership of an auto involved in an accident was proper because the claim against the driver was a claim against an agent, and, since the driver was named as a party, proper service was required; since the summons as to the driver was allowed to lapse and the statute of limitations had since run, the driver had no liability to impute to the estate. Therefore, neither the driver nor the estate could have been determined judicially to have been negligent, and the passenger's cause of action against the estate failed. Atkinson v. Lesmeister, 186 N.C. App. 442, 651 S.E.2d 294, 2007 N.C. App. LEXIS 2203 (2007).

Although a mother accepted service 285 days after a summons to terminate her parental rights was issued, under G.S. 1A-1, N.C. R. Civ. P. 4(c), service of a summons had to have been made within 60 days after the date of the issuance of summons. Accordingly, any subject matter jurisdiction the trial court had pursuant to the issuance of a summons was discontinued and expired before the mother's parental rights were terminated. In re N.E.L., — N.C. App. —, 676 S.E.2d 907, 2009 N.C. App. LEXIS 708 (2009).

Filing of a motion for change of venue or dismissal of the action did not revive an action discontinued by operation of law. Robertson v. Smith, 45 N.C. App. 535, 263 S.E.2d 36, cert. denied, 300 N.C. 376, 267 S.E.2d 677 (1980).

This rule mandates that something be done in the clerk's office to revive a discontinued action, namely, obtaining an alias or pluries summons or an endorsement to the original summons. Byrd v. Trustees of Watts Hosp., 29 N.C. App. 564, 225 S.E.2d 329 (1976); Brown v. Overby, 61 N.C. App. 329, 300 S.E.2d 565 (1983).

Prejudgment Interest Properly Calculated After Discontinuance. — Prejudgment interest was properly calculated under G.S. 24-5 on an operator's judgment for damages arising out of a motor vehicle accident as: (1) due to a lapse in the alias or pluries summons, the operator's action was discontinued under G.S. 1A-1, N.C. R. Civ. P. 4; (2) the trial court lacked discretion in determining the commencement date of the action; (3) the action commenced on 9 June 2006, when the summons was reissued; and (4) the prejudgment interest was based on the period from 9 June 2006 to the date the judgment was entered. Bryson v. Cort, — N.C. App. —, 668 S.E.2d 84, 2008 N.C. App. LEXIS 1981 (2008).

Service of Dormant Summons. — Where defendant was served with a dormant summons within the 90-day limit, rather than notice of a discontinued action, the trial court had the authority pursuant to the language of subsection (b) to extend the time for service of process under subsection (c), "to permit the act to be done where the failure to do the act was the result of excusable neglect." Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994).

Use of Endorsement or Alias or Pluries Summons. — The provisions in section (d) of this rule for an endorsement on the original summons or issuance of an alias or pluries summons apply only when the original summons was not served, and their purpose is to keep the action alive until service can be made. They are not applicable where the original summons was not issued for service on a defendant, but on a person not a party to the action. Roshelli v. Sperry, 57 N.C. App. 305, 291 S.E.2d 355 (1982).

The provisions relating to issuance of alias or pluries summonses did not apply where both individual defendants were served personally with the original summons; the provisions under subsection (d) of this rule for an endorsement on the original summons or issuance of an alias or pluries summons apply only when the original summons was not served, and their purpose is to keep the action alive until service can be made. Thomas v. Washington, 136 N.C. App. 750, 525 S.E.2d 839, 2000

N.C. App. LEXIS 154 (2000).

Issuance of New Summons. — The defendant was not entitled to dismissal for lack of jurisdiction where the original summons was not served within 30 days (now 60 days) and the plaintiff did not seek an endorsement nor an alias or pluries summons within 90 days but, instead, elected to issue a new summons. Chateau Merisier, Inc. v. Le Mueble Artisanal GEKA, S.A., 142 N.C. App. 684, 544 S.E.2d 815, 2001 N.C. App. LEXIS 173 (2001), decided prior to 2001 amendment to subsection (c).

While the original summons was not yet dormant, because the second summons did not conform with the requirements of N.C. R. Civ. P. 4(d), the original action was discontinued, and the trial court's subject matter jurisdiction was reinvoked. Because the parents were properly served with newly issued summons, commencing new actions and reinvoking the trial court's subject matter jurisdiction as of their respective dates of issuance, the contention that the court lacked subject matter jurisdiction over the parties in the termination of parental rights hearing due to ineffective service was without merit. In re D.B., 186 N.C. App. 556, 652 S.E.2d 56, 2007 N.C. App. LEXIS 2257 (2007).

Trial court erred in ruling that alias summons issued more than 90 days after original summons could relate back to the date of issue of the original summons where there had been neither endorsement by the clerk nor issuance of alias summons within the time specified by section (d) of this rule, with the result that the original action was discontinued as to the defendant. Thereafter an alias summons could be issued, but under section (e) of this rule the action would be deemed to have commenced on the date of such issuance. Lackey v. Cook, 40 N.C. App. 522, 253 S.E.2d 335, cert. denied, 297 N.C. 610, 257 S.E.2d 218 (1979).

Failure to Deliver Summons to Defendant in Bad Faith. — Where plaintiff violated section (a) by failing to deliver summons to proper person for service, and where this was done in bad faith and with intent to delay and gain unfair advantage over defendant, trial court properly dismissed plaintiff's action pursuant to Rule 41(b) based upon plaintiff's violation of Rule 4(a) for purposes of delay and in order to gain an unfair advantage over the defendant. Smith v. Quinn, 324 N.C. 316, 378 S.E.2d 28 (1989).

Duly Issued Summons as Basis for Alias or Pluries Summons. — A duly issued summons not served or delivered to the sheriff for service within 30 days (now 60 days) of its issuance may nevertheless serve as the basis for an alias or pluries summons so as to toll the statute of limitations. Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986), decided prior to 2001 amendment to subsection (c).

The case of Deaton v. Thomas, 262 N.C. 565, 138 S.E.2d 201 (1964), which held that a summons issued by the clerk but never delivered to the sheriff to whom it was directed for service may not serve as the basis for the issuance of an alias process or the extension of time for service, was decided under the old rules of civil procedure and relied, in part, on earlier decisions which held that a summons was not issued until it was delivered to the sheriff for service. Those cases are no longer controlling on the question of when a summons is issued. Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986).

Tolling of Statute Stops Where Plaintiff Fails to Keep Action Alive. — While the statute of limitations is tolled when suit is properly instituted, and it stays tolled as long as the action is alive, the tolling stops if the suit is discontinued by operation of law because of the plaintiff's failure to keep the action alive in an authorized manner after the original summons has lost its efficacy by not being served within the time allowed. Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

Time to Answer Not Extended. — Plaintiffs' motions for entry of default and default judgment were made after defendant's time to answer had expired, as although summons and complaint were served upon defendant by mail, G.S. 1A-1, Rule 6(e) did not apply to extend his time to answer to 33 days, because the 30 days (now 60 days) defendant had under G.S. 1A-1, Rule 12 to answer the complaint began running when defendant was served with the summons and complaint, not when plaintiff mailed it. Williams v. Moore, 95 N.C. App. 601, 383 S.E.2d 416 (1989), decided prior to 2001 amendment to subsection (c).

Summons Need Not Be Delivered to Sheriff Within 30 Days (now 60 days) to Be Kept Alive. — In light of the clear language of section (e) of this rule on the discontinuance of a summons, there is no justification for construing the rule to require delivery of the summons to the sheriff within 30 days (now 60 days) of its issuance to keep the summons alive. Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986), decided prior to 2001 amendment to subsection (c).

The case of Adams v. Brooks, 73 N.C. App. 624, 327 S.E.2d 19, cert. denied, 313 N.C. 596, 332 S.E.2d 177 (1985), holding that plaintiff's summons could not be used as a basis for an extension of time for service since the summons was not delivered to the sheriff for service on defendant within 30 days (now 60 days) of its issuance, is overruled. Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986), decided prior to 2001 amendment to subsection (c).

Unserved Dormant Summons Not Basis of Jurisdiction. — Where summons was returned unserved by sheriff's department on October 17, 1982, within 30 days (now 60 days) of its issuance, and plaintiff served the original summons upon the Secretary of State's office on November 3, 1982, without having revived it under section (d) of this rule, this dormant summons could not and did not subject defendant to the jurisdiction of the court. Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987), decided prior to 2001 amendment to subsection (c).

Allowance of Voluntary Dismissal Held Nugatory. — Where an action was discontinued by operation of law under section (e) of this rule, the statute of limitations having thereafter immediately run its remaining course, the judge's subsequent order of voluntary dismissal allowing plaintiff another year within which to refile the action was nugatory. Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order. The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Plaintiff's second complaint, therefore, constituted a new action which plaintiff failed to file within the three years required by the statute of limitations. Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

Action Is Abated When No Summons Is Issued. — Preliminary injunction against defendants was vacated in plaintiff's civil action because no summons was issued within five days after the complaint was filed as required by G.S. 1A-1, N.C. R. Civ. P. 4(a); the action had abated and was deemed never to have commenced, and the trial court lacked subject matter jurisdiction and authority to issue the preliminary injunction. Conner Bros. Mach. Co. v. Rogers, 177 N.C. App. 560, 629 S.E.2d 344, 2006 N.C. App. LEXIS 1058 (2006).

Removal to Federal Court Provided Opportunity to Correct Deficiencies in Service. — Although plaintiff's attempt to effect service on defendants, a county, county officials, and a prison health services corporation, by leaving copies of a complaint and summonses on the desks of administrative assistants who worked for the county did not comply with G.S. 1A-1, N.C. R. Civ. P. 4(j)(1)(b), (5)(b), (5)(c), (6)(a), and (6)(b), upon removal, 28 U.S.C.S. § 1448 provided plaintiff an opportunity to correct any deficiencies in service prior to removal because at the time of removal, plaintiff's action was not subject to dismissal insofar as plaintiff still had an opportunity to revive the summonses by seeking a reissuance prior to the expiration of the 90-day period set forth in G.S. 1A-1, N.C. R. Civ. P. 4(d). Patterson v. Brown, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 9312 (W.D.N.C. Jan. 23, 2008).

VIII. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-14, 1-65, 1-88, 1-88.1, 1-89, 1-94, 1-95, 1-96, and 1-105.*

Requirements of Due Process. — Due process of law requires that a defendant be properly notified of the proceeding against him and have an opportunity to be present and to be heard. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

Purpose of Service of Summons. — The purpose of service of summons is to give notice to the party against whom the proceedings or action is commenced, and any notification which reasonably accomplishes that purpose answers the claims of law and justice. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959), citing Jester v. Baltimore Steam Packet Co., 131 N.C. 54, 42 S.E. 447 (1902).

Service of summons, unless waived, is a jurisdictional requirement. Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962).

Service Not Waived by Appearance Under Order for Pretrial Examination. — The appearance of a party under order of court for the purpose of a pretrial examination does not amount to a waiver of service of summons, since the appearance is not voluntary. B-W Acceptance Corp. v. Spencer, 268 N.C. 1, 149 S.E.2d 570 (1966).

As to service by rural policeman for sheriff, see Griffin v. Barnes, 242 N.C. 306, 87 S.E.2d 560 (1955).

Where process issued to the sheriff of one county was returned without any notation thereon, but with an accompanying letter stating that the defendant named was in another county, the act of the clerk in marking through the name of the first county and writing above it the name of the second county, so that the process was directed to the sheriff of the second county, amounted to the issuance of new process and instituted a new action as of the date of the later issuance, and service by the sheriff of the second county met all the requirements of the law. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959).

Effect of Substituting Counties in Original Summons. — Substituting "Mecklenburg" for "Cleveland" County in the original summons and sending such summons to the sheriff of Mecklenburg County worked a discontinuance of the action commenced by issuance of summons to Cleveland County. Morton v.

Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959).

Signature of Sheriff. — Where process issued to the sheriff of one county was returned and the clerk struck through the name of the county and inserted the name of a second county, so that the process was directed to the sheriff of the second county, the fact that the sheriff of the second county signed it at the place for the signature of the sheriff of the first county was immaterial, it appearing from the affidavit of the clerk that the summons was served by the sheriff of the second county, and further, the court would take judicial notice of the person who was the sheriff of the county. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959).

Summons Signed by Deputy. — Where a summons, otherwise complete and regular, was signed by the deputy clerk and thereupon served, the summons was not void. The failure of the deputy to sign the name of his principal was a nonjurisdictional irregularity. Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953).

Want of Signature of Clerk. — The want of a signature of the clerk on a summons otherwise complete with seal does not render the summons fatally defective and ineffectual to confer jurisdiction, but merely irregular and subject to amendment; for any defect or omission of a formal character which would be waived or remedied by a general appearance or an answer upon the merits may be treated as a matter which can be remedied by amendment. The imprint of the seal furnishes internal evidence of the official origin of the summons. Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953).

Return as Evidence of Service. — Where it is sought to condemn the lands of an infant, such infant must defend by general guardian where one has been appointed; and where service of process was made upon the general guardian, and it appeared from the officer's return of notice that service had been executed upon the infant, such return was sufficient evidence of its service to take the case to the jury upon the question involved in the issue. Long v. Town of Rockingham, 187 N.C. 199, 121 S.E. 461 (1924).

Service Held Insufficient. — Delivery of a copy of summons and the complaint to defendant husband with instructions to him to deliver it to defendant wife was not valid service on the wife. Harrington v. Rice, 245 N.C. 640, 97 S.E.2d 239 (1957).

Where, apparently through inadvertence, the order for service of process upon a nonresident motorist was directed to the sheriff of one county, but was forwarded by the plaintiff's attorneys to the sheriff of another county and by him served upon the Commissioner of Motor Vehicles, service was insufficient, notwithstanding that notice of service of process upon the Commissioner and a copy thereof did reach the defendant by registered mail. Byrd v. Pawlick, 362 F.2d 390 (4th Cir. 1966).

A summons was held patently defective under former G.S. 1-105 when it was directed not to the nonresident defendants as required by this rule but to the Commissioner of Motor Vehicles, who was summoned and notified to appear and answer the complaint. Philpott v. Kerns, 285 N.C. 225, 203 S.E.2d 778 (1974).

Motion to Set Aside Default Judgment for Want of Service. — A meritorious defense is not essential or relevant on a motion to set aside a default judgment for want of jurisdiction by reason of want of service of summons. Kleinfeldt v. Shoney's of Charlotte, Inc., 257 N.C. 791, 127 S.E.2d 573 (1962).

Summons a Nullity If Not Served Within Prescribed Time. — The service of summons after the date fixed for its return, there being no endorsement by the clerk extending the time for service, is a nullity. Webb v. Seaboard Air Line R.R., 268 N.C. 552, 151 S.E.2d 19 (1966).

Purpose of Keeping Up Chain of Summonses. — The real purpose of the provisions of law with respect to keeping up the chain of summonses is to maintain the original date of the commencement of the action where the suit may be affected by the running of a statute of limitations, the pendency of another action or the time limit of an enabling act. Morton v. Blue Ridge Ins. Co., 250 N.C. 722, 110 S.E.2d 330 (1959).

The true office of an alias summons is to continue the action referable to its original date of institution, when the first summons issued has not been served. Rogerson v. Leggett, 145 N.C. 7, 58 S.E. 596 (1907); Powell v. Dail, 172 N.C. 261, 90 S.E. 194 (1916); McGuire v. Montvale Lumber Co., 190 N.C. 806, 131 S.E. 274 (1925). See also, Green v. Chrismon, 223 N.C. 724, 28 S.E.2d 215 (1943).

An alias summons issues only when the original summons has not been served upon a party defendant named therein. Cherry v. Woolard, 244 N.C. 603, 94 S.E.2d 562 (1956).

Former G.S. 1-95 related solely to the maintenance of chain of process against an original defendant not properly served, and had no application to the service of process upon an additional party after service had been had on the original defendant. Cherry v. Woolard, 244 N.C. 603, 94 S.E.2d 562 (1956).

Alias summons must be sued out within ninety days next after the date of the original summons. Mintz v. Frink, 217 N.C. 101, 6 S.E.2d 804 (1940).

An alias or pluries summons must be served within ninety days after the date of issue of the next proceeding summons in the chain of summonses, if the plaintiff wishes to avoid a discontinuance. Green v. Chrismon, 223 N.C. 724, 28 S.E.2d 215 (1943).

To "sue out" means "to obtain by application; to petition for and take out." McIntyre v. Austin, 232 N.C. 189, 59 S.E.2d 586 (1950).

Suing Out Alias or Pluries Summons to Prevent Discontinuance. — The failure of service of the original summons in an action must be followed by an alias or pluries writ or a summons successively and properly issued in order to preserve a continuous single action referable to the date of its issue, for otherwise it is a discontinuance as to the defendant. Hatch v. Alamance R.R., 183 N.C. 617, 112 S.E. 529 (1922).

In order to bring a defendant into court and hold him bound by its decree in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and timely served upon him by the officer; if not timely served, the summons must be returned, with proper notation, and alias or pluries summons issued and served, or the original summons will lose its vitality and become functus officio and void. Green v. Chrismon, 223 N.C. 724, 28 S.E.2d 215 (1943).

In a civil action or special proceeding where a defendant has not been served with the original summons, the proper issuance of alias and pluries summons keeps the cause of action alive, and prevents its discontinuance. Sizemore v. Maroney, 263 N.C. 14, 138 S.E.2d 803 (1964).

The duty is placed upon plaintiff to sue out the alias or pluries summons, if preceding writs have proved ineffectual, in order to avoid a discontinuance of the action. Williams v. Bray, 273 N.C. 198, 159 S.E.2d 556 (1968).

The duty is imposed upon the plaintiff to sue out an alias summons if the original writ failed of its purpose or proved ineffectual, and likewise to sue out a pluries summons when the preceding writs have proved ineffectual, or there will be a discontinuance of the action. McIntyre v. Austin, 232 N.C. 189, 59 S.E.2d 586 (1950).

Where plaintiff, who has commenced his action prior to the bar of the statute of limitations, fails to obtain valid service upon defendant, he is required to sue out alias or pluries summons if he desires to prevent a discontinuance. Hodges v. Home Ins. Co., 233 N.C. 289, 63 S.E.2d 819 (1951).

A discontinuance occurs only when the summons has not been served. Rogerson v. Leggett, 145 N.C. 7, 58 S.E. 596 (1907); Gomer v. Clayton, 214 N.C. 309, 199 S.E. 77 (1938), modified on rehearing, 215 N.C. 82, 1 S.E.2d 133 (1939).

Break in Chain of Summonses Works a Discontinuance. — Where in a civil action alias or pluries summonses are issued in the event of nonservice of the original, a break in the chain of summonses works a discontinuance. Neely v. Minus, 196 N.C. 345, 145 S.E. 771 (1928).

Effect of Issuance of Alias and Pluries Summonses. — If the alias or pluries summons contains sufficient information in the body thereof to show its relation to the original summons, the legal service of such writ will be effective from the date of the original process. McIntyre v. Austin, 232 N.C. 189, 59 S.E.2d 586 (1950).

Where the original process was kept alive by the proper issuance of alias and pluries summonses, a second action instituted subsequent to the issuance of the original process in the first would not be dismissed, notwithstanding the fact that process in the subsequent action was actually served prior to the service of pluries summons in the first. McIntyre v. Austin, 232 N.C. 189, 59 S.E.2d 586 (1950).

Plaintiff may apply orally or in writing to the clerk of the superior court for an alias or pluries summons, and upon such application it is the duty of the clerk of the superior court to issue the writ. No order of court is necessary to authorize the clerk to issue an alias or pluries summons. McIntyre v. Austin, 232 N.C. 189, 59 S.E.2d 586 (1950); Williams v. Bray, 273 N.C. 198, 159 S.E.2d 556 (1968).

An ordinary summons cannot be effective as an alias or pluries summons by mere endorsement of the words "alias" or "pluries" thereon. McIntyre v. Austin, 232 N.C. 189, 59 S.E.2d 586 (1950).

Sufficiency of Alias or Pluries Summons. — Where there is nothing upon a paper writing to indicate that it is an alias or pluries summons or that it relates to any original process, such paper writing, even though sufficient to constitute an original summons, cannot constitute an alias or pluries summons. Webb v. Seaboard Air Line R.R., 268 N.C. 552, 151 S.E.2d 19 (1966).

Return Showing Late Service as Sufficient Evidence of Nonservice. — Where the sheriff served summons more than ten days after its issuance, his return was sufficient evidence of nonservice to enable plaintiff to sue out an alias summons. Atwood v. Atwood, 233 N.C. 208, 63 S.E.2d 103 (1951).

OPINIONS OF ATTORNEY GENERAL

Service of Process upon Defendant in Divorce Action by Leaving Copies with Defendant's Mother at Defendant's Address Is Sufficient Service and Is Suffi-

cient for Nonjury Trial. — See opinion of Attorney General to the Honorable John S. Gardner, District Court Judge, Sixteenth Judicial District, 41 N.C.A.G. 473 (1971).

Service of process pursuant to §§ 1-105 and 1-105.1 upon the Commissioner of Motor Vehicles may be made by leaving a copy thereof with a fee of three dollars ($3.00) in the hands of the Commissioner of Motor Vehicles, or in his office. Service by Sheriff or Marshall is not required. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

Service upon the Commissioner of Motor Vehicles, in a manner consistent with this rule, meets the requirement of G.S. 1-105. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

Summary Ejectment Proceedings. — Because G.S. 7A-217(4) states that the procedure found in G.S. 42-29 can be used in summary ejectment cases only, and because summary ejectment is in the nature of an in rem proceeding, an in personam money damages claim cannot be heard and a money judgment cannot be entered in an action where service of process is effected through the alternative method under G.S. 42-29. The requirements for actual service of process found elsewhere in G.S. G.S. 7A-213 and in this rule would still apply to the claim for rents and other money damages. See opinion of Attorney General to Hon. Thomas N. Hix, Chief District Court Judge, 29th Judicial Circuit, 60 N.C.A.G. 95 (1992).

Qualification for Payroll Deductions by Employee Association. — In order to qualify for the privilege of payroll deductions an employee association must meet the following criteria: (1) the association must be domiciled in North Carolina, i.e., it must have a registered agent for service of process in the state and maintain an office in the state with a resident officer, director, managing agent or member of the governing body authorized to accept payment of the payroll deductions; (2) the association must have at least 2000 members; (3) the majority of the association's members must be employees of the state or public schools; and (4) an employee must authorize the deduction in writing. See opinion of Attorney General to Susan H. Ehringhaus, Vice Chancellor and General Counsel, University of North Carolina, 1999 N.C. AG LEXIS 34 (10/19/99).

Rule 5. Service and filing of pleadings and other papers.

(a) *Service of orders, subsequent pleadings, discovery papers, written motions, written notices, and other similar papers — When required.* — Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(a1) *Service of briefs or memoranda in support or opposition of certain dispositive motions.* — In actions in superior court, every brief or memorandum in support of or in opposition to a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment, or any other motion seeking a final determination of the rights of the parties as to one or more of the claims or parties in the action shall be served upon each of the parties at least two days before the hearing on the motion. If the brief or memorandum is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served brief or memorandum, or take such other action as the ends of justice require. The parties may, by consent, alter the period of time for service. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the brief within the required time.

(b) *Service — How made.* — A pleading setting forth a counterclaim or cross claim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on the party's attorney of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party personally is ordered by the court, upon the party's attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon a party may also be made by delivering a copy to the party or by mailing it to the party at the party's last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party, leaving it at the attorney's office with a partner or employee, or by sending it to the attorney's office by a confirmed telefacsimile transmittal for receipt by 5:00 P.M. Eastern Time on a regular business day, as evidenced by a telefacsimile receipt confirmation. If receipt of delivery by telefacsimile is after 5:00 P.M., service will be deemed to have been completed on the next business day. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

A certificate of service shall accompany every pleading and every paper required to be served on any party or nonparty to the litigation, except with respect to pleadings and papers whose service is governed by Rule 4. The certificate shall show the date and method of service or the date of acceptance of service and shall show the name and service address of each person upon whom the paper has been served. If one or more persons are served by facsimile transmission, the certificate shall also show the telefacsimile number of each person so served. Each certificate of service shall be signed in accordance with and subject to Rule 11 of these rules.

(c) *Service — Numerous defendants.* — In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any crossclaim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) *Filing.* — The following papers shall be filed with the court, either before service or within five days after service:

(1) All pleadings, as defined by Rule 7(a) of these rules, subsequent to the complaint, whether such pleadings are original or amended.
(2) Written motions and all notices of hearing.
(3) Any other application to the court for an order that may affect the rights of or in any way commands any individual, business entity, governmental agency, association, or partnership to act or to forego action of any kind.
(4) Notices of appearance.
(5) Any other paper required by rule or statute to be filed.
(6) Any other paper so ordered by the court.
(7) All orders issued by the court.

All other papers, regardless of whether these rules require them to be served upon a party, should not be filed with the court unless (i) the filing is agreed to by all parties, or (ii) the papers are submitted to the court in relation to a motion or other request for relief, or (iii) the filing is permitted by another rule or statute. Briefs or memoranda provided to the court may not be filed with the clerk of court unless ordered by the court. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the court if needed or so ordered.

(e)(1) *Filing with the court defined.* — The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(2) *Filing by electronic means.* — If, pursuant to G.S. 7A-34 and G.S. 7A-343, the Supreme Court and the Administrative Officer of the Courts establish uniform rules, regulations, costs, procedures and specifications for the filing of pleadings or other court papers by electronic means, filing may be made by the electronic means when, in the manner, and to the extent provided therein. (1967, c. 954, s. 1; 1971, c. 538; c. 1156, s. 2.5; 1975, c. 762, s. 1; 1983, c. 201, s. 1; 1985, c. 546; 1991, c. 168, s. 1; 2000-127, s. 1; 2001-379, s. 3; 2001-388, s. 1; 2001-487, s. 107.5(a); 2004-199, s. 5(a); 2005-138, ss. 1, 2; 2006-187, s. 2(a).)

COMMENT

Comment to this Rule as Originally Enacted. — *Section (a).* This section is based upon the federal rule and incorporates part of the West Virginia rule.

Former § 1-125 required that a copy of the answer be mailed to the plaintiff or his attorney of record by the clerk and prohibited the clerk from allowing the answer to be filed without a copy for that purpose. Former § 1-140 stated that if no copy of an answer containing a counterclaim was served upon the plaintiff or his attorney, the allegations in the counterclaim should be denied as a matter of law. Other statutes dealing with serving of notice included: former § 1-578, providing that no motion might be heard and no orders in the cause might be made outside the county where the action was pending unless notice of motion was served on the opposing party in accordance with the provisions of § 1-581; former § 1-568.13, service of order upon person to be examined under adverse party examination statutes; former § 1-568.14, notice to all other parties; former § 8-89, inspection of writings; former § 8-90, production of documents; former §§ 8-71 and 72, depositions; former § 1-153, motion to strike; and § 40-17, notice to parties in eminent domain proceedings.

This section is intended to include all such motions and orders. The phrase "and similar paper" indicates that the enumeration of papers is not exhaustive.

Section (b). — This section is based upon the federal rule but does not track the exact language of the federal rule. The section preserves the requirement of former § 1-140 that a counterclaim or crossclaim be served on the party against whom it is asserted or on his attorney of record.

Former §§ 1-585, 586, and 587 prescribed the form of notices and method of service, which was similar to this section. These provisions permit service upon a party or his attorney unless otherwise provided.

No statutory provision providing heretofore for notice by mail has been found, but such notice by mail was upheld by the court in a case where defendant filed a written motion to strike portions of the complaint and the court found that copies of the motion had been mailed to and received by plaintiff's attorneys. The court said in such circumstances plaintiff was not entitled to have notice of the motion to strike served on her by an officer. Heffner v. Jefferson Std. Life Ins. Co., 214 N.C. 359, 199 S.E. 293 (1938).

Section (c). — This section tracks the language of the federal rule. It should be pointed out that the rule is permissive and applies only when the court makes an order under the rule. If such an order is made, a copy of the order must be served upon all parties. If such an order is made, each defendant prepares his answer to the complaint in which he may state his defenses to the complaint, counterclaims against the plaintiff, and cross actions against any or all of the defendants. Each defendant must serve his answer upon the plaintiff within the time prescribed by Rule 12 (a) and file it with the court. The plaintiff is not required to serve and file replies to counterclaims stated in any of the answers of the defendants, and no defendant need serve and file an answer to a crossclaim asserted against him in any of the answers of the defendants. Any counterclaim, crossclaim, or matter constituting an avoidance or affirmative defense contained in any of the answers of the defendants shall be deemed denied. It should be noted that this section dispenses with service of replies to counterclaims and answers to crossclaims only. Other pleadings and all motions must be served as in other cases.

This section also provides that "the filing of any such pleading and service thereof on the plaintiff constitutes due notice of it to the parties." In all cases where an order is entered under the provisions of this section the defendant or his attorney would be required to examine the court file to determine if any crossclaim had been filed against him.

Former § 1-140 provided that if an answer containing a counterclaim was not served on the plaintiff or his attorney, the counterclaim should be deemed denied. The second paragraph of the same statute provided that if a defendant asserted a crossclaim against a codefendant, no judgment by default might be entered against such codefendant unless he had been served with a notice together with a copy of such crossclaim. Thus, the statute did not require that a counterclaim or crossclaim be "served"; it merely denied certain kinds of relief (default judgment) if such was not served.

Default provisions such as Rule 55 would obviously be inoperative if the judge made an order under this section.

Section (d). — Although this section incorporates most of the federal rule, federal Rule 5 (d) was deemed insufficient for North Carolina practice. Consequently, this section is more detailed than the federal rule. The section also incorporates part of the West Virginia rule but does not track the language of that rule. There is no provision in the federal rule with respect to acceptance of service or of a certificate indicating the method of service. It is believed that this section is more in line with North Carolina practice with respect to service or acceptance of service of summons and other process.

This section will not affect the provisions of certain other rules with respect to filing of papers, such as Rule 3, which requires the complaint to be filed before service.

In substance, this section requires the filing with the court of all papers which are required to be served. There are also papers which are not required to be served, which must also be filed, such as motions which may be heard ex parte. Good practice would indicate that all papers relating to the action should be filed with the court whether required by these rules or not.

Section (e). — This section tracks the federal rule. It reflects prior North Carolina practice.

Comment to the 1975 Amendment. — The amendment adds the words "every paper relating to discovery required to be served upon a party unless the court otherwise orders." It, therefore, makes it clear that all papers relating to discovery required to be served on any party must be served on all parties, unless the court orders otherwise. The language of the former rule expressly included notices and demands, but was not explicit as to answers or responses under Rules 33, 34, and 36. The court is given the power to vary the requirement if in a given case it proves needlessly onerous, such as where the papers are voluminous or where there are numerous parties.

Comment to the 2000 Amendment. — The rule does not require any party to submit a brief or memorandum; it only applies in certain instances in which a party intends to submit a brief or memorandum to the court. The rule would not preclude a party from providing the judge with copies of cases or statutes at a hearing.

Editor's Note. — Sections 1-581 and 40-17, referred to in the Comment to this Rule as originally enacted, set out above, have been repealed. For general information regarding the official comments to the North Carolina Rules of Civil Procedure, see the Editor's Note under the heading for this Chapter.

Session Laws 2000-127, s. 3, provides that the 2000 addition to the Official Comment shall only be for annotation purposes and shall not be construed to be the law.

Session Laws 2006-187, s. 13, provides in part: "Section 2 of this act is effective when it becomes law [August 3, 2006] and applies to all matters filed with the courts on or after the date that the Supreme Court adopts rules for electronic filing as authorized by that section."

Legal Periodicals. — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For a survey of 1996 development in civil procedure law, see 75 N.C.L. Rev. 2229 (1997).

CASE NOTES

This rule is not applicable to motions of counsel to withdraw. Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981).

This rule has no applicability to service

of case on appeal. Thurston v. Salisbury Zoning Bd. of Adjustment, 24 N.C. App. 288, 210 S.E.2d 275 (1974).

Section (b) applies to the service of notice of appeal from a magistrate to the district court. Ball Photo Supply Co. v. McClaim, 30 N.C. App. 132, 226 S.E.2d 178 (1976).

Written motion to set aside a default judgment is not one which might be heard ex parte. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

A report of commissioners is a "similar paper" within the contemplation of this rule and must be "served" upon each of the interested parties. Macon v. Edinger, 303 N.C. 274, 278 S.E.2d 256 (1981).

Sufficient notice of the filing of a report of commissioners is given to a party to a partition proceeding when a copy of the report is duly mailed as provided by section (b) of this rule. Macon v. Edinger, 303 N.C. 274, 278 S.E.2d 256 (1981).

Where the report of the commissioners in a partition proceeding became final, in that all errors were waived if exceptions were not filed within 10 days after filing, the report was held to be a "similar paper" under this rule, which had to be served upon each of the parties, since it is the purpose of this rule that every party be given due process and a reasonable opportunity to be heard. Macon v. Edinger, 49 N.C. App. 624, 272 S.E.2d 411 (1980), rev'd on other grounds, 303 N.C. 274, 278 S.E.2d 256.

What Service Required Where Party Intervenes. — An intervenor party who is granted permission to intervene pursuant to G.S. 1A-1, Rule 24(b)(2) is not required to then issue a summons and complaint pursuant to G.S. 1A-1, Rule 4. The service pursuant to this rule of the motion to intervene accompanied with the complaint is sufficient service upon the party against whom relief is sought or denied in the intervenor's pleading and is sufficient process to acquire jurisdiction over the party if all other requisites for jurisdiction over the party are met. Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345, cert. denied, 300 N.C. 374, 267 S.E.2d 675 (1980), overruled on other grounds, Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

Service of the motion and proposed complaint pursuant to this rule is sufficient service of process on defendant where the intervenor's complaint is not entirely independent of the original complaint and there is no objection that the intervenor's complaint could not be properly served on defendant in this jurisdiction. Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345, cert. denied, 300 N.C. 374, 267 S.E.2d 675 (1980), overruled on other grounds, Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

Service, pursuant to this rule, of the motion accompanied with the pleading is sufficient service upon the party against whom relief is sought or denied in the intervenor's pleading and is sufficient process to acquire jurisdiction over the party if all other requisites for jurisdiction are met. In re Baby Boy Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986), cert. denied, 318 N.C. 695, 351 S.E.2d 750 (1987).

Time for Service. — Section 1A-1, Rule 59(b), when construed with section (a) of this rule, means that service must be made within 10 days when service is required. Hennessee v. Cogburn, 39 N.C. App. 627, 251 S.E.2d 623 (1979), cert. denied, 297 N.C. 300, 254 S.E.2d 919 (1979).

Notice of Additional Claims to Party in Default. — A party who is in default for failure to appear is ordinarily not entitled to notice of additional pleadings in the case, but where a new or additional claim is asserted, service on the party, even though in default, is required in the same manner as provided by G.S. 1A-1, Rule 4 for the service of summons. First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

Plaintiff, who defaulted on original complaint which alleged that she was a resident of this State, was entitled to notice of subsequent motion to declare that none of her property was exempt by virtue of non-residency, and an opportunity to contest the factual allegations as to her non-residency. Where she was given neither notice nor an opportunity to be heard, in violation of statutory and constitutional provisions, the order declaring that her property was not exempt was invalid, and she was entitled to relief therefrom pursuant to G.S. 1A-1, Rule 60(b)(4). First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

Failure of Tenant in Common to Answer Not Cause for Entry of Default. — Where a respondent in a partition proceeding failed to answer the petition for partition because he was satisfied that the interests of the tenants in common were correctly alleged and was satisfied that the relief prayed for was appropriate, his rights were not adversely affected by his failure to plead, and petitioners were not entitled to an entry of default; respondents were therefore not "in default" under G.S. 1A-1, Rule 55, and the provision of section (a) of this rule, which obviates the need for service on parties who are "in default," did not apply. Macon v. Edinger, 49 N.C. App. 624, 272 S.E.2d 411 (1980), rev'd on other grounds, 303 N.C. 274, 278 S.E.2d 256.

Notice may be served on the attorney of record, and such notice is notice to the party. Griffith v. Griffith, 38 N.C. App. 25, 247 S.E.2d 30, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978).

Henderson County Department of Social Services' petition to terminate a mother's parental rights was properly served where it was served upon her attorney of record. In re H.T., 180 N.C. App. 611, 637 S.E.2d 923, 2006 N.C. App. LEXIS 2497 (2006).

Failure to Send Notice to Attorney Not Violation. — Although attorney should have honored defense counsel's request to be notified of calendar notices and instead served defendants directly, he did not violate the Code of Professional Responsibility or the Rules of Civil Procedure. Williams v. Hinton, 127 N.C. App. 421, 490 S.E.2d 239 (1997).

Service Upon Attorney Representing Party in Another Matter Insufficient. — The trial court abused its discretion in denying a seller's motion to set the preliminary injunction aside because the seller never received notice of the buyer's intention to seek a preliminary injunction; the lack of notice affected the seller's substantial rights, and the seller's purported attorney of record did not represent the seller in the instant action, thus making service on the attorney insufficient to provide notice to the seller. Perry v. Baxley Dev., Inc., 188 N.C. App. 158, 655 S.E.2d 460, 2008 N.C. App. LEXIS 88 (2008).

The relationship between a party and his attorney of record continues so long as the opposing party may enter a motion in the matter or apply to the court for further relief. Griffith v. Griffith, 38 N.C. App. 25, 247 S.E.2d 30, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978).

Service on Defendant At Last-Known Address After Attorney Withdrew Was Proper. — Where defendant's attorney was allowed to withdraw, plaintiffs mailed their motion for summary judgment to defendant's last known address, and defendant never argued that it was not at that address, service was proper under G. S. 1A-1, Rule 5(b). Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005), cert. denied, — U.S. —, 126 S. Ct. 2972, 165 L. Ed. 2d 954 (2006).

Presumption of Service of Request Proper. — Plaintiff was presumed to have been properly served with request for admissions, despite denying receipt, where defendants presented a copy of a return receipt signed by the defendant's husband, plaintiff conceded it was sent to the correct address, and plaintiff made no attempt to rebut receipt when questioned by the trial court. Goins v. Puleo, 350 N.C. 277, 512 S.E.2d 748 (1999).

Service of Contempt Order in Alimony Action by Delivery to Attorney. — By filing an answer and counterclaim, defendant made a general appearance in an alimony and child custody and support action, and a contempt show cause order was properly served on him by hand delivery to his attorney. Brown v. Brown, 47 N.C. App. 323, 267 S.E.2d 345 (1980).

Service of Defendant's Attorney with Notice of Motion for Enforcement of Alimony. — A plaintiff seeking enforcement of an order for alimony need not serve defendant with a new summons. Simply serving him with notice of the motion for enforcement is sufficient. Unless otherwise ordered by the court, subsection (b) of this rule allows service of notice of written motions by service on defendant's attorney of record. Miller v. Miller, 98 N.C. App. 221, 390 S.E.2d 352 (1990), cert. denied, 327 N.C. 637, 399 S.E.2d 124 (1990).

Service of defendant's attorney of record in divorce case in 1976 with copies of motion for assignment of wages and show cause order of 1988 was proper, despite defendant's contention that attorney was hired only to protect defendant's interest in the dissolution of his marriage in 1976. Miller v. Miller, 98 N.C. App. 221, 390 S.E.2d 352 (1990), cert. denied, 327 N.C. 637, 399 S.E.2d 124 (1990).

Service on Attorney of Motion to Reduce Support Payments to Judgment. — Defendant in an action for unpaid child support could not complain of inadequate notice of plaintiff's motion to reduce to judgment support payments alleged to be in arrears where defendant's attorney of record was properly served with notice. Griffith v. Griffith, 38 N.C. App. 25, 247 S.E.2d 30, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978).

Where motion for alimony did not specify a date for a hearing, but was served, by being deposited in the mail, properly addressed to defendant's attorney, at least five days before an already scheduled hearing, plaintiff properly proceeded to apply for alimony. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Effect of Failure to Serve Copy of Answer. — The requirement in section (b) that a counterclaim or cross claim be filed with the court and a copy sent to the opposing party does not make a new or separate litigation out of a counterclaim or cross claim which arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim. Therefore, whatever other consequences may flow from failure to serve a copy of the answer, such failure does not result in causing the statute of limitations to run against the claim until such service is accomplished. In re Foreclosure of Deed of Trust, 20 N.C. App. 610, 202 S.E.2d 318 (1974).

Filing of Answer Within 30 Days Not Required Under Section (d). — While G.S. 1A-1, Rule 12(a)(1) requires that the defendant serve his answer within 30 days, there is nothing in section (d) of this rule that requires the defendant to file his answer with the court within 30 days as well. Section (d) does not provide any period in which the filing must take place. Quaker Furn. House, Inc. v. Ball, 31 N.C. App. 140, 228 S.E.2d 475 (1976).

Termination of Parental Rights Actions. — Trial court erred in terminating the parental rights of parents to their minor children; the notice of the action required by G.S. 7B-1106.1 provided to the parents by an agency failed to meet the statutory requirements for such a notice, the service of the notice was made mandatory by G.S. 7B-1102 and G.S. 1A-1, Rule 5(b), and the agency's failure to provide a proper notice was reversible error. Orange County Dep't of Soc. Servs. v. Alexander (In re Alexander), 158 N.C. App. 522, 581 S.E.2d 466, 2003 N.C. App. LEXIS 1180 (2003).

Because the first termination of parental rights action against the mother had been dismissed, service in the instant action was proper under G.S. 1A-1-5 as it was made less than two years after the original action began. In re P.L.P., 173 N.C. App. 1, 618 S.E.2d 241, 2005 N.C. App. LEXIS 1921 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

Henderson County Department of Social Services' petition to terminate a mother's parental rights was properly served where two years from the date of the original petition alleging neglect fell on a Sunday; thus, the next Monday was the end of the statutory period, and the petition had been served on that day. In re H.T., 180 N.C. App. 611, 637 S.E.2d 923, 2006 N.C. App. LEXIS 2497 (2006).

Failure to Serve Father in Neglect Proceeding Required New Hearing. — Adjudication of neglect as to the father was error, where it was based in large part on the father's failure to appear and the father was not served with several relevant documents after waiving the right to counsel. In re H.D.F., — N.C. App. —, 677 S.E.2d 877, 2009 N.C. App. LEXIS 755 (2009).

Requests for Monetary Relief. — A request for monetary relief sought must be served, and the request must also be filed with the court unless it can be shown to be a discovery document of the type specifically excepted in subdivision (d) of this rule. Cottle v. Thompson, 123 N.C. App. 147, 472 S.E.2d 189 (1996).

Trial court erred in dismissing plaintiff's action for failing to file a statement of monetary relief sought where no request for a statement of monetary relief sought was ever filed with the court. Cottle v. Thompson, 123 N.C. App. 147, 472 S.E.2d 189 (1996).

A request for a statement of monetary relief sought cannot be considered a discovery document of the type specifically excepted in subdivision (d) of this rule. Cottle v. Thompson, 123 N.C. App. 147, 472 S.E.2d 189 (1996).

Affidavit Served Prior to Hearing. — Plaintiff's affidavit was served on defendant's attorney within the meaning of subsection (b), when it was mailed prior to hearing even though opposition did not see it until at the hearing. Hedrick v. Rains, 344 N.C. 729, 477 S.E.2d 171 (1996).

Last Known Address. — Where plaintiff mailed notice of hearing on her motion for default to an address other than that provided on defendant's filed response, notice was ineffective. Barnett v. King, 134 N.C. App. 348, 517 S.E.2d 397 (1999).

Admission of Unserved Affidavits Held Proper. — In a foreclosure action, the trial court did not abuse its discretion in admitting unserved affidavits that were identical to earlier affidavits admitted into evidence at a hearing before the clerk, and which contained no new assertions which the debtors could "contradict" through further investigation. In re Foreclosure of Real Prop. Under Deed of Trust from Brown, 156 N.C. App. 477, 577 S.E.2d 398, 2003 N.C. App. LEXIS 179 (2003).

Applied in North Brook Farm Lines v. McBrayer, 35 N.C. App. 34, 241 S.E.2d 74 (1978); Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849 (1979); Phillips v. Phillips, 46 N.C. App. 558, 265 S.E.2d 441 (1980); Cromer v. Cromer, 49 N.C. App. 403, 271 S.E.2d 541 (1980); Webb v. Nash Hosps., 133 N.C. App. 636, 516 S.E.2d 191, 1999 N.C. App. LEXIS 603 (1999); Trivette v. Trivette, 162 N.C. App. 55, 590 S.E.2d 298, 2004 N.C. App. LEXIS 40 (2004); Excel Staffing Serv. v. HP Reidsville, Inc., 172 N.C. App. 281, 616 S.E.2d 349, 2005 N.C. App. LEXIS 1582 (2005); Sharyn's Jewelers, LLC v. Ipayment, Inc., — N.C. App. —, 674 S.E.2d 732, 2009 N.C. App. LEXIS 362 (2009).

Cited in Follum v. N.C. State Univ., — N.C. App. —, 679 S.E.2d 420, 2009 N.C. App. LEXIS 1173 (July 21, 2009);

Towne v. Cope, 32 N.C. App. 660, 233 S.E.2d 624 (1977); State v. Hege, 78 N.C. App. 435, 337 S.E.2d 130 (1985); Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986); Gummels v. North Carolina Dep't of Human Resources, 98 N.C. App. 675, 392 S.E.2d 113 (1990); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993); Precision Fabrics Group, Inc. v. Transformer Sales & Serv., Inc., 120 N.C. App. 866, 463 S.E.2d 787 (1995); Timour v. Pitt County Mem. Hosp., 131 N.C. App. 548, 508 S.E.2d 329 (1998); In re Brown, 141 N.C. App. 550, 539 S.E.2d 366, 2000 N.C. App. LEXIS 1310 (2000); Smith v. Beaufort County Hosp. Ass'n, 141 N.C. App. 203, 540 S.E.2d 775, 2000 N.C. App. LEXIS 1391 (2000); Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002); In re J.L.K., 165 N.C. App. 311, 598 S.E.2d 387, 2004 N.C. App. LEXIS 1162 (2004); In re D.A., 169 N.C. App. 245, 609 S.E.2d 471, 2005 N.C. App. LEXIS 532 (2005).

Rule 6. Time.

(a) *Computation.* — In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, including rules, orders or statutes respecting publication of notices, the day of the act, event, default or publication after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday when the courthouse is closed for transactions, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday when the courthouse is closed for transactions. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) *Enlargement.* — When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect. Notwithstanding any other provisions of this rule, the parties may enter into binding stipulations without approval of the court enlarging the time, not to exceed in the aggregate 30 days, within which an act is required or allowed to be done under these rules, provided, however, that neither the court nor the parties may extend the time for taking any action under Rules 50(b), 52, 59(b), (d), (e), 60(b), except to the extent and under the conditions stated in them.

(c) *Unaffected by expiration of session.* — The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a session of court. The continued existence or expiration of a session of court in no way affects the power of a court to do any act or take any proceeding, but no issue of fact shall be submitted to a jury out of session.

(d) *For motions, affidavits.* — A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59(c), opposing affidavits shall be served at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the affidavit within the required time.

(e) *Additional time after service by mail.* — Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

(f) *Additional time for Address Confidentiality Program participants.* — Whenever a person participating in the Address Confidentiality Program established by Chapter 15C of the General Statutes has a legal right to act within a prescribed period of 10 days or less after the service of a notice or other paper upon the program participant, and the notice or paper is served upon the program participant by mail, five days shall be added to the prescribed period. (1967, c. 954, s. 1; 2000-127, s. 5; 2002-171, s. 2; 2003-337, s. 2.)

COMMENT

Section (a). — The basic rule of excluding the first and including the last day is presently embodied in § 1-593 as to the time within which an act is to be done, and in § 1-594 as to publication of notices. Section 1-593 excludes the last day if it is a Sunday or a legal holiday. The federal rule and this section also exclude Saturdays. This section also conforms publication period time requirements to other time computations.

One other significant change is wrought by adoption of this provision. Formerly, intermediate Saturdays, Sundays, and holidays were included in computing the time, no matter how short the period was. The federal rule makes allowance for the shorter periods of time by providing that if the period is seven days or less, intermediate Saturdays, Sundays or holidays shall not be included.

Section (b). — This section, based upon the federal rule, is more detailed than former statutory provisions. However, there is no basic change in procedure. Former § 1-125 permitted the clerk to extend the time for filing answer or demurrer for a period of time not exceeding 20 days. Former § 1-152 permitted the judge in his discretion to enlarge the time for the doing of any act. Former § 1-220 permitted the clerk or the judge to relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and to supply an omission in any proceeding.

Section (c). — Self-explanatory.

Section (d). — Former § 1-581 provided for 10 days' notice of motion. Thus, adoption of this section results in halving the normal period of notice.

Section (e). — There is no present statutory equivalent to this section. As to service of notice, the statutes do not contemplate service by mail. However, service of notice on plaintiff's attorneys by mail was upheld in Heffner v. Jefferson Std. Life Ins. Co., 214 N.C. 359, 199 S.E. 293 (1938). There are other instances in which service by mail is possible.

Legal Periodicals. — For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For note on a default not constituting an admission of facts for purposes of summary judgment, see 17 Wake Forest L. Rev. 49 (1981).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Service of Process under Lemons v. Old Hickory Council, Boy Scouts of America Inc.: Exalting Procedure over Precedent?," see 67 N.C.L. Rev. 1211 (1989).

For a survey of 1996 development in civil procedure law, see 75 N.C.L. Rev. 2229 (1997).

CASE NOTES

I. In General.
II. Enlargement of Time.
III. Effect of Expiration of Session.
IV. Service of Motions and Affidavits.
V. Additional Time after Service by Mail.
VI. Decisions under Prior Law.

I. IN GENERAL.

The 30-day provision in § 1A-1, Rule 41(d) should not be read in conjunction with subsection (b) of this rule. Sanford v. Starlite Disco, Inc., 66 N.C. App. 470, 311 S.E.2d 67 (1984).

Construction With Other Provisions. — The trial court had no authority under this rule to extend the time plaintiff had to file petition for review of annexation ordinance, because the thirty day time limitation is not a time limitation contained in the Rules of Civil Procedure, but a mandate set by the legislature in G.S. 160A-38. Chicora Country Club, Inc. v. Town of Erwin, 128 N.C. App. 101, 493 S.E.2d 797 (1997).

This rule did not control in case where the language of a local ordinance was clear and unambiguous in its requirement that a minimum ten-day "notice of a public hearing" be given and further stated how that ten days should be calculated; furthermore, no authority exists holding that this rule applies to ordinances of local governments. Richardson v. Union County Bd. of Adjustment, 136 N.C. App. 134, 523 S.E.2d 432, 1999 N.C. App. LEXIS 1297 (1999).

A paper writing is deemed to be filed when it is delivered for that purpose to the proper officer and received by him. Peebles v. Moore, 302 N.C. 351, 275 S.E.2d 833 (1981).

Responsibility to Pay Fee. — Failure to pay the filing fees would not be excused because counsel relied upon the statement of an anonymous Assistant Clerk of Court that no fee was required, and when the notice of appeal was filed with the county clerk's office, no fee was assessed. Riverview Mobile Home Park v. Bradshaw, 119 N.C. App. 585, 459 S.E.2d 283 (1995).

Adequate Notice of Hearing. — Trial court did not abuse its discretion in hearing the motions filed by the wife in a breach of separation agreement proceeding because the husband's counsel had adequate notice under G.S. 1A-1, N.C. R. Civ. P. 6(d) of the hearing for the motions and failed to demonstrate excusable neglect for failure to appear for the hearing. Carpenter v. Carpenter, 189 N.C. App. 755, 659 S.E.2d 762, 2008 N.C. App. LEXIS 692 (2008).

Applied in Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972); Atkinson v. Tarheel Homes & Realty Co., 14 N.C. App. 638, 188 S.E.2d 703 (1972); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55 (1972); Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73 (1973); Howell v. Howell, 22 N.C. App. 634, 207 S.E.2d 312 (1974); Fitch v. Fitch, 26 N.C. App. 570, 216 S.E.2d 734 (1975); Fagan v. Hazzard, 29 N.C. App. 618, 225 S.E.2d 640 (1976); In re Underwood, 38 N.C. App. 344, 247 S.E.2d 778 (1978); Harris v. Latta, 298 N.C. 555, 259 S.E.2d 239 (1979); Kavanau Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638 (1979); Carolina Narrow Fabric Co. v. Alexandria Spinning Mills, Inc., 42 N.C. App. 722, 257 S.E.2d 654 (1979); Bailey v. Gooding, 45 N.C. App. 335, 263 S.E.2d 634 (1980); W & H Graphics, Inc. v. Hamby, 48 N.C. App. 82, 268 S.E.2d 567 (1980); Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190 (1983); Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643 (1988); Gummels v. North Carolina Dep't of Human Resources, 97 N.C. App. 245, 388 S.E.2d 223 (1990); Johnson v. Hutchens, 103 N.C. App. 384, 405 S.E.2d 597 (1991); Hackett v. Bonta, 113 N.C. App. 89, 437 S.E.2d 687 (1993); Evans v. Full Circle Prods., Inc., 114 N.C. App. 777, 443 S.E.2d 108 (1994); Hedrick v. Rains, 344 N.C. 729, 477 S.E.2d 171 (1996); Lexington State Bank v. Miller, 17 N.C. App. 748, 529 S.E.2d 454, 2000 N.C. App. LEXIS 501 (2000); Beck v. City of Durham, 154 N.C. App. 221, 573 S.E.2d 183, 2002 N.C. App. LEXIS 1440 (2002); FNB Southeast v. Lane, 160 N.C. App. 535, 586 S.E.2d 530, 2003 N.C. App. LEXIS 1821 (2003); Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003); In re N.E.L., — N.C. App. —, 676 S.E.2d 907, 2009 N.C. App. LEXIS 708 (2009).

Cited in Rupert v. Rupert, 15 N.C. App. 730, 190 S.E.2d 693 (1972); Barnes v. Barnes, 30 N.C. App. 196, 226 S.E.2d 549 (1976); In re Jacobs, 38 N.C. App. 573, 248 S.E.2d 448 (1978); Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978); Harris v. Latta, 40 N.C. App. 421, 253 S.E.2d 28 (1979); City of Durham v. Keen, 40 N.C. App. 652, 253 S.E.2d 585 (1979); Anderson v. Gooding, 300 N.C. 170, 265 S.E.2d 201 (1980); State v. Harren, 302 N.C. 142, 273 S.E.2d 694 (1981); Ingle v. Ingle, 53 N.C. App. 227, 280 S.E.2d 460 (1981); Byrd v. Mortenson, 308 N.C. 536, 302 S.E.2d 809 (1983); Raintree Homeowners Ass'n v. Raintree Corp., 62 N.C. App. 668, 303 S.E.2d 579 (1983); G & M Sales of E.N.C., Inc. v. Brown, 64 N.C. App. 592, 307 S.E.2d 593 (1983); Elmore v. Elmore, 67 N.C. App. 661, 313 S.E.2d 904 (1984); Miller v. Ruth's of N.C., Inc., 69 N.C. App. 672, 318 S.E.2d 2 (1984); Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987); Pearson v. Nationwide Mut. Ins. Co., 325 N.C. 246, 382 S.E.2d 745 (1989); Adams v. Moore, 96 N.C. App. 359, 385 S.E.2d 799 (1989); Huntington Manor v. North Carolina Dep't of Human Resources, 99 N.C. App. 52, 393 S.E.2d 104 (1990); Chaplain v. Chaplain, 101 N.C. App. 557, 400 S.E.2d 121 (1991); Crowell Constructors, Inc. v. State ex rel. Cobey, 114 N.C. App. 75, 440 S.E.2d 848 (1994); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Locklear v. Scotland Mem. Hosp., 119 N.C. App. 245, 457 S.E.2d 764 (1995); Precision Fabrics Group, Inc. v. Transformer Sales & Serv., Inc., 120 N.C. App. 866, 463 S.E.2d 787 (1995); Sykes v. Keiltex Indus., Inc., 123 N.C. App. 482, 473 S.E.2d 341 (1996); Hockaday v. Lee, 124 N.C. App. 425, 477 S.E.2d 82 (1996); Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002); In re Foreclosure of Real Prop. Under Deed of Trust from Brown, 156 N.C. App. 477, 577 S.E.2d 398, 2003 N.C. App. LEXIS 179 (2003); Old Salem Foreign Car

Serv., Inc. v. Webb, 159 N.C. App. 93, 582 S.E.2d 673, 2003 N.C. App. LEXIS 1426 (2003); Draughon v. Harnett County Bd. of Educ., 166 N.C. App. 464, 602 S.E.2d 721, 2004 N.C. App. LEXIS 1785 (2004); Skinner v. Preferred Credit, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005); Megremis v. Megremis, 179 N.C. App. 174, 633 S.E.2d 117, 2006 N.C. App. LEXIS 1828 (2006); In re H.T., 180 N.C. App. 611, 637 S.E.2d 923, 2006 N.C. App. LEXIS 2497 (2006).

II. ENLARGEMENT OF TIME.

This rule gives the court discretionary authority to enlarge time required for something to be done by the rules or a notice given under the rules or order of court. Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972).

G.S. 1A-1, N.C. R. Civ. P. 6(b) grants the trial courts broad authority to extend any time period specified in any of the Rules of Civil Procedure for the doing of any act, after expiration of such specified time, upon a finding of excusable neglect; therefore, pursuant to Rule 6(b) the trial courts may extend the time for service of process under G.S. 1A-1, N.C. R. Civ. P. 4(c). Wetchin v. Ocean Side Corp., 167 N.C. App. 756, 606 S.E.2d 407, 2005 N.C. App. LEXIS 12 (2005).

Trial court had the discretion to allow individuals an extension of time to serve a summons on a corporation because the alias and pluries summons was merely dormant, and not expired, when the individuals effectuated service. Wetchin v. Ocean Side Corp., 167 N.C. App. 756, 606 S.E.2d 407, 2005 N.C. App. LEXIS 12 (2005).

Section (b) Inapplicable to Amend Entered Judgments. — Section (b) is applicable to enlargement of time for filing pleadings, motions, interrogatories, the taking of depositions, etc. It was not intended to have the effect of giving the court the discretion to amend a final order entered under the mandatory directive of a statute, nor to be applied for the purpose of amending a judgment that has been entered. Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972).

A motion to enlarge time for filing a pleading is addressed to the discretion of the trial court. Privette v. Privette, 30 N.C. App. 41, 226 S.E.2d 188 (1976).

What Time Limits May Be Extended. — The statutory language of section (b) of this rule is clear, and provides that the trial court may extend the time for performance of any acts except those expressly mentioned in the proviso to the rules. By setting out these specific exceptions to the trial court's discretionary power to extend the time specified for doing any act, the General Assembly implicitly excluded all other exceptions. Lemons v. Old Hickory Council, 322 N.C. 271, 367 S.E.2d 655, rehearing denied, 322 N.C. 610, 370 S.E.2d 247 (1988).

Magistrate did not have the authority under G.S. 1A-1, Rule 60(b) to extend the time provided in G.S. 7A-228 for party to pay appeal fees. Riverview Mobile Home Park v. Bradshaw, 119 N.C. App. 585, 459 S.E.2d 283 (1995).

Service of Summons. — Section (b) of this rule gives the trial courts the discretion to extend the time provided in G.S. 1A-1, Rule 4(c) for service of a summons. Lemons v. Old Hickory Council, 322 N.C. 271, 367 S.E.2d 655, rehearing denied, 322 N.C. 610, 370 S.E.2d 247 (1988).

By adopting section (b) of this rule, the General Assembly has given the trial courts authority to breathe new life and effectiveness into a summons retroactively after it has become functus officio by virtue of not being served within the time prescribed. Lemons v. Old Hickory Council, 322 N.C. 271, 367 S.E.2d 655, rehearing denied, 322 N.C. 610, 370 S.E.2d 247 (1988).

Retroactive Extension Not Permitted After Discontinuance of Action. — Trial court erred in allowing plaintiffs' motion to retroactively extend the time period for issuing the alias and pluries summons since the action had been discontinued; trial courts do not have discretion pursuant to G.S. 1A-1, N.C. R. Civ. P. 6(b) to prevent a discontinuance of an action under G.S. 1A-1, N.C. R. Civ. P. 4(e) where there is neither an endorsement of the original summons nor issuance of an alias and pluries summons within ninety days after issuance of the last preceding summons. Russ v. Hedgecock, 161 N.C. App. 334, 588 S.E.2d 69, 2003 N.C. App. LEXIS 2042 (2003), cert. denied, 358 N.C. 545, 599 S.E.2d 407 (2004).

Extending Time in Which to File Complaint. — The clerk represents and is the court by virtue of G.S. 1-7 and has the authority to exercise the discretionary powers conferred by this rule for the purpose of extending additional time in which to file a complaint. Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

Enlarging Time for Filing Answer. — Section (b) of this rule gives the trial court the discretionary authority to enlarge the time period for filing an answer. Norris v. West, 35 N.C. App. 21, 239 S.E.2d 715 (1978).

Where a party seeks an extension of time to answer after the expiration of the 30-day limit, the judge may permit the answer if he finds that the failure to act was the result of excusable neglect. Byrd v. Mortenson, 60 N.C. App. 85, 298 S.E.2d 170 (1982), aff'd, 308 N.C. 536, 302 S.E.2d 809 (1983).

Failure to File Within Extended Time. — Where plaintiffs filed for an extension of time to file their complaint for medical malpractice and loss of consortium, which the court granted, but plaintiffs did not file their complaint until 19 days later, when plaintiffs failed to file their complaint before the extension of time expired, their action abated, and the three-year statute of limitations had run. The trial court could not extend the time in which to file their complaint under section (b) of this Rule, thus reviving the original action and avoiding the statute of limitations. Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993).

Court's Discretion Is Not Unrestrained. — Section (b) gives the trial court wide discretionary authority to enlarge the time within which an act may be done; however, the discretion to be exercised is a judicial discretion, not an unrestrained one. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

When Discretion Can Be Exercised. — The discretion given the court to enlarge time can be exercised upon request prior to expiration of the time where the failure to act within the time prescribed was the result of excusable neglect. Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972); Johnson v. Hooks, 21 N.C. App. 585, 205 S.E.2d 796, cert. denied, 285 N.C. 660, 207 S.E.2d 754 (1974).

Showing of Excusable Neglect Necessary Where Request Untimely. — If the request under this rule for enlargement of time in which to do an act is made after the expiration of the period of time within which the act should have been done, there must be a showing of excusable neglect. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

If the request for an enlargement of the time period for filing an answer is made after the expiration of the time to file, the court may enlarge the time period for filing if the failure to file was the result of excusable neglect. Norris v. West, 35 N.C. App. 21, 239 S.E.2d 715 (1978).

Inmate who sued a sheriff and various medical providers, alleging medical malpractice and negligence, did not show excusable neglect for failing to designate his expert witnesses by the date specified in the trial court's order, and because the trial court properly denied the inmate's motion for an extension of time to designate his expert witnesses and his forecast of evidence could not include a designation of witnesses, the trial court's order granting summary judgment in favor of all defendants was upheld. Summey v. Barker, 357 N.C. 492, 586 S.E.2d 247, 2003 N.C. LEXIS 1105 (2003).

Securing Extension of Time as General Appearance. — By securing an extension of time in which to answer or otherwise plead, defendant made a general appearance which rendered service of summons upon it unnecessary. Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974).

Delayed Signing and Filing of Order Made at Hearing. — Where the decision to tax plaintiff with defendant's costs was made and announced at hearing, the delayed signing and filing of the order taxing plaintiff with costs had no effect on the authority of the trial judge to enter this order. Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987).

Motion Did Not Waive Right to Make § 1A-1, Rule 12(b) Defenses. — Defendant's motion for an extension of time in no way waived his right to make any of the G.S. 1A-1, Rule 12(b) defenses allowed by motion. Mosley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

Waiver Under § 1A-1, Rule 12(h) Not Applicable to Motion for Enlargement of Time. — While G.S. 1A-1, Rule 12(h) provides for waiver of the defense of improper venue when not joined in a motion made under that rule, such waiver is not applicable to a motion for enlargement of time made under this rule. Moseley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

Refusal to Accept Late Affidavits Upheld. — While sections (b) and (d) give the trial court discretion to allow the late filing of affidavits in opposition to a motion for summary judgment, the court does not abuse its discretion when it refuses to accept late affidavits absent a showing of excusable neglect. Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, cert. denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

Motion Held Unnecessary. — Where, upon concluding that defendant's failure to answer was a result of "excusable neglect," the court set aside entry of default and ordered that defendant's answer be filed and remain of record, it was not necessary that defendant file a section (b) motion for enlargement of time to file answer, though that would have been the better practice. Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973).

Time for Making and Ruling on Motion to Amend Judgment. — Section 1A-1, Rule 59(e) and section (b) of this rule do not circumscribe the trial court's authority to rule on a timely motion to alter or amend a judgment; they merely require that a party make such a motion within 10 days after judgment or require that a trial court acting on its own motion amend judgment within 10 days after its entry. It is not required that trial court's ruling on a timely motion by a party must also be made within 10 days after entry of the original judgment. Housing, Inc. v. Weaver, 305 N.C. 428, 290 S.E.2d 642 (1982).

A section 1A-1, Rule 12(b) defense con-

tained in an answer is not the same as a 1A-1, Rule 12(b) defense raised in a motion, and affidavits filed in support of a 1A-1, Rule 12(b) defense contained in an answer is not governed by the time constraints found in subsection (d) of this rule. Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 242, 468 S.E.2d 600 (1996).

Quo Warranto. — This rule does not provide authority for a trial court to extend the time for service of the complaint and summons in a private quo warranto action. State ex rel. Barker v. Ellis, 144 N.C. App. 135, 547 S.E.2d 166, 2001 N.C. App. LEXIS 327, cert. denied, 354 N.C. 74, 553 S.E.2d 204 (2001).

Not requested. — Trial court erred in denying the father's motion to set aside an order terminating his parental rights; since the father was not served within the time limit for serving process once a summons was issued and no extension of time was obtained, the trial court did not obtain personal jurisdiction over him in a case where the mother filed a petition to terminate the father's parental rights. In re A.B.D., 173 N.C. App. 77, 617 S.E.2d 707, 2005 N.C. App. LEXIS 1925 (2005).

III. EFFECT OF EXPIRATION OF SESSION.

This rule clearly allows a written order to be signed out of term, especially when such an act merely documents a decision made and announced before the expiration of the term. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994).

This rule clearly allows a superior court judge to sign a written order out of session without the consent of the parties so long as the hearing to which the order relates was held in term. Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994).

Entry of Orders Out of Session. — Judges did not lack subject matter jurisdiction to enter equitable distribution judgment and permanent alimony order where both were entered out of session. Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994).

Documentation of Summary Judgment Order After Term. — Where the trial judge denied defendant's motion for summary judgment during term, under section (c) of this rule he could thereafter simply document his decision by signing the order and mailing it to the clerk of court after the term had expired. Feibus & Co. v. Godley Constr. Co., 44 N.C. App. 133, 260 S.E.2d 665 (1979), rev'd on other grounds, 301 N.C. 294, 271 S.E.2d 385 (1980).

There was both statutory and common law authority for the trial court's entry of its supplemental judgment, because G.S. 7A-47.1 and this rule both authorize the entry of judgment out of session. Buford v. GMC, 339 N.C. 396, 451 S.E.2d 293 (1994).

IV. SERVICE OF MOTIONS AND AFFIDAVITS.

Section (d) of this rule relates only to the hearing of motions. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

Defendant does not have an absolute right to the notice requirement of this rule. Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975).

A party entitled to notice of a motion may waive such notice. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971); Jenkins v. Jenkins, 27 N.C. App. 205, 218 S.E.2d 518 (1975); Story v. Story, 27 N.C. App. 349, 219 S.E.2d 245 (1975).

And ordinarily does this by attending the hearing of the motion and participating in it. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971); Story v. Story, 27 N.C. App. 349, 219 S.E.2d 245 (1975).

Where defendant corporation suggested no additional testimony that would have available to it at a later hearing and did not show how it would have benefited from a later hearing, then even if notice of a motion was improperly given, defendant waived the notice requirement by attending the hearing of the motion and participating in it. J.D. Dawson Co. v. Robertson Mktg., Inc., 93 N.C. App. 62, 376 S.E.2d 254 (1989).

Service of Affidavits Supporting Summary Judgment. — The provision of section (d) which requires that supporting affidavits be served with a motion applies to affidavits in support of a G.S. 1A-1, Rule 56 motion for summary judgment. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974), distinguishing Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972), in which case affidavits in opposition to motion for summary judgment were at issue.

Subsection (d) of this rule requires that an affidavit in support of a G.S. 1A-1, Rule 56 motion be served with the motion at least 10 days prior to hearing. The trial court may exercise its discretionary powers under section (b) of this rule to order the time within which to file and serve the affidavits enlarged if the request is made prior to making the motion for summary judgment. If the request is made after the motion for summary judgment has been served, there must be a showing of excusable neglect. Gillis v. Whitley's Disct. Auto Sales, Inc., 70 N.C. App. 270, 319 S.E.2d 661 (1984).

Although affidavits in support of a motion for summary judgment are required by section (d) of this rule and G.S. 1A-1, Rule 56(c) to be filed and served with the motion, G.S. 1A-1, Rule 56(e) grants to the trial judge wide discretion to permit further affidavits to supplement those which have already been served. Rolling Fashion Mart, Inc. v. Mainor, 80 N.C. App. 213, 341 S.E.2d 61 (1986).

Extension of Time for Filing Affidavit to Support a Motion to Dismiss. — Defendant store's motion to dismiss stated with sufficient particularity the grounds alleged by citing G.S. 1A-1, Rule 12(b)(4) and 12(b)(5) and specified that plaintiffs, a husband and wife, failed to properly serve it as a corporation and instead served a mailroom employee; fact that the store filed the affidavit of the mailroom employee after its motion was insignificant, because the trial court gave plaintiffs the opportunity to respond and oppose the amended motion. Lane v. Winn-Dixie Charlotte, Inc., 169 N.C. App. 180, 609 S.E.2d 456, 2005 N.C. App. LEXIS 537 (2005).

Extension of Time for Filing Affidavits Supporting Summary Judgment. — Despite the specific language of G.S. 1A-1, Rule 56(c) requiring affidavits to be filed prior to the day of hearing, the trial court may in some instances permit the filing of the affidavits at a later time. If a request for permission to file affidavits at some later time is made before the date of the summary judgment hearing, the trial court may in its discretion order the period for filing affidavits to be enlarged. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Filing of Affidavits on Day of Summary Judgment Hearing. — If a request for permission to file affidavits in support of a motion under G.S. 1A-1, Rule 56 is made on the day of the summary judgment hearing, the trial court may permit the act to be done where the failure to act was the result of excusable neglect. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Where there was no request for enlargement of time within which to file and serve any affidavits made by the plaintiff prior to the day of the hearing of the motion on summary judgment and there was no finding or a request by the plaintiff for a finding of excusable neglect in failing to serve the affidavits prior to the date of the summary judgment hearing, because the plaintiff failed to proceed in a manner that would permit the trial court to exercise its discretion to permit the filing of plaintiff's proffered affidavit, the plaintiff could not on appeal complain about its exclusion. Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991).

Notice of Counterclaim. — Counterclaim for specific performance of separation agreement was void where the husband filed his answer and counterclaim to petition for post-separation support and alimony a week before trial, without serving notice to hear the counterclaim. Wells v. Wells, 132 N.C. App. 401, 512 S.E.2d 468 (1999).

Notice of Custody Hearing. — Ordinarily a parent is entitled to at least five days' notice (an intervening Saturday or Sunday excluded) of a hearing involving the custody of a child; but this is not an absolute right, and is subject to the rule relating to waiver of notice and to the rule that a new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial, amounting to the denial of a substantial right. Brandon v. Brandon, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

Notice of Hearing on Issue of Incompetency. — Five days' notice would be appropriate for hearing on the issue of incompetency when appointment of a guardian ad litem is proposed, unless the court, for good cause, should prescribe a shorter period. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

Motion Deemed Untimely. — As defense counsel served defendants' motion to amend their answer on the city and noticed a hearing for three days after the date of the motion under N.C. R. Civ. P. 6(a), the city had only three days notice of the motion to amend as of the actual day of the hearing; therefore, the motion was properly deemed untimely. City of Winston-Salem v. Slate, 185 N.C. App. 33, 647 S.E.2d 643, 2007 N.C. App. LEXIS 1705 (2007).

Trial court did not consider incompetent evidence when ruling on a doctor's motion to dismiss under G.S. 1A-1-6(d) as a patient made no request to be heard as to the propriety of taking judicial notice of unverified documents in a prior case, the patient failed to argue on appeal that it was error to take judicial notice of the prior action, and the documents were not "sprung" on the patient as the patient was in possession of and had drafted them. Stocum v. Oakley, 185 N.C. App. 56, 648 S.E.2d 227, 2007 N.C. App. LEXIS 1685 (2007).

Where motion for alimony did not specify a date for hearing, but was served, by being deposited in the mail, properly addressed to defendant's attorney, at least five days before an already scheduled hearing, plaintiff properly proceeded to apply for alimony. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Constructive Notice of Orders and Motions Made During Session. — Where an oral motion is appropriately made under G.S. 1A-1, Rule 7, the doctrine that a party to an action has constructive notice of all orders and motions made in the cause during the session of court at which the cause is regularly calendared is preserved in G.S. 1A-1, Rules 6 and 7.

Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

Motion that court vacate divorce judgment entered at same session of court was not subject to actual notice requirement of section (d), which requires that written motions be served at least 5 days prior to the date set for hearing. Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

Trial court did not abuse its discretion in denying plaintiffs' motion, where plaintiffs did not comply with the requirements of section (d) of this rule, but waited to file their motion until the very day that they wished it heard, and allowing it would have been unfair and prejudicial to defendants. Duncan v. Ammons Constr. Co., 87 N.C. App. 597, 361 S.E.2d 906 (1987).

Untimely Served Affidavit Properly Admitted. — Trial court did not err when it allowed and considered the untimely served affidavit of an executrix at a hearing on a party's motion to compel arbitration. Raper v. Oliver House, LLC, 180 N.C. App. 414, 637 S.E.2d 551, 2006 N.C. App. LEXIS 2440 (2006).

V. ADDITIONAL TIME AFTER SERVICE BY MAIL.

Effect of Section (e). — Section (e), in effect, extends the minimum 10 day notice period to 13 days when the notice is by mail. This rule serves to alleviate the disparity between constructive and actual notice when the mailing of notice begins a designated period of time for the performance of some right. Planters Nat'l Bank & Trust Co. v. Rush, 17 N.C. App. 564, 195 S.E.2d 96 (1973).

Section (e) does not apply to appeals from an Employment Security Commission adjudicator, so as to give the appealing party, in addition to the 10-day period prescribed by G.S. 96-15(b)(2), three additional days within which to file an appeal. Smith v. Daniels Int'l, 64 N.C. App. 381, 307 S.E.2d 434 (1983).

Section (e) Held Inapplicable. — Plaintiffs' motions for entry of default and default judgment, which were filed 31 days after service of summons and complaint on defendant, were made after defendant's time to answer had expired, as although summons and complaint were served upon defendant by mail, section (e) of this rule did not apply to extend his time to answer to 33 days, because the 30 days defendant had under G.S. 1A-1, Rule 12 to answer the complaint began running when defendant was served with the summons and complaint, not when plaintiff mailed it. Williams v. Moore, 95 N.C. App. 601, 383 S.E.2d 416 (1989).

No Reversible Error Where Defendants Not Prejudiced by Untimely Notice. — Trial court did not commit reversible error in granting summary judgment in favor of plaintiff although plaintiff failed to give timely notice to appellants of said motion pursuant to section (e) of this rule and G.S. 1A-1, Rule 56(c). Plaintiff conceded that the Notice of the Summary Judgment Hearing was served by mail only nine days prior to the hearing instead of 13 days as required; however, defendants failed to demonstrate any prejudice caused them by the untimely notice. Symons Corp. v. Quality Concrete Constr., Inc., 108 N.C. App. 17, 422 S.E.2d 365 (1992).

VI. DECISIONS UNDER PRIOR LAW.

Editor's Note. — *The cases cited below were decided under former G.S. 1-152.*

Inherent Power to Extend Time. — The superior court possesses an inherent discretionary power to amend pleadings or to allow them to be filed at any time, unless prohibited by some statute or unless vested rights are interfered with. Gilchrist v. Kitchen, 86 N.C. 20 (1882); Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

A judge of the superior court in this State has inherent power in his discretion and in furtherance of justice to extend the time for filing a complaint, and he is also vested with such authority by statute. Deanes v. Clark, 261 N.C. 467, 135 S.E.2d 6 (1964).

The right to amend pleadings in a case and to allow answers or other pleadings to be filed at any time is an inherent and statutory power of the superior courts, which they may exercise at their discretion, unless prohibited by some statutory enactment or unless vested rights are interfered with. State Hwy. Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

Where amended complaint was filed after expiration of the time allowed in order permitting filing of amendment, the trial court had the discretionary power to enter an order extending the time for the filing of the amendment to the date of the hearing and to overrule defendant's motion to strike on the ground that the amendment was filed after the expiration of the time allowed. Alexander v. Brown, 236 N.C. 212, 72 S.E.2d 522 (1952).

Defendants were not entitled to dismissal as a matter of right for plaintiff's failure to file complaint in due time, since the judge, in his discretion, could enlarge the time for pleading. Early v. Eley, 243 N.C. 695, 91 S.E.2d 919 (1956).

Power to Enlarge Time for Filing Answer. — The judge of the superior court has the discretionary power to enlarge the time in which answer may be filed beyond that limited before the clerk, upon such terms as may be just, by an order to that effect. Aldridge v. Greensboro Fire Ins. Co., 194 N.C. 683, 140

S.E. 706 (1927); Harmon v. Harmon, 245 N.C. 83, 95 S.E.2d 355 (1956).

When a complaint states a cause of action, the court, in the exercise of its discretion, may extend defendant's time to plead. Walker v. Nicholson, 257 N.C. 744, 127 S.E.2d 564 (1962).

Motion to Strike. — When a motion to strike is not made in apt time, the court has discretionary power to allow or deny such motion, and its ruling will not be disturbed on appeal in the absence of an abuse of discretion. McDaniel v. Fordham, 264 N.C. 62, 140 S.E.2d 736 (1965).

Section 136-107 as Exception to General Rule. — Section 136-107, limiting the time for the filing of answer in condemnation proceedings instituted by the Highway Commission, must be construed as an exception to the general power of the court to extend the time for the filing of pleadings, so that the court has no discretionary power to allow the filing of an answer after the time limited in the condemnation statute. State Hwy. Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

Exercise of Discretion Not Generally Subject to Review. — It is generally held that whenever the judge is vested with a discretion, his doing or refusal to do the act in question is not reviewable upon appeal. Beck v. Bellamy, 93 N.C. 129 (1885); Best v. British & Am. Mtg. Co., 131 N.C. 70, 42 S.E. 456 (1902); Wilmington v. McDonald, 133 N.C. 548, 45 S.E. 864 (1903); United Am. Free-will Baptist Church, N.E. Conference v. United Am. Free-will Baptist Church, N.W. Conference, 158 N.C. 564, 74 S.E. 14 (1912); Early v. Eley, 243 N.C. 695, 91 S.E.2d 919 (1956); Harmon v. Harmon, 245 N.C. 83, 95 S.E.2d 355 (1956).

Absent Abuse of Discretion. — A judgment or order rendered by a judge of the superior court in the exercise of a discretionary power is not subjected to review by appeal to the Supreme Court, unless there has been an abuse of discretion on his part. State Hwy. Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

If exercise of a discretionary power is refused upon the ground that the court has no power to grant a motion addressed to its discretion, the ruling of the court is reviewable. State Hwy. Comm'n v. Hemphill, 269 N.C. 535, 153 S.E.2d 22 (1967).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; motions.

(a) *Pleadings.* — There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. If the answer alleges contributory negligence, a party may serve a reply alleging last clear chance. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer.

(b) *Motions and other papers.* —

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

(3) A motion to transfer under G.S. 7A-258 shall comply with the directives therein specified but the relief thereby obtainable may also be sought in a responsive pleading pursuant to Rule 12(b).

(4) A motion in a civil action filed with the superior court clerk of a county that is in a superior court district consisting of more than one county or parts of more than one county may be heard in any county in that superior court district. The motion may be heard at a regular civil or

civil priority session of court or, with the consent of the presiding judge, at a regular criminal or criminal priority session of court. A party shall not object to the hearing of the motion outside the county with whose superior court clerk the action was filed if the motion is heard within the superior court district where the action is pending.

(c) *Demurrers, pleas, etc., abolished.* — Demurrers, pleas, and exceptions for insufficiency shall not be used.

(d) *Pleadings not read to jury.* — Unless otherwise ordered by the judge, pleadings shall not be read to the jury. (1967, c. 954, s. 1; 1971, c. 1156, s. 1; 2000-127, s. 2; 2005-163, s. 1.)

COMMENT

Section (a). — This section defines the total permissible range of pleadings, following long established code procedure by making the reply the terminal permissible pleading in the traditional exchange between plaintiff and defendant. Furthermore, this section makes specific that which has been evolved without literal sanction under the Code, that an answer is to be filed to a crossclaim and that where additional defendants are summoned, third party complaint and answer are to be filed. The only time reply is actually required, aside from when ordered by the court, is to a counterclaim actually so denominated. This is an improvement over code procedure, which requires a reply to any counterclaim at peril of admitting its allegations, thereby putting an unjustifiable burden on the plaintiff to ascertain at his peril whether answers containing affirmative defenses may be construed to involve counterclaims. Whether or not a reply is necessary is presently extremely difficult to determine in other contexts. Compare, e.g. Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966), and former § 1-159. Finally, following code practice, authority is given the courts to order replies to noncounterclaiming answers and third party answers, thus rounding out the total list of permissible pleadings under all circumstances.

Section (b)(1). — This section makes more explicit as a matter of literal statement the motion practice actually followed under present code practice. The specification that written motions shall state their grounds and the relief sought is a helpful directive. And the provision for combining the motion with the notice thereof actually gives literal sanction to a procedure of convenience frequently indulged in State court practice without such direct authorization.

Section (c). — This section rounds out the exclusive listing of pleadings and motions allowable under this approach, by making explicit what a long tradition might have resisted, that those other traditional pretrial stage procedural devices, the demurrer and the special pleas, are abolished from the practice. There are to be only the listed pleadings, and motions shaped functionally to accomplish various specific pretrial purposes formerly served by motions, demurrers and pleas. The abolition of these devices by name does not, of course, automatically do away with the possibility that the functions served by these shall continue to be served. This section must be read in the light of Rule 12, wherein the new procedure by which these functions are served is spelled out.

Section (d). — The purpose of this section is to end the practice of reading pleadings to the jury. The Commission contemplated that a brief opening statement would generally be substituted.

Comment to the 2000 Amendment. — The 2000 amendment conforms the North Carolina rule to federal Rule 7(b). The federal courts do not apply the particularity requirement as a procedural technicality to deny otherwise meritorious motions. Rather, the federal courts apply the rule to protect parties from prejudice, to assure that opposing parties can comprehend the basis for the motion and have a fair opportunity to respond.

Editor's Note. — Session Laws 2000-127, s. 4, provides that the 2000 addition to the Official Comment shall only be for annotation purposes and shall not be construed to be the law.

Legal Periodicals. — For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969).

For article on pleadings and motions, see 5 Wake Forest Intra. L. Rev. 70 (1969).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For note on default not constituting an admission of facts for purposes of summary judgment, see 17 Wake Forest L. Rev. 49 (1981).

For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

I. In General.
II. Pleadings.
III. Motions and Other Papers.
IV. Abolition of Demurrers, Pleas, etc.

I. IN GENERAL.

The only effect and purpose of section (d) of this rule is to eliminate the former practice of introducing cases to the jury by reading the pleadings; it is not concerned with the admissibility of evidence, one of the basic principles of which, under the adversary system of litigation, is that anything a litigant says about his case, if relevant and not otherwise rendered inadmissible, can be put in evidence against him. Stilwell v. Walden, 70 N.C. App. 543, 320 S.E.2d 329 (1984).

As to propriety of hearing motions for preliminary injunctions on affidavits when proceeding under G.S. 1-485(1) for a preliminary injunction, see State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

Applied in Mangum v. Surles, 12 N.C. App. 547, 183 S.E.2d 839 (1971); Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972); City of Durham v. Lyckan Dev. Corp., 26 N.C. App. 210, 215 S.E.2d 814 (1975); Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975); Barnes v. Barnes, 30 N.C. App. 196, 226 S.E.2d 549 (1976); State v. West, 31 N.C. App. 431, 229 S.E.2d 826 (1976); Biddix v. Kellar Constr. Corp., 32 N.C. App. 120, 230 S.E.2d 796 (1977); In re Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977); North Brook Farm Lines v. McBrayer, 35 N.C. App. 34, 241 S.E.2d 74 (1978); Sawyer v. Cox, 36 N.C. App. 300, 244 S.E.2d 173 (1978); Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978); Mazzocone v. Drummond, 42 N.C. App. 493, 256 S.E.2d 843 (1979); Bailey v. Gooding, 45 N.C. App. 335, 263 S.E.2d 634 (1980); Meachan v. Montgomery County Bd. of Educ., 47 N.C. App. 271, 267 S.E.2d 349 (1980); Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981); Connor v. Royal Globe Ins. Co., 56 N.C. App. 1, 286 S.E.2d 810 (1982); Towery v. Anthony, 68 N.C. App. 216, 314 S.E.2d 570 (1984); Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990); Pierce v. Johnson, 154 N.C. App. 34, 571 S.E.2d 661, 2002 N.C. App. LEXIS 1406 (2002); Sprinkle v. N.C. Wildlife Res. Comm'n, 165 N.C. App. 721, 600 S.E.2d 473, 2004 N.C. App. LEXIS 1513 (2004).

Cited in Jackson v. Jones, 1 N.C. App. 71, 159 S.E.2d 580 (1968); Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971); North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971); Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56 (1972); Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972); Bill v. Hughes, 21 N.C. App. 152, 203 S.E.2d 395 (1974); Thacker v. Harris, 22 N.C. App. 103, 205 S.E.2d 744 (1974); Student Bar Ass'n Bd. of Governors v. Byrd, 32 N.C. App. 530, 232 S.E.2d 855 (1977); Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978); Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979); Johnson v. Robert Dunlap & Racing, Inc., 53 N.C. App. 312, 280 S.E.2d 759 (1981); Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981); Brown v. Lanier, 60 N.C. App. 575, 299 S.E.2d 279 (1983); McNeal v. Black, 61 N.C. App. 305, 300 S.E.2d 575 (1983); Chappell v. Redding, 67 N.C. App. 397, 313 S.E.2d 239 (1984); Beard v. Pembaur, 68 N.C. App. 52, 313 S.E.2d 853 (1984); In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986); Smith v. North Carolina Farm Bureau Mut. Ins. Co., 84 N.C. App. 120, 351 S.E.2d 774 (1987); Stone v. Stone, 96 N.C. App. 633, 386 S.E.2d 602 (1989); Gummels v. North Carolina Dep't of Human Resources, 97 N.C. App. 245, 388 S.E.2d 223 (1990); Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991); Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992); Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); Dunkley v. Shoemate, 121 N.C. App. 360, 465 S.E.2d 319 (1996); Soderlund v. North Carolina Sch. of Arts, 125 N.C. App. 386, 481 S.E.2d 336 (1997); Hunter v. Guardian Life Ins. Co. of Am., 162 N.C. App. 477, 593 S.E.2d 595, 2004 N.C. App. LEXIS 174 (2004); Santana v. Santana, 171 N.C. App. 432, 614 S.E.2d 438, 2005 N.C. App. LEXIS 1204 (2005); Early v. County of Durham, Dep't of Soc. Servs., — N.C. App. —, 667 S.E.2d 512, 2008 N.C. App. LEXIS 1818 (2008).

II. PLEADINGS.

The function of a reply is to deny the new matter alleged in the answer or affirmative defenses which the plaintiff does not admit. A reply may not state a cause of action. Other matters within a reply outside of this scope may properly be stricken on motion. Miller v. Ruth's of N.C., Inc., 69 N.C. App. 153, 316 S.E.2d 622, cert. denied, 312 N.C. 494, 322 S.E.2d 557 (1984).

Answer is a required responsive pleading, and denials are required to fairly meet the substance of the averments denied. In a client's legal malpractice case alleging that the lawyers failed to advise the client of use restrictions on land purchased by the client, the trial court's order dismissing the case as time-barred was affirmed, where the client had failed to specifically deny that he was notified of the land use restrictions approximately two months after closing on the purchase of the land, and over three years before filing the legal malpractice case. Bolton v. Crone, 162 N.C. App. 171, 589 S.E.2d 915, 2004 N.C. App. LEXIS 56 (2004).

"Counterclaim Denominated as Such". — This rule, in providing that a reply must be filed "to a counterclaim denominated as such," implies there will be counterclaims not so denominated. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Allegations in Counterclaim Deemed Denied in Divorce Case. — Despite the fact that the wife did not respond to allegations of marital misconduct and fault contained in the husband's counterclaim in the parties' divorce case, pursuant to G.S. 50-10(a), all of the allegations of the counterclaim were deemed denied. Phillips v. Phillips, 185 N.C. App. 238, 647 S.E.2d 481, 2007 N.C. App. LEXIS 1735 (2007).

No Reply Required to "Counterclaim" Merely Asserting Affirmative Defense. — Plaintiff's failure to file a reply to defendant's purported "counterclaim" did not operate as an admission of the facts alleged therein where defendant's pleading did nothing more than raise an affirmative defense to plaintiff's cause of action to which a reply was neither required nor permitted by section (a). Eubanks v. First Protection Life Ins. Co., 44 N.C. App. 224, 261 S.E.2d 28 (1979), cert. denied, 299 N.C. 735, 267 S.E.2d 661 (1980).

Permission to File Reply to Affirmative Defenses. — Allegations of affirmative defenses were deemed denied or avoided, so normally a reply was not necessary to protect the plaintiff's rights; there was no inequity in the procedure used by the trial court in entering judgment on the pleadings in a lender's claim for a deficiency judgment against guarantors. If the lender believed a reply to the guarantors' affirmative defenses was necessary, the lender could have sought permission to file a reply to the affirmative defenses, and, in any event, the lender brought its defenses to the attention of the trial court by way of its response to the guarantors' motion, its trial brief, and its arguments before the trial court. Carolina Bank v. Chatham Station, Inc., 186 N.C. App. 424, 651 S.E.2d 386, 2007 N.C. App. LEXIS 2195 (2007).

Reply Alleging Last Clear Chance Not Exclusive Pleading Alternative. — While the recommended pleading practice is for the plaintiff to file a reply alleging last clear chance, it is not the exclusive pleading alternative. Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977).

Doctrine of Last Clear Chance Need Not Be Pleaded by Name. — While the plaintiff must plead the facts making the doctrine of last clear chance applicable on order to rely upon it, it is not required that he plead the doctrine by its generally accepted name. Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977).

But Some Pleading Alleging Last Clear Chance Is Necessary. — The words "may serve a reply" in section (a) could be misleading if a plaintiff construed the "may" as permissive and the failure to file a reply as not foreclosing any rights. When section (a) is read in conjunction with G.S. 1A-1, Rule 8(d), it is evident that some pleading alleging last clear chance is necessary if a plaintiff seeks to prove the avoidance at trial, because G.S. 1A-1, Rule 8(d) only deems affirmative defenses appearing in the answer as denied or avoided if a responsive pleading is neither required nor permitted. Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977).

Where the plaintiff in a negligence action did not exercise the option of filing a reply alleging last clear chance, nor plead facts in his complaint sufficient to invoke the doctrine, the pleadings were not sufficient to raise the defense. Meadows v. Lawrence, 75 N.C. App. 86, 330 S.E.2d 47 (1985), aff'd, 315 N.C. 383, 337 S.E.2d 851 (1986).

Until a pleading is withdrawn or changed with court's approval, it is a binding judicial admission of any fact stated therein; and the fact that that the pleading was signed only by lawyer makes no difference, unless it is made to appear that the party's attorney acted without authority. Stilwell v. Walden, 70 N.C. App. 543, 320 S.E.2d 329 (1984).

Procedure at Trial Where Party Not Permitted to File Responsive Pleading. — A party who is not permitted to file a responsive pleading may meet the allegations at trial in any manner that would have been proper had a reply been allowed. Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

The right to amend the pleadings of a cause and allow answers or other pleadings to be filed at any time is an inherent power of the district and superior courts, which they may exercise at their discretion, unless prohibited by some statutory enactment or unless vested rights are interfered with. Johnson

v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

Joining Request for Equitable Distribution in a Reply. — A plaintiff in a divorce action may admit to a claim for equitable distribution in a reply, and join in the claims for an equitable distribution of the marital property through a reply pleading. The defendant is precluded, by principles of equitable estoppel, from defeating plaintiff's right to equitable distribution by submitting to a voluntary dismissal of his counterclaim. Hunt v. Hunt, 117 N.C. App. 280, 450 S.E.2d 558 (1994).

Pleading Damages to Jury. — Notwithstanding section (a) of this rule, it is still the practice in this State for counsel for both sides to suggest in argument to the jury, if they wish, lump-sum amounts for the jury's consideration on the personal injury damage issue. Trial judges, for example, ordinarily instruct juries on this issue as follows: "I instruct you that if you reach this issue, you are not to be governed by the amount of damages suggested by the parties or their attorneys, but you are to be governed exclusively by the evidence in the case and the rules of law I have given you with respect to the measure of damages." Weeks v. Holsclaw, 306 N.C. 655, 295 S.E.2d 596 (1982), rehearing denied, 307 N.C. 273, 302 S.E.2d 884 (1983).

G.S. 1A-1, N.C. R. Civ. P. 7, 26, and G.S. 8C-1, N.C. R. Civ. P. 101 et seq., permitted a husband who had not yet been declared a child's father to file pleadings and motions, obtain discovery, and present evidence; accordingly, the husband could have introduced evidence of his paternity and/or rebutted or discredited evidence of paternity presented by a putative father. Although the husband could have accomplished neither, his presence was not obviously, utterly immaterial, as it afforded him an opportunity to defend the presumption that he was the child's father and discredit the putative father's evidence to the contrary. In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

III. MOTIONS AND OTHER PAPERS.

Similar Meaning of "Application" in Subsection (b)(1) and § 50-16.8(b) and (d). — The word "application" as used in subsection (b)(1) of this rule and in former subsections (b) and (d) of G.S. 50-16.8 has reference to the same kind of procedure. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Under this rule, an application for default judgment is considered a motion in a civil action. Miller v. Belk, 18 N.C. App. 70, 196 S.E.2d 44, cert. denied, 283 N.C. 665, 197 S.E.2d 874 (1973).

A motion for involuntary dismissal may not be properly made pursuant to this rule, because this rule merely defines the form of motions made to the court. Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973).

Oral motion made during the session of court at which a case is calendared is permitted by this rule. Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

This rule clearly allows continuation of pre-rules practice under which oral motions to which no actual notice provision applied were allowed in an action during the session of court at which it was regularly calendared. Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

A motion need not be made in writing if made during the session at which the cause is calendared for trial. Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73, cert. denied, 283 N.C. 754, 198 S.E.2d 723 (1973).

Constructive Notice of Oral Motions. — Where an oral motion is appropriately made under this rule, the doctrine that a party to an action has constructive notice of all orders and motions made in the cause during the session of court at which the cause is regularly calendared is preserved in G.S. 1A-1, Rule 6 and this rule. Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

Waiver of Notice. — Where the content of plaintiff's notice of hearing to modify custody, seeking "such relief as to the court may seem just and proper," was insufficient to comply with the requirement that the motion state the grounds therefor and the relief or order sought, but defendant's attorney failed to object, defendant waived proper notice of plaintiff's motion to modify custody. Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993).

Pre-answer Motion to Dismiss was not a responsible pleading within the confines of Rule 12 of the North Carolina Rules of Civil Procedure, preventing the entry of default judgment pursuant to Rule 55 of the Rules of Civil Procedure. Eden's Gate, Ltd. v. Leeper, 121 N.C. App. 171, 464 S.E.2d 696 (1995).

Particularity of Grounds. — Defendant store's motion to dismiss stated with sufficient particularity the grounds alleged by citing G.S. 1A-1, Rule 12(b)(4) and 12(b)(5) and specified that plaintiffs, a husband and wife, failed to properly serve it as a corporation and instead served a mailroom employee; fact that the store filed the affidavit of the mailroom employee after its motion was insignificant, because the trial court gave plaintiffs the opportunity to respond and oppose the amended motion. Lane v. Winn-Dixie Charlotte, Inc., 169 N.C. App. 180, 609 S.E.2d 456, 2005 N.C. App. LEXIS 537 (2005).

A bare-bones motion, which neither states the grounds therefor nor specifies the relief sought, fails to inform either the court or the adverse party of what the movant wants. Such complete failure to give notice cannot fairly be passed off as a technical defect, for where court and adverse cannot comprehend the basis of a motion, they are rendered powerless to respond to it. Dusenberry v. Dusenberry, 87 N.C. App. 490, 361 S.E.2d 605 (1987).

No Jurisdiction to Enter Order Where No Claim for Relief in Motion Papers. — Trial court lacked subject matter jurisdiction to enter an order on the county Department of Social Services' (DSS) "motion in the cause," which was made at the previous direction of the trial court for DSS to petition for termination of a mother's parental rights, where the motion lacked any request for relief, as required by G.S. 1A-1, Rule 7(b)(1); although the trial court had subject matter jurisdiction over termination proceedings and motions therein, pursuant to G.S.7B-200(a)(4) and 7B-1101, it was bound to follow the Rules of Civil Procedure in such an action, based on G.S. 1A-1, Rule 17(c)(2), and accordingly, the motion was found to be insufficient. In re McKinney, 158 N.C. App. 441, 581 S.E.2d 793, 2003 N.C. App. LEXIS 1191 (2003).

Defendants' motion for a new trial did not meet the requirements of this section where the defendants merely stated that they were entitled to a new trial under G.S. 1A-1, Rule 59(a)(5), (a)(7) and (a)(8), but did not state any specific basis for granting a new trial. Meehan v. Cable, 135 N.C. App. 715, 523 S.E.2d 419, 1999 N.C. App. LEXIS 1373 (1999).

Name and Number of Rule Pursuant to Which Motion Is Made. — While failure to give the number of the rule to which a motion is made is not necessarily fatal, it would be of great benefit to the trial court and the appellate court for counsel to name and number the rule pursuant to which a motion is made. Home Health & Hospice Care, Inc. v. Meyer, 88 N.C. App. 257, 362 S.E.2d 870 (1987).

While failure to give the number of the rule under which a motion is made is not necessarily fatal, the grounds for the motion and the relief sought must be consistent with the Rules of Civil Procedure. Gallbronner v. Mason, 101 N.C. App. 362, 399 S.E.2d 139, cert. denied, 329 N.C. 268, 407 S.E.2d 835 (1991), appeal dismissed, 333 N.C. 167, 399 S.E.2d 139 (1992).

Motion to Alter or Amend Judgment. — In order to suspend the running of the appeal clock, a G.S. 1A-1, Rule 59(e) motion must not only be timely served, but it must also meet the demands of section (b) of this rule. Dusenberry v. Dusenberry, 87 N.C. App. 490, 361 S.E.2d 605 (1987).

If a G.S. 1A-1, Rule 59(e) motion fails to comply with the requirements of section (b) of this rule, it is ipso facto ineffective to suspend the running of appeal time.' Dusenberry v. Dusenberry, 87 N.C. App. 490, 361 S.E.2d 605 (1987).

Trial court properly held that a motion to alter or amend violated G.S. 1A-1-7(b)(1) and was not a proper G.S. 1A-1-59(e) motion because the motion did not make reference to any of the grounds of that rule, did not use any of the language from the rule that gave notice of reliance on any of those grounds, and did not reveal the basis of the motion in terms of that rule; further, because the time for filing an appeal was not tolled by the improper G.S. 1A-1-59 motion, the notice of appeal was not a timely appeal of the order dismissing the petition. N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp., 183 N.C. App. 466, 645 S.E.2d 105, 2007 N.C. App. LEXIS 1105 (2007).

Motion to Amend Failed to Meet Requirements of Rule. — Trial court did not err by failing to address a former employee's alleged motions to amend because the employee's alleged oral request to amend was contingent upon the trial court's dismissal of the case and did not adequately inform either the trial court or defendants that the employee truly intended to amend her complaint, but instead, the employee indicated a mere willingness to amend her complaint; the employee's alleged written motion, which took the form of a letter addressed to the trial judge and copied to defense counsel, did not meet the requirements of a written motion to amend under G.S. 1A-1, Rules 7 and 10 because the letter contained no designation, caption, or numbered paragraphs, it was not filed with the trial court, and even assuming arguendo that the letter could be construed as a motion to amend, the employee failed to show any abuse of discretion in the trial court's decision to not allow the amendment. Helm v. Appalachian State Univ., — N.C. App. —, 670 S.E.2d 571, 2008 N.C. App. LEXIS 2251 (2008).

Trial court erred in granting a motion captioned "Motion to Forfeit Security Deposit" in a landlord-tenant dispute, where the motion was in essence an attempt to amend the complaint, which made no reference to a security deposit, and judgment had been entered in the case. Gallbronner v. Mason, 101 N.C. App. 362, 399 S.E.2d 139, cert. denied, 329 N.C. 268, 407 S.E.2d 835 (1991), appeal dismissed, 333 N.C. 167, 399 S.E.2d 139 (1992).

Statute of Limitations Defense. — Attorney's failure to affirmatively plead a statute of limitations defense in his written motion to dismiss did not bar the trial court from considering the defense because a partner briefed and argued that his fraud, negligent misrepresentation, and civil conspiracy claims were not time-barred; further, the motion was in writing and stated with sufficient particularity the grounds for dismissal. Carlisle v. Keith, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

Timeliness of Responsive Pleading. — Although plaintiff had no right to file a responsive pleading to the answer under this rule, plaintiff did have a continuing duty to review the appropriateness of persisting in litigating a claim which was alleged to be time-barred. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Motions for costs and fees were not time-barred. — The 14-day rule in Rule 54(d)(2)(B), F.R.Civ.P., clearly does not apply to litigation pending in North Carolina state courts, and the North Carolina Rules of Civil Procedure contain neither a counterpart to federal Rule 54(d)(2)(B) nor a deadline for filing a motion for costs and fees. Okwara v. Dillard Dep't Stores, 136 N.C. App. 587, 525 S.E.2d 481, 2000 N.C. App. LEXIS 117 (2000).

Particularity requirement of N.C. R. Civ. P. 7(b)(1) was met by a plaintiff with regard to upholding a trial court's judgment that plaintiff provided sufficient evidence to survive defendant insurance company's motion for summary judgment in a negligence and fraud action wherein one of the insurance company's agents misappropriated the plaintiff's annuity fund for his own gambling habit because the plaintiff presented sufficient allegations to support a jury finding that the insurance company failed to exercise reasonable skill, care, and diligence in allowing themselves to have been misled by the fraudulent acts of its agent or in failing to timely discover the fraud. White v. Consol. Planning, Inc., 166 N.C. App. 283, 603 S.E.2d 147, 2004 N.C. App. LEXIS 1780 (2004), cert. denied, — N.C. —, 610 S.E.2d 717 (2005).

IV. ABOLITION OF DEMURRERS, PLEAS, ETC.

"Pleas" Abolished. — Under section (c) of this rule, "pleas" are specifically abolished. Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 185 S.E.2d 727 (1972).

Concept of "Defective Statement of a Good Cause of Action" Abolished. — When section (c) of this rule abolished demurrers and decreed that pleas "for insufficiency shall not be used," it also abolished the concept of "a defective statement of a good cause of action." Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

Section (c) of this rule abolished demurrers, and with them the concept of a defective statement of a good cause of action. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

Motion to Dismiss May Be Interposed to Defective Claim. — Generally speaking, the motion to dismiss under G.S. 1A-1, Rule 12(b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

But Not to Defective Statement of Good Claim. — The motion to dismiss under G.S. 1A-1, Rule 12(b)(6) may not be successfully interposed to a complaint which was formerly labeled a "defective statement of a good cause of action." For such complaint, other provisions of G.S. 1A-1, Rule 12, the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

Rule 8. General rules of pleadings.

(a) *Claims for relief.* — A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain

(1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and

(2) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. In all negligence actions, and in all claims for punitive damages in any civil action, wherein the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars ($10,000). However, at any time after service of the claim for relief, any party may request of the claimant a written statement of the monetary relief sought, and the

claimant shall, within 30 days after such service, provide such statement, which shall not be filed with the clerk until the action has been called for trial or entry of default entered. Such statement may be amended in the manner and at times as provided by Rule 15.

(b) *Defenses; form of denials.* — A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) *Affirmative defenses.* — In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in actions for defamation, usury, waiver, and any other matter constituting an avoidance or affirmative defense. Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) *Effect of failure to deny.* — Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) *Pleading to be concise and direct; consistency.* —

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) *Construction of pleadings.* — All pleadings shall be so construed as to do substantial justice. (1967, c. 954, s. 1; 1975, 2nd Sess., c. 977, s. 5; 1979, ch. 654, s. 4; 1985 (Reg. Sess., 1986), c. 1027, s. 56; 1989 (Reg. Sess., 1990), c. 995, s. 1.)

COMMENT

Section (a). — In prescribing what a complaint is to contain, it will be observed that while the Commission abandoned the code formulation of "a plain and concise statement of the facts constituting a cause of action," it did not adopt without change the federal rules formula, "a short and plain statement of the claim showing that the pleader is entitled to relief." The statement must be "sufficiently particular to give the court and the parties notice of the transactions or occurrences, intended to be proved. . . ."

The Commission's objective may be summarized as follows: 1. By omitting any requirement in terms that a complaint state "facts," the Commission sought to put behind it the sterile dispute as to whether an allegation states evidentiary or ultimate facts or conclusions of law. Of course, in order to show that he is entitled to relief, a pleader will be compelled to be factual, but the new formulation saved him from foundering on the ancient distinctions.

2. By omitting any reference to "cause of action," and directing attention to the notice-giving functions served by the complaint, the Commission sought a new start on the problem of how much specificity is desirable in a complaint. It can fairly be argued, of course, that when the Commission substituted "claim" for "cause of action" that it was merely exchanging one conundrum for another. But changing the formulation does have the advantage of enabling the courts to approach the problem of specificity unembarrassed by prior decisions and with an eye to the functions that pleading can properly serve. Moreover, the new approach can take into account other procedures provided by these rules — the pretrial conference, the broadened discovery, the summary judgment.

3. By specifically requiring a degree of particularity the Commission sought to put at rest any notion that the mere assertion of a grievance will be sufficient under these rules. In this connection, the forms provided in Rule 84 should be examined. The Commission's prescription suggests that not only is it permissible under these rules for a pleader to so plead as to obviate the need for a pretrial conference or resort to the discovery procedures but that it will frequently be his duty to do so.

Section (b). — This section sets forth the basic directive for defensive pleading. It follows the basic code pattern of requiring either denials or admissions of all specific averments of the claimant for affirmative relief, or the pleading of affirmative defenses in avoidance. It is interesting to reflect that here, too, is a plain indication that Rule § 1A-1, 8(a) contemplates factual pleading, else the directive to admit or deny averments is meaningless. Sanction is given as in existing State practice to obtain the effect of a denial by stating lack of sufficient knowledge or information to form a belief. The traditional prohibition against negative pregnant pleading is stated in terms of fairly meeting the substance of averments denied.

The fairly detailed specification of the different forms that partial denials and admissions may take is a helpful one and does not appear in the code. An innovation from the standpoint of existing State practice is involved in the allowance of a true general denial, or a qualified general denial not directed specifically to each separate paragraph, which is the largest unit that may be generally denied under judicial interpretation of the Code.

Section (c) contains a helpful specific listing of numerous traditional defenses which must be specially pleaded. This enumeration is beneficial in avoiding questions as to whether this or that defense is an "affirmative defense" required to be pleaded to allow evidence in its proof. At least one change in existing law is involved in the inclusion of the defense of statute of frauds in this listing. Added to the federal listing are truth in defamation actions, and usury, to reflect existing State practice.

Section (d) states existing State practice.

Section (e)(1) contains a general homily eschewing the old technical forms of pleading and admonishing directness rather than the pomposity which frequently creeps into common law and Code pleading.

Section (e)(2) directly sanctions alternative and hypothetical pleadings, which are not literally sanctioned under the code, but generally permitted within limits. More significantly this rule directly authorizes the pleading of inconsistent claims as well as defenses. While inconsistent defenses are now permissible under the code, inconsistent affirmative claims of some types have been held to require election when their underlying legal theories (as opposed to factual theories) were substantively inconsistent.

Section (f) states a homily similarly expressed under the Code in former § 1-151.

Editor's Note. — Session Laws 1979, c. 654, which inserted reference to actions against product manufacturers, wholesalers or retailers for recovery of damages for personal injury, death or damage to property based upon or arising out of alleged defects or failures in subsection (a)(2), provided in s. 6: "The provisions of this act shall not be construed to amend or repeal the provisions of G.S. 1-17."

Legal Periodicals. — For note on specificity in pleading under subsection (a)(1) of this rule, see 48 N.C.L. Rev. 636 (1970).

For survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1979 commercial law, see 58 N.C.L. Rev. 1290 (1980).

For article, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For note on the presumption of a wife's gratuitous services, see 16 Wake Forest L. Rev. 235 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1043 (1981).

For note on default not constituting an admission of facts for purposes of summary judgment, see 17 Wake Forest L. Rev. 49 (1981).

For survey of 1981 law on civil procedure, see 60 N.C.L. Rev. 1214 (1982).

For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

For survey of 1983 law on civil procedure, see 62 N.C.L. Rev. 1107 (1984).

For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

For article, "Tinkering with the Ad Damnum Clause in Tort Cases: Tort Reform or Proliferation of New Tort Claims?," see 17 N.C. Cent. L.J. 62 (1988).

For article, "Proving Violations or Proving Affirmative Defenses under the Occupational Safety and Health Act of North Carolina," see 18 N.C. Cent. L.J. 99 (1989).

CASE NOTES

I. In General.
II. Pleadings; Generally.
III. Affirmative Defenses.
IV. Effect of Failure to Deny.
V. Alternative, Hypothetical and Inconsistent Statements.
VI. Decisions under Prior Law.

I. IN GENERAL.

Section (b) of this rule is virtually identical to FRCP, Rule 8(b). Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

Taken together, § 1A-1, Rule 12(b)(6) and section (a) of this rule suggest pleadings should be limited to those facts or descriptions of transactions, occurrences, or series of transactions or occurrences, intended to be proved. Bowlin v. Duke Univ., 108 N.C. App. 145, 423 S.E.2d 320 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

Purpose of Section (a). — The purpose of section (a) is to establish that the plaintiff will be entitled to some form of relief should he prevail on the claim raised by the factual allegations in his complaint. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

The right to amend the pleadings of a cause and allow answers or other pleadings to be filed at any time is an inherent power of the district and superior courts, which they may exercise at their discretion, unless prohibited by some statutory enactment or unless vested rights are interfered with. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

A motion to amend an answer is addressed to the sound discretion of the trial judge, and he has broad discretion in permitting or denying amendments. Hinson v. Brown, 80 N.C. App. 661, 343 S.E.2d 284, appeal dismissed and cert. denied, 318 N.C. 282, 348 S.E.2d 138 (1986).

This rule did not remove all requirements of particularity. Thus, mere assertion of a grievance will not suffice, but the pleader must plead with sufficient particularity to identify the legal issues and to allow the other party to frame a responsive pleading. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The policy behind the notice theory of the present rules is to resolve controversies on the merits, following opportunity for discovery, rather than resolving them on technicalities of pleading. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

A pleading cannot give notice of occurrences that take place a year after filing of the pleading. Gordon v. Gordon, 7 N.C. App. 206, 171 S.E.2d 805 (1970).

Admissions in the pleadings and stipulations by the parties have the same effect as jury findings; the jury is not required to find the existence of such facts, and nothing else appearing, they are conclusive and binding upon the parties and the trial judge. Crowder v. Jenkins, 11 N.C. App. 57, 180 S.E.2d 482 (1971). See Alston v. Monk, 92 N.C. App. 59, 373 S.E.2d 463 (1988), cert. denied, 324 N.C. 246, 378 S.E.2d 420 (1989).

Answer Treated as Counterclaim. — In a suit for absolute divorce, where defendant admitted the allegations of the complaint and prayed for an absolute divorce on the same grounds, the fact that defendant's pleading was labelled an "answer" did not preclude its being treated also as a counterclaim. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Sanctions for Violations. — Although a dismissal with prejudice pursuant to subsection (b) is available as a sanction for a violation of subdivision (a)(2), it is not the only available sanction and should be imposed only where the trial court determines that less drastic sanctions are insufficient; therefore, the trial court did not err in only striking the punitive damages award in the slander case as a sanction. McLean v. Mechanic, 116 N.C. App. 271, 447 S.E.2d 459 (1994), review denied, 339 N.C. 738, 454 S.E.2d 654, cert. denied, 339 N.C. 738, 454 S.E.2d 653 (1995).

The trial court has the same authority to punish a filing of a response to a request for monetary relief before the action has been called for trial or entry of default entered in violation of G.S. 1A-1, Rule 8(a)(2) as it would if a complaint demanding a specific sum above $10,000 were filed in violation of G.S. 1A-1, Rule 8(a)(2). A dismissal of the action pursuant to G.S. 1A-1, Rule 41(b) is one of the permissible sanctions for violating the provision of G.S. 1A-1, Rule 8(a)(2) regarding pleading of damages in excess of $10,000. Patterson v. Sweatt, 146 N.C. App. 351, 553 S.E.2d 404, 2001 N.C. App. LEXIS 935 (2001), aff'd, 560 S.E.2d 792 (N.C. 2002).

Removal to Federal Court. — Because subsection (a)(2) of this rule provides that certain negligence actions claiming in excess of $10,000 may only so state and, therefore, no specific amount was alleged in the complaint, defendants were required to offer evidence such as pleadings, affidavits or other matters in the record, in support of its claim that the controversy satisfied the federal jurisdictional amount for removal to federal court. Aerial Images, Inc. v. Anderson, — F. Supp. 2d —, 2000 U.S. Dist. LEXIS 3777 (E.D.N.C. Feb. 21, 2000).

District court denied the borrowers' motion to remand, under 28 U.S.C.S. § 1447(c), their action alleging violations of state law by the banks and loan trusts because it found that the amount in controversy exceed $75,000, as opposed to what the borrowers' complaint asserted. The banks and loan trusts pointed to N.C. R. Civ. P. 8(a)(2), which permitted the borrowers to recover more than what they pled in their complaint, and they produced evidence that the actual amount in controversy exceeded $75,000; the borrowers had also requested treble damages under G.S. 75-16. Dash v. FirstPlus Home Loan Trust 1996-2, 248 F. Supp. 2d 489, 2003 U.S. Dist. LEXIS 3706 (M.D.N.C. 2003).

Plaintiff's motion to remand under 28 U.S.C.S. § 1447 was denied because the request for damages in the complaint was unclear and defendant had a right to a statement of relief sought under subdivision (a)(2) of this rule; therefore, defendant's notice of removal based on diversity jurisdiction under 28 U.S.C.S. § 1332 which, was filed within 30 days of defendant's receipt of the statement of relief sought, was timely under the second paragraph of 28 U.S.C.S. § 1446(b). Lee Elec. Constr., Inc. v. Eagle Elec., LLC, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 9956 (M.D.N.C. June 10, 2003).

Applied in Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461 (1971); North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971); Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971); Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972); Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972); Fruit & Produce Packaging Co., Div. of Inland Container Corp. v. Stepp, 15 N.C. App. 64, 189 S.E.2d 536 (1972); Thompson v. Watkins, 15 N.C. App. 208, 189 S.E.2d 615 (1972); Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972); Beachboard v. Southern Ry., 16 N.C. App. 671, 193 S.E.2d 577 (1972); Brantley v. Dunstan, 17 N.C. App. 19, 193 S.E.2d 423 (1972); City of Kings Mt. v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973); Chance v. Jackson, 17 N.C. App. 638, 195 S.E.2d 321 (1973); Nolan v. Boulware, 21 N.C. App. 347, 204 S.E.2d 701 (1974); Thacker v. Harris, 22 N.C. App. 103, 205 S.E.2d 744 (1974); Clary v. Alexander County Bd. of Educ., 286 N.C. 525, 212 S.E.2d 160 (1975); Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975); Jones v. Pettiford, 24 N.C. App. 546, 211 S.E.2d 455 (1975); First-Citizens Bank & Trust Co. v. Akelaitis, 25 N.C. App. 522, 214 S.E.2d 281 (1975); Andrews v. North Carolina Farm Bureau Mut. Ins. Co., 26 N.C. App. 163, 215 S.E.2d 373 (1975); Fagan v. Hazzard, 29 N.C. App. 618, 225 S.E.2d 640 (1976); Haddock v. Smithson, 30 N.C. App. 228, 226 S.E.2d 411 (1976); N.C. Monroe Constr. Co. v. Coan, 30 N.C. App. 731, 228 S.E.2d 497 (1976); Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977); Raccoon Valley Inv. Co. v. Toler, 32 N.C. App. 461, 232 S.E.2d 717 (1977); Student Bar Ass'n Bd. of Governors v. Byrd, 32 N.C. App. 530, 232 S.E.2d 855 (1977); Reid v. Reid, 32 N.C. App. 750, 233 S.E.2d 620 (1977); Ross v. Ross, 33 N.C. App. 447, 235 S.E.2d 405 (1977); Streeter v. Streeter, 33 N.C. App. 679, 236 S.E.2d 185 (1977); North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977); Sawyer v. Cox, 36 N.C. App. 300, 244 S.E.2d 173 (1978); Nugent v. Beckham, 37 N.C. App. 557, 246 S.E.2d 541 (1978); Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978); Sanders v. Walker, 39 N.C.

App. 355, 250 S.E.2d 84 (1979); Annas v. Davis, 40 N.C. App. 51, 252 S.E.2d 28 (1979); Lee v. Capitol Tire Co., 40 N.C. App. 150, 252 S.E.2d 252 (1979); Baumann v. Smith, 41 N.C. App. 223, 254 S.E.2d 627 (1979); Mazzocone v. Drummond, 42 N.C. App. 493, 256 S.E.2d 843 (1979); Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979); Angel v. Ward, 43 N.C. App. 288, 258 S.E.2d 788 (1979); Watts v. Watts, 44 N.C. App. 46, 260 S.E.2d 170 (1979); Patrick v. Mitchell, 44 N.C. App. 357, 260 S.E.2d 809 (1979); Town of Bladenboro v. McKeithan, 44 N.C. App. 459, 261 S.E.2d 260 (1980); First Peoples Sav. & Loan Ass'n v. Cogdell, 44 N.C. App. 511, 261 S.E.2d 259 (1980); Thornton v. Thornton, 45 N.C. App. 25, 262 S.E.2d 326 (1980); Mabe v. Dillon, 46 N.C. App. 340, 264 S.E.2d 796 (1980); Hazard v. Hazard, 46 N.C. App. 280, 264 S.E.2d 908 (1980); Munchak Corp. v. Caldwell, 46 N.C. App. 414, 265 S.E.2d 654 (1980); Brenner v. Little Red Sch. House, Ltd., 302 N.C. 207, 274 S.E.2d 206 (1981); Connor v. Royal Globe Ins. Co., 56 N.C. App. 1, 286 S.E.2d 810 (1982); Whichard v. Oliver, 56 N.C. App. 219, 287 S.E.2d 461 (1982); Watson v. White, 60 N.C. App. 106, 298 S.E.2d 174 (1982); Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983); Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983); Phillips v. Grand Union Co., 64 N.C. App. 373, 307 S.E.2d 205 (1983); Hendrix v. Hendrix, 67 N.C. App. 354, 313 S.E.2d 25 (1984); Norlin Indus., Inc. v. Music Arts, Inc., 67 N.C. App. 300, 313 S.E.2d 166 (1984); Carter v. Carr, 68 N.C. App. 23, 314 S.E.2d 281 (1984); Towery v. Anthony, 68 N.C. App. 216, 314 S.E.2d 570 (1984); Starling v. Sproles, 69 N.C. App. 598, 318 S.E.2d 94 (1984); Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984); Isenhour v. Isenhour, 71 N.C. App. 762, 323 S.E.2d 369 (1984); Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986); MCB Ltd. v. McGowan, 86 N.C. App. 607, 359 S.E.2d 50 (1987); Westover Prods., Inc. v. Gateway Roofing Co., 94 N.C. App. 63, 380 S.E.2d 369 (1989); Midgette v. Pate, 94 N.C. App. 498, 380 S.E.2d 572 (1989); Young v. Warren, 95 N.C. App. 585, 383 S.E.2d 381 (1989); Town of Sparta v. Hamm, 97 N.C. App. 82, 387 S.E.2d 173 (1990); Oxendine v. Bowers, 100 N.C. App. 712, 398 S.E.2d 57 (1990); Wallace v. Haserick, 105 N.C. App. 315, 412 S.E.2d 694 (1992); Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193 (1992); Lewis v. Blackman, 116 N.C. App. 414, 448 S.E.2d 133 (1994); Hunt v. Hunt, 117 N.C. App. 280, 450 S.E.2d 558 (1994); Miller v. Talton, 112 N.C. App. 484, 435 S.E.2d 793 (1993); Haywood Street Redevelopment Corp. v. Harry S. Peterson, Co., 120 N.C. App. 832, 463 S.E.2d 564 (1995); Sloan v. Miller Bldg. Corp., 128 N.C. App. 37, 493 S.E.2d 460 (1997); Hoffman v. Vulcan Materials Co., 19 F. Supp. 2d 475 (M.D.N.C. 1998); Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000); Beneficial Mortg. Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A., 164 N.C. App. 41, 595 S.E.2d 705, 2004 N.C. App. LEXIS 727 (2004); Sprinkle v. N.C. Wildlife Res. Comm'n, 165 N.C. App. 721, 600 S.E.2d 473, 2004 N.C. App. LEXIS 1513 (2004); Revelle v. Chamblee, 168 N.C. App. 227, 606 S.E.2d 712, 2005 N.C. App. LEXIS 158 (2005); Allred v. Capital Area Soccer League, Inc., — N.C. App. —, 669 S.E.2d 777, 2008 N.C. App. LEXIS 2265 (2008); Craig v. New Hanover County Bd. of Educ., 363 N.C. 334, 678 S.E.2d 351, 2009 N.C. LEXIS 613 (June 18, 2009).

Cited in Ketner v. Rouzer, 11 N.C. App. 483, 182 S.E.2d 21 (1971); Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971); Brewer v. Harris, 10 N.C. App. 515, 179 S.E.2d 160 (1971); Langdon v. Hurdle, 15 N.C. App. 158, 189 S.E.2d 517 (1972); Bercegeay v. Surfside Realty Co., 16 N.C. App. 718, 193 S.E.2d 356 (1972); Morris v. Dickson, 14 N.C. App. 122, 187 S.E.2d 409 (1972); In re Mark, 15 N.C. App. 574, 190 S.E.2d 381 (1972); Hamrick v. Beam, 19 N.C. App. 729, 200 S.E.2d 337 (1973); Wallace Men's Wear, Inc. v. Harris, 28 N.C. App. 153, 220 S.E.2d 390 (1975); Cogdill v. Scates, 290 N.C. 31, 224 S.E.2d 604 (1976); Recreatives, Inc. v. Travel-On Motorcycles Co., 29 N.C. App. 727, 225 S.E.2d 637 (1976); Critcher v. Ogburn, 30 N.C. App. 182, 226 S.E.2d 414 (1976); Gagan v. Hazzard, 34 N.C. App. 312, 237 S.E.2d 916 (1977); Biddix v. Kellar Constr. Corp., 32 N.C. App. 120, 230 S.E.2d 796 (1977); Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977); Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977); Acker v. Barnes, 33 N.C. App. 750, 236 S.E.2d 715 (1977); Hudspeth v. Bunzey, 35 N.C. App. 231, 241 S.E.2d 119 (1978); Craig v. Kessing, 36 N.C. App. 389, 244 S.E.2d 721 (1978); Thigpen v. Piver, 37 N.C. App. 382, 246 S.E.2d 67 (1978); Shellhorn v. Brad Ragan, Inc., 38 N.C. App. 310, 248 S.E.2d 103 (1978); Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979); Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980); Cranford v. Helms, 53 N.C. App. 337, 280 S.E.2d 756 (1981); Outer Banks Contractors v. Forbes, 302 N.C. 599, 276 S.E.2d 375 (1981); Deal v. Christenbury, 50 N.C. App. 600, 274 S.E.2d 867 (1981); Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981); Patterson v. Phillips, 53 N.C. App. 802, 281 S.E.2d 716 (1981); Terry v. Terry, 302 N.C. 77, 273 S.E.2d 674 (1981); Pigott v. City of Wilmington, 50 N.C. App. 401, 273 S.E.2d 752 (1981); Ridings v. Ridings, 55 N.C. App. 630, 286 S.E.2d 614 (1982); Federal Realty Inv. Trust v. Belk-Tyler of Elizabeth City, Inc., 56 N.C. App. 363, 289 S.E.2d 145 (1982); Loman-Garrett Supply Co. v. Dudney, 56 N.C. App. 622, 289 S.E.2d 600 (1982); Four

Seasons Homeowners Ass'n v. Sellers, 62 N.C. App. 205, 302 S.E.2d 848 (1983); Hull v. Floyd S. Pike Elec. Contractor, 64 N.C. App. 379, 307 S.E.2d 404 (1983); Chappell v. Redding, 67 N.C. App. 397, 313 S.E.2d 239 (1984); Beard v. Pembaur, 68 N.C. App. 52, 313 S.E.2d 853 (1984); Hawkins v. State Capital Ins. Co., 74 N.C. App. 499, 328 S.E.2d 793 (1985); Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985); Rowe v. Franklin County, 318 N.C. 344, 349 S.E.2d 65 (1986); WXQR Marine Broadcasting Corp. v. JAI, Inc., 83 N.C. App. 520, 350 S.E.2d 912 (1986); Brown v. Lumbermens Mut. Cas. Co., 90 N.C. App. 464, 369 S.E.2d 367 (1988); Rivenbark v. Southmark Corp., 93 N.C. App. 414, 378 S.E.2d 196 (1989); Howell v. Landry, 96 N.C. App. 516, 386 S.E.2d 610 (1989); Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991); Estridge v. Ford Motor Co., 101 N.C. App. 716, 401 S.E.2d 85 (1991); Metric Constructors, Inc. v. Industrial Risk Insurers, 102 N.C. App. 59, 401 S.E.2d 126 (1991); Fox v. Killian, 102 N.C. App. 819, 403 S.E.2d 546 (1991); Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992); Marler v. Amoco Oil Co., 793 F. Supp. 656 (E.D.N.C. 1992); Heart of Valley Motel, Inc. v. Edwards, 111 N.C. App. 896, 433 S.E.2d 466 (1993); Griffin v. Holmes, 843 F. Supp. 81 (E.D.N.C. 1993); Burwell v. Giant Genie Corp., 115 N.C. App. 680, 446 S.E.2d 126 (1994); Tipton & Young Constr. Co. v. Blue Ridge Structure Co., 116 N.C. App. 115, 446 S.E.2d 603 (1994); Byrd v. Arrowood, 118 N.C. App. 418, 455 S.E.2d 672 (1995); Soderlund v. North Carolina Sch. of Arts, 125 N.C. App. 386, 481 S.E.2d 336 (1997); Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997); Soto v. McLean, 20 F. Supp. 2d 901 (E.D.N.C. 1998); State ex rel. Long v. Petree Stockton, 129 N.C. App. 432, 499 S.E.2d 790 (1998); Robinson v. Powell, 348 N.C. 562, 500 S.E.2d 714 (1998); Ellison v. Ramos, 130 N.C. App. 389, 502 S.E.2d 891 (1998); First Atl. Mgt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 507 S.E.2d 56 (1998); Atkinson v. Atkinson, 132 N.C. App. 82, 510 S.E.2d 178 (1999); McIver v. Smith, 134 N.C. App. 583, 518 S.E.2d 522 (1999); Save our Schs. of Bladen County, Inc. v. Bladen County Bd. of Educ., 140 N.C. App. 233, 535 S.E.2d 906, 2000 N.C. App. LEXIS 1109 (2000); Schlossberg v. Goins, 141 N.C. App. 436, 540 S.E.2d 49, 2000 N.C. App. LEXIS 1296 (2000); Mabrey v. Smith, 144 N.C. App. 119, 548 S.E.2d 183, 2001 N.C. App. LEXIS 349 (2001); Ausley v. Bishop, 150 N.C. App. 56, 564 S.E.2d 252, 2002 N.C. App. LEXIS 382 (2002); Orthodontic Ctrs. of Am., Inc. v. Hanachi, 151 N.C. App. 133, 564 S.E.2d 573, 2002 N.C. App. LEXIS 683 (2002); Childs v. Johnson, 155 N.C. App. 381, 573 S.E.2d 662, 2002 N.C. App. LEXIS 1626 (2002); Lawson v. Tyco Elecs. Corp., 286 F. Supp. 2d 639, 2003 U.S. Dist. LEXIS 18231 (M.D.N.C. 2003); Zubaidi v. Earl L. Pickett Enters., 164 N.C. App. 107, 595 S.E.2d 190, 2004 N.C. App. LEXIS 716 (2004); Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005); State ex rel. Cooper v. NCCS Loans, Inc., 174 N.C. App. 630, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005); James River Equip., Inc. v. Mecklenburg Utils., Inc., 179 N.C. App. 414, 634 S.E.2d 557, 2006 N.C. App. LEXIS 1898 (2006); In re D.R.S., 181 N.C. App. 136, 638 S.E.2d 626, 2007 N.C. App. LEXIS 23 (2007); In re L.T.R., 181 N.C. App. 376, 639 S.E.2d 122, 2007 N.C. App. LEXIS 157 (2007); Wilson v. Wilson, 183 N.C. App. 267, 644 S.E.2d 379, 2007 N.C. App. LEXIS 1042 (2007); Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008).

II. PLEADINGS; GENERALLY.

This rule did not remove all requirements of particularity. Thus, mere assertion of a grievance will not suffice, but the pleader must plead with sufficient particularity to identify the legal issues and to allow the other party to frame a responsive pleading. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The requirement of particularity in § 1A-1, Rule 9(b) must be reconciled with this rule, which requires a short and concise statement of claims, and with the general notice pleading theory of the Rules of Civil Procedure. Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Compliance With Subsections (b) and (c). — Trial court did not abuse its discretion when it denied an G.S. 1A-1, N.C. R. Civ. P. 12(f), motion to strike the overview section of a count's answer to a complaint for declaratory relief. The answer complied with G.S. 1A-1, N.C. R. Civ. P. 8(b) and (c), the objectionable language ascribed a motive for plaintiff's institution of litigation that was personal to him as one engaged in business pursuits with an alternative plan for the subject properties, and the matter might have had a bearing upon the litigation. Reese v. Charlotte-Mecklenburg Bd. of Educ. & Mecklenburg, — N.C. App. —, 676 S.E.2d 481, 2009 N.C. App. LEXIS 532 (2009).

Phrases "Cause of Action" and "Claim for Relief" Not Substantially Different. — While neither the North Carolina nor the federal rules incorporate the phrase "cause of action," in the manner of their use, there is no substantial difference in the meaning of "cause of action" and "claim for relief." Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

As to the use of precedent under New York and federal rules in construing this section, see Sutton v. Duke, 277 N.C. 94, 176

S.E.2d 161 (1970); Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

Concept of "Notice Pleading" Adopted. — By repealing G.S. 1-122, which required a complaint to state "the facts constituting a cause of action," and substituting in lieu thereof the requirement that a "claim for relief" shall be stated with sufficient particularity to give notice of the events intended to be proved showing that the pleader is entitled to relief, the legislature intended to relax somewhat the strict requirements of detailed fact pleading and to adopt the concept of "notice pleading." Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

By repealing former section which required a complaint to state "the facts constituting a cause of action," and substituting in lieu thereof the requirement that a "claim for relief" shall be stated with sufficient particularity to give notice of the events intended to be proved showing that the pleader is entitled to relief, the legislature obviously intended to change prior law. Its choice of "new semantics" was neither accidental nor casual. Rather, the legislature intended to relax somewhat the strict requirements of detailed fact pleading and to adopt the concept of "notice pleading." Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

By repealing G.S. 1-122 and enacting subsection (a)(1) of this rule, the General Assembly intended to relax somewhat the strict requirements of detailed fact pleading and to adopt the concept of "notice pleading." Madigan v. Jenkins, 31 N.C. App. 391, 229 S.E.2d 213 (1976).

This rule was intended to liberalize pleading requirements by adopting the concept of "notice pleading," thereby abolishing the more strict requirements of "fact pleading." Smith v. North Carolina Farm Bureau Mut. Ins. Co., 84 N.C. App. 120, 351 S.E.2d 774, aff'd, 321 N.C. 60, 361 S.E.2d 571 (1987).

In enacting subsection (a)(1), the General Assembly adopted the concept of notice pleading. Pyco Supply Co. v. American Centennial Ins. Co., 321 N.C. 435, 364 S.E.2d 380 (1988).

The policy behind the notice theory of the present rules is to resolve controversies on the merits, following opportunity for discovery, rather than resolving them on technicalities of pleading. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Controversies to Be Resolved on Merits and Not Technicalities. — The adoption of the notice theory of pleading indicates the legislature's intention that controversies be resolved on their merits, following an opportunity for discovery, rather than resolving them on technicalities of pleading. Wentz v. Unifi, Inc., 89 N.C. App. 33, 365 S.E.2d 198, cert. denied, 322 N.C. 610, 370 S.E.2d 257 (1988).

Detailed Fact Pleading No Longer Required. — Under the "notice theory" of pleading contemplated by subsection (a)(1), detailed fact pleading is no longer required. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Madigan v. Jenkins, 31 N.C. App. 391, 229 S.E.2d 213 (1976).

Under the notice theory of this rule, pleadings need not contain detailed factual allegations to raise issues. Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981).

But there is nothing in the rules to prevent detailed pleading if the pleader deems it desirable. He may plead enough facts to prevent the invocation of discovery devices or the use of motions for more definite statement. Such a complaint could clearly identify the issues, since G.S. 1A-1, Rule 10(b) requires the claim or claims to be averred in numbered paragraphs. In other words, there is nothing to prevent skillful and candid pleaders from meeting head-on in the pleadings. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

Simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971).

Sufficiency of Pleading Under Notice Theory. — Under the "notice theory of pleading," a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971); Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972); Lewis v. Gastonia Air Serv., Inc., 16 N.C. App. 317, 192 S.E.2d 6 (1972); Patterson v. Weatherspoon, 17 N.C. App. 236, 193 S.E.2d 585 (1972); Randolph v. Schuyler, 18 N.C. App. 393, 197 S.E.2d 3 (1973), rev'd on other grounds, 284 N.C. 496, 201 S.E.2d 833 (1974); Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974).

A pleading complies with this rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and, by using the rules provided for obtaining pretrial discovery, to get any additional information he may need to prepare for trial. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Lewis v. Gastonia Air Serv., Inc., 16 N.C. App. 317, 192 S.E.2d 6 (1972); Patterson v. Weatherspoon, 17 N.C. App. 236, 193 S.E.2d

585 (1972); Roberts v. Whitley, 17 N.C. App. 554, 195 S.E.2d 62 (1973); Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Henry v. Deen, 61 N.C. App. 189, 300 S.E.2d 707 (1983); Huff v. Chrismon, 68 N.C. App. 525, 315 S.E.2d 711, cert. denied, 311 N.C. 756, 321 S.E.2d 134 (1984); Brad Ragan, Inc. v. Callicut Enters., Inc., 73 N.C. App. 134, 326 S.E.2d 62 (1985); Buchanan v. Hunter Douglas, Inc., 87 N.C. App. 84, 359 S.E.2d 271, cert. denied, 321 N.C. 296, 362 S.E.2d 779 (1987).

The allegations of the verified complaint were sufficiently particular as required by this rule to give the defendant notice of the transactions and occurrences intended to be proved and the type of relief demanded. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

True test under this rule is whether the pleading gives fair notice and states the elements of the claim plainly and succinctly. Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

A party is not required to plead evidence. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

Under the "notice theory of pleading" a complainant must state a claim sufficient to enable the adverse party to understand the nature of the claim, to answer, and to prepare for trial. Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271, cert. denied, 314 N.C. 116, 332 S.E.2d 481 (1985).

Under the notice theory of pleading, a complaint need no longer allege facts or elements showing aggravating circumstances which would justify an award of punitive damages. Huff v. Chrismon, 68 N.C. App. 525, 315 S.E.2d 711, cert. denied, 311 N.C. 756, 321 S.E.2d 134 (1984).

Under our modern practice only claims for fraud, duress, libel and slander have to be pleaded with any particularity at all. In all other instances the complaint is sufficient if it gives the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved, showing that the pleader is entitled to relief. Newton v. Whitaker, 83 N.C. App. 112, 349 S.E.2d 333 (1986), aff'd, 319 N.C. 455, 355 S.E.2d 138 (1987).

A pleading is sufficient if it gives notice of the events and transactions and allows the adverse party to understand the nature of the claim and to prepare for trial. Smith v. North Carolina Farm Bureau Mut. Ins. Co., 84 N.C. App. 120, 351 S.E.2d 774, aff'd, 321 N.C. 60, 361 S.E.2d 571 (1987).

Under the notice theory of pleading, a statement of a claim is adequate if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand its nature and basis and to file a responsive pleading. Pyco Supply Co. v. American Centennial Ins. Co., 321 N.C. 435, 364 S.E.2d 380 (1988).

A worker's complaint demanding entry of judgment against his employer for the sums due under an Industrial Commission Form 60 was an acceptable method for asserting a claim, where the complaint failed to state that the claimant was seeking judgment under this section, but he pled facts sufficient to alert the employer that relief was being sought under this section. Calhoun v. Wayne Dennis Heating & Air Conditioning, 129 N.C. App. 794, 501 S.E.2d 346 (1998).

Where plaintiff's complaint did not allege equitable mortgage as a possible claim against defendants, and did not allege any facts that would put defendants on notice of an equitable mortgage claim, plaintiff's pleadings did not provide defendants with the notice of such claim as required by section (a) of this rule. Parkersmith Props. v. Johnson, 136 N.C. App. 626, 525 S.E.2d 491, 2000 N.C. App. LEXIS 115 (2000).

Wife did not sufficiently plead her claim for alimony when her counterclaim for this relief only requested a certain monthly amount of alimony because she did not specify the grounds upon which she based her alimony claim, so her husband was not put on notice of such grounds and could not defend against them, as required by G.S.1A-1-8(a)(1). Coleman v. Coleman, 182 N.C. App. 25, 641 S.E.2d 332, 2007 N.C. App. LEXIS 475 (2007).

All this rule requires is a "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971).

It was error for the court to strike a lengthy, highly detailed and technical complaint on the apparent grounds that it did not contain a short and plain statement of the facts. This rule prescribes the minimum information that a pleading must contain; it does not require that a complaint contain only a "short and plain statement." Holley v. Burroughs Wellcome Co., 74 N.C. App. 736, 330 S.E.2d 228 (1985), aff'd, 318 N.C. 352, 348 S.E.2d 772 (1986).

Which Must Be More Than a General Statement. — Even construing pleadings liberally, the "short and plain statement of the claim" required by subsection (a)(1) requires more than a general statement that a notice for relief has been filed pursuant to some statute. Baumann v. Smith, 41 N.C. App. 223, 254 S.E.2d 627, rev'd on other grounds, 298 N.C. 778, 260 S.E.2d 626 (1979).

While this rule does not require detailed fact pleading, nevertheless it does require a certain degree of specificity. It is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant and the court can obtain a fair idea of what the plaintiff is complaining about, and can see that there is some basis for recovery. Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

Mere assertion of a grievance is insufficient to state a claim upon which relief can be granted. Some degree of factual particularity is required. The statement of a claim for relief must satisfy the requirements of the substantive law which give rise to the pleadings. Alamance County v. North Carolina Dep't of Human Resources, 58 N.C. App. 748, 294 S.E.2d 377 (1982).

Language of a letter attached to pleadings controlled over plaintiff's allegations and refuted his argument that an exchange of properties contemplated by an interlocal agreement was hastily arranged; therefore the claim failed to overcome the presumption of legality afforded to acts by public officials. The allegations were grievances, rather than allegations sufficient to demonstrate bad faith circumvention of the statutory requirements of G.S. 160A-266. Reese v. Charlotte-Mecklenburg Bd. of Educ. & Mecklenburg, — N.C. App. —, 676 S.E.2d 481, 2009 N.C. App. LEXIS 532 (2009).

Claim for relief and basis for defense must still satisfy requirements of substantive law which give rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim or of his defense. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

Despite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantial elements of at least some legally recognized claim or it is subject to dismissal under G.S. 1A-1, Rule 12(b)(6). Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979).

Damages Governed by Evidence Presented. — There is a longstanding rule that damages in this state are governed by the evidence presented rather than the claim made for relief; the fact that the complaint contained a much lower figure than the amount awarded did not mean that the trial judge abused his discretion. Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181, aff'd in part; discretionary review improvidently granted in part, 334 N.C. 682, 435 S.E.2d 71 (1993).

Inclusion of Statute Authorizing Measure of Damages Not Necessary. — This rule requires only that a pleading contain "[a] demand for judgment for the relief to which [the party] deems himself entitled." This language does not necessitate including the specific statute authorizing a particular measure of damages. Atkins v. Mitchell, 91 N.C. App. 730, 373 S.E.2d 152 (1988).

In an action by the seller of securities under a contract for sale to recover the purchase price of securities not accepted by the buyer, sellers' failure to specifically cite G.S. 25-8-107 in their complaint did not foreclose them from seeking the contract price remedy nor limit them to recovering only the more traditional measure of the difference between fair market value and unpaid contract price. Atkins v. Mitchell, 91 N.C. App. 730, 373 S.E.2d 152 (1988).

Where a petition requested relief not authorized by statute, the petition stated a defective claim in that it requested relief the court was powerless to grant regardless of what facts could be proved, and thus a motion to dismiss was properly granted. Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

"Ultimate" and "Evidentiary" Facts No Longer Distinguished. — One of the objectives sought to be attained by enactment of subsection (a)(1) of this rule was to eliminate the sometimes troublesome and often sterile discussion as to whether a particular allegation states an "ultimate" fact or an "evidentiary" fact or conclusion of law. Hoover v. Hoover, 9 N.C. App. 310, 176 S.E.2d 10 (1970).

Allegations must be liberally construed. Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

Pleadings must be liberally construed to do substantial justice, and must be fatally defective before they may be rejected as insufficient. Smith v. North Carolina Farm Bureau Mut. Ins. Co., 84 N.C. App. 120, 351 S.E.2d 774, aff'd, 321 N.C. 60, 361 S.E.2d 571 (1987).

Mere vagueness or lack of detail is not ground for a motion to dismiss. Such a deficiency should be attacked by a motion for a more definite statement. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

But vague and conclusory pleading is not encouraged or commended. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

And the courts should not engage in judicial amending or rewriting of pleadings. FCX, Inc. v. Bailey, 14 N.C. App. 149, 187 S.E.2d 381 (1972).

Pleading of Fraud as Exception to Notice Pleading Approach. — Section 1A-1, Rule 9(b) is in contrast to the notice pleading approach adopted upon the enactment of section (a) of this rule and is essentially a codification of former case law of this State with respect to pleading fraud. Girard Trust Bank v. Belk, 41 N.C. App. 328, 255 S.E.2d 430, cert. denied, 298 N.C. 293, 259 S.E.2d 299 (1979).

The provision that pleadings are to be liberally construed under the notice theory of pleadings does not apply to fraud cases. In a fraud case the plaintiff must allege all material facts and circumstances constituting the fraud with particularity. Rosenthal v. Perkins, 42 N.C.

App. 449, 257 S.E.2d 63 (1979).

For case comparing specificity requirements of subsection (a)(1) of this rule and corresponding federal and New York rules, see Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

Punitive Damages Need Not Be Specially Pled. — Where a pleading fairly apprises opposing parties of facts which will support an award of punitive damages, they may be recovered at trial without having been specially pleaded. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

Allegations Sufficient to Give Rise to Punitive Damages Claim. — Where complaint alleged that defendant intentionally pointed a gun at the plaintiffs in an attempt to intimidate them, reached into plaintiff's vehicle and struggled with her, making contact with plaintiff infant and plaintiff mother in the process, the acts were intentional acts of the type giving rise to punitive damages. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

Mislabeled Claims. — In order to survive a motion to dismiss, the allegations of a mislabeled claim must reveal that plaintiff has properly stated a claim under a different legal theory. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979).

When the allegations in the complaint give sufficient notice of the wrong complained of, an incorrect choice of legal theory should not result in dismissal of the claim if the allegations are sufficient to state a claim under some legal theory. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979).

Action on Contract Does Not Require Entire Writing. — The principle of pleading, well established under the former Code, that in an action on a written contract it is not mandatory to make the entire writing a part of the complaint, is not specifically set forth in the present Rules of Civil Procedure, but it is implicit in the requirement of this rule that the plaintiff's claim for relief be set forth in "a short and plain statement of the claim" and that "each averment of a pleading shall be simple, concise, and direct." RGK, Inc. v. United States Fid. & Guar. Co., 292 N.C. 668, 235 S.E.2d 234 (1977).

To hold that in order to resist successfully a motion to dismiss, a materialman, who sues on a contractor's payment bond, must set forth in his complaint, by attachment or otherwise, the contract between the builder and the owner, including all plans and specifications for the construction of an apartment complex, would make a farce of the requirement of the present rule that the plaintiff state his claim in a "short and plain statement . . . simple, concise, and direct." RGK, Inc. v. United States Fid. & Guar. Co., 292 N.C. 668, 235 S.E.2d 234 (1977).

Illustrative Forms 3 and 4, § 1A-1, Rule 84, illustrate the sufficient form of a complaint for negligence; they contain much more than the corresponding federal forms, by requiring the pleader to allege the specific acts which constitute the defendant's negligence. Ormond v. Crampton, 16 N.C. App. 88, 191 S.E.2d 405, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

A petition to condemn land for urban renewal is sufficient under the Rules of Civil Procedure to state a claim for relief where it gives notice of the nature and basis of the petitioners' claim and the type of case brought, and alleges generally the occurrence or performance of the required statutory conditions precedent. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Sufficiency of Amended Complaint Where Demurrer to Original Complaint Sustained Under Prior Practice. — Where a demurrer to original complaint was sustained under former G.S. 1-122(2), and motion to dismiss the amended complaint for failure to state a claim for relief was filed after the effective date of the new Rules of Civil Procedure, the sufficiency of the amended complaint would be tested against the standard provided in subsection (a)(1) of this rule; the order sustaining the demurrer to the original complaint could not be res judicata when considering the question of the sufficiency of the amended complaint under the new rule. Hoover v. Hoover, 9 N.C. App. 310, 176 S.E.2d 10 (1970).

Purpose of Subsection (a)(2). — The General Assembly enacted subsection (a)(2) in response to a perceived crisis in the area of professional liability insurance. A study commission thereon recommended elimination of the ad damnum clause in professional malpractice cases to avoid adverse press attention prior to trial, and thus save reputations from the harm which can result from persons reading about huge malpractice suits and drawing their own conclusions based on the money demanded. Rather than eliminating the clause entirely, the General Assembly chose to follow the Wisconsin approach in which only a jurisdictional amount is named (e.g., the plaintiff claims in excess of $10,000 in damages). Jones v. Boyce, 60 N.C. App. 585, 299 S.E.2d 298 (1983); Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983); Biggs v. Cumberland County Hosp. Sys., 69 N.C. App. 547, 317 S.E.2d 421 (1984).

Provision of subsection (a)(2) of this rule relating to professional malpractice actions was enacted to reduce the believed impact of pretrial publicity about medical malpractice cases, and for no other purpose. It has no bearing on the damages that a victim of medical negligence is entitled to recover, as the long-standing rule that damages in this State are governed by the evidence presented, rather than the claim made for relief, still abides except in cases of default. Nor does this provision curtail the rights that counsel in this State have long had to argue the facts in evidence and all reasonable inferences drawable therefrom. Biggs v. Cumberland County Hosp. Sys., 69 N.C. App. 547, 317 S.E.2d 421 (1984).

The General Assembly enacted subsection (a)(2) of this rule in response to what has been called a national medical malpractice crisis brought on by increasing numbers of malpractice suits and resultant sharply rising malpractice insurance rates. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

The North Carolina General Assembly enacted subsection (a)(2) of this rule to respond to a national medical malpractice crisis and the adverse publicity which sometimes accompanies frivolous or exorbitant claims. Richards & Assocs. v. Boney, 604 F. Supp. 1214 (E.D.N.C. 1985), overruled on other grounds, 148 F.R.D. 545 (E.D.N.C. 1993).

Applicability of Subdivision (a)(2). — Subdivision (a)(2) does not apply to diversity cases in U.S. District Court, and therefore could not provide a basis for dismissal of diversity personal injury action. Creech v. Denning, 148 F.R.D. 545 (E.D.N.C. 1993).

Penalty for Violation of Subsection (a)(2) of This Rule. — Subsection (a)(2) of this rule prescribes no penalty for violation of its proscription against stating the demand for monetary relief. Absent application of the G.S. 1A-1, Rule 41(b) provision for dismissal for violation of the rules, litigants could ignore the proscription with impunity, thereby nullifying the express legislative purpose for its enactment. The General Assembly thus must have intended application of the G.S. 1A-1, Rule 41(b) power of dismissal as a permissible sanction for violation of the proscription of subsection (a)(2). Jones v. Boyce, 60 N.C. App. 585, 299 S.E.2d 298 (1983).

Although the North Carolina Supreme Court has never decided what sanctions are appropriate for parties who violate subsection (a)(2) of this rule, decision in other jurisdictions favor penalties less harsh than dismissal. Stokes v. Wilson & Redding Law Firm, 72 N.C. App. 107, 323 S.E.2d 470 (1984), cert. denied, 313 N.C. 612, 332 S.E.2d 83 (1985).

Dismissal for a violation of subsection (a)(2) of this rule is not always the best sanction available to the trial court and is certainly not the only sanction available. Although an action may be dismissed under G.S. 1A-1, Rule 41(b) for a plaintiff's failure to comply with subsection (a)(2), this extreme sanction is to be applied only when the trial court determines that less drastic sanctions will not suffice. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

A dismissal with prejudice, pursuant to G.S. 1A-1, Rule 41(b), is an available sanction for a plaintiff's violation of subsection (a)(2) of this rule. It is not, however, the only available sanction and should be applied only when the trial court determines that less drastic sanctions will not suffice. Miller v. Ferree, 84 N.C. App. 135, 351 S.E.2d 845 (1987).

The determination of whether to dismiss for a violation of subsection (a)(2) and whether such a dismissal should be with prejudice so as to bar a subsequent action involves the exercise of judicial discretion. Miller v. Ferree, 84 N.C. App. 135, 351 S.E.2d 845 (1987).

Dismissal May Not Be Imposed Mechanically. — Although dismissal under subsection (a)(2) of this rule is within the discretion of the trial court, when the rule is violated such sanction may not be imposed mechanically. Because the drastic sanction of dismissal is not always the best sanction available to the trial court and is certainly not the only sanction available, dismissal is to be applied only when the trial court determines that less drastic sanctions will not suffice. Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

As to use of the § 1A-1, Rule 41(b) power of dismissal as a sanction for violation of provision of subsection (a)(2) of this rule as to pleading of malpractice damages, see Schell v. Coleman, 65 N.C. App. 91, 308 S.E.2d 662 (1983), appeal dismissed and cert. denied, 311 N.C. 763, 321 S.E.2d 145 (1984).

A motion for a more definite statement is the most purely dilatory of all the motions available under the Rules of Civil Procedure, and should not be granted so long as the pleading meets the requirements of this rule and/or G.S. 1A-1, Rule 9 and fairly notifies the opposing party of the nature of the claim. Fisher v. Lamm, 66 N.C. App. 249, 311 S.E.2d 61 (1984).

Complaint Held Insufficient. — Where complaint merely alleged that defendant treated plaintiff cruelly and offered indignities to her person, using the exact language of the alimony statute, but it did not refer to any transactions, occurrences or series of transactions or occurrences intended to be proved, nor mention any specific act of cruelty or indignity, such complaint did not give defendant fair notice of plaintiff's claim, but was merely an "assertion of a grievance," and did not comply with section (a) of this rule. Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973).

Board of education's resolution to authorize its chairman to approve an interlocal agreement was afforded a presumption of legality and correctness: (1) G.S. 160A-274 and G.S. 115C-518 authorized the board, upon such terms and conditions as it deemed wise, to exchange property owned by the board, based upon a determination that the property was no longer suitable and necessary for public school purposes; (2) the board determined that the replacement office space in the Government Center was more suitable for its needs; (3) this determination was adequate to meet the unnecessary or unsuitable requirement of G.S. 115C-518, (4) plaintiff failed to overcome the presumption of legality afforded public officials; therefore (5) plaintiff's complaint did not state a cause of action, as required by G.S. 1A-1, N.C. R. Civ. P. 8(a), for which relief could be granted. Reese v. Charlotte-Mecklenburg Bd. of Educ. & Mecklenburg, — N.C. App. —, 676 S.E.2d 481, 2009 N.C. App. LEXIS 532 (2009).

Complaint Held Sufficient. — Complaint was sufficient where it gave notice of the nature and basis of plaintiff's claim and the type of case brought and alleged that a lease agreement was entered into by the parties and subsequently breached by nonpayment of rent. Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974).

While the allegation in a malpractice claim that the defendant-physician's conduct "amounted to a reckless and wanton disregard of and indifference to the rights and safety of" the plaintiff-patient mentioned no particular instance of aggravated conduct, it was sufficient to put the defendant on notice of a punitive damage claim, to provide an understanding of the nature and basis of the claim, and to allow him to prepare his defense. Paris v. Kreitz, 75 N.C. App. 365, 331 S.E.2d 234, cert. denied, 315 N.C. 185, 337 S.E.2d 858 (1985).

Plaintiff sufficiently set out his claim against hospital for medical malpractice where he alleged that under the direction of his doctors, agents or employees of the hospital anesthetized him, that immediately after the surgery he noticed numbness in his left hand, later diagnosed as ulnar neuropathy, and that this condition was the direct and proximate result of the negligent procedures employed in anesthetizing him and immobilizing him during his surgery. Fournier v. Haywood County Hosp., 95 N.C. App. 652, 383 S.E.2d 227 (1989).

Complaint's allegations that a doctor improperly allowed access to and exposure of a patient's medical records by third parties sufficiently stated a claim for negligent infliction of emotional distress, and dismissal of the claim against the doctor was error. Acosta v. Byrum, 180 N.C. App. 562, 638 S.E.2d 246, 2006 N.C. App. LEXIS 2503 (2006).

Failure to Comply with Subsection (a)(2) in Federal Case Transferred to This State. — Where malpractice action was commenced in Virginia and was transferred intact, the action would not be dismissed because the complaint failed to comply with subsection (a)(2) of this rule, as since the action was commenced in Virginia, there was no foreseeable need at that time to comply with this State's pleading rules. Porter v. Groat, 713 F. Supp. 893 (M.D.N.C. 1989).

Responsive Letter Deemed Answer. — A letter, or any document, that is filed with the court and substantively responds to a complaint may constitute an answer, notwithstanding its failure to comply with all of the technical requirements of the Rules of Civil Procedure. Brown v. American Messenger Servs., Inc., 129 N.C. App. 207, 498 S.E.2d 384 (1998), cert. denied, 348 N.C. 692, 511 S.E.2d 644 (1998).

Notice Theory Does Not Necessarily Require Full-Blown Trial. — The notice theory of pleading does not necessarily mean that there must be a full-blown trial. Utilizing the facility of pretrial discovery, the real facts can be ascertained, and by motion for summary judgment (or other suitable device) the trial court can determine whether as a matter of law there is any right of recovery on those facts. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

Methods for Obtaining Facts More Specifically. — If, for purposes of preparing a defense, a defendant wishes to know more specifically than the complaint alleges exactly what facts plaintiffs intend to rely upon, tools, such as discovery proceedings under G.S. 1A-1, Rule 26 or a motion for more definite statement under G.S. 1A-1, Rule 12(e), are available. Nolan v. Boulware, 21 N.C. App. 347, 204 S.E.2d 701, cert. denied, 285 N.C. 590, 206 S.E.2d 863 (1974).

Once a complaint gives general notice of the matter being pleaded, the defendant must rely on other procedures, such as discovery, to further define the issues and prepare for trial. Smith v. North Carolina Farm Bureau Mut. Ins. Co., 84 N.C. App. 120, 351 S.E.2d 774, aff'd, 321 N.C. 60, 361 S.E.2d 571 (1987).

Plaintiff's original complaint held to have given notice of amended claim. Pyco Supply Co. v. American Centennial Ins. Co., 321 N.C. 435, 364 S.E.2d 380 (1988).

Mislabeled Claims. — The fact that plaintiff's claim is mislabeled in his complaint will not, in and of itself, prove fatal to the action, if critical facts are sufficiently pled in the body of the complaint that will give the adverse party notice of the assertions against him. Buchanan v. Hunter Douglas, Inc., 87 N.C. App. 84, 359 S.E.2d 271, cert. denied, 321 N.C. 296, 362 S.E.2d 779 (1987).

Disability Need Not Be Pleaded. — Plaintiff was not required to plead mental disability in avoidance of the affirmative defense of statute of limitations. Dunkley v. Shoemate, 121 N.C. App. 360, 465 S.E.2d 319 (1996).

Requests for Monetary Relief. — A request for monetary relief sought must be served, and the request must also be filed with the court unless it can be shown to be a discovery document of the type specifically excepted in Rule 5(d). Cottle v. Thompson, 123 N.C. App. 147, 472 S.E.2d 189 (1996).

Trial court erred in dismissing plaintiff's action for failing to file a statement of monetary relief sought where no request for a statement of monetary relief sought was ever filed with the court. Cottle v. Thompson, 123 N.C. App. 147, 472 S.E.2d 189 (1996).

A request for a statement of monetary relief sought cannot be considered a discovery document of the type specifically excepted in Rule 5(d). Cottle v. Thompson, 123 N.C. App. 147, 472 S.E.2d 189 (1996).

III. AFFIRMATIVE DEFENSES.

Section (c) of this rule applies only to responsive pleadings. Meachan v. Montgomery County Bd. of Educ., 47 N.C. App. 271, 267 S.E.2d 349 (1980).

Affirmative Defense Defined. — A defense which introduces new matter in an attempt to avoid defendant's counterclaim, regardless of the truth or falsity of the allegations in the counterclaim, is an affirmative defense. Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981).

Requirements for Pleading Affirmative Defense. — The language in section (a), dealing with general pleading, and that in section (c), dealing with pleading affirmative defenses, are largely identical. The requirements for pleading an affirmative defense are no more stringent than those for pleading a cause of action. Bell v. Traders & Mechanics Ins. Co., 16 N.C. App. 591, 192 S.E.2d 711 (1972).

When an injured party sued a rural fire department and one of its firemen for injuries he received from one of the department's vehicles after the department responded to a fire in the injured party's neighborhood, the department and the fireman adequately pled the affirmative defense of immunity, under G.S. 58-82-5, in both their answer and their motion for summary judgment to satisfy the requirements of G.S. 1A-1, N.C. R. Civ. P. 8(c) and provide the injured party with notice of this defense. Luhmann v. Hoenig, 161 N.C. App. 452, 588 S.E.2d 550, 2003 N.C. App. LEXIS 2187 (2003).

Failure to plead an affirmative defense ordinarily results in waiver thereof. The parties may, however, still try the issue by express or implied consent. Nationwide Mut. Ins. Co. v. Edwards, 67 N.C. App. 1, 312 S.E.2d 656, rev'd on other grounds, 311 N.C. 170, 316 S.E.2d 298 (1984); Alston v. Monk, 92 N.C. App. 59, 373 S.E.2d 463 (1988), cert. denied, 324 N.C. 246, 378 S.E.2d 420 (1989); Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989).

Defendants waived the affirmative defense of estoppel at summary judgment by failing to affirmatively assert the defense of estoppel in either their original answer or their amended answer. HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc., 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

However, failure to plead arbitration as an affirmative defense pursuant to this section did not result in a waiver of the right later in the proceedings. Smith v. Young Moving & Storage, Inc., 141 N.C. App. 469, 540 S.E.2d 383, 2000 N.C. App. LEXIS 1297 (2000), aff'd, 353 N.C. 521, 546 S.E.2d 87 (2001).

Failure to Plead Barred Issue on Appeal. — Defendants' failure to plead plaintiffs' contributory negligence case was a bar to this issue being raised on appeal. Forbes v. Par Ten Group, Inc., 99 N.C. App. 587, 394 S.E.2d 643 (1990), discretionary review denied, 99 N.C. 587, 402 S.E.2d 824 (1991).

Failure to Plead Res Judicata. — The failure of the defendant to plead res judicata is not a bar to that issue being raised at hearing on summary judgment. County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

Consenting to claim splitting does not constitute waiver of defense of collateral estoppel under *Bockweg* or *Howerton*. Youse v. Duke Energy Corp., 171 N.C. App. 187, 614 S.E.2d 396, 2005 N.C. App. LEXIS 1209 (2005).

Illegality is an affirmative defense under section (c) of this rule, and the burden of proving illegality is on the party who pleads it. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973); Collins v. Davis, 68 N.C. App. 588, 315 S.E.2d 759, aff'd, 312 N.C. 324, 321 S.E.2d 892 (1984).

As Is Contributory Negligence. — Contributory negligence is an affirmative defense, and the burden of proof on a contributory negligence issue rests on defendant. Clary v. Alexander County Bd. of Educ., 286 N.C. 525, 212 S.E.2d 160 (1975).

And Misconduct in Divorce Action. — The burden of pleading, as well as establishing, the affirmative defense of misconduct in a divorce action is on the defendant. Gray v. Gray, 16 N.C. App. 730, 193 S.E.2d 492 (1972).

As Well as Laches. — Laches is an affirmative defense which must be pleaded, and the party pleading it bears the burden of proof. Young v. Young, 43 N.C. App. 419, 259 S.E.2d 348 (1979); Larsen v. Sedberry, 54 N.C. App. 166, 282 S.E.2d 551 (1981), cert. denied, 304 N.C. 728, 288 S.E.2d 381 (1982).

Laches is an affirmative defense which must be specifically pleaded by answer. Bertie-Hertford Child Support Enforcement Agency v. Barnes, 80 N.C. App. 552, 342 S.E.2d 579 (1986).

Payment is an affirmative defense, and as such it must be pleaded by the party asserting it. The general rule is that the burden of showing payment must be assumed by the party interposing it. Shaw v. Shaw, 63 N.C.

App. 775, 306 S.E.2d 506 (1983).

Payment is an affirmative defense which must be established by the party claiming its protection. Where creditor's evidence establishes an existing indebtedness and nonpayment, and debtor offers no competent evidence in support of his defense of payment, summary judgment or directed verdict for the creditor is properly granted. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, cert. denied as to additional issues, 312 N.C. 495, 322 S.E.2d 558 (1984).

Pleading Held to Give Sufficient Notice to Putative Husband. — It was apparent that the averments of a putative wife pled in her answer sufficiently placed the putative husband on notice that she intended to put forth evidence that the putative husband should be estopped from asserting the invalidity of the marriage. Hurston v. Hurston, — N.C. App. —, 635 S.E.2d 451, 2006 N.C. App. LEXIS 2130 (2006).

Sudden Emergency. — Defendants failed to meet the requirement of section (c) of this rule when they failed to set forth affirmatively sudden emergency as an avoidance or affirmative defense. Hinson v. Brown, 80 N.C. App. 661, 343 S.E.2d 284, appeal dismissed and cert. denied, 318 N.C. 282, 348 S.E.2d 138 (1986).

Ordinarily waiver and estoppel must be pleaded as affirmative defenses. Stuart v. United States Fire Ins. Co., 18 N.C. App. 518, 197 S.E.2d 250 (1973).

Waiver, the voluntary relinquishment of a known right, is an affirmative defense which a defendant must plead and which he has the burden of proving. Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973).

A defense based on waiver or release is an affirmative defense, and therefore the defendant bears the burden of proof. Lyon v. Shelter Resources Corp., 40 N.C. App. 557, 253 S.E.2d 277 (1979).

Waiver and estoppel are affirmative defenses which must be pleaded with certainty and particularity and established by the greater weight of the evidence. Duke Univ. v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989).

The doctrine of equitable estoppel did not bar an action by the Attorney General against finance companies who neither participated in deceptive practices of defendant grocery chain nor were put on notice that the Attorney General was investigating the defendant, from whom they purchased disputed retail installment sales contracts, for possible violations of Chapter 75, where they failed to affirmatively plead estoppel as required by this section, and where the delay before the action was filed was attributed to the extensive investigation undertaken by the Consumer Protection Division of the Attorney General's Office, the efforts to obtain information from defendant grocery chain, and intensive efforts to arrive at a resolution; furthermore, estoppel does not normally operate to bar the actions of the State or its agencies and arises only "if such an estoppel will not impair the exercise of the governmental powers of the county." State ex rel. Easley v. Rich Food Servs., Inc., 139 N.C. App. 691, 535 S.E.2d 84, 2000 N.C. App. LEXIS 1041 (2000).

Contributory Negligence Sufficiently Pleaded. — Where defendant in her answer specifically alleged contributory negligence and referred to the actions which constituted the alleged contributory negligence, plaintiff was therefore put on notice that defendant would try to prove that plaintiff could not recover on those grounds. Watkins v. Hellings, 83 N.C. App. 430, 350 S.E.2d 590 (1986), rev'd on other grounds, 321 N.C. 78, 361 S.E.2d 568 (1987).

Where the parties' pleadings were sufficient to give notice of all theories, claims and facts sought to be proven by each party, the trial court did not err in submitting the issue of contributory negligence to the jury. Wentz v. Unifi, Inc., 89 N.C. App. 33, 365 S.E.2d 198, cert. denied, 322 N.C. 610, 370 S.E.2d 257 (1988).

Plaintiff Failed to Carry Burden of Broof on Contributory Negligence. — Store owners' summary judgment motion was denied because they failed to carry their burden of proving, in accordance with N.C. R. Civ. P. 8(c), that a patron was contributorily negligent in not looking at the floor while he was walking where (1) a tote bag that was left in a store aisle was known by an employee to have been left there; (2) the patron had no knowledge of the tote; (3) the tote was not visible when rounding the corner of the aisle; and (4) the patron was trying to avoid bumping into other customers, rather than looking at the floor. Allen v. Crown Cent. Petroleum Corp., 352 F. Supp. 2d 629, 2005 U.S. Dist. LEXIS 840 (M.D.N.C. 2005).

On an affirmative defense, the burden of proof lies with the defendant. Price v. Conley, 21 N.C. App. 326, 204 S.E.2d 178 (1974).

When not raised by the pleadings, the issue of usury may still be tried if raised by express or implied consent of the parties at trial. Wallace Men's Wear, Inc. v. Harris, 28 N.C. App. 153, 220 S.E.2d 390 (1975), cert. denied, 289 N.C. 298, 222 S.E.2d 703 (1976).

Exclusion of evidence on the ground that an affirmative defense was not specifically pleaded may be properly raised at trial. Cooke v. Cooke, 34 N.C. App. 124, 237 S.E.2d 323, cert. denied, 293 N.C. 740, 241 S.E.2d 513 (1977).

Where a defendant does not raise an affirmative defense in his pleadings or in the trial, he cannot present it on appeal. Delp v. Delp, 53 N.C. App. 72, 280 S.E.2d 27, cert.

denied, 304 N.C. 194, 285 S.E.2d 97 (1981).

Where defendant did not raise the defense of the statute of frauds, one of the affirmative defenses which must be pleaded, in his pleadings or in the trial, he could not present it on appeal. Grissett v. Ward, 10 N.C. App. 685, 179 S.E.2d 867 (1971).

A defendant may not take advantage of the provisions of the statute of frauds by a motion to dismiss for failure to state a claim upon which relief could be granted, which must be pleaded as an affirmative defense. Green v. Harbour, 113 N.C. App. 280, 437 S.E.2d 719 (1993).

Pleading of Affirmative Defense Not Required. — Because a husband neither disputed a property contract nor brought any new claim of his own, it would not have been appropriate for the wife to specifically plead an affirmative defense under G.S. 1A-1, N.C. R. Civ. P. 8(c); accordingly, the property contract was improperly disregarded by the trial court. Street v. Street, 191 N.C. App. 815, 664 S.E.2d 69, 2008 N.C. App. LEXIS 1488 (2008).

Waiver. — Where neither the defendants' original nor amended answer included an affirmative defense based upon G.S. 39-13.6, they waived this defense by failing to affirmatively assert *this defense.* Purchase Nursery, Inc. v. Edgerton, 153 N.C. App. 156, 568 S.E.2d 904, 2002 N.C. App. LEXIS 1073 (2002).

Bank and its subsidiary waived the defense of federal preemption because they did not raise the defense in their answer, and they also did not raise the defense in their motions for summary judgment; instead, they raised the defense for the first time in their memorandum in response to the borrowers' motion for partial summary judgment, which was filed after the bank and its subsidiary filed their motions for summary judgment. Richardson v. Bank of Am., N.A., — N.C. App. —, 643 S.E.2d 410, 2007 N.C. App. LEXIS 809 (2007), petition allowed as to additional issues 361 N.C. 569, 650 S.E.2d 439 (2007).

Failure to Affirmatively Plead Defenses of Consideration and Statute of Frauds. — In an action to recover damages for breach of contract for the sale of land and construction of a house thereon, where defendants failed to affirmatively plead in their answer the defenses of consideration and the statute of frauds, defendants thereby waived their right to assert these defenses. Smith v. Hudson, 48 N.C. App. 347, 269 S.E.2d 172 (1980).

Complaint Sufficient to Put Defendants on Notice of a Contract. — Complaint alleging, that there was an express contract between plaintiff and defendants for payment of funeral expenses was sufficient to put defendants on notice of a contract; therefore, where defendants did not specifically plead the affirmative defense of the statute of frauds as required by G.S. 1A-1, Rule 8(c), it would not be available as a defense to the contract. Parrish Funeral Home v. Pittman, 104 N.C. App. 268, 409 S.E.2d 327 (1991).

Amendment of Complaint. — Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. Estate of Spell v. Ghanem, 175 N.C. App. 191, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

Failure to Cite Statutory Statute of Limitations Provision. — Failure to plead G.S. 1-52(16) by precise number and subdivision is not fatal under subsection (c) of this Rule. Bonestell v. North Topsail Shores Condominiums, Inc., 103 N.C. App. 219, 405 S.E.2d 222 (1991).

Burden on Plaintiff When Statute of Limitations Is Pleaded. — North Carolina, apparently alone among American jurisdictions, continues to adhere to the rule that once the statute of limitations has been properly pleaded in defense the burden of proof shifts to the plaintiff to show that the action was filed within the statutory period. This anomalous rule survived the adoption of the Rules of Civil Procedure, which specifically list the statute of limitations as an affirmative defense and operate generally to place the burden of proof of affirmative defenses on the party raising them. Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

Where the defense admits that the statute of limitations does not bar the claim, the question should be summarily treated (if at all) by the court, not the jury. Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

Defenses Raised in Hearing on Summary Judgment Motion Deemed Part of Pleadings. — The nature of summary judgment procedure, coupled with the generally liberal rules relating to amendment of pleadings, requires that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on a motion for summary judgment. Cooke v. Cooke, 34 N.C. App. 124, 237 S.E.2d 323, cert. denied, 293 N.C. 740, 241 S.E.2d 513 (1977); Barrett, Robert & Woods, Inc. v. Armi, 59 N.C. App. 134, 296 S.E.2d 10, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982); C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 66 N.C. App.

170, 310 S.E.2d 615, rev'd on other grounds, 311 N.C. 170, 316 S.E.2d 298 (1984).

Debt collector sued by consumers showed that the collector was exempt from the definition of a collection agency in G.S. 58-70-15 because the collector showed that the collector was the type of bank subsidiary meant to be exempt under G.S. 58-70-15(c)(2); the collector was not estopped under G.S. 1A-1-8(c) from asserting this exemption because the collector did not assert the exemption in the collector's answer as unpleaded defenses, when raised by the evidence, were to be considered in resolving the collector's motion for summary judgment. Williams v. HomEq Servicing Corp., 184 N.C. App. 413, 646 S.E.2d 381, 2007 N.C. App. LEXIS 1472 (2007).

And May Be Heard for First Time on Motion for Summary Judgment. — Unpleaded affirmative defenses may be heard for the first time on motion for summary judgment, even though not asserted in the answer, at least where both parties are aware of the defense. Dickens v. Puryear, 45 N.C. App. 696, 263 S.E.2d 856 (1980), rev'd on other grounds, 302 N.C. 437, 276 S.E.2d 325 (1981).

For the purpose of ruling on a motion for summary judgment, an affirmative defense may be raised for the first time by affidavit. Bassett Furn. Indus. of N.C., Inc. v. Griggs, 47 N.C. App. 104, 266 S.E.2d 702 (1980).

Unpled affirmative defenses may be heard for the first time on motion for summary judgment even though not asserted in the answer, at least where both parties are aware of the defense. Gillis v. Whitley's Disct. Auto Sales, Inc., 70 N.C. App. 270, 319 S.E.2d 661 (1984).

Raising of Affirmative Defense in Support of Summary Judgment Before Responsive Pleadings Due. — A party whose responsive pleading is not yet due may, by motion for summary judgment and in support of the motion, raise an affirmative defense to an asserted claim before he pleads responsively to the claim. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

Affirmative Defenses Deemed Denied. — Allegations of affirmative defenses were deemed denied or avoided, so normally a reply was not necessary to protect the plaintiff's rights; there was no inequity in the procedure used by the trial court in entering judgment on the pleadings in a lender's claim for a deficiency judgment against guarantors. If the lender believed a reply to the guarantors' affirmative defenses was necessary, the lender could have sought permission to file a reply to the affirmative defenses, and, in any event, the lender brought its defenses to the attention of the trial court by way of its response to the guarantors' motion, its trial brief, and its arguments before the trial court. Carolina Bank v. Chatham Station, Inc., 186 N.C. App. 424, 651 S.E.2d 386, 2007 N.C. App. LEXIS 2195 (2007).

Failure to be properly licensed is an affirmative defense which ordinarily must be specifically pleaded. Barrett, Robert & Woods, Inc. v. Armi, 59 N.C. App. 134, 296 S.E.2d 10, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Defense of Consideration Waived. — Where defendant failed to plead or offer evidence on the defense of consideration advanced in good faith, defendant waived right to assert this defense. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Failure to Plead Election of Remedies. — Defendant, who claimed that plaintiff was barred from recovery because plaintiff elected inconsistent remedies, could not introduce election of remedy theory for the first time on appeal, since the defense of inconsistent remedies is an affirmative defense, and defendant did not plead election of remedies or present that theory at trial. North Carolina Fed. Savs. & Loan Ass'n v. Ray, 95 N.C. App. 317, 382 S.E.2d 851 (1989).

Failure to Plead Good Faith Purchaser for Value. — Limited liability company (LLC) that purchased a mobile home at a tax sale waived its claim that a lienholder was not entitled to invalidate the sale because the LLC was a good faith purchaser for value by failing to raise that claim as an affirmative defense when it answered the lienholder's complaint. Oakwood Acceptance Corp., LLC v. Massengill, 162 N.C. App. 199, 590 S.E.2d 412, 2004 N.C. App. LEXIS 118 (2004).

Abatement Where Prior Action Pending in Appellate Division. — A prior action which is pending in the appellate division may serve as a prior action pending for the purpose of basing a judgment of abatement in a subsequent action between the same parties upon the same issues. Clark v. Craven Regional Medical Auth., 326 N.C. 15, 387 S.E.2d 168 (1990).

Assertion of Affirmative Defense on Appeal from Small Claims Court. — When a landlord successfully sued a tenant for summary ejectment in small claims court, and the tenant obtained a trial de novo in district court, the tenant did not waive its affirmative defense of estoppel by not pleading it in district court because, in small claims court, the only pleading was the complaint, and on appeal to district court, the district court judge could elect to try the case on the pleadings filed, so the tenant did not waive its affirmative defense. Don Setliff & Assocs. v. Subway Real Estate Corp., 178 N.C. App. 385, 631 S.E.2d 526, 2006 N.C. App. LEXIS 1414 (2006).

Effect of an Entry of Default. — The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint and is prohibited from defending on the merits of the case. Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

Evidence of a fraudulent scheme on the part of plaintiff and her husband, submitted pursuant to this section, did not entitle the defendant to a directed verdict where the defendant in an alienation of affection case neither affirmatively pled, as required by this section, nor tried the case on the theory of fraud. Ward v. Beaton, 141 N.C. App. 44, 539 S.E.2d 30, 2000 N.C. App. LEXIS 1288 (2000), cert denied, 353 N.C. 398, 547 S.E.2d 431 (2001).

IV. EFFECT OF FAILURE TO DENY.

Averments in pleadings are admitted when not denied in a responsive pleading, if a responsive pleading is required. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

Answer is a required responsive pleading, and denials are required to fairly meet the substance of the averments denied. In a client's legal malpractice case alleging that the lawyers failed to advise the client of use restrictions on land purchased by the client, the trial court's order dismissing the case as time-barred was affirmed, where the client had failed to specifically deny that he was notified of the land use restrictions approximately two months after closing on the purchase of the land, and over three years before filing the legal malpractice case. Bolton v. Crone, 162 N.C. App. 171, 589 S.E.2d 915, 2004 N.C. App. LEXIS 56 (2004).

Allegations in Complaint Supported Default Judgment. — Pursuant to G.S. 1A-1-8(d), when a contractor failed to answer a complaint by a passenger, seeking a declaratory judgment regarding workers' compensation coverage that was allegedly extended by the contractor to a subcontractor's employees, which included the passenger, the factual allegations stated in the complaint were deemed admitted and were adequate to support the trial court's grant of a default judgment in favor of the passenger. Lowery v. Campbell, 185 N.C. App. 659, 649 S.E.2d 453, 2007 N.C. App. LEXIS 1948 (2007).

Allegations Not Admitted Where Reply Not Required. — Plaintiff's failure to file a reply to defendant's purported "counterclaim" did not operate as an admission of the facts alleged therein where defendant's pleading did nothing more than raise an affirmative defense to plaintiff's cause of action, to which a reply was neither required nor permitted by G.S. 1A-1, Rule 7(a). Eubanks v. First Protection Life Ins. Co., 44 N.C. App. 224, 261 S.E.2d 28 (1979), cert. denied, 299 N.C. 735, 267 S.E.2d 661 (1980).

Where plaintiff was not required to plead matters in avoidance of affirmative defenses, he could not as a matter of right file a reply to plead such matters, and he was not required to seek leave to plead such matters. Thus, defendants' affirmative defense of release was deemed avoided or denied by section (d) of this rule and no further pleadings were required. Brown v. Lanier, 60 N.C. App. 575, 299 S.E.2d 279 (1983).

Privilege Against Self-incrimination Applies at Pleading Stage. — A defendant may plead his privilege against self-incrimination in a civil action where the plaintiff asks for punitive damages, and the privilege applies to protect a party from self-incrimination at the pleading stage of an action. Byrd v. Hodges, 44 N.C. App. 509, 261 S.E.2d 269 (1980).

Thus, Allegations Not Admitted Where Privilege Asserted. — In an action to recover compensatory and punitive damages for alienation of affections and criminal conversation, where defendant refused to answer the allegations of plaintiff's complaint, claiming his constitutional privilege against self-incrimination, the trial court erred in deeming the allegations as admitted pursuant to section (d). Byrd v. Hodges, 44 N.C. App. 509, 261 S.E.2d 269 (1980).

Allegations Deemed Denied in Divorce Case. — Despite the fact that the wife did not respond to allegations of marital misconduct and fault contained in the husband's counterclaim in the parties' divorce case, pursuant to G.S. 50-10(a), all of the allegations of the counterclaim were deemed denied. Phillips v. Phillips, 185 N.C. App. 238, 647 S.E.2d 481, 2007 N.C. App. LEXIS 1735 (2007).

Procedure at Trial Where Party Not Permitted to File Responsive Pleading. — A party who is not permitted to file a responsive pleading may meet the allegations at trial in any manner that would have been proper had a reply been allowed. Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977).

Reply Not Required. — Where defendant's claim contending that all the property listed was marital property, though denominated a counterclaim, in effect did no more than deny plaintiff's allegations that only the property listed in the complaint was marital property, a reply was not required. Cornelius v. Cornelius, 87 N.C. App. 269, 360 S.E.2d 703 (1987).

There was no error in an instruction to the jury that defendant admitted a contract, where a paragraph of the complaint alleged the making of the contract and the terms thereof as contended by the plaintiff, and the answer stated that the paragraph was not denied and did not allege a different contract. Johnson v. Massengill, 280 N.C. 376, 186 S.E.2d 168 (1972).

V. ALTERNATIVE, HYPOTHETICAL AND INCONSISTENT STATEMENTS.

There is no requirement that all claims be legally consistent. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

A party may allege and prove inconsistent or alternative theories without subjecting the case to directed verdict. Hall v. Mabe, 77 N.C. App. 758, 336 S.E.2d 427 (1985).

Use of disjunctive "or" in corporation's allegations that the corporations' president cashed, or replaced with a certified check, the subject checks either with no endorsement or being endorsed only by the president himself did not cause the complaint to violate subdivision (e)(1) of this rule or G.S. 1A-1, Rule 11(a) as subdivision (e)(1) permitted pleading in the alternative. Castle Worldwide, Inc. v. Southtrust Bank, 157 N.C. App. 518, 579 S.E.2d 478, 2003 N.C. App. LEXIS 730 (2003).

Defendant may plead alternative, inconsistent defenses, and need not make an election between the two defenses prior to trial. Alpar v. Weyerhaeuser Co., 20 N.C. App. 340, 201 S.E.2d 503, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

Election of Remedies. — Where defendant sought equitable distribution and imposition of a constructive trust upon certain property in her husband's possession, doctrine of election of remedies would ban action for constructive trust only if a distribution had been made in the equitable distribution action and the constructive trust remedy was inconsistent with the equitable distribution remedy. Lamb v. Lamb, 92 N.C. App. 680, 375 S.E.2d 685 (1989).

On appeal from summary judgment, the record did not provide basis for determination of whether defendant's equitable distribution action would allow redress of injury complained of in her constructive trust proceeding, thus barring the constructive trust action under the doctrine of election of remedies; nonetheless, as the equitable distribution action had not been prosecuted to a final judgment, the trial court erred in entering summary judgment for the plaintiff and dismissing defendant's counterclaim for a constructive trust. Lamb v. Lamb, 92 N.C. App. 680, 375 S.E.2d 685 (1989).

Quantum Meruit. — It is not necessary to plead quantum meruit in the alternative unless the claim is based on the same subject matter as the express contract claim, since one cannot recover on both claims. Consequently, it is error to submit an alternative implied contract claim to the jury when an express contract has been proved. Catoe v. Helms Constr. & Concrete Co., 91 N.C. App. 492, 372 S.E.2d 331 (1988).

Where plaintiff, in the event that he could not prove breach of an express contract, sought the same amount in the alternative in quantum meruit, and succeeded in proving the existence of an express contract at trial, he could not then successfully assert on appeal that his implied contract claim should have been considered by the jury simply because his express contract claim yielded only nominal damages. Catoe v. Helms Constr. & Concrete Co., 91 N.C. App. 492, 372 S.E.2d 331 (1988).

VI. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-151 and 1-159.*

Common-law rule requiring every pleading to be construed against the pleader was materially modified by former G.S. 1-151. Sexton v. Farrington, 185 N.C. 339, 117 S.E. 172 (1923).

Liberal Construction of Pleadings with View to Substantial Justice. — Pleadings challenged by a demurrer are to be construed liberally with a view to substantial justice between the parties. Stamey v. Rutherfordton Elec. Membership Corp., 247 N.C. 640, 101 S.E.2d 814 (1958); Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968); Clemmons v. Life Ins. Co., 1 N.C. App. 215, 161 S.E.2d 55, aff'd, 274 N.C. 416, 163 S.E.2d 761 (1968).

The allegations of a pleading must be liberally construed for the purpose of determining their effect and with a view to substantial justice between the parties. Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964); Powell v. Powell, 271 N.C. 420, 156 S.E.2d 691 (1967).

In the construction of a pleading to determine whether or not the allegations meet the requirements laid down by the court, such allegations must be construed with a view to substantial justice between the parties. Kemp v. Funderburk, 224 N.C. 353, 30 S.E.2d 155 (1944).

The pleadings must be liberally construed, with a view to present the case upon its real merits. Lyon v. Atlantic Coast Line R.R., 165 N.C. 143, 81 S.E. 1 (1914).

Construction of Pleadings in Favor of Pleader. — Pleadings must be liberally construed, and every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. Corbett v. Hilton Lumber Co., 223 N.C. 704, 28 S.E.2d 250 (1943). See also, Sandlin v. Yancey, 224 N.C. 519, 31 S.E.2d 532 (1944); Ferrell v. Worthington, 226 N.C. 609, 39 S.E.2d 812 (1946); Winston v. Williams & McKeithan Lumber Co., 227 N.C. 339, 42 S.E.2d 218 (1947); McCampbell v. Valdese Bldg. & Loan Ass'n, 231 N.C. 647, 58 S.E.2d 617 (1950); Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

The allegations of the complaint are to be liberally construed so as to give the plaintiff the benefit of every reasonable intendment in his favor. Clemmons v. Life Ins. Co., 274 N.C. 416, 163 S.E.2d 761 (1968).

The court is required to construe the complaint liberally with a view to substantial justice between the parties, and every reasonable intendment is to be made in favor of the pleader. Setser v. Cepco Dev. Corp., 3 N.C. App. 163, 164 S.E.2d 407 (1968); Joyner v. Woodard, 201 N.C. 315, 160 S.E. 288 (1931); Bailey v. Roberts, 208 N.C. 532, 181 S.E. 754 (1935); Leach v. Page, 211 N.C. 622, 191 S.E. 349 (1937); Anthony v. Knight, 211 N.C. 637, 191 S.E. 323 (1937); Anderson Cotton Mills v. Royal Mfg. Co., 218 N.C. 560, 11 S.E.2d 550 (1940).

Upon inquiry as to whether a complaint states a cause of action, it will be liberally construed, with every reasonable intendment therefrom in the plaintiff's favor, however uncertain, defective, and redundant its allegations may be drawn. Elam v. Barnes, 110 N.C. 73, 14 S.E. 621 (1892); Foy v. Stephens, 168 N.C. 438, 84 S.E. 758 (1915); State ex rel. N.C. Corp. Comm'n v. Harnett County Trust Co., 192 N.C. 246, 134 S.E. 656 (1926); North Carolina Corp. Comm'n v. Citizens Bank & Trust Co., 193 N.C. 513, 137 S.E. 587 (1927); Seawell v. Chas. Cole & Co., 194 N.C. 546, 194 N.C. 1450a, 140 S.E. 85, 140 S.E. 85 (1927); Enloe v. Ragle, 195 N.C. 38, 141 S.E. 477 (1928); Presnell v. Beshears, 227 N.C. 279, 41 S.E.2d 835 (1947). See Bryant v. Little River Ice Co., 233 N.C. 266, 63 S.E.2d 547 (1951).

A motion for judgment on the pleadings is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader. Edwards v. Edwards, 261 N.C. 445, 135 S.E.2d 18 (1964); Powell v. Powell, 271 N.C. 420, 156 S.E.2d 691 (1967).

Complaint Sufficient to State Cause of Action Sustained. — If the facts alleged are sufficient for a cause of action when liberally construed, however inartistically the complaint may have been drawn, it will be sustained. Renn v. Seaboard Air Line R.R., 170 N.C. 128, 86 S.E. 964 (1915), aff'd, 241 U.S. 290, 36 S. Ct. 567, 60 L. Ed. 1006 (1916); Conrad v. Board of Educ., 190 N.C. 389, 130 S.E. 53 (1925). Same rule applies to an answer. Dixon v. Green, 178 N.C. 205, 100 S.E. 262 (1919); Pridgen v. Pridgen, 190 N.C. 102, 129 S.E. 419 (1925). See also Farrell v. Thomas & Howard Co., 204 N.C. 631, 169 S.E. 224 (1933).

A complaint cannot be overthrown unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartistically it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader. A complaint must be fatally defective before it will be rejected as insufficient. Fairbanks, Morse & Co. v. J.A. Murdock Co., 207 N.C. 348, 177 S.E. 122 (1934); Ramsey v. Nash Furn. Co., 209 N.C. 165, 183 S.E. 536 (1936); Cummings v. Dunning, 210 N.C. 156, 185 S.E. 653 (1936); State ex rel. Avery County v. Braswell, 215 N.C. 270, 1 S.E.2d 864 (1939); Vincent v. Powell, 215 N.C. 336, 1 S.E.2d 826 (1939); Dickensheets v. Taylor, 223 N.C. 570, 27 S.E.2d 618 (1943), citing Anderson Cotton Mills v. Royal Mfg. Co., 218 N.C. 560, 11 S.E.2d 550 (1940).

If a complaint merely alleges conclusions, it is demurrable. On the other hand, if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action, the pleading will stand. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

A pleading will be upheld if any part presents sufficient facts, or if such facts may be gathered from the whole pleading by a liberal and reasonable construction. Pridgen v. Pridgen, 190 N.C. 102, 129 S.E. 419 (1925).

When it is apparent from the whole pleading that the complaint alleges a good cause of action, it will be sustained under the rule of liberal construction. Muse v. Ford Motor Co., 175 N.C. 466, 95 S.E. 900 (1918); Dixon v. Green, 178 N.C. 205, 100 S.E. 262 (1919).

There should be at least a substantial accuracy in the averments of pleadings, and a compliance therein with the essential rules of pleading so that the real issues may be evolved from the controversy. New Bern Banking & Trust Co. v. Duffy, 156 N.C. 83, 72 S.E. 96 (1911).

The complaint is construed to aver all the facts that can be implied by fair and reasonable intendment from the facts expressly stated. Steel v. Locke Cotton Mills Co., 231 N.C. 636, 58 S.E.2d 620 (1950).

But the court will not construe into a pleading that which it does not contain. Jones v. Jones Lewis Furn. Co., 222 N.C. 439, 23 S.E.2d 309 (1942).

The rule of liberal construction does not mean that a pleading shall be construed to say what it does not say, but that if it can be seen from its general scope that a party has a cause of action or defense, he will not be deprived thereof merely because he has not stated it with technical accuracy. Chesson v. Lynch, 186 N.C. 625, 120 S.E. 198 (1923).

The rule of liberal construction does not mean that the court shall supply the necessary allegations, nor is it intended thereby to repeal those rules of pleading which are essential to produce certainty of issues. Turner v. McKee, 137 N.C. 251, 49 S.E. 330 (1904). See also, Fairbanks, Morse & Co. v. J.A. Murdock Co., 207 N.C. 348, 177 S.E. 122 (1934).

While the appellate court must construe liberally the allegations of a challenged pleading, the appellate court is not permitted to read into it facts which it does not contain. Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

Liberal construction does not mean that the court is to read into the complaint allegations which it does not contain. Clemmons v. Life Ins. Co., 274 N.C. 416, 163 S.E.2d 761 (1968).

A complaint must be fatally defective before it will be rejected as insufficient. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968).

Under the liberal construction rule, an answer must be fatally defective before it will be rejected as insufficient, and every reasonable intendment and presumption must be in favor of the pleader. Commerce Ins. Co. v. McCraw, 215 N.C. 105, 1 S.E.2d 369 (1939).

A demurrer will not be sustained unless the complaint is fatally and wholly defective. Clemmons v. Life Ins. Co., 1 N.C. App. 215, 161 S.E.2d 55, aff'd, 274 N.C. 416, 163 S.E.2d 761 (1968).

Construction of Inaccurate Language. — A plea that a cause of action did not "arise" within the time prescribed by the statute for the commencement of an action, while not strictly accurate, would be construed under the liberal system of pleading to mean that it did not "accrue" within that time. Stubbs v. Motz, 113 N.C. 458, 18 S.E. 387 (1893).

It is proper to strike repetitious allegations from the pleadings. Girard Trust Bank v. Easton, 3 N.C. App. 414, 165 S.E.2d 252 (1969).

New matter in the answer not relating to a counterclaim is deemed denied without a reply. Sullivan v. Johnson, 3 N.C. App. 581, 165 S.E.2d 507 (1969).

Conflict of Laws. — The rules of construction of pleadings are governed by the law of the state in which the cause is being litigated. McNinch v. American Trust Co., 183 N.C. 33, 110 S.E. 663 (1922), appeal dismissed, 261 U.S. 606, 43 S. Ct. 363, 67 L. Ed. 823, cert. denied, 261 U.S. 618, 43 S. Ct. 663, 67 L. Ed. 823 (1923).

Rule 9. Pleading special matters.

(a) *Capacity.* — Any party not a natural person shall make an affirmative averment showing its legal existence and capacity to sue. Any party suing in any representative capacity shall make an affirmative averment showing his capacity and authority to sue. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) *Fraud, duress, mistake, condition of the mind.* — In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) *Conditions precedent.* — In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) *Official document or act.* — In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) *Judgment.* — In pleading a judgment, decision or ruling of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment, decision or ruling without setting forth matter showing jurisdiction to render it.

(f) *Time and place.* — For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) *Special damage.* — When items of special damage are claimed each shall be averred.

(h) *Private statutes.* In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification if ratified before January 1, 1996, or the date it becomes law if it becomes law on or after January 1, 1996, and the court shall thereupon take judicial notice of it.

(i) *Libel and slander.* —

(1) In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the claim for relief arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken.

(2) The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances.

(j) *Medical malpractice.* — Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

(1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care;

(2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint; or

(3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitur.

Upon motion by the complainant prior to the expiration of the applicable statute of limitations, a resident judge of the superior court for a judicial district in which venue for the cause of action is appropriate under G.S. 1-82 or, if no resident judge for that judicial district is physically present in that judicial district, otherwise available, or able or willing to consider the motion, then any presiding judge of the superior court for that judicial district may allow a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule, upon a determination that good cause exists for the granting of the motion and that the ends of justice would be served by an extension. The plaintiff shall provide, at the request of the defendant, proof of compliance with this subsection through up to ten written interrogatories, the answers to which shall be verified by the expert required under this subsection. These interrogatories do not count against the interrogatory limit under Rule 33.

(k) *Punitive damages.* — A demand for punitive damages shall be specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity. The amount of damages shall be pled in accordance with Rule 8. (1967, c. 954, s. 1; 1995, c. 20, s. 10; c. 309, s. 2; c. 514, s. 3; 1998-217, s. 61; 2001-121, s. 1.)

COMMENT

This rule is designed to lay down some special rules for pleading in typically recurring contexts which have traditionally caused trouble when no codified directive existed.

Section (a). — This section deals with the problem of putting in issue the legal existence, the capacity or the authority of parties. The rule as presented here requires that parties plaintiff who are not natural persons shall affirmatively aver their legal existence and capacity and that parties plaintiff suing in representative capacities shall affirmatively plead to show capacity and authority. However, the further requirement is laid down that any party actually desiring to put any of these concepts in issue shall negatively aver their nonexistence and support the averment. This section departs from federal Rule 9, which has no requirement that capacity, legal existence or representative authority be affirmatively averred. The Code nowhere deals specifically with the question whether capacity, etc., must be affirmatively pleaded. It did, of course, provide for demurrer to a complaint which affirmatively disclosed lack of capacity. Former § 1-127(2). Monfils v. Hazlewood, 218 N.C. 215, 10 S.E.2d 673 (1940) (complaint in wrongful death action affirmatively showing plaintiff a foreign administratrix). Capacity and existence are customarily pleaded affirmatively in North Carolina practice in any context where they might possibly be in issue, e.g., by parties suing in representative capacities; by corporations. There is no present Code requirement that their nonexistence or noncapacity be specifically averred and supported by pleading in order to put this in issue, and the rule does require this. This is an improvement, since it deprives parties of the easy ability, without real basis in fact, to put the opponent to needless proof of these matters.

Section (b). — This section codifies a rule applied without specific Code directive in existing State practice. See, e.g., Calloway v. Wyatt, 246 N.C. 129, 97 S.E.2d 881 (1957).

Section (c). — This section is an approximate counterpart to former § 1-155. The rule is, however, more precise on two aspects, and thereby an improvement. First it is made plain that the license to plead generally extends to "occurrence" as well as to "performance" of conditions precedent. Second, the rule requires that the party desiring to controvert performance or occurrence must specify and particularize rather than merely deny the general allegation.

Section (d). — This section had no counterpart in existing law, but is a helpful sanction to plead generally and in conclusory terms the official character of document issuance and particular acts — "facts" not logically subject to "ultimate fact" pleading.

Section (e). — This section is an approximate counterpart to former § 1-154, but makes precise some things not spelled out in that statute, i.e., that it relates to judgments of foreign as well as domestic courts and to the decisions of quasi-judicial tribunals as well as those of traditional courts of law and judicial officers.

Section (f). — This section varies the usual rule under the Code that allegations of time and place are immaterial, but in only one narrow respect, viz., that for purposes of testing the sufficiency of a pleading, i.e., on motion to dismiss or for judgment on the pleadings, such allegations are considered material. The main purpose of this is to allow the early raising of issues as to the bar of the statute of limitations. This section would actually solidify a trend in North Carolina practice toward pretrial resolutions of the issue, notwithstanding it may not technically be raised by an attack by demurrer on the pleading itself, but must be affirmatively pleaded by the party relying on the defense. Section 1-15. The practice has already evolved, however, of resolving the issue after answer filed, on pretrial motion or motion for judgment on the pleading. See, e.g., Rowland v. Beauchamp, 253 N.C. 231, 116 S.E.2d 720 (1960); Gillikin v. Bell, 254 N.C. 244, 118 S.E.2d 609 (1961). This section would carry the process one step further and allow the issue to be raised prior to filing of answer by motion to dismiss. For all other purposes, however, allegations of time and place ordinarily remain immaterial, so far as limiting proof is concerned. Of course, any question of materiality is customarily avoided by the "on or about" or "at or near" type allegation.

Section (g). — This section codifies, without attempting elaboration, the rule generally stated and followed under North Carolina Code practice. It attempts no specification of what amounts to "special damage" in particular context, so that developed case precedent on this would continue to apply. See, on this point, Brandis and Trotter, *Some Observations on Pleading Damages in North Carolina,* 31 N.C.L. Rev. 249 (1953).

Section (h). — This section has no counterpart in the federal rules, but is taken from former § 1-157.

Section (i). — This section has no counterpart in the federal rules, but is taken from former § 1-158.

Editor's Note. — Session Laws 1995, c. 20, s. 17 provided that sections 1 through 16 of this act would become effective only if the constitutional amendments proposed by Session Laws 1995, c. 5, ss. 1-2 were approved as provided by Session Laws 1995, c. 5, ss. 3-4, and if so approved, sections 1 through 16 would become effective with respect to bills and joint resolutions passed in either house of the General Assembly on or after January 1, 1997. The constitutional amendments were approved.

Session Laws 1995, c. 309, which amended this section by adding subsection (j), in s. 3, provides that the amendment to this section is not intended, and shall not be construed, to enlarge or diminish the doctrine of res ipsa loquitur in medical malpractice claims.

Legal Periodicals. — For survey of 1981 law on civil procedure, see 60 N.C.L. Rev. 1214 (1982).

For note, "Keith v. Northern Hospital District of Surry County and Rule 9(j): Preventing Frivolous Medical Malpractice Claims at the Expense of North Carolina Courts' Equitable Powers," see 77 N.C. L. Rev. 2303 (1999).

For a discussion of the interaction between Civ. Procedure Rules 9(j) and 41(a)(1) in medical malpractice actions, see 79 N.C.L. Rev. 855 (2001).

For note, "Rule 9(j) — Is Requiring a Plaintiff in a Medical Malpractice Action to Certify His or Her Claim Before Filing Unconstitutional? — The Issue in Anderson v. Assimos," 25 Campbell L. Rev. 219 (2003).

For article, "Law Between the Lines," 25 Campbell L. Rev. 151 (2003).

For comment, "Punitive Damages in Medical Malpractice: An Economic Evaluation," see 81 N.C.L. Rev. 2371 (2003).

CASE NOTES

I. In General.
II. Capacity.
III. Fraud, Duress, Mistake, etc.
IV. Conditions Precedent.
V. Special Damages.
VI. Libel and Slander.
VII. Pleading and Practice.
VIII. Time and Place.
IX. Decisions Under Prior Law.

I. IN GENERAL.

Constitutionality of Subsection (j). — Ruling of the North Carolina Court of Appeals that G.S. 1A-1, N.C. R. Civ. P. 9(j) was unconstitutional was premature because the medical malpractice case in which the ruling was made was based solely on res ipsa loquitur, and Rule 9(j) did not apply to medical malpractice cases based on res ipsa loquitur. Anderson v. Assimos, 356 N.C. 415, 572 S.E.2d 101, 2002 N.C. LEXIS 1117 (2002).

This rule codifies established North Carolina law. Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976).

The pleading with particularity required by section (b) of this rule is complemented by § 1A-1, Rule 15(b). Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

Intent and knowledge may be averred generally. Carver v. Roberts, 78 N.C. App. 511, 337 S.E.2d 126 (1985).

When Complaint Is Sufficient. — Under our modern practice only claims for fraud, duress, libel and slander have to be pleaded with any particularity at all. In all other instances the complaint is sufficient if it gives the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved, showing that the pleader is entitled to relief. Newton v. Whitaker, 83 N.C. App. 112, 349 S.E.2d 333 (1986), aff'd, 319 N.C. 455, 355 S.E.2d 138 (1987).

A Review of Hypothetical Medical Facts Satisfies Requirements of Section (j). — The plaintiff complied with the requirements of this rule where the plaintiff's counsel presented to the doctor/expert, during a telephone conversation, certain "facts" about the medical care provided decedent by the defendant/doctor and, based on this information, the doctor opined defendant breached the applicable standard of care for an anesthesiologist. Hylton v. Koontz, 138 N.C. App. 511, 530 S.E.2d 108 (2000).

Pleading of Private or Local Act by Title or Day of Ratification. — As a general rule, a court will not take judicial notice of a private or local act unless it is pleaded by reference to its title or the day of its ratification, even though the act is published among the public laws. But this rule is one of pleading, designed to prevent surprise, and should never be allowed to prevail when a statute which effectually settles the controversy has been formally brought to the attention of the court and all parties. Bland v. City of Wilmington, 278 N.C. 657, 180 S.E.2d 813 (1971).

Plaintiffs were not required to obtain a separate Rule 9(j) extension in each county in which any named defendant was alleged to have committed negligence; therefore, the trial court erred in dismissing the plaintiffs' complaint with prejudice for their alleged failure to comply with this rule, where the complaint properly joined all defendants and was properly filed, where the Rule 9(j) extension was obtained in the proper county insofar as it applied to some of the defendants, where the appellees were properly joined in the action as additional defendants inasmuch as they were alleged to be joint tortfeasors, and where defendants failed to show how, if at all, they would be prejudiced by an interpretation of Rule 9(j) requiring a single, rather than multiple extensions. Stewart v. Southeastern Regional Med. Ctr., 142 N.C. App. 456, 543 S.E.2d 517, 2001 N.C. App. LEXIS 137 (2001), review denied, 353 N.C. 733, 552 S.E.2d 169 (2001).

Claim for Medical Malpractice Under Subsection (j) Not Appropriate. — Because the observance and supervision of plaintiff patient when she smoked in the designated smoking area did not constitute an occupation involving specialized knowledge or skill, and because preventing the patient from dropping a match or a lighted cigarette upon herself while in a designated smoking room did not involve matters of medical science, ordinary negligence were properly applied to such behaviors, and the requirements of section (j) of this rule, concerning a complaint for medical malpractice, did not apply. Taylor v. Vencor, Inc., 136 N.C. App. 528, 525 S.E.2d 201 (2000).

Certification by an expert witness was not necessary for the patient's ordinary negligence claims, despite the fact that the hospital was a health care provider, since the hospital's independent duties owed to the patient could be judged by a reasonable person standard which did not require expert testimony at trial. Sharpe v. Worland, 147 N.C. App. 782, 557 S.E.2d 110, 2001 N.C. App. LEXIS 1252 (2001).

Certification Requirements for Medical Malpractice. — Certification requirements of G.S. 1A-1, N.C. R. Civ. P. 9(j) apply only to medical malpractice cases where a plaintiff seeks to prove that a defendant's conduct breached the requisite standard of care and not to res ipsa loquitur claims. Anderson v. Assimos, 356 N.C. 415, 572 S.E.2d 101, 2002 N.C. LEXIS 1117 (2002).

Complaint's allegations that a doctor improperly allowed access to and exposure of a patient's medical records by third parties stated a claim based on the doctor's administrative act, not one involving direct patient care, and therefore the plaintiff did not need certification before filing suit. Acosta v. Byrum, 180 N.C. App. 562, 638 S.E.2d 246, 2006 N.C. App. LEXIS 2503 (2006).

Summary judgment in favor of a doctor in an executrix's refiled malpractice case was proper because, although the original complaint contained the required G.S. 1A-1-9(j) expert certification, the executrix admitted in discovery that she had not consulted with her expert until nearly seven months after the filing of her complaint, and thus the allegation in her original complaint was ineffective to meet the requirements of G.S. 1A-1-9(j); therefore, voluntary dismissal of the original complaint did not toll the statute of limitations and the refiled complaint was untimely. Winebarger v. Peterson, 182 N.C. App. 510, 642 S.E.2d 544, 2007 N.C. App. LEXIS 691 (2007).

Summary judgment for a doctor in a patient's medical malpractice action was proper because the patient did not allege that her complaint had been reviewed by an expert before filing suit as required by G.S. 1A-1, N.C. R. Civ. P. 9(j), and the complaint failed to set forth sufficient facts for application of res ipsa loquitor; the patient neither pled that there was no direct proof of her injury nor did she make such an argument in her brief. The patient's own testimony focused on the skin incisions made to the left knee as the source of her pain, which was sufficient to identify the cause of her injury, and which rendered res ipsa loquitor inapplicable. Rowell v. Bowling, — N.C. App. —, 678 S.E.2d 748, 2009 N.C. App. LEXIS 1089 (July 7, 2009).

Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. Estate of Spell v. Ghanem, 175 N.C. App. 191, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

Corporate Negligence of Hospital. — Only those claims which assert negligence on the part of a hospital which arise out of the provision of clinical patient care constitute medical malpractice actions and require Rule 9(j) certification; thus, where a corporate negligence claim arises out of policy, management, or administrative decisions, such as granting or continuing hospital privileges, failing to monitor or oversee performance of physicians, credentialing, and failing to follow hospital policies, the claim is instead derived from ordinary negligence principles and certification is not required. Estate of Waters v. Jarman, 144 N.C. App. 98, 547 S.E.2d 142, cert. denied, 354 N.C. 68, 553 S.E.2d 213 (2001).

Effect of Tolling the Statute of Limitations in a Medical Malpractice Case. — A Rule 9(j) order extending the time to file a medical malpractice action tolls the statute of limitations as to defendants who are not named in the motion requesting the extension of time, as well as all defendants who are not served with notice of the extension. Webb v. Nash Hosps., 133 N.C. App. 636, 516 S.E.2d 191, 1999 N.C. App. LEXIS 603 (1999), cert. denied, 351 N.C. 122, 541 S.E.2d 471 (1999).

A Rule 9(j) extension by defendant to file her medical malpractice claim also tolls the statute of limitations as to her husband's loss of consortium. Webb v. Nash Hosps., 133 N.C. App. 636, 516 S.E.2d 191, 1999 N.C. App. LEXIS 603 (1999), cert. denied, 351 N.C. 122, 541 S.E.2d 471 (1999).

Trial Court Erred in Dismissing Claim. — G.S. 1A-1, N.C. R. Civ. P. 60(b) did not apply to an interlocutory order denying a motion to dismiss a medical malpractice case, and a trial court lacked the authority to grant relief from that denial and to dismiss the case; in any event, a decision ruling that G.S 1A-1, N.C. R. Civ. P. 9(j) was constitutional did not affect rights acquired in an earlier holding that the rule was invalid, and the trial court erred in dismissing the malpractice on the basis of G.S. 1A-1, N.C. R. Civ. P. 9(j). Rupe v. Hucks-Follis, 170 N.C. App. 188, 611 S.E.2d 867, 2005 N.C. App. LEXIS 901 (2005).

Applied in Beachboard v. Southern Ry., 16 N.C. App. 671, 193 S.E.2d 577 (1972); Brantley v. Dunstan, 17 N.C. App. 19, 193 S.E.2d 423 (1972); Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974); Britt v. Britt, 16 N.C. App. 132, 215 S.E.2d 172 (1975); N.C. Monroe Constr. Co. v. Coan, 30 N.C. App. 731, 228 S.E.2d 497 (1976); F.E. Davis Plumbing Co. v. Ingleside W. Assocs., 37 N.C. App. 149, 245 S.E.2d 555 (1978); Best v. Perry, 41 N.C. App. 107, 254 S.E.2d 281 (1979); Eubanks v. First Protection Life Ins. Co., 44 N.C. App. 224, 261 S.E.2d 28 (1979); Carolina Wire & Cable, Inc. v. Finnican, 46 N.C. App. 87, 264 S.E.2d 138 (1980); Lee v. Regan, 47 N.C. App. 544, 267 S.E.2d 909 (1980); Cone v. Cone, 50 N.C. App. 343, 274 S.E.2d 341 (1981); Bond Park Truck Serv. Inc. v. Hill, 53 N.C. App. 443, 281 S.E.2d 61 (1981); Harris v. Bridges, 59 N.C. App. 195, 296 S.E.2d 299 (1982); Plemmons v. City of Gastonia, 62 N.C. App. 470, 302 S.E.2d 905 (1983); Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983); Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298 (1984); Dellinger v. Lamb, 79 N.C. App. 404, 339 S.E.2d 480 (1986); Duke Power Co. v. Daniels, 86 N.C. App. 469, 358 S.E.2d 87 (1987); Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164, cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992); Sharp v. Teague, 113 N.C. App. 589, 439 S.E.2d 792 (1994); Robinson v. Entwistle, 132 N.C. App. 519, 512 S.E.2d 438 (1999); Becker v. Graber Bldrs., Inc., 149 N.C. App. 787, 561 S.E.2d 905, 2002 N.C. App. LEXIS 308 (2002).

Cited in Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971); Estate of Loftin v. Loftin, 285 N.C. 717, 208 S.E.2d 670 (1974); Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976); Wachovia Mtg. Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 S.E.2d 727 (1978); Mosley v. National Fin. Co., 36 N.C. App. 109, 243 S.E.2d 145 (1978); Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980); Murray v. Allstate Ins. Co., 51 N.C. App. 10, 275 S.E.2d 195 (1981); Briggs v. Mid-State Oil Co., 53 N.C. App. 203, 280 S.E.2d 501 (1981); Gower v. Strout Realty, Inc., 56 N.C. App. 603, 289 S.E.2d 880 (1982); Poore v. Swan Quarter Farms, Inc., 57 N.C. App. 97, 290 S.E.2d 799 (1982); Brown v. Lanier, 60 N.C. App. 575, 299 S.E.2d 279 (1983); African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983); George Shinn Sports, Inc. v. Bahakel Sports, Inc., 99 N.C. App. 481, 393 S.E.2d 580 (1990); Fox v. Killian, 102 N.C. App. 819, 403 S.E.2d 546 (1991); Bonestell v. North Topsail Shores Condominiums, Inc., 103 N.C. App. 219, 405 S.E.2d 222 (1991); Brandis v. Lightmotive Fatman, Inc., 115 N.C. App. 59, 443 S.E.2d 887 (1994); Trapp v. Maccioli, 129 N.C. App. 237, 497 S.E.2d 708 (1998); Abe v. Westview Capital, 130 N.C. App. 332, 502 S.E.2d 879 (1998); Howze v. Hughs, 134 N.C. App. 493, 518 S.E.2d 198 (1999); Clark v. Visiting Health Prof'ls, Inc., 136 N.C. App. 505, 524 S.E.2d 605, 2000 N.C. App. LEXIS 63 (2000); Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002); Ausley v. Bishop, 150 N.C. App. 56, 564 S.E.2d 252, 2002 N.C. App. LEXIS 382 (2002); Summey v. Barker, 357 N.C. 492, 586 S.E.2d 247, 2003 N.C. LEXIS 1105 (2003); Hunter v. Guardian Life Ins. Co. of Am., 162 N.C. App. 477, 593 S.E.2d 595, 2004 N.C. App. LEXIS 174 (2004); Rauch v. Urgent Care Pharm., Inc., 178 N.C. App. 510, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006); Wells v. Cumberland County Hosp. Sys., 181 N.C. App. 590, 640 S.E.2d 400, 2007 N.C. App. LEXIS 255 (2007); Higgins v. Spence & Spence, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 13096 (E.D.N.C. Feb. 21, 2008); N.C. State Bar v. Gilbert, 189 N.C. App. 320, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008); Cornett v. Watauga Surgical Group, P.A., — N.C. App. —, 669 S.E.2d 805, 2008 N.C. App. LEXIS 2231 (2008); Barringer v. Wake Forest Univ. Baptist Med. Ctr., — N.C. App. —, 677 S.E.2d 465, 2009 N.C. App. LEXIS 673 (2009).

II. CAPACITY.

This Rule and § 1A-1, Rule 17(a) Compared. — Section 1A-1, Rule 17(a) deals not only with real party in interest questions, but also with questions relating to capacity to sue, which are not solely governed by this rule, while this rule sets out those things which must be specially and specifically pleaded, one of which is the capacity in which plaintiff sues. Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

Standing. — Trial court properly found that a neighborhood association did not have standing to bring suit in a rezoning matter. While G.S.1-69.1(b) eliminated the pleading requirements set forth in G.S. 1-69.1(a)(3), G.S. 1A-1, N.C. R. Civ. P. 9(a) required the association to affirmatively aver that it was an unincorporated nonprofit association; the association failed to make an affirmative averment showing its legal existence and capacity to sue. N. Iredell Neighbors for Rural Life v. Iredell County, — N.C. App. —, 674 S.E.2d 436, 2009 N.C. App. LEXIS 370 (2009).

Plaintiff in a wrongful death action must allege and prove that he has the capacity to sue. Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

Complaint Need Not Allege What Type of Legal Entity Defendant Is. — The defendant in a civil action must be an existing legal entity, either natural or artificial; however, it is not necessary to allege in the complaint what type of legal entity the defendant is. Rollins v. Junior Miller Roofing Co., 55 N.C. App. 158, 284 S.E.2d 697 (1981).

Allegations that a party is a member of and properly represents a class under § 1A-1, Rule 23 suffice as the "affirmative averment" of "capacity and authority to sue" required by subsection (a) of this rule. Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

III. FRAUD, DURESS, MISTAKE, ETC.

Allegations establishing fraud must be stated with particularity. von Hagel v. Blue Cross & Blue Shield, 91 N.C. App. 58, 370 S.E.2d 695 (1988).

Allegations of fraud are subject to more exacting pleading requirements than are generally demanded by our liberal rules of notice pleading. Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales & Serv., Inc., 91 N.C. App. 539, 372 S.E.2d 901 (1988).

Where plaintiff consumers in a proposed class action admitted that the named consumers did not have grounds for any relief against defendant law firm under the North Carolina Racketeer Influenced and Corrupt Organizations Act (NCRICO), G.S. 75D-8(c), because they suffered no injury to their business or property, and instead argued the absent class members would be able to do so, the named consumers, who pleaded mail and wire fraud as predicate acts to show violation of NCRICO, could not provide the required facts to plead fraud as against the class members with particularity, as was required by Fed. R. Civ. P. 9(b) and G.S. 1A-1, Rule 9(b), and thus, is was appropriate to dismiss the NCRICO claim for failure to state a claim. Godfredson v. JBC Legal Group, P.C., 387 F. Supp. 2d 543, 2005 U.S. Dist. LEXIS 17878 (E.D.N.C. 2005).

This rule requires that the circumstances constituting the defense of duress be pled with particularity. Stewart v. Stewart, 61 N.C. App. 112, 300 S.E.2d 263 (1983).

The requirement of particularity in section (b) must be reconciled with § 1A-1, Rule 8, which requires a short and concise statement of claims, and with the general notice pleading theory of the Rules of Civil Procedure. Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Section (b) is in contrast to the notice pleading approach adopted upon the enactment of G.S. 1A-1, Rule 8(a), and is essentially a codification of former case law of this State with respect to pleading fraud. Girard Trust Bank v. Belk, 41 N.C. App. 328, 255 S.E.2d 430, cert. denied, 298 N.C. 293, 259 S.E.2d 299 (1979).

Notice Pleading Not Applicable to Fraud. — The provision of G.S. 1A-1, Rule 8 that pleadings are to be liberally construed under the notice theory of pleadings does not apply to fraud cases. In a fraud case, the plaintiff must allege all material facts and circumstances constituting the fraud with particularity. Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979).

A claim for relief based on fraud is unique and must be pleaded with particularity even under the liberal rules of notice pleading. Stanford v. Owens, 76 N.C. App. 284, 332 S.E.2d 730, cert. denied, 314 N.C. 670, 336 S.E.2d 402 (1985).

The pleading with particularity required by section (b) of this rule is complemented by § 1A-1, Rule 15(b). Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

The purpose of G.S. 1A-1, Rule 9(b), and its relation to G.S. 1A-1, Rule 15(c), is because fraud embraces such a wide variety of potential conduct that the alleged fraudulent party needs particularity of allegations in order to meet the evidentiary remands of the charges; this is one reason why a claim of fraud must allege all material facts and circumstances constituting fraud with particularity. State Farm Fire & Cas. Co. v. Darsie, 161 N.C. App. 542, 589 S.E.2d 391, 2003 N.C. App. LEXIS 2257 (2003), cert. denied, 358 N.C. 241, 594 S.E.2d 194 (2004), cert. dismissed, 358 N.C. 241, 594 S.E.2d 193 (2004).

The purpose of prior case law and present section (b) is to require pleading of the facts upon which the plaintiff relies to establish the essential elements of fraud; the facts alleged must be sufficient to support a finding of the intent to deceive, the specific false representations that were made, and that the defrauded party relied upon the misrepresentations to his detriment. Girard Trust Bank v. Belk, 41 N.C. App. 328, 255 S.E.2d 430, cert.

denied, 298 N.C. 293, 259 S.E.2d 299 (1979).

The purpose of this rule is to protect a defendant from unjustified injury to his reputation by requiring more particularity than is normally required by notice pleading, because fraud embraces such a wide variety of potential conduct that the defendant needs particularity of allegation in order to meet the charges. Terry v. Terry, 302 N.C. 77, 273 S.E.2d 674 (1981).

What Constitutes Fraud. — The vitals of the creature of fraud are well established: There must be a misrepresentation of material fact, made with knowledge of its falsity and with intent to deceive, which the other party reasonably relies on to his deception and detriment. Terry v. Terry, 46 N.C. App. 583, 265 S.E.2d 463 (1980), rev'd on other grounds, 302 N.C. 77, 273 S.E.2d 674 (1981).

To prevail in a cause of action sounding in fraud, the plaintiff must prove that false representations or concealments were made with knowledge of the truth or with reckless indifference thereto. Watts v. Cumberland County Hosp. Sys., 74 N.C. App. 769, 330 S.E.2d 256 (1985), rev'd in part on other grounds, 317 N.C. 110, 343 S.E.2d 879 (1986).

Fraud, Duress or Mistake Must Be Alleged. — Section (b) of this rule codifies the requirement previously existing that the facts relied upon to establish fraud, duress or mistake must be alleged. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972); In re Estate of Loftin v. Loftin, 21 N.C. App. 627, 205 S.E.2d 574, aff'd, 285 N.C. 717, 208 S.E.2d 670 (1974).

Insufficient Allegation of Fraud Subjects Plaintiff to Summary Judgment. — Plaintiff cannot simply allege fraud and thereby escape summary judgment; therefore, where plaintiff asserted defendant never intended to honor its obligations, dismissal of the issue was appropriate. Strum v. Exxon Co., 15 F.3d 327 (4th Cir. 1994).

Requirements of Pleading or Averring Fraud. — A pleading setting up fraud must allege the facts relied upon to constitute fraud, and that the alleged false representation was made with intent to deceive plaintiff, or must allege facts from which such intent can be legitimately inferred. Moore v. Wachovia Bank & Trust Co., 30 N.C. App. 390, 226 S.E.2d 833 (1976).

In pleading actual fraud the particularity requirement of this rule is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representation. Terry v. Terry, 302 N.C. 77, 273 S.E.2d 674 (1981); Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), rev'd on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986); Lackey v. Bressler, 86 N.C. App. 486, 358 S.E.2d 560 (1987); Powell v. Wold, 88 N.C. App. 61, 362 S.E.2d 796 (1987).

The pleader must state with particularity the time, place and content of the false misrepresentation. Coley v. North Carolina Nat'l Bank, 41 N.C. App. 121, 254 S.E.2d 217 (1979).

In pleading actual fraud the particularity requirement of this rule is met by alleging time, place and content of the fraudulent representation and what was obtained as a result of the fraudulent acts or representations. Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Without any essential factual basis to support the plaintiff's allegation that the defendant knowingly made false misrepresentations, a critical element of fraud, his tort claim for fraud could not withstand a motion to dismiss. Beasley v. National Sav. Life Ins. Co., 75 N.C. App. 104, 330 S.E.2d 207, discretionary review improvidently allowed, 316 N.C. 372, 341 S.E.2d 338 (1986); Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales & Serv., Inc., 91 N.C. App. 539, 372 S.E.2d 901 (1988).

The well-recognized elements of fraud are 1) a false representation or concealment of a material fact, 2) reasonably calculated to deceive, 3) made with intent to deceive, 4) which does in fact deceive, and 5) which results in damage to the injured party. A complaint charging fraud must allege these elements with particularity. Hunter v. Spaulding, 97 N.C. App. 372, 388 S.E.2d 630 (1990).

Plaintiff's pleadings were sufficient to allege the separation and property settlement agreement was procured by fraud and the breach of fiduciary duty, in that she alleged she and the defendant were married at the time the agreement was executed and there was evidence presented, without objection, that defendant failed to disclose the existence of his State Retirement Account. The defendant's admission that he inadvertently failed to disclose the existence of his State Retirement Account, was tantamount to an amendment to the complaint that he failed to disclose a material asset. Sidden v. Mailman, 137 N.C. App. 669, 529 S.E.2d 266, 2000 N.C. App. LEXIS 493 (2000).

It was error to dismiss an insured's fraud and constructive fraud claims for failure to plead with sufficient particularity under G.S. 1A-1, N.C. R. Civ. P. 9(b), since the insured outlined the fiduciary relationship the insured had with an agent, and through the agent, with an insurer, and put forward allegations of forgery and deception that culminated in the denial of the insured's claim for underinsured motorist coverage. Piles v. Allstate Ins. Co., 187 N.C. App. 399, 653 S.E.2d 181, 2007 N.C. App. LEXIS 2449 (2007).

Actual fraud and constructive fraud satisfy the particularity requirement in varying ways. Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

The very nature of constructive fraud defies specific and concise allegations. This particularity requirement may be met by alleging facts and circumstances (1) which created the relation of trust and confidence, and (2) which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

Less Particularity Required in Alleging Constructive Fraud. — A constructive fraud claim requires less particularity, as it is based on a confidential relationship rather than a specific misrepresentation; the particularity requirement for alleging constructive fraud may be met by alleging facts and circumstances which created the relation of trust and confidence and which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. Terry v. Terry, 302 N.C. 77, 273 S.E.2d 674 (1981).

Mere generalities and conclusory allegations of fraud will not suffice under section (b). Moore v. Wachovia Bank & Trust Co., 30 N.C. App. 390, 226 S.E.2d 833 (1976).

In order to state a cause of action for fraud, facts must be alleged which, if true, would constitute fraud, it not being sufficient to allege the elements of fraud in general terms. Watts v. Cumberland County Hosp. Sys., 74 N.C. App. 769, 330 S.E.2d 256 (1985), rev'd in part on other grounds, 317 N.C. 110, 343 S.E.2d 879 (1986).

Reliance Must Be Pleaded. — Section (b) of this rule requires allegations as to all of the elements of fraud, including plaintiff's reasonable reliance. Foley v. L & L Int'l, Inc., 88 N.C. App. 710, 364 S.E.2d 733 (1988).

Failure to Allege Intent. — Where plaintiffs failed to allege defendants' intent at the time the alleged fraudulent representations were made, that portion of the trial court's order granting summary judgment for defendants on the fraudulent misrepresentation of recreational facilities claim was not error since this rule requires that fraud be pleaded with particularity. Leake v. Sunbelt Ltd., 93 N.C. App. 199, 377 S.E.2d 285, cert. denied, 324 N.C. 578, 381 S.E.2d 774 (1989).

Fraud by Group or Association of Persons. — The plaintiff must identify the particular individuals who dealt with him when he alleges that he was defrauded by a group or association of persons. Coley v. North Carolina Nat'l Bank, 41 N.C. App. 121, 254 S.E.2d 217 (1979).

Fraud by Corporation. — It is not sufficient to conclusorily allege that a corporation made fraudulent misrepresentations; the pleader in such a situation must allege specifically the individuals who made the misrepresentations of material fact, the time the alleged misstatements were made, and the place or occasion at which they were made. Coley v. North Carolina Nat'l Bank, 41 N.C. App. 121, 254 S.E.2d 217 (1979).

Plaintiff's claim that corporation fraudulently induced him to purchase property and execute a note did not meet the particularity requirements because there was no allegation that the representations which the corporation's agent made were false or that the agent either knew them to be false or made them with reckless indifference to the truth. Trull v. Central Carolina Bank & Trust Co., 117 N.C. App. 220, 450 S.E.2d 542 (1994), cert. denied, 339 N.C. 611, 454 S.E.2d 267 (1995).

Fraud Claim Arising from Express Representation That Plaintiff's Interests Would Be Defended Held Not Barred. — The court erroneously dismissed plaintiffs' fraud claim arising from defendant's allegedly express representation that it would defend plaintiffs' interests, since the bar evidenced by G.S. 1-50(6) was inapplicable to this particular fraud claim, plaintiffs having alleged that they were injured by defendant's intentionally deceptive express representation that defendants would provide counsel for them irrespective of barred products liability claims. Brown v. Lumbermens Mut. Cas. Co., 90 N.C. App. 464, 369 S.E.2d 367, aff'd, 326 N.C. 387, 390 S.E.2d 150 (1990).

Burden Where Duress Raised Against Summary Judgment Motion. — A party resisting a summary judgment motion through an alleged defense of duress by threat of legal proceedings, has the burden of forecasting evidence showing with particularity circumstances which tend to indicate that the alleged threats were made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of such proceedings. Sound policy considerations support this approach. Were the burden otherwise, amorphous allegations and forecasts of evidence of duress, frivolous in nature, could consume valuable court time, delay resolution of disputes, and tend to force settlements less than equitable to the party accused of duress. Stewart v. Stewart, 61 N.C. App. 112, 300 S.E.2d 263 (1983).

Allegations Held Insufficient Under Section (b). — Allegations which amounted to a mere conclusion that an antenuptial contract was fraudulently procured were not sufficient under section (b). In re Estate of Loftin v. Loftin, 21 N.C. App. 627, 205 S.E.2d 574, aff'd, 285 N.C. 717, 208 S.E.2d 670 (1974).

Where defendants alleged the elements of false representation and concealment of material fact in general terms, they pleaded no facts which, if true, would have constituted fraudulent concealment by plaintiff of the financial condition of corporation. Consequently, defendants' allegation about the books and records did not satisfy the particularity requirement of section (b) of this rule, and dismissal of defendants' amended counterclaim under G.S. 1A-1, Rule 12(b)(6) was proper. Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales & Serv., Inc., 91 N.C. App. 539, 372 S.E.2d 901 (1988).

Because a potential property purchaser did not allege the time nor place where an individual's and company's purported fraudulent representations to the purchaser occurred, and the allegations did not state with particularity the content of the purported fraudulent representations, the complaint did not sufficiently set out a fraud claim and had to be dismissed. S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, 189 N.C. App. 601, 659 S.E.2d 442, 2008 N.C. App. LEXIS 703 (2008).

IV. CONDITIONS PRECEDENT.

Section (c) contains the same provisions as Rule 9(c) of the Federal Rules of Civil Procedure. Clary v. Alexander County Bd. of Educ., 286 N.C. 525, 212 S.E.2d 160 (1975).

Failure of Occurrence of Necessary Condition. — Where a party intends to rely upon failure of the occurrence of a necessary condition, such failure should be specially pleaded in the answer. Spencer Oil Co. v. Welborn, 20 N.C. App. 681, 202 S.E.2d 618, cert. denied, 285 N.C. 235, 204 S.E.2d 25 (1974).

Allegations of Conditions Precedent in Action to Condemn Land for Urban Renewal. — A petition to condemn land for urban renewal was sufficient under the Rules of Civil Procedure to state a claim for relief where it gave notice of the nature and basis of the petitioners' claim and the type of case brought and alleged generally occurrence or performance of the conditions precedent statutorily required. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

The trial court erred in dismissing the plaintiffs' complaint in the context of a Rule 12(b)(6) motion for failure to comply with the statutory requirements of a derivative action where the plaintiffs had complied with G.S. 1A-1-9(c); G.S. 55-7-42 does not require that the complaint in a derivative proceeding state how the demand requirement was met although its predecessor statute (G.S. 55-7-40) required that a plaintiff allege his efforts "with particularity." Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000).

Statutes of Repose Are Conditions Precedent Which Must Be Specifically Pled. — An action alleging faulty construction of a house was barred by the statute of repose where the case was not filed until more than six years after the house was substantially completed and occupied as a residence, and the homeowners failed to show that the construction company's conduct amounted to more than mere negligence. Moore v. F. Douglas Biddy Constr., Inc., 161 N.C. App. 87, 587 S.E.2d 479 (2003).

V. SPECIAL DAMAGES.

Facts giving rise to special damages must be alleged so as to fairly inform defendant of the scope of plaintiff's demand. Stanford v. Owens, 46 N.C. App. 388, 265 S.E.2d 617, cert. denied, 301 N.C. 95, 273 S.E.2d 300 (1980).

Special damages must be specifically pleaded and proved, and the facts giving rise to the special damages must be sufficient to inform the defendant of the scope of plaintiff's demand. Gillespie v. Draughn, 54 N.C. App. 413, 283 S.E.2d 548 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 805 (1982); Johnson v. Bollinger, 86 N.C. App. 1, 356 S.E.2d 378 (1987).

Under this rule, each claimed item of special damage must be averred. Johnson v. Bollinger, 86 N.C. App. 1, 356 S.E.2d 378 (1987).

Dismissal for Insufficient Allegation of Special Damage. — Where special damage is an integral part of a claim for relief, its insufficient allegation could provide the basis for dismissal under G.S. 1A-1, Rule 12(b)(6). Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979).

Special damage, as that term is used in the law of defamation, means pecuniary loss, as distinguished from humiliation. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

Pleading Factors in Support of Claim for Punitive Damages. — By setting forth facts to support unfair and deceptive trade practices, conversion, and punitive damages claims, specifically stating that these allegations were "common to all claims," setting forth the fraudulent statements alleged of the lessors regarding their inability to provide the lessees with access to their store, and specifically requesting that the court impose punitive damages against the lessors for their wanton, reckless, and malicious actions, the lessees gave sufficient notice of the events or transactions that produced the claim of punitive damages as required under G.S. 1A-1, N.C. R. Civ. P. 9(k). Zubaidi v. Earl L. Pickett Enters., 164 N.C. App. 107, 595 S.E.2d 190, 2004 N.C. App. LEXIS 716 (2004).

Operating losses are special damages which must be alleged under section (g) and are consequential damages which are recoverable under G.S. 25-2-715(2) if defendant knew or reasonably could have foreseen that the probable result of a malfunctioning product would be such operating losses. Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976).

When Loss of Profits Recoverable as Special Damages in Personal Injury Suits. — In personal injury suits, loss of profits are recoverable as special damages if properly pleaded as such under section (g), if they arise naturally and proximately from the injury, and if they are reasonably definite and certain. Ponder v. Budweiser of Asheville, Inc., 30 N.C. App. 200, 226 S.E.2d 539, cert. denied, 291 N.C. 176, 229 S.E.2d 690 (1976).

Sum Allegedly Spent to Repair Water System as Special Damages. — A sum which plaintiff allegedly spent in its efforts to repair a water system installed by defendant was an item of special damages which should have been specifically pleaded; failure of plaintiff to so plead required that the portion of the judgment awarding the special damages be vacated. Windfield Corp. v. McCallum Inspection Co., 18 N.C. App. 168, 196 S.E.2d 607 (1973).

Remedy Where Pleading for Special Damages Is Vague. — Where plaintiff pleaded business losses as special damages, however vaguely and ambiguously, defendants' proper remedy was a motion for a more definite statement under G.S. 1A-1, Rule 12(e), and not dismissal under G.S. 1A-1, Rule 12(b)(6). Johnson v. Bollinger, 86 N.C. App. 1, 356 S.E.2d 378 (1987).

Plaintiff's alienation of affection complaint which averred both malice and willful and wanton conduct as the relevant aggravating factors under G.S. 1D-15 was not required to state with particularity the circumstances underlying these factors. Ward v. Beaton, 141 N.C. App. 44, 539 S.E.2d 30, 2000 N.C. App. LEXIS 1288 (2000), cert denied, 353 N.C. 398, 547 S.E.2d 431 (2001).

Pleading Factors in Support of Claim for Loss of Use of Property. — Plaintiffs pled sufficient facts in their affidavit of complaint to warrant an award for the loss of use of their boat as a result of a conservation officer causing a collision where plaintiffs showed it was possible to repair the damaged boat at a reasonable cost and within a reasonable time; however, the award for loss of use to plaintiffs was increased to include the minimum finance payments per month plaintiffs were required by law to pay while the boat was being repaired. Sprinkle v. N.C. Wildlife Res. Comm'n, 165 N.C. App. 721, 600 S.E.2d 473, 2004 N.C. App. LEXIS 1513 (2004).

VI. LIBEL AND SLANDER.

Failure to State Defamatory Words Verbatim Not Fatal. — In an action for slander, plaintiff's failure to state the defamatory words verbatim in the complaint did not render the complaint fatally defective, since the words attributed to defendant must be alleged only substantially or with sufficient particularity to enable the court to determine whether the statement was defamatory. Stutts v. Duke Power Co., 47 N.C. App. 76, 266 S.E.2d 861 (1980).

Right of Defendant to Plead and Prove Truth and Other Mitigating Circumstances. — This rule does not require the defendant in a libel and slander action to reveal whether he intends to prove the defense of truth; the latter portion of this rule allows the defendant to plead and prove truth and/or other mitigating circumstances. Alpar v. Weyerhaeuser Co., 20 N.C. App. 340, 201 S.E.2d 503, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

VII. PLEADING AND PRACTICE.

A motion for a more definite statement is the most purely dilatory of all the motions available under the Rules of Civil Procedure, and should not be granted so long as the pleading meets the requirements of G.S. 1A-1, Rule 8 and/or Rule 9 and fairly notifies the opposing party of the nature of the claim. Fisher v. Lamm, 66 N.C. App. 249, 311 S.E.2d 61 (1984).

Where the opposing party does not object to evidence outside the issues raised by the pleadings, the issue is tried with his implied consent. Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

Heightened Pleading Requirements for Fraud. — Subsection (b) of this rule requires that, in all averments of fraud, the circumstances constituting the alleged fraud must be stated with particularity; i.e., the plaintiff must, at a minimum, allege time, place, and content of the fraudulent representation, the identity of the person making the representation, and what was obtained as a result of the fraud. Leary v. N.C. Forest Prods., Inc., 157 N.C. App. 396, 580 S.E.2d 1, 2003 N.C. App. LEXIS 745 (2003).

Medical malpractice complaint that failed to include the certification requirement of section (j) of this rule could not be subsequently amended pursuant to G.S. 1A-1 Rule 15(a), by adding the certification and having that amendment relate back, pursuant to G.S. 1A-1, Rule 15(c). Keith v. Northern Hosp. Dist., 129 N.C. App. 402, 499 S.E.2d 200 (1998), cert. denied, 348 N.C. 693, 511 S.E.2d 646 (1998).

A patient was not required to assert in his complaint that his medical care had been reviewed by an expert, where he sued his doctor for negligently breaking his hip while moving him from an examination table to his wheelchair, because moving the patient was predominantly a manual activity not requiring specialized knowledge or skill. Lewis v. Setty, 130 N.C. App. 606, 503 S.E.2d 673 (1998).

The plaintiffs' voluntary dismissal pursuant to Rule 41(a)(1) effectively extended the statute of limitations by allowing plaintiffs to refile their medical malpractice complaint against defendants within one year, even though the original complaint lacked a Rule 9(j) certification. Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000).

Trial court properly dismissed decedent's wife's medical malpractice action with prejudice on the basis that she failed to comply with this section, by tendering as a witness a general surgeon whom she could not have reasonably expected to qualify as an expert witness against general practitioner under G.S. 8C-1, Rule 702. Allen v. Carolina Permanente Med. Group, P.A., 139 N.C. App. 342, 533 S.E.2d 812, 2000 N.C. App. LEXIS 903 (2000).

Once a party receives and exhausts the 120-day extension of time in order to comply with G.S. 1A-1, Rule 9(j)'s expert certification requirement, the party cannot amend a medical malpractice complaint to include expert certification. Expert review of a medical malpractice claim under G.S. 1A-1, Rule 9(j) must take place before the filing of the complaint. Thigpen v. Ngo, 355 N.C. 198, 558 S.E.2d 162, 2002 N.C. LEXIS 17 (2002).

Medical center and the doctors' motion to dismiss the inmate's malpractice claim pursuant to Fed. R. Civ. P. 12(b)(6) was granted because the inmate's complaint failed to assert that the medical care had been reviewed by a person who was reasonably expected to qualify as an expert witness as required by the North Carolina Rules of Civil Procedure for medical malpractice actions, G.S. 1A-1, N.C. R. Civ. P. 9, and the inmate's claim of negligent hiring against the medical center, which was based on the failure of an emergency room physician to provide adequate care, was actually a medical malpractice case which required a certification. Frazier v. Angel Med. Ctr., 308 F. Supp. 2d 671 (W.D.N.C. 2004).

Trial court properly dismissed an estate's medical malpractice suit against the hospital defendants, the medical practice defendants, and a doctor where a first complaint that was voluntarily dismissed did not contain a G.S. 1A-1, N.C. R. Civ. P. 9(j) certification, and the re-filed complaint was filed after the statute of limitations expired and the 120-day extension, if it had been sought, would have expired; there was no expert review prior to the commencement of the original action, which was contrary to the North Carolina legislature's intent in enacting Rule 9(j). Estate of Barksdale v. Duke Univ. Med. Ctr., 175 N.C. App. 102, 623 S.E.2d 51, 2005 N.C. App. LEXIS 2753 (2005).

Estate's claim that at the time its original complaint was filed, it was G.S. 1A-1, N.C. R. Civ. P. 9(j) under Anderson v. Assimos, 553 S.E.2d 63 (2001), was rejected because: (1) the North Carolina Supreme Court vacated the ruling in Anderson to the extent that it concluded that Rule 9(j) was unconstitutional before the estate voluntarily dismissed its complaint, (2) once the North Carolina Supreme Court's decision became controlling, the estate was required to comply with Rule 9(j), and (3) the estate had the opportunity to amend its complaint to include the Rule 9(j) certification and to have the amendment relate back to the original filing date, but it did not do so. Estate of Barksdale v. Duke Univ. Med. Ctr., 175 N.C. App. 102, 623 S.E.2d 51, 2005 N.C. App. LEXIS 2753 (2005).

Medical Malpractice Complaint. — Patient did not comply with G.S. 1A-1-9(j) since expert patient identified had orthopedic surgery specialty, and not physical medicine and rehabilitation specialty that the doctor had; even if the expert was familiar with the standard of care, that familiarity did not satisfy G.S. 8C-1-702(b)(2)a. Smith v. Serro, 185 N.C. App. 524, 648 S.E.2d 566, 2007 N.C. App. LEXIS 1801 (2007).

Where an estate administratrix sued a hospital, asserting claims based on a decedent's fall from a hospital bed, the hospital was properly granted summary judgment because the complaint did not include certification under N.C. R. Civ. P. 9(j), which was required because the original complaint was for medical malpractice since the administratrix chose to base the complaint on the lack of restraints on decedent and the decision to apply restraints was a professional service. Sturgill v. Ashe Mem'l Hosp., Inc., 186 N.C. App. 624, 652 S.E.2d 302, 2007 N.C. App. LEXIS 2256 (2007).

Expert could not reasonably be expected to qualify as an expert witness as required by G.S. 1A-1, N.C. R. Civ. P. 9(j), and did not qualify as an expert witness under G.S. 8C-1, N.C. R. Evid. 702(b) or (c) as: (1) the expert was a board certified obstetrician, (2) doctor one was a board certified emergency room physician and doctor two was a board certified trauma surgeon, (3) both doctors were acting within their capacities as specialists in treating a decedent as a trauma patient, (4) both doctor one and doctor two were properly deemed as specialists under Rule 702, and (5) the expert was not certified as either an emergency room physician or a trauma surgeon, nor did the expert practice in either of these areas. Knox v. Univ. Health Sys. of E. Carolina, Inc., 187 N.C. App. 279, 652 S.E.2d 722, 2007 N.C. App. LEXIS 2363 (2007).

In a medical malpractice suit against an oral surgeon, the trial court erred by striking the patient's standard of care witness because (1) the expert fulfilled the "performance of the procedure" and "prior experience" requirements since the expert was licensed to perform oral surgery and performed the surgical extraction of molars, (2) the expert was a general dentist who specialized in the practice of oral surgery, and (3) the expert possessed sufficient familiarity with the city of Charlotte and the practice of dentistry therein. Roush v. Kennon, 188 N.C. App. 570, 656 S.E.2d 603, 2008 N.C. App. LEXIS 216 (2008).

Dismissal of an administratrix's second medical malpractice complaint filed after her earlier malpractice complaint was voluntarily dismissed was error because there was no evidence that the initial complaint's N.C. R. Civ. P. 9(j) certification was insufficient; the administratrix had an absolute right under N.C. R. Civ. P. 41(a)(1) to dismiss the original action and re-file her claim, regardless of whether there had been a ruling on her G.S. 8C-1, N.C. R. Evid. 702(e) motion to qualify the witness she used for the certification of her original complaint as an expert. The fact that the second complaint relied on Rule 9(j)(1) instead of Rule 9(j)(2) did not give rise to an inference that the administratrix did not reasonably expect her expert for the first certification to qualify. Ford v. McCain, — N.C. App. —, 666 S.E.2d 153, 2008 N.C. App. LEXIS 1657 (2008).

Trial court erred in dismissing an administrator's complaint alleging negligence, wrongful death, and medical malpractice because the administrator met the requirements of G.S. 1A-1, N.C. R. Civ. P. 9(j) by filing a motion to extend the statute of limitations prior to the expiration of the limitations period; even if the original complaint was treated as a legal nullity, the amended complaint, treated as an original complaint, filed within the extended limitations period, contained the requisite Rule 9(j) certification, which stated that the case had been reviewed by an expert who was willing to testify, and although the administrator could not satisfy Rule 9(j) at the time he filed his original complaint, in the time between that filing and the filing of the amended complaint, he could have succeeded in locating expert witnesses who were willing to testify to a breach of the appropriate standard of care. Brown v. Kindred Nursing Ctrs. East, L.L.C., — N.C. App. —, 675 S.E.2d 687, 2009 N.C. App. LEXIS 505 (2009).

Wrongful Death Complaint. — Because there was a question of fact as to whether defendant rehabilitation center and its chief operating officer followed the applicable standard of care, they were not entitled to qualified immunity under G.S. 122C-210.1 on plaintiff's wrongful death claims as a matter of law; plaintiff alleged facts that defendants had violated accepted professional judgment, practice and standards, an investigative report from the North Carolina Division of Facility Services found that the facility had failed to adequately supervise plaintiff's brother, and plaintiff's complaint was certified by an expert under N.C. R. Civ. P. 9(j) that the medical care outlined in the complaint did not comply with the applicable standard of care. Snyder v. Learning Servs. Corp., 187 N.C. App. 480, 653 S.E.2d 548, 2007 N.C. App. LEXIS 2454 (2007).

Extension of Statute of Limitations. — Wrongful death complaint was improperly dismissed under G.S. 1A-1, N.C. R. Civ. P. 12(b)(6), where visiting superior court judge had the authority to grant an extension of the statute of limitations, pursuant to G.S. 1A-1, N.C. R. Civ. P. 9(j), and administratrix filed her action within the extended time frame. Howard v. Vaughn, 155 N.C. App. 200, 573 S.E.2d 253, 2002 N.C. App. LEXIS 1609 (2002), cert. denied, 357 N.C. 62, 579 S.E.2d 389 (2003).

In a medical malpractice case, the trial court erred in granting the doctor and hospital's motions for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12(c) and denying the injured party's motion to set aside the dismissal pursuant to G.S. 1A-1, Rule 60(b), where the injured party filed the case on the last day of a 120-day extension filed an amended complaint containing certification of expert testimony, dismissed the action and then refiled the complaint; the statute of limitations for malpractice actions under G.S. 1-15(c) had not run, because the original complaint was timely filed, and the first action was properly dismissed without prejudice and properly re-filed within a year. Bass v. Durham County Hosp. Corp., 158 N.C. App. 217, 580 S.E.2d 738, 2003 N.C. App. LEXIS 1044 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

Notice of 120-Day Extension to Other Party. — A patient who was granted a 120-day extension under this rule for filing her medical malpractice complaint against a hospital was not required to serve notice on the hospital that she had been granted the extension. Timour v. Pitt County Mem. Hosp., 131 N.C. App. 548, 508 S.E.2d 329 (1998).

No Contradiction in Expert Witness Testimony. — Appellate court reversed the dismissal of the patient's medical malpractice claim pursuant to G.S. 1A-1, N.C. R. Civ. P. 9(j)(1), because there was no clear contradiction by an expert witness, a non-party, in his deposition and later filed affidavit. Phillips v. A Triangle Women's Health Clinic, Inc., 155 N.C. App. 372, 573 S.E.2d 600, 2002 N.C. App. LEXIS 1614 (2002).

Rule 9(j) Does Not Apply to Legal Malpractice Complaints. — G.S. 1A-1-9(j) applies solely to medical malpractice actions, not to legal malpractice actions. Accordingly, in a legal malpractice suit based on an attorney's actions in a medical malpractice case, it was error to dismiss the complaint because plaintiffs had not complied with the pleading requirements of Rule 9(j). Formyduval v. Britt, 177 N.C. App. 654, 630 S.E.2d 192, 2006 N.C. App. LEXIS 1222 (2006), aff'd by an equally divided court as law of case but without precedential value, 361 N.C. 215, 639 S.E.2d 443 (2007).

VIII. TIME AND PLACE.

Reasonable Time to File Complaint After Statute Authorizing Extension to File Declared Unconstitutional. — Administratrix in a wrongful death action must be afforded a reasonable time to file her complaint after the statute (G.S. 1A-1, Rule 9(j)) which granted her an extension of time to obtain a certification and file her complaint was declared unconstitutional (in Anderson v. Assimos, — N.C. App. —, 553 S.E. 2d 63 (2001)). Best v. Wayne Mem. Hosp., 147 N.C. App. 628, 556 S.E.2d 629, 2001 N.C. App. LEXIS 1259 (2001).

For the purposes of testing the timeliness of a complaint, averments of time and place are material. This allows early consideration of statute of limitations defenses, which are appropriately raised by motions to dismiss. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

IX. DECISIONS UNDER PRIOR LAW.

***Editor's Note.** — The cases cited below were decided under former G.S. 1-155 and 1-158.*

Averment of Conditions Precedent. — Under former G.S. 1-155, in an action upon an insurance policy, the truth of the representations in the application as conditions precedent could be averred generally by stating that the party duly performed all the conditions on his part. Britt v. Mutual Benefit Life Ins. Co., 105 N.C. 175, 10 S.E. 896 (1890).

Sufficient Averment of Libel and Slander. — It is material only to aver in the complaint that the slanderous words were spoken of the plaintiff. The facts which point to them and convey to the hearer the sense in which they are used are matters of proof before the jury. Wozelka v. Hettrick, 93 N.C. 10 (1885).

Insufficient Allegation of Publication. — Where the complaint in an action for libel alleged that the defendant sent the plaintiff, through the mails, an open postcard containing libelous matter, without alleging that such matter was read by some third person, the allegation of publication was insufficient. McKeel v. Latham, 202 N.C. 318, 162 S.E. 747 (1932).

Rule 10. Form of pleadings.

(a) *Caption; names of parties.* — Every pleading shall contain a caption setting forth the division of the court in which the action is filed, the title of the action, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) *Paragraphs; separate statement.* — All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) *Adoption by reference; exhibits.* — Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion in the action. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes. (1967, c. 954, s. 1.)

COMMENT

Section (a). — This section dealing with the formal caption and designation of parties in the pleadings generally approximates the corresponding directive found in former § 1-122(1), although the latter actually dealt literally only with the caption and party designation in the complaint. The rule literally sanctions the practice customarily followed of shortening the listing of multiple parties in all pleadings subsequent to the complaint.

Section (b). — This section deals basically with the requirement that pleadings be drafted in a format designed to promote the clear definition of fact issues — the required separate statement in numbered paragraphs of practically manageable aggregates of factual averments, each generally referable to a separate substantive concept likely to lead to one manageable issue if controverted. This is a key innovation in the Code "fact-pleading" reform in reaction to the formulary pleading of common law. Thus, comparable provisions were found in former §§ 1-122(2) (complaint) and 1-138 (answer). By carrying forward this scheme, it is made abundantly clear that these rules are designed just as are the codes to cause factual issues clearly to emerge in the unsupervised exchange of pleadings where skilled and honest pleaders are aligned in opposition. That this is the design of these rules, particularly as exemplified in Rule 10(b), see Mr. Justice Jackson's analysis and admonition in O'Donnell v. Elgin, J. & E. Ry., 338 U.S. 384, 70 S. Ct. 200, 94 L. Ed. 187, 16 A.L.R.2d 646 (1949) ("We no longer insist upon technical rules of pleading, but it will ever be difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation or thinking"). It can be stated quite confidently that this rule contemplates a continuation of the issue-defining fact pleading approach of the Code.

Section (c). — This section's first sentence involves a change from present practice which is controlled by a rule of the Supreme Court and does not permit adoption of portions of pleadings by reference into other parts of the cause or other pleadings. Of course, this presents a critical policy question of the propriety of adopting statutes in direct conflict with existing court rules. However, the practice sanctioned in this rule is believed an improvement, all things considered. The second sentence, directly sanctioning the incorporation of attached exhibits involves no change in procedure. The phrase "for all purposes" is apt to avoid the type of decision which quibbles over whether mere attachment of an exhibit without express words purporting to incorporate particular aspects as direct allegations does have this effect.

CASE NOTES

Letter Deemed an Answer. — Where letter raised no defenses to plaintiff's claims, nor answered the allegations, but offered partial payment and promised to repay the balance of the principal in question, the letter was an answer sufficient to satisfy the Rules of Civil Procedure. Brown v. American Messenger Servs., Inc., 129 N.C. App. 207, 498 S.E.2d 384 (1998), cert. denied, 348 N.C. 692, 511 S.E.2d 644 (1998).

Treatment of Pleading as Counterclaim. — Defendant's failure to affirmatively allege facts within his pleading does not preclude the pleading from being treated as a counterclaim where the answer begins, "the defendant . . . alleges and says:" and then admits the allegations of the complaint. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

To require defendant who solemnly admits the truth of the allegations of the complaint upon which he then bases his prayer for relief to repeat them in his own pleading as a prerequisite to treating his pleading as a counterclaim seeking affirmative relief would be a triumph of form over substance. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Section (c) of this rule permits an incorporation by reference of statements made in other parts of a pleading. FCX, Inc. v. Bailey, 14 N.C. App. 149, 187 S.E.2d 381 (1972).

Where affidavits considered by the trial court were not incorporated by reference into the pleadings pursuant to subdivision (c) of this rule, a motion to dismiss was converted into a motion for summary judgment. Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996), rev'd, 346 N.C. 170, 484 S.E.2d 527 (1997).

Incorporation of Federal Court Case Complaint. — Where complaint incorporated by reference, as an exhibit, a complaint in a federal court action, the complaint in the federal court action was not a matter outside the pleadings so as to convert a G.S. 1A-1, Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment, since section (c) of this rule provides that such an exhibit is a part of the pleading for all purposes. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979).

Applied in Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461 (1971); Koehring Co. v. Seacrest Marine Corp., 29 N.C. App. 498, 224 S.E.2d 654 (1976); State ex rel. Eure v. Lawrence, 93 N.C. App. 446, 378 S.E.2d 207 (1989); Interstate Hwy. Express, Inc. v. S & S Enters., Inc., 93 N.C. App. 765, 379 S.E.2d 85 (1989); State v. Pruitt, 94 N.C. App. 261, 380 S.E.2d 383 (1989); Smith v. Bohlen, 95 N.C. App. 347, 382 S.E.2d 812 (1989); State v. Jaynes, 353 N.C. 534, 549 S.E.2d 179, 2001 N.C. LEXIS 672 (2001); Miles v. Carolina Forest Ass'n, 167 N.C. App. 28, 604 S.E.2d 327, 2004 N.C. App. LEXIS 2053 (2004).

Cited in Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Musten v. Musten, 36 N.C. App. 618, 244 S.E.2d 699 (1978); State v. Harren, 302 N.C. 142, 273 S.E.2d 694 (1981); State v. McLean, 74 N.C. App. 224, 328 S.E.2d 451 (1985); Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986); Lawson v. Lawson, 84 N.C. App. 51, 351 S.E.2d 794 (1987); Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873 (1993); Terrell v. Lawyers Mut. Liab. Ins., 131 N.C. App. 655, 507 S.E.2d 923 (1998); Croom v. State Dep't of Commerce, 143 N.C. App. 493, 547 S.E.2d 87, 2001 N.C. App. LEXIS 297 (2001).

Rule 11. Signing and verification of pleadings.

(a) *Signing by Attorney.* — Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(b) *Verification of pleadings by a party.* — In any case in which verification of a pleading shall be required by these rules or by statute, it shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true. Such verification shall be by affidavit of the party, or if there are several parties united in interest and pleading together, by at least one of such parties acquainted with the facts and capable of making the affidavit. Such affidavit may be made by the agent or attorney of a party in the cases and in the manner provided in section (c) of this rule.

(c) *Verification of pleadings by an agent or attorney.* — Such verification may be made by the agent or attorney of a party for whom the pleading is filed, if the action or defense is founded upon a written instrument for the payment of money only and the instrument or a true copy thereof is in the possession of the agent or attorney, or if all the material allegations of the pleadings are within the personal knowledge of the agent or attorney. When the pleading is verified by such agent or attorney, he shall set forth in the affidavit:

(1) That the action or defense is founded upon a written instrument for the payment of money only and the instrument or a true copy thereof is in his possession, or

(2)a. That all the material allegations of the pleadings are true to his personal knowledge and

b. The reasons why the affidavit is not made by the party.

(d) *Verification by corporation or the State.* — When a corporation is a party the verification may be made by any officer, or managing or local agent thereof upon whom summons might be served; and when the State or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts. (1967, c. 954, s. 1; 1985 (Reg. Sess., 1986), c. 1027, s. 55.)

COMMENT

This rule is in form an amalgamation of federal Rule 11 and basic North Carolina statutes concerned with signing and verification of pleadings. The provision common to both, that every pleading must be signed either by a party or his attorney of record, is retained. The requirement that every pleading subsequent to a verified pleading must be verified is abandoned, and the only time any pleading must be verified is when some statute specifically requires it, as in actions for divorce (G.S. 50-8). As an alternative to the verification control on truth, the federal approach of constituting an attorney's signature to any pleading a certificate of good faith in its preparation is adopted. However, the severe explicit federal rule sanction of disciplinary action against an attorney violating this rule is dropped, retaining only the sanction of striking as sham.

Sections (b), (c), and (d) are not found in the corresponding federal rule, but are lifted as substantial counterparts from former §§ 1-145, 1-146, and 1-147.

Cross References. — As to affidavit for arrest in civil action, see G.S. 1-411. As to affidavit or verified complaint for attachment, see G.S. 1-440.11. As to affidavit for claim and delivery, see G.S. 1-473. For requirement that complaints in secondary actions by shareholders be verified by oath, see G.S. 1A-1, Rule 23. For provision requiring affidavit or verified complaint for temporary restraining order, see G.S. 1A-1, Rule 65. As to requirement for plaintiff's affidavit to be filed with complaint in divorce action, see G.S. 50-8.

Legal Periodicals. — For case law survey as to verification of pleading, see 44 N.C.L. Rev. 897 (1966).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Practice and Procedure Under Amended Rule 11 of the Federal Rules of Civil Procedure," see 9 Campbell L. Rev. 11 (1986).

For article, "Discretion or Law: Appellate Review of Determinations That Rule 11 Has Been Violated or That Nonmutual Issue Preclusion Will Be Imposed Offensively," see 68 N.C.L. Rev. (1990).

For note, "Lawyers Take Heed! A De Novo Review of Rule 11 in North Carolina — Turner v. Duke Univ.," regarding Federal Rule 11, see 12 Campbell L. Rev. 293 (1990).

For comment,"Rule (11)a of the North Carolina Rules of Civil Procedure: Turner v. Duke University, The New Standards of Judicial Review," see 19 N.C. Cent. L.J. 67 (1990).

For survey of developments in North Carolina law (1992), see 71 N.C.L. Rev. 1893 (1993).

For comment, "Creating the Legal Monster: The Expansion and Effect of Legal Malpractice Liability in North Carolina," see 18 Campbell L. Rev. 121 (1996).

For an article discussing "reverse bad faith," the concept of allowing an insurer to assert a counterclaim for affirmative relief against an insured who brings a frivolous, bad faith action, see 19 Campbell L. Rev. 43 (1996).

For a survey of 1996 developments in civil procedure law, see 75 N.C.L. Rev. 2229 (1997).

For note, "To Sanction of Not to Sanction: Why Arguing Against the Court's Precedent Is Not an Automatic Rule 11 Violation According to Hunter v. Earthgrains Co. Bakery," 25 Campbell L. Rev. 115 (2002).

For note, "Rule 9(j) — Is Requiring a Plaintiff in a Medical Malpractice Action to Certify His or Her Claim Before Filing Unconstitutional? — The Issue in Anderson v. Assimos," 25 Campbell L. Rev. 219 (2003).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Lack of Signature Did Not Deprive Court of Jurisdiction Where Petition Was Verified. — Trial court did not lack subject matter jurisdiction over the juvenile petition that the caseworker filed in the termination of parental rights case regarding the father even though the caseworker did not sign the juvenile petition; the caseworker verified the petition, which was sufficient to confer jurisdiction, and in any event, would have been allowed to amend the petition by signing it if not signing it was a problem. In re D.D.F., 187 N.C. App. 388, 654 S.E.2d 1, 2007 N.C. App. LEXIS 2447 (2007).

No Lack of Credibility Implied by Absence of Verification. — Since section (a) of this rule provides that generally pleadings need not be verified, no lack of credibility is implied by the absence of a verification. Hankins v. Somers, 39 N.C. App. 617, 251

S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

Verified Pleading May Be Considered as Affidavit. — There is nothing in the rules which precludes the judge from considering a verified answer as an affidavit in the cause. Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

To the extent that a verified pleading meets the requirements of G.S. 1A-1, Rule 56(e), then it may properly be considered as equivalent to a supporting or opposing affidavit, as the case may be. Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

Verification of Instrument for Payment of Money by Agent or Attorney Not Specifically Required. — Section (c) of this rule sets forth the circumstances and the manner in which pleadings may be verified by an agent or attorney of a party when the action or defense is founded upon a written instrument for the payment of money only, but it does not specifically require verification. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

As to insufficient basis to impeach verification, see Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976).

In analyzing whether the complaint meets the factual certification requirement, the court must determine: whether the plaintiff (1) undertook a reasonable inquiry into the facts and (2) after reviewing the results of his inquiry, reasonably believed that his position was well grounded in fact. McClerin v. R-M Indus., Inc., 118 N.C. App. 640, 456 S.E.2d 352 (1995).

Letters to Court Within Scope of Rule. — Because an attorney's letters to the trial court were sent with the improper purpose of persuading the judge not to enter opposing counsel's proposed consent order, to revisit settled issues, and to cause unnecessary delay, the letters fell within the scope of G.S. 1A-1, N.C. R. Civ. P. 11. Once the court found that the letters met the improper purpose prong of G.S. 1A-1, N.C. R. Civ. P. 11, it was entitled to impose sanctions. Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006), appeal dismissed, cert. denied, 361 N.C. 351, 645 S.E.2d 766 (2007).

Reference to "other papers" in G.S. 1A-1-11(a), should, at least, encompass letters forwarded to a court that seek to influence the court to take particular action. Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006), appeal dismissed, cert. denied, 361 N.C. 351, 645 S.E.2d 766 (2007).

Plaintiff May Not File Solely to Toll Statute. — A plaintiff may not file a complaint within the time permitted by the statute of limitations for the sole purpose of tolling the statute of limitations, but with no intention of pursuing the prosecution of the action, then voluntarily dismiss the complaint and thereby gain an additional year pursuant to G.S. 1A-1, Rule 41(a)(1). Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

Pleading in Violation of Section (a) May Not Be Voluntarily Dismissed. — Section 1A-1, Rule 41(a)(1) and section (a) of this rule must be construed in pari materia to require that, in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year "extension" by way of a G.S. 1A-1, Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading, including section (a) of this rule. A pleading filed in violation of section (a) should be stricken as "sham and false" and may not be voluntarily dismissed without prejudice in order to give the pleader the benefit of the "saving" provision of G.S. 1A-1, Rule 41(a)(1). Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

Defendant partner's verification of original answer where he was sued in his partnership capacity did not subject him to individual liability. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 83 N.C. App. 511, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

Petition to Review Zoning Board Decision Need Not Be Verified. — No civil procedure rule or statute requires a petition to review a zoning board decision to be verified. Little v. City of Locust, 83 N.C. App. 224, 349 S.E.2d 627 (1986), cert. denied, 319 N.C. 105, 353 S.E.2d 111 (1987).

Trial courts cannot abdicate their duties and responsibilities under G.S. 1A-1, N.C. R. Civ. P. 11 to a private attorney. Dalenko v. Collier, 191 N.C. App. 713, 664 S.E.2d 425, 2008 N.C. App. LEXIS 1500 (2008).

Lack of Verification. — Petition for a contested case hearing, containing signatures of petitioner and his attorney, but which failed to include either an affidavit executed by petitioner or an affidavit executed by his attorney, was timely filed but was not verified under sections (b) and (c) of this rule when it was filed. Gaskill v. State ex rel. Cobey, 109 N.C. App. 656, 428 S.E.2d 474 (1993), pet. disc. rev. denied, 334 N.C. 163, 432 S.E.2d 359 (1993).

While a petition in a child neglect proceeding was notarized, the notarization reading "sworn and subscribed to before me," the petition was neither signed nor verified by the director of a county department for social services or an authorized representative of the director; thus, the petition requesting that a juvenile be adjudicated neglected was not in compliance with the statute requiring that all petitions be verified pursuant to G.S. 7B-403, and the trial court therefore lacked subject matter jurisdiction to adjudicate the matter. In re T.R.P., 173 N.C. App. 541, 619 S.E.2d 525, 2005 N.C. App. LEXIS 2098 (2005).

Lack of Evidence. — Under G.S. 57C-3-30, it was improper to name an individual member of a limited liability company as a party defendant without any evidence to support it; thus, the naming of member as an individual defendant was not well-grounded in law and therefore a violation of this section. Page v. Roscoe, 128 N.C. App. 678, 497 S.E.2d 422 (1998).

Trial court's award of sanctions was appropriate where plaintiff's verified complaint was not well grounded in fact, or based upon a reasonable inquiry; the complaint alleged then-existing direct competition, and ongoing misappropriation and disclosure of trade secrets, both of which were directly contradicted by deposition testimony. Static Control Components, Inc. v. Vogler, 152 N.C. App. 599, 568 S.E.2d 305, 2002 N.C. App. LEXIS 978 (2002).

Sanction Provision Not Applicable to Claims Filed Before Amendment of This Rule. — Court could not award attorneys' fees pursuant to this rule, recently amended to permit such awards, because the amendment was not effective until after the filing of the claim for declaratory relief on which the award was based. Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

Although plaintiffs and their attorney could be liable for sanctions under this Rule for signing and filing certain "other papers" for an improper purpose after January 1, 1987, the complaint in the case at bar was filed in December of 1986, and therefore could not be a basis for the imposition of sanctions. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Dismissal does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated. Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Neither the dismissal of a case nor the filing of an appeal deprives the trial court of jurisdiction to hear Rule 11 motions. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363, cert. denied, 337 N.C. 691, 448 S.E.2d 521 (1994).

There are three separate and distinct issues to Rule 11 including: (1) legal sufficiency; (2) factual sufficiency; and (3) improper purpose. Williams v. Hinton, 127 N.C. App. 421, 490 S.E.2d 239 (1997).

There are three parts to a Rule 11 analysis: (1) factual sufficiency; (2) legal sufficiency; and (3) improper purpose; a violation of any one of these requirements mandates the imposition of sanctions under Rule 11. Static Control Components, Inc. v. Vogler, 152 N.C. App. 599, 568 S.E.2d 305, 2002 N.C. App. LEXIS 978 (2002).

Evidence at Rule 11 Hearing. — G.S. 1A-1, N.C. R. Civ. P. 11 hearing did not have to be deferred to allow other evidence as a law firm did not show what oral testimony or other evidence was necessary. Johns v. Johns, — N.C. App. —, 672 S.E.2d 34, 2009 N.C. App. LEXIS 110 (2009).

When Sanctions May Be Imposed. — To impose sanctions against a party for filing a complaint for an improper purpose, the complaint must fail either the legal or factual certification requirements of this rule. In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991), cert. denied, 330 N.C. 612, 413 S.E.2d 800 (1992).

The trial court was applauded for assessing $400 in sanctions against defendants' counsel for violations of this section where he essentially attempted to refile the same counterclaims against plaintiff's counsel that had just been dismissed. Davis Lake Cmty. Ass'n v. Feldmann, 138 N.C. App. 322, 530 S.E.2d 870, 2000 N.C. App. LEXIS 609 (2000).

Sanctions imposed under G.S. 1A-1-11 were not an abuse of discretion because the trial court found that there was absolutely no basis in the law for any negligence claim against a backseat passenger where it was not alleged that the passenger had any legal right or duty to control the operation of the motor vehicle driven by an underaged driver who was unlicensed under G.S. 20-11; further, there were insufficient allegations to establish a legal basis for liability for any vicarious liability, and plaintiffs' counsel had signed and certified the complaint as having merit. Harris v. DaimlerChrysler Corp., 180 N.C. App. 551, 638 S.E.2d 260, 2006 N.C. App. LEXIS 2500 (2006).

Dismissal pursuant to G.S. 1A-1-11 was proper even though a doctor made the dismissal motion 14 months after the doctor received notice of suit as: (1) the doctor filed a first Rule 11 motion about a month after becoming aware of the alleged violations; (2) there was no requirement of prejudice before granting Rule 11 sanctions; (3) upon a finding of a Rule 11(a) violation, a sanction was mandatory; (4) the doctor was not estopped from seeking sanctions. Stocum v. Oakley, 185 N.C. App. 56, 648 S.E.2d 227, 2007 N.C. App. LEXIS 1685 (2007).

When Sanctions May Not Be Imposed. — The denial of the defendants' motion for sanctions pursuant to this rule was proper where the complaint was not legally and factually deficient or filed with an improper purpose. Golds v. Central Express, Inc., 142 N.C. App. 664, 544 S.E.2d 23, 2001 N.C. App. LEXIS 192 (2001), cert. denied, 353 N.C. 725, 550 S.E.2d 775 (2001).

Sanctions against an employer were properly denied under G.S. 1A-1, N.C. R. Civ. P. 11(a) in an action for breach of a non-competition contract because all certification requirements were met; the former employee did not show that the employer knew its misstatements to the trial court were incorrect, the complaint was facially plausible, and the action was not filed for an improper purpose since the employer voluntarily dismissed it when the employee stopped working for a competitor. Kohler Co. v. McIvor, 177 N.C. App. 396, 628 S.E.2d 817, 2006 N.C. App. LEXIS 981 (2006).

Timeliness of Motion for Sanctions. — While the court will impose no explicit time limit for filing a motion under this rule, a party should make such a motion within a reasonable time after he discovers an alleged impropriety. Rice v. Danas, Inc., 132 N.C. App. 736, 514 S.E.2d 97 (1999).

Motion for Sanctions Was Timely. — Motion for sanctions was timely filed, as the impropriety of plaintiff's claims only came into focus during discovery, and the motion was filed after plaintiff refused to respond to a settlement inquiry made within weeks of the discovery of the absence of any factual basis to plaintiff's complaint. Static Control Components, Inc. v. Vogler, 152 N.C. App. 599, 568 S.E.2d 305, 2002 N.C. App. LEXIS 978 (2002).

Motion for Sanctions Not Timely. — Employer's motion for sanctions was not filed within a reasonable time, where it was filed six months after a judgment in the employer's favor, and the pleadings and other documents of the former employee to which the employer referred in its motion were signed months before trial. Rice v. Danas, Inc., 132 N.C. App. 736, 514 S.E.2d 97 (1999).

Because plaintiff waited over 13 months after the North Carolina Supreme Court denied defendants' petition for discretionary review to file his motion for sanctions under this rule, plaintiff failed to file within a reasonable time of detecting the alleged impropriety. Griffin v. Sweet, 136 N.C. App. 762, 525 S.E.2d 504, 2000 N.C. App. LEXIS 145 (2000).

Sua sponte imposition of sanctions against an attorney without notice of the bases for the sanctions violated the attorney's due process rights. Griffin v. Griffin, 348 N.C. 278, 500 S.E.2d 437 (1998).

Sanctions Following Voluntary Dismissal. — Absent a rule to the contrary, sanctions motions may appropriately be filed after a voluntary dismissal. Renner v. Hawk, 125 N.C. App. 483, 481 S.E.2d 370 (1997), cert. denied, 346 N.C. 283, 487 S.E.2d 553 (1997).

Failure to Participate in Arbitration in Good Faith. — Failure of defendant in auto accident case to appear at arbitration hearing, and lack of evidence regarding attorney's authority, resulted in conclusion that defendant failed to participate in arbitration hearing in good faith and meaningful manner; the failure or refusal to participate in an arbitration proceeding in a good faith and meaningful manner was subject to sanctions by the court on motion of a party, or report of the arbitrator. Bledsole v. Johnson, 150 N.C. App. 619, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002), cert. granted, 356 N.C. 297, 570 S.E.2d 498 (2002).

Review of Sanctions. — Imposition of sanctions under this rule is reviewable de novo; however, but the choice of sanction is reviewable under an abuse of discretion standard. Crutchfield v. Crutchfield, 132 N.C. App. 193, 511 S.E.2d 31 (1999).

An abuse of discretion could not be found where a party did not offer evidence in support of the party's motion for sanctions. N.C. State Bar v. Gilbert, 189 N.C. App. 320, 663 S.E.2d 1, 2008 N.C. App. LEXIS 541 (2008).

Sanctions Where Party Knew Pleadings Not Factually Plausible. — Where judge announced the rendering of an absolute divorce in open court while defendant was present with counsel, when defendant's motion to dismiss based on lack of service was later filed defendant knew that the pleading was not factually plausible because he had made a general appearance; therefore, the trial court's imposition of sanctions under this rule was proper. Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994).

Sanctions were not appropriate for alienation of affections claim. Brown v. Hurley, 124 N.C. App. 377, 477 S.E.2d 234 (1996).

Sanctions Imposed Without Jury Trial. — Trial court does not violate a person's right to a trial by imposing G.S. 1A-1, N.C. R. Civ. P. 11 sanctions without a jury. Dalenko v. Collier, 191 N.C. App. 713, 664 S.E.2d 425, 2008 N.C. App. LEXIS 1500 (2008).

Sanctions Were Not Appropriate. — It was improper for the trial court to impose Rule 11 sanctions on attorney, based on his conduct in failing to timely notify the court and defense counsel of a scheduling conflict since it does not involve the filing of a pleading, motion or other paper. Williams v. Hinton, 127 N.C. App. 421, 490 S.E.2d 239 (1997).

When a mother sued the adoptive parents of the mother's children for (1) return of the children because the mother's consent to the children's adoption was obtained by fraud, (2) specific performance of an open adoption agreement with the adoptive parents, and (3) visitation with the children, it was error to impose sanctions on the mother for filing the complaint, even though the complaint was properly dismissed, because the issues raised by the complaint were issues of first impression in North Carolina. Quets v. Needham, — N.C. App. —, — S.E.2d —, 2009 N.C. App. LEXIS 1169 (July 21, 2009).

Although attorney should have honored defense counsel's request to be notified of calendar notices and instead served defendants directly, he did not violate the Code of Professional Responsibility or the Rules of Civil Procedure. Williams v. Hinton, 127 N.C. App. 421, 490 S.E.2d 239 (1997).

Petitioner, non-party corporate officer who verified complaint on behalf of his company, but who was never a party to the litigation, was not subject to the court's jurisdiction, and had no notice or opportunity to be heard in his individual capacity, could not be sanctioned under this section. Polygenex Int'l, Inc. v. Polyzen, Inc., 133 N.C. App. 245, 515 S.E.2d 457 (1999).

Sanctions were inappropriate where there was no evidence of either "legal insufficiency" or "improper purpose" and where the issue raised by plaintiff's complaint, namely, whether a stranger to an insurance contract could seek a declaratory judgment as to the construction of its provisions, was one of first impression. DeMent v. Nationwide Mut. Ins. Co., 142 N.C. App. 598, 544 S.E.2d 797, 2001 N.C. App. LEXIS 189 (2001).

G.S. 1A-1-11 did not support an attorney fees award as the argument upon which it was based did not appear in any pleading, motion, or other paper, but was an argument made by defense counsel at a hearing. Watts v. N.C. Dep't of Env't & Natural Res., 182 N.C. App. 178, 641 S.E.2d 811, 2007 N.C. App. LEXIS 595 (2007), aff'd in part, modified in part, 362 N.C. 487, 666 S.E.2d 752 (2008).

Where a student's due process and equal protection suit against a county board of education was barred by res judicata, sanctions were inappropriate because (1) the trial court mischaracterized the student's claim, (2) the student's attorneys performed a reasonable inquiry into the facts, and (3) at the time the complaint was filed, no case had specifically held that a dismissal on grounds of sovereign immunity was a final adjudication on the merits barring subsequent actions. Herring v. Winston-Salem/Forsyth County Bd. of Educ., 188 N.C. App. 441, 656 S.E.2d 307, 2008 N.C. App. LEXIS 231 (2008).

Sanctions Held Appropriate. — Sufficient evidence existed to support trial court's findings that plaintiff corporation's complaint was facially implausible, not well-grounded in fact and interposed for the improper purpose of harassing defendants. Polygenex Int'l, Inc. v. Polyzen, Inc., 133 N.C. App. 245, 515 S.E.2d 457 (1999).

Sanctions were not appropriate where plaintiff/wife had grounds for seeking to register a foreign state's support order pursuant to the Uniform Interstate Family Support Act. Twaddell v. Anderson, 136 N.C. App. 56, 523 S.E.2d 710, 1999 N.C. App. LEXIS 1306 (1999), cert. denied, 351 N.C. 480, 543 S.E.2d 510 (2000).

This section was not violated, although the court determined that the statute of limitations had run on a consent judgment barring the plaintiff's recovery, where there was a legitimate question of whether the plaintiff's consent judgment could be considered a judgment or a contract whose breach was discovered after the judgment, in which case the statute would not have run. Grover v. Norris, 137 N.C. App. 487, 529 S.E.2d 231, 2000 N.C. App. LEXIS 429 (2000).

The trial court did not err in denying defendants' motion for sanctions although the plaintiff failed to prevail on any of its claims where the plaintiff challenged the arbitrator's award on the basis that the arbitrator failed to rule on estoppel, election, and parol evidence issues and made no findings of fact or conclusions of law; and on the basis that the defendant was awarded the right to arbitrate under a contract that the arbitrator then found not to be binding on the defendant. Sholar Bus. Assocs., Inc. v. Davis, 138 N.C. App. 298, 531 S.E.2d 236, 2000 N.C. App. LEXIS 607 (2000).

District court had jurisdiction to issue sanctions under G.S. 1A-1, Rule 11 against lessors by requiring the lessors to pay attorney's fees to the lessees after a magistrate had dismissed the underlying summary ejectment action brought by the lessors. Chandak v. Electronic Interconnect Corp., 144 N.C. App. 258, 550 S.E.2d 25, 2001 N.C. App. LEXIS 413 (2001).

Although an attorney challenged the propriety of a trial court imposing sanctions against him under G.S. 1A-1-11, he provided no authority, as required under N.C. R. App. P. 28(b)(6), to support his contention that the judge, by expressing personal opinions regarding the case during a hearing, violated N.C. Code Jud. Conduct 5(E) by improperly assuming the role of a mediator, and therefore was stripped of the authority to impose sanctions. Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006), appeal dismissed, cert. denied, 361 N.C. 351, 645 S.E.2d 766 (2007).

Although an attorney challenged the propriety of a trial court imposing sanctions against him under G.S. 1A-1-11 and the process by which the sanctions were imposed under N.C. Code Jud. Conduct 3(C)(1)(a), he submitted no affidavits providing evidence of the judge's personal bias, prejudice, or interest, but instead he argued that the judge's annoyance with his disruption of settlement proceedings warranted recusal; the attorney failed to demonstrate that his motion for recusal should have been granted. Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006), appeal dismissed, cert. denied, 361 N.C. 351, 645 S.E.2d 766 (2007).

Trial court properly imposed sanctions against an attorney pursuant to G.S. 1A-1-11 because a charging lien filed by the attorney against the judgment of equitable distribution in favor of appellee in a divorce action failed to meet the legal sufficiency requirement of Rule 11, as the charging lien was filed before the attorney had received permission from the trial court to formally withdraw from the case, and the attorney filed the charging lien before the final judgment was entered. Wilson v. Wilson, 183 N.C. App. 267, 644 S.E.2d 379, 2007 N.C. App. LEXIS 1042 (2007), review denied, 362 N.C. 92, 657 S.E.2d 32 (2007), Wilson v. Wilson, 183 N.C. App. 267, 644 S.E.2d 379, 2007 N.C. App. LEXIS 1042 (2007).

Award of sanctions and attorney fees was proper in an estate proceeding because, pursuant to G.S. 1A-1-1 the North Carolina Rules of Civil Procedure applied to all actions and proceedings of a civil nature; the estate proceeding was a "proceeding of a civil nature," and the North Carolina Rules of Civil Procedure applied. In re Estate of Rand, — N.C. App. —, 645 S.E.2d 174, 2007 N.C. App. LEXIS 1091 (2007).

Sanctioning the father in the form of an attorney's fee award to the mother was proper because the father's allegations against the mother did not rise to the level of legal sufficiency needed to allege criminal contempt in court. Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008).

Judge sufficiently satisfies requirement for findings in support of imposing sanctions when the order finds as fact that the amount of attorney's fees awarded to defendant was appropriate based upon the amount of work required by the case and the experience of defendant's attorneys. Dalenko v. Collier, 191 N.C. App. 713, 664 S.E.2d 425, 2008 N.C. App. LEXIS 1500 (2008).

G.S. 1A-1, N.C. R. Civ. P. 11 sanctions are properly imposed after the trial court finds that plaintiff's claims are frivolous and have no basis in law or fact and that plaintiff's claims are barred by the doctrine of collateral estoppel. Dalenko v. Collier, 191 N.C. App. 713, 664 S.E.2d 425, 2008 N.C. App. LEXIS 1500 (2008).

Trial court, after the dismissal of the tenant's complaint for failure to state a cause of action, properly granted the landlord attorney's fees and costs under G.S. 1A-1, N.C. R. Civ. P. 11(a) because the tenant's claims against the landlord were not warranted by existing law and were filed with an improper purpose. Ward v. Jett Props., LLC, 191 N.C. App. 605, 663 S.E.2d 862, 2008 N.C. App. LEXIS 1490 (2008).

Law firm's objection to the appointment of a guardian ad litem for a client's step-daughter was not legally sufficient for G.S. 1A-1, N.C. R. Civ. P. 11 purposes since the firm failed to cite authority to support its argument, even though the firm claimed to have made a reasonable inquiry, and the firm did not show that derogatory comments about the client's wife and step-daughter were relevant. Johns v. Johns, — N.C. App. —, 672 S.E.2d 34, 2009 N.C. App. LEXIS 110 (2009).

Law firm's objection to the appointment of a guardian ad litem for a client's step-daughter was filed for an improper purpose for G.S. 1A-1, N.C. R. Civ. P. 11 purposes since the firm did not show that derogatory comments about the client's wife and step-daughter were relevant, and the client did not have personal knowledge of much of the information that the client purported to verify; it could reasonably be concluded that the firm's purpose was to gain an advantage in other aspects of the dispute between the client and his wife. The objection was filed for the improper purpose of harassing and humiliating the wife, and the firm's claim that the client should have been awarded fees did not make the filing of the improper objection warranted. Johns v. Johns, — N.C. App. —, 672 S.E.2d 34, 2009 N.C. App. LEXIS 110 (2009).

Courts should not impose sanctions under this rule when relief is available under another provision which more specifically addresses the situation. Overcash v. Blue Cross & Blue Shield, 94 N.C. App. 602, 381 S.E.2d 330 (1989).

The Improper Purpose Prong. — The improper purpose prong of this Rule is separate and distinct from the factual and legal sufficiency requirements. Certification under the rule includes three things: That the subject person has read the document, that he or she believes it to be well-grounded in fact and law, and that it is not interposed for any improper purpose. Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Even if the complaint is well grounded in fact and in law, it may nonetheless violate the improper purpose prong of this rule. McClerin v. R-M Indus., Inc., 118 N.C. App. 640, 456 S.E.2d 352 (1995).

A claim, while well grounded in law, can nevertheless violate the improper purpose prong of this Rule. Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

While attorney's filing of the notice of lien against former client after having withdrawn from the case violated the legal sufficiency prong of this rule, that itself did not support a strong inference of improper purpose. However, the totality of the circumstances did. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Even if a complaint is well-grounded in fact and in law, it may nonetheless violate the improper purpose of Rule 11. Brown v. Hurley, 124 N.C. App. 377, 477 S.E.2d 234 (1996).

Objective Standard Used to Determine Improper Purpose. — An objective standard is used to determine the existence of an improper purpose, with the burden on the movant to prove such improper purpose. Brown v. Hurley, 124 N.C. App. 377, 477 S.E.2d 234 (1996).

Motion Based on ERISA Action. — Where although defendant's post-trial motion also sought fees under this rule, the motion was based upon his Employee Retirement Income Security Act action, any award of attorneys' fees would be governed by 29 U.S.C. § 1132(g). Overcash v. Blue Cross & Blue Shield, 94 N.C. App. 602, 381 S.E.2d 330 (1989).

When a party files a motion which is virtually identical to a previously denied motion, sanctions under this rule may be appropriate. Overcash v. Blue Cross & Blue Shield, 94 N.C. App. 602, 381 S.E.2d 330 (1989).

Sanctions Not Required Based on Sequential Filing of Two Summary Judgment Motions. — Trial court properly refused to award a patient sanctions against a hospital pursuant to G.S. 1A-1, N.C. R. Civ. P. 11; the hospital's second motion for summary judgment sought judgment on liability due in part to defendants' therapeutic justification argument, and on an additional issue, that of punitive damages, and even assuming that the second motion on liability was not well grounded, there was no evidence in the record that the motion was interposed for any improper purpose. Fox v. Green, 161 N.C. App. 460, 588 S.E.2d 899, 2003 N.C. App. LEXIS 2193 (2003).

Trial court's decision to impose or not to impose mandatory sanctions under section (a) of this rule is reviewable de novo as a legal issue; in the de novo review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence; if the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under section (a). Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989), aff'd, 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991); Williams v. Garrison, 105 N.C. App. 79, 411 S.E.2d 633 (1992).

After a voluntary dismissal the broad limitation on the trial court's power to enter orders does not extend so far as to bar the trial court from awarding attorney's fees pursuant to subsection (a) of this Rule or G.S. 6-21.5. VSD Communications, Inc. v. Lone Wolf Publishing Group, Inc., 124 N.C. App. 642, 478 S.E.2d 214 (1996).

And Clearly Erroneous Standard Is Not Applicable. — In a malpractice case, Court of Appeals erred in employing a "clearly erroneous" standard in reviewing the trial court's denial of plaintiff's motion for sanctions under section (a) of this rule. Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989), aff'd, 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

The standard to be applied in assessing an attorney's conduct under section (a) of this rule is "objective reasonableness under the circumstances." Central Carolina Nissan, Inc. v. Sturgis, 98 N.C. App. 253, 390 S.E.2d 730, cert. denied, 327 N.C. 137, 394 S.E.2d 169 (1990).

The proper standard for reviewing the appropriateness of the sanction imposed in a given case is whether the trial court has abused its discretion. Central Carolina Nissan, Inc. v. Sturgis, 98 N.C. App. 253, 390 S.E.2d 730, cert. denied, 327 N.C. 137, 394 S.E.2d 169 (1990).

Inference of Improper Purpose Inferred from Objective Behavior. — Under this rule, an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose. In this regard, the relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Reasonableness of Belief That Claim Is Warranted. — The reasonableness of the belief that a complaint is warranted by existing law must be judged as of the time the document was signed. Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

Sanctions against plaintiff were improper where plaintiff in good faith relied on his attorney regarding the legal sufficiency of his claims and thus met his duty of making a "reasonable inquiry". Taylor v. Collins, 128 N.C. App. 46, 493 S.E.2d 475 (1997).

Motion for Attorney's Fees. — Petitioner's motion for attorney's fees, filed well before final judgment, was timely; therefore, the trial court had jurisdiction to hear the matter. Whiteco Indus., Inc. v. Harrelson, 111 N.C. App. 815, 434 S.E.2d 229 (1993); Whiteco Indus., Inc. v. Harrington, 111 N.C. App. 839, 434 S.E.2d 234 (1993), cert. granted, 335 N.C. 565, 441 S.E.2d 135 (1994).

Reduction of Award Held Error. — Trial court which found as fact that petitioners had expended a reasonable attorneys' fee of $14,400 in defending action signed and filed by respondent, but reduced that figure to $4,800 because it found the professional damages to have been "mitigated considerably by the extremely honest, candid and competent representation" of respondent by his attorney in G.S. 1A-1, Rule 11 hearing, abused its discretion in basing its reduction on that factor. Central Carolina

Nissan, Inc. v. Sturgis, 98 N.C. App. 253, 390 S.E.2d 730, cert. denied, 327 N.C. 137, 394 S.E.2d 169 (1990).

Award of Attorneys' Fees Upheld. — Trial court did not err by ordering defendant's counsel to pay plaintiffs' attorneys' fees where the trial court found as a fact that defendant's counsel had raised nonjusticiable issues in the motion in the cause, and had failed to make a reasonable inquiry, as required by this rule, before filing the motion, and where the evidence did not support defendant's contention that the trial court directed him to file the motion in the cause after dismissing his earlier action. H. McBride Realty, Inc. v. Myers, 94 N.C. App. 511, 380 S.E.2d 586 (1989).

Where plaintiff had violated this section, the trial court acted within its discretion in awarding reasonable attorney's fees as an appropriate sanction. VSD Communications, Inc. v. Lone Wolf Publishing Group, Inc., 124 N.C. App. 642, 478 S.E.2d 214 (1996).

Since findings of fact were superfluous in summary judgment orders, the trial court properly ordered the payment of attorney's fees as a sanction under G.S. 1A-1-11 in response to a company's motion to amend the summary judgment order to include findings of fact and conclusions of law. Phelps-Dickson Builders, L.L.C. v. Amerimann Partners, 172 N.C. App. 427, 617 S.E.2d 664, 2005 N.C. App. LEXIS 1791 (2005).

Award of Attorney Fees Not Upheld. — In sanctioning an attorney $5,000, the trial court did not make the findings of fact necessary to explain why the figure of $5,000 was selected or why the trial court considered it an appropriate sanction; as a result, the appellate court could not determine from the face of the order the precise nature of the sanction; consequently, while the trial court properly imposed sanctions against the attorney, further findings of fact were necessary on the issue of the extent of the sanction. Dunn v. Canoy, 180 N.C. App. 30, 636 S.E.2d 243, 2006 N.C. App. LEXIS 2239 (2006), appeal dismissed, cert. denied, 361 N.C. 351, 645 S.E.2d 766 (2007).

Findings and Conclusions Insufficient to Support Sanctions. — Court's findings and conclusions were insufficient to support an award of sanctions, where the order recited that "sanctions are imposed against plaintiff for violation of the legal provision and improper purpose provision" of Rule 11, but contained no findings or conclusions explaining how plaintiff's conduct violated these provisions, or to explain the appropriateness of the sanction imposed or award of attorney's fees, or to indicate how the court arrived at the amount. Davis v. Wrenn, 121 N.C. App. 156, 464 S.E.2d 708 (1995), overruled in part, on other grounds, by Forbis v. Neal, 361 N.C. 519, 649 S.E.2d 382 (2007).

Although there was some evidence in the record which would support an award of attorney fees in favor of the competitors, an attorney fees award to the competitors under G.S. 1A-1-11 and G.S. 75-16.1 was error, as the order contained no findings of fact or conclusions of law, even though it summarily granted all of the attorney fees and costs requested by the competitors, and it failed to indicate what portion of the fees granted was based on G.S. 1A-1-11 and what portion was based on G.S. 75-16.1. Blyth v. McCrary, 184 N.C. App. 654, 646 S.E.2d 813, 2007 N.C. App. LEXIS 1626 (2007).

Remand for Findings and Conclusions. — A remand to the trial court was required so that the trial court could render findings and conclusions to support its denial of sanctions against plaintiff buyer under G.S. 1A-1, Rule 11 for making allegedly unsupported allegations in complaint regarding the closing value of a home which defendant seller built and sold to plaintiff, as plaintiff's own admissions during discovery indicated that plaintiff's statement regarding the home's value at closing was based on an unsupported estimate and was contrary to a lender's appraisal and to plaintiff's own belief as to value at the time of closing. Tucker v. The Blvd. at Piper Glen LLC, 150 N.C. App. 150, 564 S.E.2d 248, 2002 N.C. App. LEXIS 409 (2002).

Trial court's order imposing sanctions for the filing of a complaint that was not grounded in the law and in fact was reversed and remanded for further proceedings to determine the validity of the complaint; because the trial court erroneously concluded that the complaint was not legally sufficient, the trial court did not render appropriate findings of fact to support its conclusions of law that the complaint was not well grounded in fact, and the trial court did not address the movants' allegations that the complaint was brought for an improper purpose. Adams v. Bank United of Tex. FSB, 167 N.C. App. 395, 606 S.E.2d 149, 2004 N.C. App. LEXIS 2384 (2004), cert. denied, 359 N.C. 410, — S.E.2d — (2005).

Where defendant filed a motion for sanctions under G.S. 1A-1, N.C. R. Civ. P.11 in response to plaintiffs' motion for new trial, and plaintiffs responded with their own Rule 11 motion, because the trial court failed to make findings of fact or conclusions of law before dismissing plaintiffs' Rule 11 motion, and it appeared defendant's Rule 11 motion might have lacked a sufficient factual basis and might have been filed for an improper purpose, remand for entry of findings and conclusion was required. Krantz v. Owens, 168 N.C. App. 384, 607 S.E.2d 337, 2005 N.C. App. LEXIS 264 (2005).

Sanctions Not Merited. — Where there was no indication at trial that the grandparents in fact did not wish to obtain custody of the children or that their claim was made in bad faith, the fact that the grandparents had originally asked for visitation does not make their later claim for custody violative of this rule. Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

Although claimant was explicitly told by an employee of the Employment Security Commission that she was not required to conduct a job search during her temporary recall, because there were grounds for the Commission's holding, under G.S. 96-18(g)(2), that claimant repay the sum, received as benefits, based on failure to conduct a job search, sanctions could not be imposed. Gilliam v. Employment Sec. Comm'n, 110 N.C. App. 796, 431 S.E.2d 772, cert. denied and appeal dismissed, 334 N.C. 619, 435 S.E.2d 334 (1993).

Attorney made a "reasonable inquiry" into the factual bases for the allegations contained in the complaint regarding conspiracy, an auto theft-drug ring, and intentional infliction of emotional distress; therefore, the sanctions imposed against attorney were not warranted. Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873, aff'd, 113 N.C. App. 375, 438 S.E.2d 214 (1994).

It was improper for the trial court to impose Rule 11 sanctions on plaintiff for his failure to promptly serve the summons and complaint, as it did not involve the filing of a pleading or other paper and was therefore beyond the scope of this Rule. Ward v. Lyall, 125 N.C. App. 732, 482 S.E.2d 740, 1997 N.C. App. LEXIS 233 (1997), cert. denied, appeal dismissed, 346 N.C. 290, 487 S.E.2d 573 (1997).

Use of disjunctive "or" in corporation's allegations that the corporations' president cashed, or replaced with a certified check, the subject checks either with no endorsement or being endorsed only by the president himself did not cause the complaint to violate G.S. 1A-1, Rule 8(e)(1) or subsection (a) of this rule as G.S. 1A-1, Rule 8(e)(2) permitted pleading in the alternative. Castle Worldwide, Inc. v. Southtrust Bank, 157 N.C. App. 518, 579 S.E.2d 478, 2003 N.C. App. LEXIS 730 (2003).

Imposition of Sanctions Upheld. — In a malpractice case where defendant university failed to identify doctor in response to other discovery requests, where doctor's depositions threatened to cause a needless increase in the cost of litigation and an unnecessary delay, and where the depositions were noticed for an improper purpose, that is, to disrupt counsel's trial preparation, university's conduct was sufficient to trigger the mandatory sanctions clause of section (a) of this rule. Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989), aff'd, 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

Denial of Sanctions Upheld. — Motion brought by plaintiffs who sought sanctions under G.S. 1A-1, Rule 56(g) on the grounds that defendant filed an affidavit in support of summary judgment that was not based on his personal knowledge, because it used a phrase with which he was unacquainted, in bad faith, was not so unwarranted by existing case law as to merit sanctions under G.S. 1A-1, Rule 11. Johnson v. Harris, 149 N.C. App. 928, 563 S.E.2d 224, 2002 N.C. App. LEXIS 383 (2002).

Where complaint stated that defendant, a postal service employee, earned income of about $5,000 or more per week, and contended that wife needed $3,000 per week while wife's affidavit alleged expenses of only $779.00 per month, and where claims for costs and attorneys' fees were unconscionable, the consistent use of inflated figures in complaint, after the opportunity to amend, was sufficient evidence for the trial court to impose sanctions under this rule. Shook v. Shook, 95 N.C. App. 578, 383 S.E.2d 405 (1989), cert. denied, 326 N.C. 50, 389 S.E.2d 94 (1990).

Abuse of the Declaratory Judgment Act, G.S. 1-253 et seq., by prospective defendant in an anticipated enforcement action by the State under Chapter 75 by attempting to prelitigate its defenses and seek to determine the scope of prosecutorial discretion constituted grounds for trial court's holding that attorney violated this rule in signing and filing pleadings which were not warranted by existing law or a good faith argument for modification or reversal of existing law. Central Carolina Nissan, Inc. v. Sturgis, 98 N.C. App. 253, 390 S.E.2d 730, cert. denied, 327 N.C. 137, 394 S.E.2d 169 (1990).

Striking of the notice of the taking of a deposition and prohibiting its further use was a reasonable sanction for a deposition procured in violation of deposition rules, even though it was defendant's counsel, and not defendant itself, who committed the acts giving rise to the sanction. Turner v. Duke Univ., 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

Insured and insured's attorney were properly assessed costs and expenses incurred by holder of security interest in insured's vehicle for improperly naming holder as a party in an action against vehicle's insurer, despite plaintiff's contention that holder was named in pleadings to give it notice as a lienholder. Lassiter v. North Carolina Farm Bureau Mut. Ins. Co., 106 N.C. App. 66, 415 S.E.2d 212, cert. denied, 332 N.C. 148, 419 S.E.2d 573 (1992).

A superior court award of $2,918.82 to reimburse plaintiff for attorneys' fees and expenses and an order to defendant to pay $1,000 to the clerk of superior court as an additional sanction for filing frivolous and vexatious motions to dismiss and for summary judgment was not an abuse of discretion where defendant persisted in advancing arguments which had been previously rejected by the courts. Lowder v. All Star

Mills, Inc., 103 N.C. App. 500, 405 S.E.2d 774, cert. denied, 330 N.C. 196, 412 S.E.2d 678 (1991), 332 N.C. 484, 421 S.E.2d 349 (1992).

Where a motion to dismiss and a motion for summary judgment were based on the same grounds that had proven baseless in past motions and appeals, and were patently frivolous, the trial judge had more than ample basis for imposition of sanctions. Lowder v. All Star Mills, Inc., 103 N.C. App. 500, 405 S.E.2d 774, cert. denied, 330 N.C. 196, 412 S.E.2d 678 (1991), 332 N.C. 484, 421 S.E.2d 349 (1992).

Co-counsel for corporate defendant, almost 19 months after corporation employees' counsel gave notice that she was serving as co-counsel, and only two weeks before trial, signed and filed a motion for disqualification of counsel; neither his co-counsel nor his client signed it, and there was no evidence that co-counsel even knew that the motion was being filed, the late date on which the motion was filed indicated an attempt to interrupt opposing counsel's trial preparation and increase litigation costs. Therefore, Rule 11 sanctions were appropriate. Harrison v. Edison Bros. Apparel Stores, 146 F.R.D. 142 (M.D.N.C. 1993).

There was no abuse of discretion in the court's imposition of $931 in sanctions; the court found as a fact that defendant incurred $931.00 as a necessary consequence of plaintiff's notice of appeal following a voluntary dismissal and that the rate was reasonable. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363, cert. denied, 337 N.C. 691, 448 S.E.2d 521 (1994).

Where the Employment Commission's signing of order remanding the matter to a hearing officer just three days prior to the date by which the Commission was to have entered a final order could be calculated as an attempt to delay the litigation or increase its cost, sanctions would apply. Gilliam v. Employment Sec. Comm'n, 110 N.C. App. 796, 431 S.E.2d 772, cert. denied and appeal dismissed, 334 N.C. 619, 435 S.E.2d 334 (1993).

Where ex-husband filed a complaint to harass ex-wife and needlessly increase the costs of litigation, where senseless litigation initiated by ex-husband had persisted since the parties' separation in 1986, while ex-husband claimed the litigation was part and parcel of his attempts to increase visitation privileges with his son, but he had done nothing constructive to further that objective, and testimony indicated that he has spent $20,000 trying to recover $10,000 in attorney's fees, the trial did not err in imposing $15,000 sanction against the ex-husband. Brown v. Brown, 112 N.C. App. 614, 436 S.E.2d 404 (1993).

Sanctions were properly imposed where the plaintiff's brief in opposition to defendant's motion to dismiss ignored well-established precedent and failed to argue for reversal or modification of well-established law. Sharp v. Miller, 121 N.C. App. 616, 468 S.E.2d 799 (1996), cert. denied, 343 N.C. 309, 471 S.E.2d 76, cert. denied, 519 U.S. 871, 117 S. Ct. 187, 136 L. Ed. 2d 125 (1996).

Evidence overwhelmingly supported the trial court's finding that attorneys' actions in obtaining medical records were improper and the trial court's conclusion of law that the imposition of sanctions was appropriate. Bass v. Sides, 120 N.C. App. 485, 462 S.E.2d 838 (1995).

Sanctions against plaintiff's attorney were upheld where the evidence showed that attorney was familiar with the separation agreement before filing the signed complaint that was not well-grounded in fact or law. Taylor v. Collins, 128 N.C. App. 46, 493 S.E.2d 475 (1997).

Trial court did not err in denying the one child's request for a jury trial on the one child's motion for sanctions against the second child and wife regarding the counterclaim that they filed; the motion for sanctions was not an action regarding a property right, and thus the one child did not have a constitutional right to a jury, and in any event the trial court's denial of an award of sanctions was proper, as the evidence did not support the entry of sanctions. Hill v. Hill, 181 N.C. App. 69, 638 S.E.2d 601, 2007 N.C. App. LEXIS 65 (2007), appeal dismissed, cert. denied, 361 N.C. 427, 648 S.E.2d 502, 503.

Because the shareholders failed to show that the trial court manifestly abused its discretion and because sanctions were appropriate based on the complaint, the trial court properly denied their motion for attorney's fees and expenses under G.S. 6-21.5 and G.S. 1A-1, N.C. R. Civ. P. 11. Egelhof v. Szulik, — N.C. App. —, 668 S.E.2d 367, 2008 N.C. App. LEXIS 2026 (2008).

Trial court did not err in denying buyers' motion for sanctions pursuant to G.S. 1A-1, N.C. R. Civ. P. 11 because a contractor's breach of contract complaint was not filed for an improper purpose, and the evidence supported the trial court's findings that the contractor undertook a reasonable inquiry into the facts and reasonably believed that the complaint was well grounded in fact; the trial court's finding that the contractor filed its complaint for the purpose of putting its claims of rights under the parties' contract to a proper test was binding on the court of appeals under N.C. R. App. P. 10(a) because the buyers did not assign error to that finding, it Persis Nova Constr. v. Edwards, — N.C. App. —, 671 S.E.2d 23, 2009 N.C. App. LEXIS 61 (2009).

Complaint Was Filed for An Improper Purpose. — Trial court did not err in concluding that the complaint was filed for the improper purpose of harassing defendant; plaintiff's chief executive officer admitted that defendant had not violated the non-competition agreement, as was alleged in the complaint, and that there was no evidence that defendant was unwilling to abide by the non-competition agreement. Static Control Components, Inc. v. Vogler, 152 N.C. App. 599, 568 S.E.2d 305, 2002 N.C. App. LEXIS 978 (2002).

Trial court did not err in concluding that deputy area director for a substance abuse area authority filed an action against the authority for an improper purpose when the director instituted the action in retaliation for the authority's failure to appoint her to a position with the authority and for leverage in obtaining a settlement from the authority for her other personnel actions against the authority; furthermore, the director failed to inform, as was her duty, the board of the authority that she did not believe that the board was properly conducting closed meetings in its search to fill the position, the basis upon which the director filed her complaint when she was not selected to the position. Davis v. Durham Mental Health/Development Disabilities/Substance Abuse Area Auth., 165 N.C. App. 100, 598 S.E.2d 237, 2004 N.C. App. LEXIS 1156 (2004).

Harassment of Former Client. — In light of the obviously strained relationship between former attorney and client, and because it is utterly unreasonable for an attorney, particularly one who has withdrawn from the case, to file an attorney's charging lien seeking recovery of fees based on both quantum meruit and a percentage of the judgment, there exists a strong inference of improper purpose, i.e., harassment, in filing the notice of lien. Accordingly, the trial court's imposition of Rule 11 sanctions based on alleged improper purpose in filing the notice of lien must be upheld. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Subjective Beliefs and Actual Effect of Conduct Not Relevant. — Just as the Rule 11 movant's subjective belief that a paper had been filed for an improper purpose was immaterial in determining whether an alleged offender's conduct was sanctionable, whether the conduct did in fact harass was also not relevant to the issue. Rather, the dispositive question was whether the filing of the notice of lien supported a strong inference of improper purpose. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Denial of Sanctions Not Insulation from Future Sanctions. — The denial of sanctions does not insulate a party or an attorney from the future imposition of sanctions under the improper purpose prong of this rule if the litigation is continued after subsequent developments in the case render it meritless. Taylor v. Taylor Prods. Inc., 105 N.C. App. 620, 414 S.E.2d 568 (1992), overruled on other grounds, 334 N.C. 303, 432 S.E.2d 347 (1993).

Features of Certification. — The central feature of this rule is a certification established by the signature of the person signing the pleadings, motions, or other papers. This certification includes: (1) that the signer has conducted a reasonable inquiry into the facts that support the pleading, motion or other paper; (2) that the signer has conducted a reasonable inquiry into the law such that the paper embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing legal principles; and (3) that the paper is not interposed for any improper purpose. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Under this rule, in addition to certifying that the pleading or paper is well grounded in fact and not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, the signer also certifies that the pleading or paper is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

The signature of an attorney under this rule simply certifies upon reasonable inquiry that the complaint is well grounded in fact and warranted by existing law; this signature does not demonstrate that there is genuine issue of material fact, in light of evidence gathered after the complaint is filed, as to whether a plaintiff would actually have prevailed on the underlying claim. Byrd v. Arrowood, 118 N.C. App. 418, 455 S.E.2d 672 (1995).

Two-Part Analysis. — An award of sanctions under this rule on the ground that a pleading is not warranted by existing law requires a two-part analysis. First, the court must determine whether the pleading, when read in conjunction with the responsive pleadings, is facially plausible. If it is facially plausible, then the inquiry is complete, and sanctions are not proper. If the pleading is not facially plausible, then the second issue is whether to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the complaint was warranted by the existing law. dePasquale v. O'Rahilly, 102 N.C. App. 240, 401 S.E.2d 827 (1991).

In determining whether sanctions are warranted under the legal sufficiency prong of the rule, the court must first determine the facial plausibility of the paper. If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper. If the paper is not facially plausible, then the second issue is (1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based upon the results of the inquiry, formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed. If the court answers either prong of this second issue negatively, then sanctions under this rule are appropriate. Mack v. Moore, 107 N.C. App. 87, 418 S.E.2d 685 (1992).

Three-Part Analysis. — There are three parts to a Rule 11 analysis: (1) factual sufficiency, (2) legal sufficiency, and (3) improper purpose; a violation of any one of these requirements mandates the imposition of sanctions. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363, cert. denied, 337 N.C. 691, 448 S.E.2d 521 (1994); Page v. Roscoe, 128 N.C. App. 678, 497 S.E.2d 422 (1998).

Collateral Issues. — Attorneys' fee requests under this rule raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under G.S. 1A-1, Rule 41(a) does not deprive the trial court of jurisdiction to determine these collateral issues. Higgins v. Patton, 102 N.C. App. 301, 401 S.E.2d 854 (1991), overruled on other grounds, Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Voluntary Dismissal. — Where the plaintiffs filed a voluntary dismissal with prejudice pursuant to G.S. 1A-1, Rule 41(a)(1), the trial court was not deprived of jurisdiction to determine the appropriateness of attorneys' fees under this rule or G.S. 6-21.5. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Involuntary Dismissal Not Required for Failure to Prosecute. — The trial court did not abuse its discretion by dismissing the plaintiff's action without prejudice, under G.S. 1A-1-41, while imposing costs on the plaintiff where it found that the plaintiff had intentionally delayed prosecution in violation of this rule. Melton v. Stamm, 138 N.C. App. 314, 530 S.E.2d 622, 2000 N.C. App. LEXIS 602 (2000).

Considerations for Court. — This rule raises three interconnected interpretive issues for the court: (1) When has sanctionable conduct occurred? (2) Who should be sanctioned, attorney, client, or both? (3) What sanction is appropriate? Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Inadequate Researching and Filing of Pleadings by Attorney. — Prior to imposing sanctions against an attorney under this rule on the ground that the nonmovant's pleadings are not warranted by the existing law, the movant must show that the attorney's conduct in researching and filing the pleadings was not objectively reasonable. dePasquale v. O'Rahilly, 102 N.C. App. 240, 401 S.E.2d 827 (1991).

Failure of Attorney to Confirm Facts. — The attorney should be sanctioned for failure to take minimal steps to confirm the client's facts, when these facts could be verified easily by reference to the public record or to accessible documents. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Sanctions Against Attorney and Client. — Generally, since the lawyer exercises primary control over the litigation, the responsibility for improper purpose violations should rest with the lawyer. However, "the sanction may fall in equal or greater proportion upon the client as well" as this allocation serves punitive and deterrent purposes. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Sanctions Against Client. — Whether the violation of this rule is one of law, fact, or improper purpose, if the prejudice caused by the violation can only be remedied by entry of sanctions against the client, such sanctions are appropriate. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Where a party misleads an attorney as to facts or the purpose of the lawsuit, but the attorney nevertheless had an objectively reasonable basis to sign the papers in question, then sanctions on the party alone are appropriate. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

No Sanctions Against Client. — Clients should not be sanctioned when the attorney fails to ask the right questions to elicit legally relevant facts. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Allocation of Sanctions. — Sanctions should be allocated among the persons responsible for the offending pleading, motion or other paper, based upon their relative culpability. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

De Novo Review of Sanctions. — Court of Appeals exercises de novo review of the question of whether to impose Rule 11 sanctions; if sanctions were warranted, the court must review the actual sanctions imposed under an abuse of discretion standard. Dodd v. Steele, 114 N.C. App. 632, 442 S.E.2d 363, cert. denied, 337 N.C. 691, 448 S.E.2d 521 (1994).

On appeal, the trial court's decision whether to impose sanctions for a violation of Rule 11 is reviewable de novo as a legal issue. Static Control Components, Inc. v. Vogler, 152 N.C. App. 599, 568 S.E.2d 305, 2002 N.C. App. LEXIS 978 (2002).

Sanctions Against State. — Even though this rule does not provide for sanctions against the State, that does not mean that judge did not have jurisdiction to decide this question; when he decided it, he could not be overruled by another superior court judge. Able Outdoor, Inc. v. Harrelson, 341 N.C. 167, 459 S.E.2d 626 (1995).

Reliance on Counsel by Nonlawyers as to Issues of Law. — Reliance on counsel by nonlawyers as to issues of law, is relevant, but not conclusive evidence on the issue of "reasonable inquiry." The reasonableness of the reliance would depend upon the surrounding circumstances including the extent of knowledge possessed by the lawyer about the facts of the controversy, the history and duration of the relationship between the attorney and client, and the relative expertise of the attorney relating to the legal issues involved. It is appropriate, however, to consider in evaluating the reasonableness of the inquiry that nonlawyers are not expected to appreciate the nuances of subtle legal issues. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Determining Compliance with Rule. — In determining compliance with this rule, courts should avoid hindsight and resolve all doubts in favor of the signer. Furthermore, whether the certification requirements have been met requires an objective determination. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Signature of Party Unnecessary for Sanctions. — Defendants were entitled to request sanctions against the attorney, as signer of complaint, and against plaintiffs as represented parties, regardless of whether the plaintiffs signed the complaint. Higgins v. Patton, 102 N.C. App. 301, 401 S.E.2d 854 (1991), overruled on other grounds, Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Burdens of Proof and Persuasion. — When a motion is made for sanctions pursuant to this rule and the nature of the alleged violation is legal, rather than factual, this rule requires a two-part analysis. In such cases, the court should first scrutinize the challenged paper. If, on its face, the paper states a plausible legal theory (either under existing law or a good faith argument for a change in the law), there is no need for further inquiry. Only if the court concludes that the paper is not facially plausible in its legal analysis is there a need for further scrutiny into the actual conduct of the signer in researching or otherwise gathering the law. The movant bears the burden of persuasion on the first prong of the two-part analysis and the burdens of proof and persuasion on the second prong. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, In re J.A., 103 N.C. App. 720, 407 S.E.2d 873 (1991).

While there may be valid and plausible reasons for adopting a clear, cogent and convincing evidence standard for determining G.S. 1A-1, N.C. R. Civ. P. 11 sanctions, the Court of Appeals of North Carolina adheres to the general rule that a preponderance of the evidence quantum of proof governs in civil cases, unless changed by the North Carolina General Assembly or Supreme Court of North Carolina; thus, the preponderance of the evidence quantum of proof should be utilized in determining whether a Rule 11 violation has occurred. Adams v. Bank United of Tex. FSB, 167 N.C. App. 395, 606 S.E.2d 149, 2004 N.C. App. LEXIS 2384 (2004), cert. denied, 359 N.C. 410, — S.E.2d — (2005).

Plaintiff's affidavits did not support the court's finding that judgment was entered as a result of mistake, inadvertence or excusable neglect, as the inadvertence, mistake, or neglect that they showed were of a kind that the law does not excuse. All the affidavits showed, when sifted down, was that in signing the court papers which enabled default judgment to be entered plaintiff's treasurer and counsel were unaware that they had sued for future rents — a matter that they could have known through the exercise of due diligence and reasonable care, and that they were required to know by G.S. 1A-1, Rule 11 of our civil procedure rules. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Sanction Held Not Nondischargeable in Bankruptcy. — The debt owed by the defendant attorney as a result of Rule 11 sanctions imposed in a State court proceeding against him was not nondischargeable pursuant to 11 U.S.C. § 523(a)(6); although his headstrong and stubborn zealous pursuit of his client's claim may have clouded his professional judgment, his actions were neither willful nor malicious. Bryant v. Rogers, 239 Bankr. 318 (E.D.N.C. 1999).

Applied in Carolina Freight Carriers Corp. v. Local 61, 11 N.C. App. 159, 180 S.E.2d 461 (1971); Boyd v. Boyd, 61 N.C. App. 334, 300 S.E.2d 569 (1983); Bush v. BASF Wyandotte Corp., 64 N.C. App. 41, 306 S.E.2d 562 (1983); Harris v. Harris, 93 N.C. App. 67, 376 S.E.2d 502 (1989); Lowry v. Lowry, 99 N.C. App. 246, 393 S.E.2d 141 (1990); First Am. Bank v. Carley Capital Group, 99 N.C. App. 667, 394 S.E.2d 237 (1990); Oglesby v. S.E. Nichols, Inc., 101 N.C. App. 676, 401 S.E.2d 92 (1991); Boone Lumber, Inc. v. Sigmon, 103 N.C. App. 798, 407 S.E.2d 291 (1991); Harwell v. Harwell, 106 N.C. App. 389, 416 S.E.2d 595 (1992); Brooks v. Giesey, 106 N.C. App. 586, 418 S.E.2d 236 (1992); Jerry Bayne, Inc. v. Skyland Indus., Inc., 108 N.C. App. 209, 423 S.E.2d 521 (1992); Able Outdoor, Inc. v. Harrelson, 113 N.C. App. 483, 439 S.E.2d 245 (1994); Benton v. Thomerson, 339 N.C. 598, 453 S.E.2d 161

(1995); Pitt County v. Deja Vue, Inc., 185 N.C. App. 545, 650 S.E.2d 12, 2007 N.C. App. LEXIS 1937 (2007); Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008); Perry v. GRP Fin. Servs. Corp., — N.C. App. —, 674 S.E.2d 780, 2009 N.C. App. LEXIS 451 (2009); Harbin Yinhai Tech. v. Greentree Fin. Group, Inc., — N.C. App. —, 677 S.E.2d 854, 2009 N.C. App. LEXIS 525 (2009).

Cited in Young v. Marshburn, 10 N.C. App. 729, 180 S.E.2d 43 (1971); Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986); WXQR Marine Broadcasting Corp. v. JAI, Inc., 83 N.C. App. 520, 350 S.E.2d 912 (1986); Smith v. Quinn, 91 N.C. App. 112, 370 S.E.2d 438 (1988); Smith v. Quinn, 324 N.C. 316, 378 S.E.2d 28 (1989); Coman v. Thomas Mfg. Co., 325 N.C. 172, 381 S.E.2d 445 (1989); Thorneburg Hosiery Co. v. G.L. Wilson Bldg. Co., 94 N.C. App. 769, 381 S.E.2d 718 (1989); McKinney v. Avery Journal, Inc., 99 N.C. App. 529, 393 S.E.2d 295 (1990); Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990); Battle v. Nash Technical College, 103 N.C. App. 120, 404 S.E.2d 703 (1991); Parsons v. Jefferson-Pilot Corp., 106 N.C. App. 307, 416 S.E.2d 914 (1992); In re Triscari Children, 109 N.C. App. 285, 426 S.E.2d 435 (1993); T.H. Blake Contracting Co. v. Sorrells, 109 N.C. App. 119, 426 S.E.2d 85 (1993); Pearsall v. Phillips, 839 F. Supp. 11 (E.D.N.C. 1993); Williams v. Liggett, 113 N.C. App. 812, 440 S.E.2d 331 (1994); Logan v. Logan, 116 N.C. App. 344, 447 S.E.2d 485 (1994); Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994); Enzor v. North Carolina Farm Bureau Mut. Ins. Co., 123 N.C. App. 544, 473 S.E.2d 638 (1996); Robinson v. Parker, 124 N.C. App. 164, 476 S.E.2d 406 (1996); Carter v. Stanly County, 125 N.C. App. 628, 482 S.E.2d 9 (1997); Mohamad v. Simmons, 139 N.C. App. 610, 534 S.E.2d 616, 2000 N.C. App. LEXIS 993 (2000); Harleysville Mut. Ins. Co. v. Narron, 155 N.C. App. 362, 574 S.E.2d 490, 2002 N.C. App. LEXIS 1615 (2002); Ayers v. Patz, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2093 (Aug. 20, 2002); Lemon v. Combs, 164 N.C. App. 615, 596 S.E.2d 344, 2004 N.C. App. LEXIS 964 (2004); N.C. State Bar v. Rogers, 164 N.C. App. 648, 596 S.E.2d 337, 2004 N.C. App. LEXIS 965 (2004); May v. Down East Homes of Beulaville, Inc., 175 N.C. App. 416, 623 S.E.2d 345, 2006 N.C. App. LEXIS 51 (2006); Megremis v. Megremis, 179 N.C. App. 174, 633 S.E.2d 117, 2006 N.C. App. LEXIS 1828 (2006); Richardson v. Bank of Am., N.A., — N.C. App. —, 643 S.E.2d 410, 2007 N.C. App. LEXIS 809 (2007); Morris v. Moore, 186 N.C. App. 431, 651 S.E.2d 594, 2007 N.C. App. LEXIS 2207 (2007); Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008); Mason v. Dwinnell, 190 N.C. App. 209, 660 S.E.2d 58, 2008 N.C. App. LEXIS 908 (2008); State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009); State ex rel. Johnson v. Eason, — N.C. App. —, 679 S.E.2d 151, 2009 N.C. App. LEXIS 1093 (July 7, 2009).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-144 through 1-147.*

The object of verification is that if the defendant does not deny the allegations, the cause shall stand as if the jury had been empaneled, and the allegations put in proof without denial, the purpose being to avoid the delay of trial upon uncontroverted points. Griffin v. Asheville Light & Power Co., 111 N.C. 434, 16 S.E. 423 (1892); Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

A motion is not a pleading, and therefore judgment by default may not be entered pending the hearing of a motion to strike on the ground that the motion was not verified. Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

The requirement as to verification may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading. Sisk v. Perkins, 264 N.C. 43, 140 S.E.2d 753 (1965).

Whether plaintiff verifies his complaint is optional with him unless some statute requires verification as a condition to the maintenance of the action. Levy v. Meir, 248 N.C. 328, 103 S.E.2d 288 (1958).

Where the plaintiff's verification does not meet requirements, defendant is not required to verify his answer. Levy v. Meir, 248 N.C. 328, 103 S.E.2d 288 (1958).

Effect of Attempted But Unnecessary Verification. — Where plaintiff can maintain his action without verifying the complaint, an attempted verification, which is a nullity, cannot defeat that right. Levy v. Meir, 248 N.C. 328, 103 S.E.2d 288 (1958).

Affiant is not required to subscribe the affidavit. State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

It is sufficient if the oath is administered by one authorized to administer oaths. State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966).

No Literal Formula Required. — Verification must be in "substance" as prescribed, and hence a verbal and literal following of the formula prescribed is not necessary. McLamb v. McPhail, 126 N.C. 218, 35 S.E. 426 (1900).

But Following Words of Statute Is Advisable. — While it is not necessary to follow the exact words of the statute, it is always safe to do so, and such course is advisable in preference to mere experimental practice, which is always dangerous. Cole v. Boyd, 125 N.C. 496, 34 S.E. 557 (1899).

As to verification by an agent or attorney, see Hammerslaugh v. Farrior, 95 N.C. 135 (1886); Griffin v. Asheville Light & Power Co., 111 N.C. 434, 16 S.E. 423 (1892).

Verification by Corporate Officer Need Not State Knowledge or Grounds for Belief. — Verification to a complaint made by an officer of a corporation need not set forth "his knowledge or the grounds of his belief on the subject and the reason why it was not made by the party." A corporation acts only through its officers and agents, and such verification is the verification of the corporation itself. Bank v. Hutchison & Hutchison, 87 N.C. 22 (1882).

Verification by Corporate Officers Not Verification by Individual Defendants. — Verification by the vice-president and secretary of the corporate defendant, unchallenged as a proper verification as to the corporate defendant, was not verification by or in behalf of the individual defendants. Rich v. Norfolk S. Ry., 244 N.C. 175, 92 S.E.2d 768 (1956).

Managing director of a foreign corporation may verify its pleadings. Best v. British & Am. Mtg. Co., 131 N.C. 70, 42 S.E. 456 (1902).

City manager of a municipal corporation is its "managing or local agent" and is authorized to verify the municipality's answer in an action instituted against it. Grimes v. Lexington, 216 N.C. 735, 6 S.E.2d 505 (1940).

Verification Held Sufficient. — Verification to a complaint, made by an agent or attorney of a nonresident, to the effect that the claim sued on was in writing and in his possession for collection, giving facts in his personal knowledge and sources of other information, met the substantial statutory requirements. Johnson, Clark & Co. v. Maxwell, 87 N.C. 18 (1882).

Verification of answer in the words "The foregoing answer of the defendant is true of his own knowledge, except those matters stated on information and belief, and he believes those to be true" is a substantial compliance. McLamb v. McPhail, 126 N.C. 218, 35 S.E. 426 (1900).

An allegation that plaintiff has "reason to believe," and therefore "alleges," etc., is sufficient compliance with requirement that matter be alleged as of plaintiff's knowledge or upon "information and belief." Ware-Kramer Tobacco Co. v. American Tobacco Co., 180 F. 160 (E.D.N.C. 1910), appeal dismissed, 196 F. 1004 (4th Cir. 1912).

A petition in proceedings for contempt which is verified in accordance with the prescribed form is sufficient to give the court jurisdiction of the persons named when the facts set forth in the petition constituting a sufficient basis for judgment of contempt are stated to be within the knowledge of affiant and not upon information and belief. Safie Mfg. Co. v. Arnold, 228 N.C. 375, 45 S.E.2d 577 (1947).

Verification Held Insufficient. — Verification of a complaint made by an attorney of the plaintiff, setting forth in the affidavit that the facts set forth as of his own knowledge were true and that those stated on information and belief he believed to be true; that the action was based on a written instrument for the payment of money; and that the instrument was in his possession, did not comply with the requisites of the statute, and was defective in not stating the grounds of the affiant's belief and the reason why the party himself did not make the verification. Miller v. Curl, 162 N.C. 1, 77 S.E. 952 (1913).

In a proceeding to restore certain records destroyed by fire, an affidavit by the agent of the petitioner that the facts set forth in the complaint were true to the best of his knowledge, information and belief was an insufficient verification. Cowles v. Hardin, 79 N.C. 577 (1878).

OPINIONS OF ATTORNEY GENERAL

Notarization of Verification in Divorce Proceedings by Partner in Firm of Plaintiff's Counsel. — When one partner of Firm A appears as attorney for a plaintiff in a divorce proceeding, the other partners in the firm also "appear," and they could be prohibited under former G.S. 47-8 from notarizing the verification of the client. This would be true whether or not the firm appears as "of counsel" to the individual partner on the face of the complaint or answer. Therefore, such practice should be avoided, and an attorney/notary who acts in this fashion proceeds at his own risk. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, 58 N.C.A.G. 35 (1988).

It is not advisable for a notary who is also a partner in a law firm acting of counsel to an attorney filing a divorce complaint to notarize the verification of the client. A divorce complaint which is not properly notarized is subject to dismissal. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, 58 N.C.A.G. 35 (1988).

Pleadings not requiring verification by one of the parties are not subject to dismissal if they are verified anyway and a partner of the firm representing that client acts as the notary. However, former G.S. 47-8 would still seem to say that partner is without power to act as a notary in that situation. The signature of the attorney signing the pleadings would be adequate under section (a) of this rule. See opinion of Attorney General to Mr. James Lee Knight, Notary Public, Guilford County, 58 N.C.A.G. 35 (1988).

Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading.

(a)(1) When Presented. — A defendant shall serve his answer within 30 days after service of the summons and complaint upon him. A party served with a pleading stating a crossclaim against him shall serve an answer thereto within 30 days after service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 30 days after service of the answer or, if a reply is ordered by the court, within 30 days after service of the order, unless the order otherwise directs. Service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

a. The responsive pleading shall be served within 20 days after notice of the court's action in ruling on the motion or postponing its disposition until the trial on the merits;

b. If the court grants a motion for a more definite statement, the responsive pleading shall be served within 20 days after service of the more definite statement.

(2) Cases Removed to United States District Court. — Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this State and the filing of a copy of the petition in the State court, the State court shall proceed no further therein unless and until the case is remanded. If it shall be finally determined in the United States courts that the action or proceeding was not removable or was improperly removed, or for other reason should be remanded, and a final order is entered remanding the action or proceeding to the State court, the defendant or defendants, or any other party who would have been permitted or required to file a pleading had the proceedings to remove not been instituted, shall have 30 days after the filing in such State court of a certified copy of the order of remand to file motions and to answer or otherwise plead.

(b) *How Presented.* — Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter,
(2) Lack of jurisdiction over the person,
(3) Improper venue or division,
(4) Insufficiency of process,
(5) Insufficiency of service of process,
(6) Failure to state a claim upon which relief can be granted,
(7) Failure to join a necessary party.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The consequences of failure to make such a motion shall be as provided in sections (g) and (h). No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. Obtaining an extension of time within which to answer or otherwise plead shall not constitute a waiver of any defense herein set forth. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) *Motion for judgment on the pleadings.* — After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) *Preliminary hearings.* — The defenses specifically enumerated (1) through (7) in section (b) of this rule, whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section (c) of this rule shall be heard and determined before trial on application of any party, unless the judge orders that the hearing and determination thereof be deferred until the trial.

(e) *Motion for more definite statement.* — If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the judge is not obeyed within 20 days after notice of the order or within such other time as the judge may fix, the judge may strike the pleading to which the motion was directed or make such orders as he deems just.

(f) *Motion to strike.* — Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 30 days after the service of the pleading upon him or upon the judge's own initiative at any time, the judge may order stricken from any pleading any insufficient defense or any redundant, irrelevant, immaterial, impertinent, or scandalous matter.

(g) *Consolidation of defenses in motion.* — A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in section (h)(2) hereof on any of the grounds there stated.

(h) *Waiver or preservation of certain defenses.* —

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a necessary party, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. (1967, c. 954, s. 1; 1971, c. 1236; 1975, c. 76, s. 2.)

COMMENT

This rule deals comprehensively with the whole mechanism, including timetables, for raising all the various defenses and objections traditionally available to defensively aligned parties at some pretrial stage, including those based merely on objections to form of pleadings, those traditionally characterized as dilatory defenses, and those based upon defenses on the merits.

Section (a) is a straightforward timetable for the filing of the traditional defensive pleadings, the answer, and the reply. The 30-day period rather than the federal rule 20-day period is adopted. All other considerations of timeliness in raising the various possible objections and defenses by other devices are related to the times for filing these responsive pleadings.

The remaining sections deal in closely interrelated fashion with the whole problem of an orderly staging of the various traditional objections and defenses, worked out to guard against dilatoriness and to encourage economy of effort and early potential raising and determination of defenses likely to be decisive, either as to the abatement of the particular action, or on the merits. The key conceptions, involving some fairly drastic changes from the Code practice, are these: (1) Only two kinds of procedural devices — the traditional defensive pleadings and functionally shaped motions — shall be utilized to raise all the objections and defenses made available. This has been presaged in the provisions of Rule 7(c), abolishing demurrers and pleas, and thus leaving only pleadings and the motion remaining as available devices out of the traditional arsenal. (2) Except for the possible objections to mere forms of pleadings, all the traditional defenses, whether characterized as merely formal, dilatory, or on the merits, may be raised together, and for the first time, in the required responsive pleadings. This departs from the traditional Code approach which required certain defenses, both dilatory and on the merits, to be raised, at peril of waiver, by demurrer, when they appear on the face of the pleading (former §§ 1-127, 1-133). Taking a different approach, this rule instead merely gives the option to any defensive pleader to raise seven enumerated objections and defenses by motion prior to filing his responsive pleading [Rule 12(b)]; and the option to either party to then have such motion-raised defenses heard preliminarily unless the court defers consideration of them to trial time [Rule 12(d)].

The third sentence in section (b) has as its purpose the clarification of the preceding sentence. Ordinarily, of course, a motion making any of the listed defenses should be made before pleading. But the failure to do so is not preclusive in all circumstances and as to all defenses, as sections (g) and (h) of this rule make clear.

The only ones of the traditional objections to mere form which are retained are the motion to make more definite and certain and the motion to strike. It must be assumed that in the context of the federal pleading approach the motion to make more definite and certain will be utilized with much more restraint, generally only when such ambiguity exists that the responsive pleader cannot reasonably be required to plead to the pleading under attack. See generally 2 *Moore's Federal Practice* Pars. 12.18 and 12.20.

The most direct analogue to the Code demurrer for failure to state facts sufficient to constitute a cause of action, which is abolished under this procedure, is the motion to dismiss for failure to state a claim upon which relief can be granted. [Rule 12(b)(6)]. In a general way it can be said that this motion is typically honored in federal practice under the same circumstances that a demurrer is sustained and action dismissed in State practice because the pleading attacked contains a "statement of a defective cause of action," as opposed merely to a "defective statement of good cause of action." Compare, for example, Turner v. Gastonia City Bd. of Educ., 250 N.C. 456, 109 S.E.2d 211 (1959), illustrating application of the "defective cause" rule under existing State demurrer practice, with DeLoach v. Crawley's, Inc., 128 F.2d 378 (5th Cir. 1942), illustrating dismissal rule on motion to dismiss under federal Rule 12(b)(6). Unlike the State practice demurrer, this motion to dismiss may "speak." [Rule 12(b), last sentence].

The waiver provisions of Rule 12(h) provide in effect that the defenses of failure to state a claim, or failure to join a necessary party may be raised at any time before verdict. After verdict however, the defenses of failure to state a claim and failure to join a necessary party cannot then be raised or noted for the first time. Lack of jurisdiction of the subject matter, of course, cannot be waived and is always available as a defense.

In addition to the motion to dismiss, analogous in a limited way to the demurrer as above stated, a motion for judgment on the pleadings is likewise provided in Rule 12(c). It too has "speaking" capacities.

Legal Periodicals. — For note on specificity in pleading under G.S. 1A-1, Rule 8(a)(1), see 48 N.C.L. Rev. 636 (1970).

For survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

For note on default not constituting an admission of facts for purposes of summary judgment, see 17 Wake Forest L. Rev. 49 (1981).

For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For note on the North Carolina Supreme Court's rejection of the minimum contacts analysis under the "transient rule" of jurisdiction, see 66 N.C.L. Rev. 1051 (1988).

For note, "The North Carolina Court of Appeals Provides a Solution to the Business Name Game," see 66 N.C.L. Rev. 1064 (1988).

For note on the expansion of the viable fetus wrongful death action, see 11 Campbell L. Rev. 91 (1988).

For article, "Functions of Rule 12(b)(6) in the Federal Rules of Civil Procedure: A Categorization Approach," see 15 Campbell L. Rev. 119 (1993).

For note, "Do You Need 'Will Insurance'? Let the Testator Beware — Hargett v. Holland," see 21 N.C. Cent. L.J. 353 (1995).

For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

For comment, "'Even in These Days of Notice Pleadings': Factual Pleading Requirements in the Fourth Circuit," see 82 N.C.L. Rev. 1167 (2004).

CASE NOTES

I. In General.
II. Answers and Time Therefor.
III. Preservation and Waiver of Defenses, Generally.
IV. Subject Matter Jurisdiction.
V. Personal Jurisdiction.
VI. Improper Venue.
VII. Insufficiency of Process.
VIII. Insufficiency of Service.
IX. Failure to State Claim.
  A. In General.
  B. Conversion of Motion to Dismiss to Summary Judgment Motion.
X. Failure to Join Necessary Party.
XI. Motion for Judgment on the Pleadings.
XII. Motion for More Definite Statement.
XIII. Motion to Strike.
XIV. Decisions under Prior Law.

I. IN GENERAL.

Rule 12 of the Federal Rules of Civil Procedure is essentially the same as this rule. Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972), rev'd on other grounds, 285 N.C. 689, 208 S.E.2d 649 (1974). See also, Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

Section (b) of this rule is essentially a verbatim copy of FRCP, Rule 12(b). Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

Subsection (h)(3) of this rule is virtually identical to FRCP, Rule 12(h)(3). Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

Taken together, subsection (b)(6) of this rule and § 1A-1, Rule 8(a) suggest pleadings should be limited to those facts or descriptions of transactions, occurrences, or series of transactions or occurrences, intended to be proved. Bowlin v. Duke Univ., 108 N.C. App. 145, 423 S.E.2d 320 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

Construction with G.S. 1A-1, Rule 15(a). — Specific requirements of G.S. 1A-1, Rule 12(a)(1)(b) control where in conflict with the general requirements of G.S. 1A-1, Rule 15(a); thus, a response to an amended complaint following a motion for a more definite statement was due within 20 days, however, because the answer was filed, albeit late, before default was entered and because there was no prejudice, it was not improper to deny a motion to strike the response. Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003).

An order entered out of session without the parties' consent is null and void and must be vacated pursuant to subsection (h)(3) of this rule. Turner v. Hatchett, 104 N.C. App. 487, 409 S.E.2d 747 (1991).

Subject Matter Jurisdiction of Court. — Superior court could not dismiss complaint with prejudice for failure to state a claim where the court lacked subject matter jurisdiction over plaintiffs' claim. Flowers v. Blackbeard Sailing Club, Ltd., 115 N.C. App. 349, 444 S.E.2d 636, cert. granted, 337 N.C. 691, 448 S.E.2d 522 (1994), review improvidently granted, 340 N.C. 357, 457 S.E.2d 599 (1995).

Motions under subsection (b)(6) and section (c) of this rule can be treated as summary judgment motions, the difference being that under subsections (b)(6) and section (c) the motion is decided on the pleadings alone, while under G.S. 1A-1, Rule 56 the court may receive and consider various kinds of evidence. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

Distinction Between Motion to Dismiss and Motion for Summary Judgment. — The distinction between a motion to dismiss under subdivision (b)(6) of this rule and a motion for summary judgment is more than a mere technicality. When considering a motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery. By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matter outside the pleadings. Locus v. Fayetteville State Univ., 102 N.C. App. 522, 402 S.E.2d 862 (1991).

Justiciable Controversy. — The mere filing of an affirmative defense, without more, is not sufficient to establish the absence of a justiciable issue, nor is the grant of a motion under subdivision (b)(6) of this rule, nor the entry of summary judgment. These events may only be evidence of the absence of a justiciable issue. However, action by the losing party which perpetuated litigation in the face of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of G.S. 6-21.5. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Failure to obtain certificate of authority to transact business in State. — Trial court properly dismissed, pursuant to G.S. 1A-1, N.C. R. Civ. P. 12, plaintiff's action seeking to recover money allegedly owed to plaintiff by defendants from the sale and consignment of jewelry; pursuant to G.S. 55-15-02, a foreign corporation that transacted business in North Carolina was barred from maintaining an action in any state court unless it had obtained a certificate of authority to transact business prior to trial, plaintiff's actions of selling and consigning jewelry to North Carolina jewelers constituted transaction of business pursuant to G.S. 55-15-01(b), the trial court acted within its discretion when it addressed this issue pursuant to G.S. 1A-1, N.C. R. Civ. P. 16 prior to trial as the issue was dispositive of the action, and the trial court was not required by G.S. 55-15-02 to continue the case to allow plaintiff to obtain a certificate of authority. Harold Lang Jewelers, Inc. v. Johnson, 156 N.C. App. 187, 576 S.E.2d 360, 2003 N.C. App. LEXIS 73 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 765 (2003).

Whether sovereign immunity is a question of subject matter jurisdiction or personal jurisdiction is an unsettled area of the law in this State. The distinction is important because the denial of a motion to dismiss for lack of subject matter jurisdiction pursuant to subsection (b)(1) of this rule is nonappealable, but the denial of a motion challenging the jurisdiction of the court over the person of the defendant pursuant to subsection (b)(2) is immediately appealable. Zimmer v. North Carolina Dep't of Transp., 87 N.C. App. 132, 360 S.E.2d 115 (1987).

NCDOT's Motion to Dismiss Was Incorrectly Denied Because It Did Not Waive Its Sovereign Immunity. — When the North Carolina Department of Transportation (NCDOT) entered into an agreement with a developer to jointly fund a roadway to be built to state specifications by a contractor selected by the developer, which NCDOT approved, due to the involvement of public funds in the project, and the developer did not pay the contractor, NCDOT was not liable to the contractor because it did not contract with the contractor and, therefore, did not waive its sovereign immunity as to the contractor; NCDOT's motion to dismiss under G.S. 1A-1, Rule 12(b)(1), (b)(2), (b)(6), and (h)(3) was incorrectly denied. Rifenburg Constr., Inc. v. Brier Creek Assocs., L.P., 160 N.C. App. 626, 586 S.E.2d 812, 2003 N.C. App. LEXIS 1926 (2003), aff'd sub nom. Rifenburg Constr., Inc. v. Brier Creek Assocs.L.P., 358 N.C. 218, 593 S.E.2d 585 (2004).

Pleadings are to be liberally construed. Benton v. W.H. Weaver Constr. Co., 28 N.C. App. 91, 220 S.E.2d 417 (1975).

Failure to plead the particulars of jurisdiction is not fatal to a claim, so long as the facts alleged permit the inference of jurisdiction under the statute. Williams v. Institute for Computational Studies, 85 N.C. App. 421, 355 S.E.2d 177 (1987).

Amendment of Complaint. — Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. Estate of Spell v. Ghanem, 175 N.C. App. 191, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

Memorandum to Withdraw a Claim Can Be Considered at Summary Judgment. — As a document properly served and filed in a case, the trial court was entitled to consider a memorandum in which the plaintiff withdrew one of its causes of action as a matter outside the pleading when it ruled on a motion for summary judgment. Shroyer v. County of Mecklenburg, 154 N.C. App. 163, 571 S.E.2d 849, 2002 N.C. App. LEXIS 1402 (2002).

Denial of Motion to Dismiss Pro Se Complaint Held Proper. — Trial court did not err in denying healthcare providers' motion to dismiss an estate's wrongful death complaint, which was signed, pro se, by the administrator of the estate. Reid v. Cole, 187 N.C. App. 299, 653 S.E.2d 164, 2007 N.C. App. LEXIS 2321 (2007).

Standard of Review. — Under the appellate standard of review as to G.S. 1A-1, N.C. R. Civ. P. 12(b)(2) motions, an appellate court had to take defendant's assertions as true because defendant provided an affidavit which presented evidence, and plaintiff submitted no evidence opposing the defendant's showing. Dailey v. Popma, 191 N.C. App. 64, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (2008).

No appeal lies as a matter of right from denial of a motion under section (d) of this rule. Raines v. Thompson, 62 N.C. App. 752, 303 S.E.2d 413 (1983).

Appeal of Dismissal. — Although order dismissing class action without prejudice did not determine the controversy and was interlocutory, the order affected a substantial right of the unnamed plaintiffs and was immediately appealable. Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437, rev'd on other grounds, 319 N.C. 274, 354 S.E.2d 459 (1987).

Denial of a motion to dismiss was non-reviewable after final judgment on the merits. Shadow Group v. Heather Hills Home Owners Ass'n, 156 N.C. App. 197, 579 S.E.2d 285, 2003 N.C. App. LEXIS 154 (2003).

Dismissals Based on Lack of Standing Not on Merits. — Trial court did not exceed its authority in dismissing a complaint at a temporary restraining order hearing where neither of the grounds given by the trial court, failure to state a claim because of lack of standing under G.S. 1A-1, N.C. R. Civ. P. 12(b)(6), nor lack of subject matter jurisdiction because of lack of standing under Rule 12(b)(1), were on the merits. State Employees Ass'n of N.C., Inc. v. State, 154 N.C. App. 207, 573 S.E.2d 525, 2002 N.C. App. LEXIS 1451 (2002).

Procedure and Discovery in Shareholders' Derivative Actions. — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholders' derivative action, particularly with respect to former G.S. 55-55(c) (see now G.S. 55-7-40), this rule, and G.S. 1A-1, Rules 23 and 56, see Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Motion to Dismiss Affected by Law Handed Down While Appeal Was Pending. — Where the court below granted the defendant's 12(b)(6) motion to dismiss based on a willful and wanton standard for licensees, and where the North Carolina Supreme Court changed the appropriate standard of duty owed to licensees to one of reasonable care while the case was pending on appeal, the decision had to be vacated. Alexander v. Quattlebaum, 135 N.C. App. 622, 522 S.E.2d 88, 1999 N.C. App. LEXIS 1183 (1999).

Failure to Satisfy Shareholder Derivative Action Demand Requirements. — The trial court properly dismissed plaintiff's claims pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to satisfy the shareholder derivative action demand requirement of G.S. 55-7-42 where he was not excused from meeting the requirements because the enactment of G.S. 55-7-42 abolished the futility exception under North Carolina law. Allen v. Ferrera, 141 N.C. App. 284, 540 S.E.2d 761, 2000 N.C. App. LEXIS 1404 (2000).

Declaratory Judgment as to a Personal Guaranty. — The court erred in dismissing the shareholder plaintiff's individual claim under this section; declaratory judgment is not unavailable where plaintiff seeks to have his personal guaranty declared invalid instead of merely interpreted by the court. Allen v. Ferrera, 141 N.C. App. 284, 540 S.E.2d 761, 2000 N.C. App. LEXIS 1404 (2000).

Dissent Erred in Claiming that Issue of Waiver Ex Mero Motu Could Be Addressed. — Dissent erred in raising an issue as to the waiver of sovereign immunity under G.S. 9-32 as the claim was not raised by the parties; the dissent's claim that issue of waiver ex mero motu could be addressed because the North Carolina Board of Nursing moved to dismiss the complaint pursuant to N.C. R. Civ. P. 12(b)(1) and 12(b)(2) was rejected as: (1) the Board only moved to dismiss a negligent infliction of emotional distress claim pursuant to Rule 12(b)(1) and 12(b)(2), (2) the Board moved to dismiss the violation of N.C. Gen. Stat. § 9-32 claim pursuant to N.C. R. Civ. P. 12(b)(6), and (3) the parties stipulated that the trial court had both subject matter jurisdiction and personal jurisdiction. Abbott v. N.C. Bd. of Nursing, 177 N.C. App. 45, 627 S.E.2d 482, 2006 N.C. App. LEXIS 714 (2006).

Dismissal of Refilled Medical Malpractice Case was Error. — Dismissal of an administratrix's second medical malpractice complaint filed after her earlier malpractice complaint was voluntarily dismissed was error because there was no evidence that the initial complaint's N.C. R. Civ. P. 9(j) certification was insufficient; the administratrix had an absolute right under N.C. R. Civ. P. 41(a)(1) to dismiss the original action and re-file her claim within one year, regardless of whether there had been a ruling on her G.S. 8C-1, N.C. R. Evid. 702(e) motion to qualify the witness she used for the certification of her original complaint as an expert. The fact that the second complaint relied on Rule 9(j)(1) instead of Rule 9(j)(2) did not give rise to an inference that the administratrix did not reasonably expect her expert for the first certification to qualify, and no basis existed for dismissal of the re-filed action pursuant to N.C. R. Civ. P. 12(b)(6). Ford v. McCain, — N.C. App. —, 666 S.E.2d 153, 2008 N.C. App. LEXIS 1657 (2008).

Applied in Haddock v. Lassiter, 8 N.C. App. 243, 174 S.E.2d 50 (1970); Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970); Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234 (1971); Yancey v. Watkins, 12 N.C. App. 140, 182 S.E.2d 605 (1971); Evans v. Rose, 12 N.C. App. 165, 182 S.E.2d 591 (1971); Barker v. Hicks, 12 N.C. App. 407, 183 S.E.2d 431 (1971); Jaynes v. Lawing, 12 N.C. App. 682, 184 S.E.2d 373 (1971); Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793 (1972); Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412 (1972); FCX, Inc. v. Bailey, 14 N.C. App. 149, 187 S.E.2d 381 (1972); Oliver v. Ernul, 14 N.C. App. 540, 188 S.E.2d 679 (1972); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55 (1972); Roth v. Parsons, 16 N.C. App. 646, 192 S.E.2d 659 (1972); Merchants Distribs., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972); Gray v. Gray, 16 N.C. App. 730, 193 S.E.2d 492 (1972); Brantley v. Dunstan, 17 N.C. App. 19, 193 S.E.2d 423 (1972); Real Estate Exch. & Investors, Inc. v. Tongue, 17 N.C. App. 575, 194 S.E.2d 873 (1973); Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973); Clouse v. Chairtown Motors, Inc., 17 N.C. App. 669, 195 S.E.2d 327 (1973); Manning v. Manning, 20 N.C. App. 149, 201 S.E.2d 46 (1973); Westmoreland v. Safe Bus, Inc., 20 N.C. App. 632, 202 S.E.2d 605 (1974); Town of Wadesboro v. Holshouser, 22 N.C. App. 65, 205 S.E.2d 550 (1974); Duke Power Co. v. City of High Point, 22 N.C. App. 91, 205 S.E.2d 774 (1974); Sides v. Cabarrus Mem. Hosp., 22 N.C. App. 117, 205 S.E.2d 784 (1974); Peace v. Peace Broadcasting Corp., 22 N.C. App. 631, 207 S.E.2d 288 (1974); Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974); Sides v. Cabarrus Mem. Hosp., 287 N.C. 14, 213 S.E.2d 297 (1975); Wall v. Wall, 24 N.C. App. 725, 212 S.E.2d 238 (1975); Shaw v. Shaw, 25 N.C. App. 53, 212 S.E.2d 222 (1975); William R. Andrews Assocs. v. Sodibar Sys., 25 N.C. App. 372, 213 S.E.2d 411 (1975); Aydin Corp. v. ITT Corp., 25 N.C. App. 427, 213 S.E.2d 582 (1975); Sims v. Rea Constr. Co., 25 N.C. App. 472, 213 S.E.2d 398 (1975); Carding Specialists (Can.), Ltd. v. Gunter & Cooke, Inc., 25 N.C. App. 491, 214 S.E.2d 233 (1975); Gammon v. Clark, 25 N.C. App. 670, 214 S.E.2d 250 (1975); Durham v. Creech, 25 N.C. App. 721, 214 S.E.2d 612 (1975); Smith v. Ford Motor Co., 26 N.C. App. 181, 215 S.E.2d 376 (1975); City of Durham v. Lyckan Dev. Corp., 26 N.C. App. 210, 215 S.E.2d 814 (1975); In re Will of Edgerton, 26 N.C. App. 471, 216 S.E.2d 476 (1975); Cole v. Earon, 26 N.C. App. 502, 216 S.E.2d 422 (1975); Alpine Village, Inc. v. Lomas & Nettleton Fin. Corp., 27 N.C. App. 403, 219 S.E.2d 242 (1975); Grissom v. North Carolina Dep't of Revenue, 28 N.C. App. 277, 220 S.E.2d 872 (1976); Gibson v. Campbell, 28 N.C. App. 653, 222 S.E.2d 449 (1976); William R. Andrews Assocs. v. Sodibar Sys., 28 N.C. App. 663, 222 S.E.2d 922 (1976); Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518 (1976); Yow v. Nance, 29 N.C. App. 419, 224 S.E.2d 292 (1976); Church v. Madison County Bd. of Educ., 31 N.C. App. 641, 230 S.E.2d 769 (1976); RGK, Inc. v. United States Fid. & Guar. Co., 31 N.C. App. 708, 230 S.E.2d 600 (1976); Biddix v. Keller Constr. Corp., 32 N.C. App. 120, 230 S.E.2d 796 (1977); Acker v. Barnes, 33 N.C. App. 750, 236 S.E.2d 715 (1977); North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 240 S.E.2d 345 (1978); Mosley v. National Fin. Co., 36 N.C. App. 109, 243 S.E.2d 145 (1978); Britt v. Allen, 37 N.C. App. 732, 247 S.E.2d 17 (1978); Harris v. Family Medical Ctr., 38 N.C. App. 716, 248 S.E.2d 768 (1978); Wadsworth v. Georgia-Pacific Corp., 297 N.C. 172, 253 S.E.2d 925 (1979); Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979); Kinlaw v. Long Mfg. N.C., Inc., 298 N.C. 494, 259 S.E.2d 552 (1979); Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); Best v. Perry, 41 N.C. App. 107, 254 S.E.2d 281 (1979); Kavanau Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638 (1979); Grundey v. Clark Transf. Co., 42 N.C. App. 308, 256 S.E.2d 732 (1979); Rosenthal v. Perkins, 42 N.C. App. 449, 257 S.E.2d 63 (1979); Mazzocone v. Drummond, 42 N.C. App. 493, 256 S.E.2d 843 (1979); High

v. Parks, 42 N.C. App. 707, 257 S.E.2d 661 (1979); Stroup Sheet Metal Works, Inc. v. Heritage, Inc., 43 N.C. App. 27, 258 S.E.2d 77 (1979); Southern v. Southern, 43 N.C. App. 159, 258 S.E.2d 422 (1979); Golden v. Golden, 43 N.C. App. 393, 258 S.E.2d 809 (1979); Nicholson v. Hugh Chatham Mem. Hosp., 43 N.C. App. 615, 259 S.E.2d 586 (1979); Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979); Boone v. Boone, 44 N.C. App. 79, 259 S.E.2d 921 (1979); Henry v. North Carolina Dep't of Transp., 44 N.C. App. 170, 260 S.E.2d 438 (1979); Crawford v. Aetna Cas. & Sur. Co., 44 N.C. App. 368, 261 S.E.2d 25 (1979); Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980); Thompson v. Northwestern Sec. Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397 (1980); Bailey v. Gooding, 45 N.C. App. 335, 263 S.E.2d 634 (1980); Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345 (1980); Discount Auto Mart, Inc. v. Bank of N.C., 45 N.C. App. 543, 263 S.E.2d 41 (1980); Green Thumb Indus. of Monroe, Inc. v. Warren County Nursery, Inc., 46 N.C. App. 235, 264 S.E.2d 753 (1980); La Grenade v. Gordon, 46 N.C. App. 329, 264 S.E.2d 757 (1980); Georgia R.R Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980); Brenner v. Little Red Sch. House, Ltd., 47 N.C. App. 19, 266 S.E.2d 728 (1980); Stutts v. Duke Power Co., 47 N.C. App. 76, 266 S.E.2d 861 (1980); Emanuel v. Fellows, 47 N.C. App. 340, 267 S.E.2d 368 (1980); Hammers v. Lowe's Cos., 48 N.C. App. 150, 268 S.E.2d 257 (1980); Stahl-Rider, Inc. v. State, 48 N.C. App. 380, 269 S.E.2d 217 (1980); Forbis v. Honeycutt, 301 N.C. 699, 273 S.E.2d 240 (1981); Terry v. Terry, 302 N.C. 77, 273 S.E.2d 674 (1981); Brenner v. Little Red Sch. House, Ltd., 302 N.C. 207, 274 S.E.2d 206 (1981); Foster v. Winston-Salem Joint Venture, 50 N.C. App. 516, 274 S.E.2d 265 (1981); State v. Williams & Hessee, 53 N.C. App. 674, 281 S.E.2d 721 (1981); Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982); In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982); Selby v. Taylor, 57 N.C. App. 119, 290 S.E.2d 767 (1982); Bowens v. Board of Law Exmrs., 57 N.C. App. 78, 291 S.E.2d 170 (1982); Rhodes v. Board of Educ., 58 N.C. App. 130, 293 S.E.2d 295 (1982); White v. Pate, 58 N.C. App. 402, 293 S.E.2d 601 (1982); Stines v. Satterwhite, 58 N.C. App. 608, 294 S.E.2d 324 (1982); Howell v. Butler, 59 N.C. App. 72, 295 S.E.2d 772 (1982); Richardson v. Carolina Bank, 59 N.C. App. 494, 297 S.E.2d 197 (1982); New Hanover County v. Pleasant, 59 N.C. App. 644, 297 S.E.2d 760 (1982); Boyce v. Boyce, 60 N.C. App. 685, 299 S.E.2d 805 (1983); Boyd v. Boyd, 61 N.C. App. 334, 300 S.E.2d 569 (1983); Four Seasons Homeowners Ass'n v. Sellers, 62 N.C. App. 205, 302 S.E.2d 848 (1983); State ex rel. Horne v. Chafin, 309 N.C. 813, 309 S.E.2d 239 (1983); Styleco, Inc. v. Stoutco, Inc., 62 N.C. App. 525, 302 S.E.2d 888 (1983); Monte Enters., Inc. v. 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App. LEXIS 315 (2001); Williamson v. Town of Surf City, 143 N.C. App. 539, 545 S.E.2d 798, 2001 N.C. App. LEXIS 316 (2001); Zenobile v. McKecuen, 144 N.C. App. 104, 548 S.E.2d 756, 2001 N.C. App. LEXIS 328 (2001); GATX Logistics, Inc. v. Lowe's Cos., 143 N.C. App. 695, 548 S.E.2d 193, 2001 N.C. App. LEXIS 338 (2001); Andrews v. Crump, 144 N.C. App. 68, 547 S.E.2d 117, 2001 N.C. App. LEXIS 340 (2001); Groves v. Community Hous. Corp. of Haywood County, 144 N.C. App. 79, 548 S.E.2d 535, 2001 N.C. App. LEXIS 345 (2001); Wilkerson v. Norfolk S. Ry., 151 N.C. App. 332, 566 S.E.2d 104, 2002 N.C. App. LEXIS 744 (2002); Boney Publishers, Inc. v. Burlington City Council, 151 N.C. App. 651, 566 S.E.2d 701, 2002 N.C. App. LEXIS 859 (2002); Steeves v. Scot. County Bd. of Health, 152 N.C. App. 400, 567 S.E.2d 817, 2002 N.C. App. LEXIS 913 (2002); Seymour v. Lenoir County, 152 N.C. App. 464, 567 S.E.2d 799, 2002 N.C. App. LEXIS 914 (2002); Baars v. Campbell Univ., Inc., 148 N.C. App. 408, 558 S.E.2d 871, 2002 N.C. App. LEXIS 30 (2002); Douglas v. McVicker, 150 N.C. App. 705, 564 S.E.2d 622, 2002 N.C. App. LEXIS 641 (2002); Hatcher v. Harrah's NC Casino Co., 151 N.C. App. 275, 565 S.E.2d 241, 2002 N.C. App. LEXIS 712 (2002); Craig v. Faulkner, 151 N.C. App. 581, 565 S.E.2d 733, 2002 N.C. App. LEXIS 743 (2002); Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 568 S.E.2d 893, 2002 N.C. App. LEXIS 1088 (2002); Summey v. Barker, 154 N.C. App. 448, 573 S.E.2d 534, 2002 N.C. App. LEXIS 1449 (2002); Huntington Props., LLC v. Currituck County, 153 N.C. App. 218, 569 S.E.2d 695, 2002 N.C. App. LEXIS 1132 (2002); Royal v. State, 153 N.C. App. 495, 570 S.E.2d 738, 2002 N.C. App. LEXIS 1167 (2002); Lovelace v. City of Shelby, 153 N.C. App.

378, 570 S.E.2d 136, 2002 N.C. App. LEXIS 1175 (2002); RPR & Assocs. v. Univ. of North Carolina-Chapel Hill, 153 N.C. App. 342, 570 S.E.2d 510, 2002 N.C. App. LEXIS 1191 (2002); Pierce v. Johnson, 154 N.C. App. 34, 571 S.E.2d 661, 2002 N.C. App. LEXIS 1406 (2002); Homeq v. Watkins, 154 N.C. App. 731, 572 S.E.2d 871, 2002 N.C. App. LEXIS 1527 (2002); Martin Architectural Prods. v. Meridian Constr. Co., 155 N.C. App. 176, 574 S.E.2d 189, 2002 N.C. App. LEXIS 1567 (2002); Howard v. Vaughn, 155 N.C. App. 200, 573 S.E.2d 253, 2002 N.C. App. LEXIS 1609 (2002); Powell v. Bulluck, 155 N.C. App. 613, 573 S.E.2d 699, 2002 N.C. App. LEXIS 1628 (2002); Barnes v. Erie Ins. Exch., 156 N.C. App. 270, 576 S.E.2d 681, 2003 N.C. App. LEXIS 103 (2003); Brotherton v. Point on Norman, LLC, 156 N.C. App. 577, 577 S.E.2d 361, 2003 N.C. App. LEXIS 241 (2003); Piedmont Inst. of Pain Mgmt. v. Staton Found. , 157 N.C. App. 577, 581 S.E.2d 68, 2003 N.C. App. LEXIS 934 (2003); Dockery v. Hocutt, 357 N.C. 210, 581 S.E.2d 431, 2003 N.C. LEXIS 596 (2003); In re Will of Smith, 159 N.C. App. 651, 583 S.E.2d 615, 2003 N.C. App. LEXIS 1506 (2003); Summey v. Barker, 357 N.C. 492, 586 S.E.2d 247, 2003 N.C. LEXIS 1105 (2003); Beau Rivage Homeowners Ass'n v. Billy Earl, L.L.C., 163 N.C. App. 325, 593 S.E.2d 120, 2004 N.C. App. LEXIS 366 (2004); PharmaResearch Corp. v. Mash, 163 N.C. App. 419, 594 S.E.2d 148, 2004 N.C. App. LEXIS 410 (2004); Justice for Animals, Inc. v. Robeson County, 164 N.C. App. 366, 595 S.E.2d 773, 2004 N.C. App. LEXIS 813 (2004); Lemon v. Combs, 164 N.C. App. 615, 596 S.E.2d 344, 2004 N.C. App. LEXIS 964 (2004); Home Sav. Bank v. Colonial Am. Cas. & Sur. Co., 165 N.C. App. 189, 598 S.E.2d 265, 2004 N.C. App. LEXIS 1147 (2004); Wetchin v. Ocean Side Corp., 167 N.C. App. 756, 606 S.E.2d 407, 2005 N.C. App. LEXIS 12 (2005); Hatcher v. Harrah's NC Casino Co., LLC, 169 N.C. App. 151, 610 S.E.2d 210, 2005 N.C. App. LEXIS 512 (2005); Chatmon v. N.C. HHS, 175 N.C. App. 85, 622 S.E.2d 684, 2005 N.C. App. LEXIS 2711 (2005); Brown v. Centex Homes, 171 N.C. App. 741, 615 S.E.2d 86, 2005 N.C. App. LEXIS 1356 (2005); Freeman v. Food Lion, LLC, 173 N.C. App. 207, 617 S.E.2d 698, 2005 N.C. App. LEXIS 1919 (2005); Skinner v. Preferred Credit, 172 N.C. App. 407, 616 S.E.2d 676, 2005 N.C. App. LEXIS 1806 (2005); May v. Down East Homes of Beulaville, Inc., 175 N.C. App. 416, 623 S.E.2d 345, 2006 N.C. App. LEXIS 51 (2006); Hill v. West, 177 N.C. App. 132, 627 S.E.2d 662, 2006 N.C. App. LEXIS 692 (2006); Kohler Co. v. McIvor, 177 N.C. App. 396, 628 S.E.2d 817, 2006 N.C. App. LEXIS 981 (2006); Rauch v. Urgent Care Pharm., Inc., 178 N.C. App. 510, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006); Stann v. Levine, 180 N.C. App. 1, 636 S.E.2d 214, 2006 N.C. App. LEXIS 2252 (2006); Bio-Medical Applications of N.C., Inc. v. N.C. HHS, 179 N.C. App. 483, 634 S.E.2d 572, 2006 N.C. App. LEXIS 1979 (2006); In re Will of McFayden, 179 N.C. 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App. 451, 664 S.E.2d 347, 2008 N.C. App. LEXIS 1480 (2008); Willow Bend Homeowners Ass'n v. Robinson, — N.C. App. —, 665 S.E.2d 570, 2008 N.C. App. LEXIS 1614 (2008); State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 362 N.C. 431, 666 S.E.2d 107, 2008 N.C. LEXIS 687 (2008); Babb v. Graham, 190 N.C. App. 463, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008); Wells Fargo Bank, N.A. v. Affiliated FM Ins. Co., — N.C. App. —, 666 S.E.2d 774, 2008 N.C. App. LEXIS 1766 (2008); Egelhof v. Szulik, — N.C. App. —, 668 S.E.2d 367, 2008 N.C. App. LEXIS 2026 (2008); Wilfong v. N.C. DOT, — N.C. App. —, 670 S.E.2d 331, 2009 N.C. App. LEXIS 31 (2009); Hendrix v. Advanced Metal Corp., — N.C. App. —, 672 S.E.2d 745, 2009 N.C. App. LEXIS 151 (2009); Sony Ericsson

Mobile Communs. United States v. Agere Sys., — N.C. App. —, 672 S.E.2d 763, 2009 N.C. App. LEXIS 207 (2009); Gilbert v. N.C. State Bar, 363 N.C. 70, 678 S.E.2d 602, 2009 N.C. LEXIS 238 (2009); Barringer v. Wake Forest Univ. Baptist Med. Ctr., — N.C. App. —, 677 S.E.2d 465, 2009 N.C. App. LEXIS 673 (2009); Town of Oriental v. Henry, — N.C. App. —, 678 S.E.2d 703, 2009 N.C. App. LEXIS 1057 (July 7, 2009); Carolina Forest Ass'n v. White, — N.C. App. —, 678 S.E.2d 725, 2009 N.C. App. LEXIS 1066 (July 7, 2009).

II. ANSWERS AND TIME THEREFOR.

Commencement of Time for Filing. — Failure of owners of condemned land to comply with statutory judicial review requirements was sufficient cause to affirm denial of their counterclaims, where the time for filing their counterclaims commenced to run upon notice of final environmental impact statement by publication. DOT v. Blue, 147 N.C. App. 596, 556 S.E.2d 609, 2001 N.C. App. LEXIS 1235 (2001).

Service of Motion Alters Time Period for Answering. — Although the motions provided for in section (b) of this rule are not pleadings under G.S. 1A-1, Rule 7(a), section (a) of this rule provides that the service of such a motion results in a postponement of the time for serving an answer, and consequently no default results pending disposition of these motions. Moseley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

Time to Answer Not Extended. — Plaintiffs' motions for entry of default and default judgment were made after defendant's time to answer had expired, where although summons and complaint were served upon defendant by mail, G.S. 1A-1, Rule 6(e) did not apply to extend his time to answer to 33 days, because the 30 days defendant had under this rule to answer the complaint began running when defendant was served with the summons and complaint, not when plaintiff mailed it. Williams v. Moore, 95 N.C. App. 601, 383 S.E.2d 416 (1989).

Pre-answer motion to dismiss was not a responsive pleading within the confines of this rule, preventing the entry of default judgment pursuant to Rule 55 of the Rules of Civil Procedure. Eden's Gate, Ltd. v. Leeper, 121 N.C. App. 171, 464 S.E.2d 696 (1995).

Substantive Response May Constitute Answer. — A letter, or any document, that is filed with the court and substantively responds to a complaint may constitute an answer, notwithstanding its failure to comply with all of the technical requirements of the Rules of Civil Procedure. Brown v. American Messenger Servs., Inc., 129 N.C. App. 207, 498 S.E.2d 384 (1998), cert. denied, 348 N.C. 692, 511 S.E.2d 644 (1998).

Letter Deemed an Answer. — Where letter raised no defenses to plaintiff's claims, nor answered the allegations, but offered partial payment and promised to repay the balance of the principal in question, the letter was an answer sufficient to satisfy the Rules of Civil Procedure. Brown v. American Messenger Servs., Inc., 129 N.C. App. 207, 498 S.E.2d 384 (1998), cert. denied, 348 N.C. 692, 511 S.E.2d 644 (1998).

Untimely Answer in Proceeding to Terminate Parental Rights. — Where a mother sought to terminate the father's parental rights and the father filed a last minute response to the petition in violation of G.S. 1A-1, N.C. R. Civ. P. 12(a)(1) and contrary to G.S. 7B-1107, the trial court erred under G.S. 7B-1108(b) in failing to appoint a guardian ad litem for the child; it was improper to punish the child for the father's late response. In re J.L.S., 168 N.C. App. 721, 608 S.E.2d 823, 2005 N.C. App. LEXIS 453 (2005).

III. PRESERVATION AND WAIVER OF DEFENSES, GENERALLY.

Under section (b) of this rule, every defense, including a defense in the nature of the old plea in abatement, may be raised by responsive pleading. Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 185 S.E.2d 727 (1972).

Motions Under Subsections (b)(2), (b)(4) and (b)(5) Distinguished. — A challenge to the court's jurisdiction over the person under subsection (b)(2) of this rule concerns whether the court has power, assuming it is properly invoked, to require the defendant to come into court to adjudicate the claim, a test which has come to be known as "minimum contacts." Challenges to sufficiency of process and service do not concern the State's fundamental power to bring a defendant before its courts for trial; instead they concern the means by which a court gives notice to the defendant and asserts jurisdiction over him. Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982); Sigman v. R.R. Tydings, Inc., 59 N.C. App. 346, 296 S.E.2d 659 (1982).

A subsection 12(b) defense contained in an answer is not the same as a 12(b) defense raised in a motion, and affidavits filed in support of a 12(b) defense contained in an answer is not governed by the time constraints found in 1A-1, Rule 6(d). Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 242, 468 S.E.2d 600 (1996).

Dismissal of Less Than All Claims Permitted. — Section (b) of this rule permits assertion by motion of a defense to "a claim for relief in any pleading." It does not require that the assertion be to "the claims for relief." Thus, it appears that the clear intent of the rule is to permit dismissal of some claims without requiring dismissal of all. Morrow v. Kings Dep't Stores, Inc., 57 N.C. App. 13, 290 S.E.2d 732, cert. denied, 306 N.C. 385, 294 S.E.2d 210 (1982).

A similar action pending in the courts of any other jurisdiction will not abate an action between the same parties in the North Carolina courts if raised as a defense under section (b) of this rule. Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 185 S.E.2d 727 (1972).

But Court in Second Forum May Stay or Continue Action. — A prior action pending outside the jurisdiction, if raised as a defense under section (b) of this rule, is not grounds for the abatement of an action begun in the courts of the state in question, but this does not preclude the court in the second forum from staying or continuing the progress of the second action pending determination of the first. Such a stay or continuance is discretionary and not a matter of right. Lehrer v. Edgecombe Mfg. Co., 13 N.C. App. 412, 185 S.E.2d 727 (1972).

Application of Waiver Provisions of Rule. — The waiver provisions of this rule apply only to those motions enumerated under section (b) and not excepted under section (h). Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73, cert. denied, 283 N.C. 754, 198 S.E.2d 723 (1973).

Out-of-state seller, by failing to include a motion to dismiss for lack of personal jurisdiction under G.S. 1A-1-12(b)(2) with its motion to dismiss for lack of subject matter jurisdiction under G.S. 1A-1-12(b)(1), waived any challenge to personal jurisdiction. Evangelistic Outreach Ctr. v. Gen. Steel Corp., 181 N.C. App. 723, 640 S.E.2d 840, 2007 N.C. App. LEXIS 399 (2007).

General Appearance by Defendant. — Even if the court had not already obtained jurisdiction over defendant by serving him with process by registered mail in compliance with G.S. 1A-1, Rule 4, by contesting both the notice to take his deposition and the show cause motion on grounds other than the court's lack of jurisdiction over him, defendant made a general appearance in the proceeding and thus submitted himself to the jurisdiction of the court. M.G. Newell Co. v. Wyrick, 91 N.C. App. 98, 370 S.E.2d 431 (1988).

Subsection (b)(2) Waived Where Raised for First Time on Appeal. — Defendant waived his right to raise subsection (b)(2) of this rule as a defense because he failed to raise it in his answer or motions but presented it for the first time on appeal. Shores v. Shores, 91 N.C. App. 435, 371 S.E.2d 747 (1988).

Lack of jurisdiction can never be waived by the parties, nor may such jurisdiction be conferred on a court by consent of the parties, except where a valid statute may allow jurisdiction to be so conferred. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

Waiver of Claim of Lack of Jurisdiction in Action to Terminate Parental Rights. — Trial court had jurisdiction over a mother in a termination of parental rights action; the mother failed to raise the defenses of lack of personal jurisdiction, insufficiency of process, and insufficiency of service of process as required by G.S. 1A-1, N.C. R. Civ. P. 12(h), and those issues were therefore waived, and because the mother made a general appearance in the termination hearing and prior hearings and filed an answer to the termination petition, the trial court had jurisdiction. In re Howell, 161 N.C. App. 650, 589 S.E.2d 157, 2003 N.C. App. LEXIS 2262 (2003).

Waiver of Venue in Custody and Support Modification Proceeding. — Waiver of venue occurs when a custody and support modification request is filed with the district court in an improper county and there is no timely demand that the trial be conducted in the proper county. In such event, the district court in the improper county appropriately adjudicates the modification request. Brooks v. Brooks, 107 N.C. App. 44, 418 S.E.2d 534 (1992).

Failure to Assert Affirmative Defense of Sovereign Immunity. — In an appeal brought by the North Carolina Department of Correction (NCDOC), an assistant superintendent, and a superintendent, the superintendent's appeal was dismissed as improperly before the court for review as the superintendent never asserted in any of his pleadings the affirmative defense of sovereign immunity. As a result, the denial of the superintendent's motion for summary judgment was not immediately appealable on the same grounds as those for the NCDOC and the assistant superintendent, therefore, the superintendent was barred from raising the same for the first time on appeal. Demurry v. N.C. Dep't of Corr., — N.C. App. —, 673 S.E.2d 374, 2009 N.C. App. LEXIS 204 (2009).

Trial court did not err in denying motion to dismiss default judgment that was entered before the motion to dismiss and set aside was filed because this was deemed waived after the pleading stage under G.S. 1A-1, N.C. R. Civ. P. 12; the buyer could have moved for relief from the judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b), but buyer's failure to address a motion to set aside in its brief meant that the motion was not before the appellate court. Autec, Inc. v. Southlake Holdings, Inc., 169 N.C. App. 232, 609 S.E.2d 485, 2005 N.C. App. LEXIS 510 (2005).

IV. SUBJECT MATTER JURISDICTION.

Lack of jurisdiction of the subject matter may always be raised by a party, or the court may raise such defect on its own initiative. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

Lack of subject matter jurisdiction may always be raised by a party, or the court may raise such defect on its own initiative, even after an answer has been filed. Jackson County ex rel. Child Support Enforcement Agency v. Swayney, 75 N.C. App. 629, 331 S.E.2d 145 (1985), rev'd in part on other grounds, 319 N.C. 52, 352 S.E.2d 413, cert. denied, 484 U.S. 826, 108 S. Ct. 93, 98 L. Ed. 2d 54 (1987).

Failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding. Stancil v. Bruce Stancil Refrigeration, Inc., 81 N.C. App. 567, 344 S.E.2d 789, cert. denied, 318 N.C. 418, 349 S.E.2d 601 (1986), appeal dismissed, 94 N.C. App. 760, 381 S.E.2d 720 (1989).

An objection to subject matter jurisdiction may be made at any time during the course of the action. Vance Constr. Co. v. Duane White Land Corp., 127 N.C. App. 493, 490 S.E.2d 588 (1997).

The question of subject matter jurisdiction may be raised at any point in a proceeding under the Uniform Child Custody Jurisdiction Act, G.S. 50A-1 et seq., and such jurisdiction cannot be conferred by waiver, estoppel or consent. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

The district courts of this State do undoubtedly possess general subject matter jurisdiction over child custody disputes. Such matters are in no wise reserved by the Constitution or laws of North Carolina to the exclusive consideration of another tribunal. Therefore the real question under the Uniform Child Custody Jurisdiction Act, G.S. 50A-1 et seq., is whether jurisdiction is properly exercised according to the statutory requirements in a particular case. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

The question of subject matter jurisdiction may properly be raised for the first time on appeal. Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978), cert. denied, 296 N.C. 583, 254 S.E.2d 32 (1979).

And the Court of Appeals may raise the question of subject matter jurisdiction on its own motion, even when it was not argued by the parties in their briefs. Bache Halsey Stuart, Inc. v. Hunsucker, 38 N.C. App. 414, 248 S.E.2d 567 (1978), cert. denied, 296 N.C. 583, 254 S.E.2d 32 (1979).

Standard of review on a motion to dismiss under G.S. 1A-1, Rule 12(b)(1) for lack of jurisdiction is de novo. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

A dismissal for lack of subject matter jurisdiction is not on the merits and thus is not given res judicata effect. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Timber Companies Paying Excise Taxes on Behalf of Landowners. — Timber companies that paid excise tax on timber on behalf of landowners who sold timber were not taxpayers under G.S. 105-228.30, and the trial court properly dismissed the companies' lawsuit against the State of North Carolina seeking reimbursement of the tax because the companies did not have standing to sue. Am. Woodland Indus. v. Tolson, 155 N.C. App. 624, 574 S.E.2d 55, 2002 N.C. App. LEXIS 1584 (2002), cert. denied, 357 N.C. 61, 579 S.E.2d 283 (2003), cert. dismissed, 357 N.C. 61, 579 S.E.2d 282 (2003).

Failure to State Claim Does Not Constitute Lack of Subject Matter Jurisdiction. — The failure of the complaint to state a claim upon which relief can be granted does not constitute a lack of jurisdiction of the subject matter. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

And a motion to dismiss for lack of subject matter jurisdiction is not viewed in the same manner as a motion to dismiss for failure to state a claim upon which relief can be granted. Matters outside the pleadings may be considered and weighed by the court in determining the existence of jurisdiction over the subject matter. Tart v. Walker, 38 N.C. App. 500, 248 S.E.2d 736 (1978).

Failure to properly file a petition for writ of certiorari with the superior court which would have allowed the court to exercise its jurisdiction following administrative hearing justified dismissal by the trial court. House of Raeford Farms, Inc. v. City of Raeford, 104 N.C. App. 280, 408 S.E.2d 885 (1991).

Failure to Comply with Requirements of § 1A-1, Rule 23(b) Not Jurisdictional Defect. — Although complaint, in shareholders' derivative suit was not properly verified, because G.S. 1A-1, Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholders' derivative suit, plaintiffs' failure to comply with the verification requirement at the time the complaint was filed was not a jurisdictional defect. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Failure to exhaust administrative remedies on non-constitutional claims rendered plaintiffs' claims subject to dismissal under this section. Shell Island Homeowners Ass'n v. Tomlinson, 134 N.C. App. 217, 517 S.E.2d 406 (1999).

Appeal of Dismissal. — Appeal from the denial of a G.S. 1A-1, N.C. R. Civ. P. 12(b)(1) motion based on sovereign immunity was neither immediately appealable under G.S.

1-277(b), nor affected a substantial right. Meherrin Indian Tribe v. Lewis, — N.C. App. —, 677 S.E.2d 203, 2009 N.C. App. LEXIS 661 (2009).

Denial of Motion Not Immediately Appealable. — While G.S. 1-277(b) permits the immediate appeal of an order denying a motion made pursuant to subsection (b)(2) of this rule to dismiss for lack of jurisdiction over the person, that statute does not apply to orders denying motions made pursuant to subsection (b)(1) of this rule to dismiss for lack of subject matter jurisdiction. Such orders, the same as other orders not determinative of an action, are interlocutory and therefore not immediately appealable. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

Employer's appeal of the trial court's order denying its N.C.R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, based on workers' compensation exclusivity, was dismissed, because avoiding the time and expense of trial was not a "substantial right" justifying immediate appeal of an interlocutory order. Burton v. Phoenix Fabricators & Erectors, Inc., 185 N.C. App. 303, 648 S.E.2d 235, 2007 N.C. App. LEXIS 1741 (2007), review granted, in part, 362 N.C. 353, 661 S.E.2d 242 (2008).

Concurrent Federal and State Jurisdiction Presumed in RICO and Similar Federal Actions. — The general rule in Racketeer Influenced and Corrupt Organizations actions and similar federal actions presumes concurrent jurisdiction over federal claims as between state and federal courts. This presumption however may be rebutted only by showing the existence of a Congressional provision establishing sole federal jurisdiction, a clear implication of exclusivity from the relevant legislative history or a "disabling incompatibility between the federal claim and state court adjudications." Hoke v. E.F. Hutton & Co., 91 N.C. App. 159, 370 S.E.2d 857 (1988).

Termination Proceedings Involving American Indian. — Trial court had subject matter jurisdiction over termination of parental rights proceeding since the equivocal testimony of the father that he was an American Indian was insufficient to meet the father's burden to prove the applicability of the Indian Child Welfare Act, 25 U.S.C.S. § 1912(f). In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

Claim Involving Estate Administration. — Where the children of the decedent sued the decedent's second wife for conversion and breach of fiduciary duties concerning the wife's administration of the decedent's estate, the trial court had jurisdiction over the claims as the claims were civil in nature. State ex rel. Pilard v. Berninger, 154 N.C. App. 45, 571 S.E.2d 836, 2002 N.C. App. LEXIS 1407 (2002), cert. denied, 356 N.C. 694, 579 S.E.2d 100 (2003).

Claim Involving Civil Service Board. — Trial court improperly dismissed, upon the City's N.C. Civ. P. 12(b)(1), (b)(6), and (b)(2) motion to dismiss for lack of subject matter jurisdiction, an employee's appeal of a decision by the Asheville Civil Service Board as the employee had a right to de novo review of the Board's decision under § 8(f) of the Asheville Civil Service Law; however, the appellate court considered the City's summary judgment motion and the evidence presented to the Board, as there were no factual issues and whether the Board had subject matter jurisdiction was a question of law, and concluded that the employee had not met his burden to prove subject matter jurisdiction as he resigned and had not been fired. Harper v. City of Asheville, 160 N.C. App. 209, 585 S.E.2d 240, 2003 N.C. App. LEXIS 1760 (2003).

Motion to dismiss a third-party complaint for indemnification against the North Carolina Department of Transportation (NCDOT) should have been dismissed under G.S. 1A-1, N.C. R. Civ. P. 12(b)(1); the complaint, which was filed by a bridge contractor, was untimely because the contractor's G.S. 136-29 verified claim was filed more than 60 days after the contractor received NCDOT's payment on the final estimate for a bridge project, and thus, the trial court lacked subject matter jurisdiction over the action. A.H. Beck Found. Co. v. Jones Bros., 166 N.C. App. 672, 603 S.E.2d 819, 2004 N.C. App. LEXIS 2023 (2004).

Claim Against Officer of Bankrupt Corporation. — Trial court had subject matter jurisdiction to hear constructive fraud and unfair and deceptive practice claims asserted by a corporation that supplied lumber to another corporation that went bankrupt, against the former president of the bankrupt corporation, as the claims did not belong to the bankrupt corporation, the claims were not part of the bankruptcy estate, and the bankruptcy trustee had no authority to bring the claims. Keener Lumber Co. v. Perry, 149 N.C. App. 19, 560 S.E.2d 817, 2002 N.C. App. LEXIS 128 (2002).

Claim Involving Denial of Special Use Permit. — Neither a trial court nor an appellate court had subject matter jurisdiction over a developer's appeal of a city council's denial of a special use permit to construct a cemetery where the proper avenue of appeal for the developer was to have petitioned for certiorari under G.S. 160A-381(c). Northfield Dev. Co. v. City of Burlington, 165 N.C. App. 885, 599 S.E.2d 921, 2004 N.C. App. LEXIS 1528 (2004), cert. denied, 359 N.C. 191, 607 S.E.2d 278 (2004).

Jurisdiction of Industrial Commission. — Because the Industrial Commission had sole jurisdiction over the plaintiff worker's allegations, after settlement, that defendants committed fraud, bad faith, unfair and deceptive trade practices, intentional infliction of emotional distress and civil conspiracy during the handling of his workers' compensation claim, the trial court properly dismissed his appeal pursuant to G.S. 1A-1, Rule 12(b). Deem v. Treadaway & Sons Painting & Wallcovering, Inc., 142 N.C. App. 472, 543 S.E.2d 209, 2001 N.C. App. LEXIS 141 (2001).

Trial court lacked subject matter jurisdiction over whether the insurance guaranty association was required by amendments to the Insurance Guaranty Association Act, G.S. 58-48-1 et seq., and the North Carolina Workers' Compensation Act, G.S. 97-1 et seq., to defend and indemnify the workers' compensation claims against the insolvent insurers, as the industrial commission had jurisdiction over the matter; not only was the association an insurer under G.S. 58-48-35(a)(2) over which the industrial commission had jurisdiction, but also, under G.S. 97-91, the industrial commission had jurisdiction to hear all questions arising under the Workers' Compensation Act. N.C. Ins. Guar. Ass'n v. Int'l Paper Co., 152 N.C. App. 224, 569 S.E.2d 285, 2002 N.C. App. LEXIS 1092 (2002).

Declaratory Judgment Action as to Criminal Statute. — Appellate court erred in finding that jurisdiction for a declaratory judgment action as to the constitutionality of a criminal statute did not exist because the case presented an actual controversy between parties with adverse interests; furthermore, the claimant sufficiently alleged imminent prosecution and that the claimant stood to lose fundamental human rights and property interests if the criminal statute was enforced and was later determined to be unconstitutional. Malloy v. Cooper, 356 N.C. 113, 565 S.E.2d 76, 2002 N.C. LEXIS 543 (2002).

V. PERSONAL JURISDICTION.

The manner of presenting the defense of lack of jurisdiction over the person is governed by this rule. Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972), rev'd on other grounds, 285 N.C. 689, 208 S.E.2d 649 (1974).

Personal Jurisdiction Found. — The plaintiff's complaint charging that defendant engaged in solicitations of and criminal conversation with plaintiff's husband via phone and e-mail, which resulted in the alienation of the affections of her husband, satisfied the requirements of the North Carolina long-arm statute and established the necessary minimum contacts between the South Carolina defendant and North Carolina sufficient to meet due process requirements; the plaintiff's allegations that there were sexual relations between the two and that she was injured in North Carolina due to the telephone and e-mail solicitations brought her claims within the purview of G.S. 1-75.4(4); although the quantity of defendant's contacts were not extensive, the injury occurred within North Carolina which had an interest in providing a forum for plaintiff's cause of action, not recognized in South Carolina, and the exercise of jurisdiction imposed only a minimal burden on the defendant who lives in a neighboring state. Cooper v. Shealy, 140 N.C. App. 729, 537 S.E.2d 854, 2000 N.C. App. LEXIS 1265 (2000).

North Carolina trial court had personal jurisdiction under the long-arm statute, G.S. 1-75.4(5)b, over a non-resident driver of a truck owned by a North Carolina resident, under a policy issued by a North Carolina insurer, that the driver authorized, ratified, and accepted, and the exercise of personal jurisdiction was consistent with due process requirements; the trial court erred in dismissing a declaratory action brought by the insurer against the driver under G.S. 1A-1, N.C. R. Civ. P. 12(b)(2). N.C. Farm Bureau Mut. Ins. Co. v. Holt, 154 N.C. App. 156, 574 S.E.2d 6, 2002 N.C. App. LEXIS 1413 (2002), cert. denied, appeal dismissed, 357 N.C. 63, 579 S.E.2d 391 (2003).

In a support enforcement action, the trial court properly concluded that the exercise of personal jurisdiction over the ex-husband and father complied with both the long-arm statute and due process because the father's activity of engaging in the real estate business in North Carolina, which the trial court's findings showed was systematic and continuous, was sufficient to support the conclusion that he purposefully availed himself of the privilege of conducting activities within North Carolina, thus invoking the benefits and protections of its laws, and could therefore have reasonably anticipated being haled into court in North Carolina; furthermore, the denial of the father's motion was appealable. Lang v. Lang, 157 N.C. App. 703, 579 S.E.2d 919, 2003 N.C. App. LEXIS 947 (2003).

Personal Jurisdiction Found. — Where a builder's customers lived in North Carolina, executed the contract in North Carolina, and conducted negotiations and discussions in the state, North Carolina could exercise of personal jurisdiction over him without violating due process and his motion to dismiss was denied. Carson v. Brodin, 160 N.C. App. 366, 585 S.E.2d 491, 2003 N.C. App. LEXIS 1801 (2003).

Personal Jurisdiction Not Established. — Trial court did not err in granting a Florida resort's motion to dismiss claims arising out of injuries sustained at the resort; the injured person did not establish that North Carolina had personal jurisdiction over tortious acts allegedly committed in North Carolina by private investigator working on behalf of the resort, as the injured person did not raise an issue of fact as to the resort's retention of control over how the investigator investigated the accident. Wyatt v. Walt Disney World, Co., 151 N.C. App. 158, 565 S.E.2d 705, 2002 N.C. App. LEXIS 726 (2002).

There were insufficient minimal contacts with North Carolina to establish either general or specific personal jurisdiction over a Japanese drug manufacturer which did not design, manufacture, package, sell, ship, or distribute the drug in question in North Carolina, and where, inter alia, having a few "seconded" employees in North Carolina and a bank account in North Carolina which was closed three years before suit was filed were only peripheral contacts; a trial court erred in denying the drug manufacturer's motion to dismiss for lack of personal jurisdiction in a suit brought by cancer patients alleging that the drug manufacturer and others violated various laws relating to the marketing and pricing of a drug, and participated in a fraudulent marketing, pricing, and sales scheme to defraud persons taking the drug. Stetser v. TAP Pharm. Prods., 162 N.C. App. 518, 591 S.E.2d 572, 2004 N.C. App. LEXIS 187 (2004).

Trial court properly granted a driver's motion pursuant to G.S. 1A-1, N.C. R. Civ. P. 12, to dismiss a personal injury action arising from an automobile accident, because the injured party failed to properly serve the driver pursuant to G.S. 1A-1, N.C. R. Civ. P. 4, and the driver did not make a general appearance by requesting an extension of time pursuant to G.S. 1-75.7, so the trial court lacked personal jurisdiction. Zellars v. McNair, 166 N.C. App. 755, 603 S.E.2d 826, 2004 N.C. App. LEXIS 2024 (2004), cert. denied, — N.C. —, 614 S.E.2d 925 (2005).

In an action filed by the State against a foreign corporation under G.S. 66-291, the trial court properly dismissed the action for lack of personal jurisdiction, because: (1) the State's conclusory allegation was insufficient to establish an alter ego theory of liability for personal jurisdiction purposes; (2) there was no evidence of any act or omission by the foreign corporation within North Carolina in the record; and (3) the trial court specifically found that the foreign corporation was not in the State of North Carolina when it received the alleged fraudulent funds from the North Carolina corporation. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 188 N.C. App. 302, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008).

Motion to Dismiss for Lack of Personal Jurisdiction. — Motion to dismiss should have been granted to defendant, where court lacked authority to exercise personal jurisdiction over it. Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

Trial court properly granted out-of-state law clients' motion to dismiss, pursuant to Rule 12(b)(2), in an action by a law firm seeking fees for work done on an appeal, pursuant to theories of breach of contract and quantum meruit where there was a statutory basis under G.S. 1-75.4 that supported a finding of personal jurisdiction, but there was no minimum contacts established to satisfy the grounds for specific jurisdiction; the court noted that unsolicited letters sent by the firm to the clients, which were never responded to, did not satisfy minimum contacts, nor was there proof that the clients had authorized another to contract with the firm on their behalf, or that the clients ever ratified the work that was allegedly done by the firm. Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC v. Jacobs, 158 N.C. App. 376, 581 S.E.2d 798, 2003 N.C. App. LEXIS 1195 (2003).

Inappropriate Challenge by Motion for Directed Verdict. — According to this section, a motion for a directed verdict is not an appropriate method of presenting the defense of lack of jurisdiction over the person. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

Methods of Challenging Jurisdiction. — This section provides that a defendant may raise the defense of lack of jurisdiction over his person by a pre-answer motion or by a responsive pleading. If the defendant fails to proceed in this manner, the defense of lack of jurisdiction is waived. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

Concept of Voluntary Appearance Not Abolished. — When this rule and G.S. 1-75.7 are construed together, it is apparent that this rule does not abolish the concept of the voluntary or general appearance. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974); Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 183 (1979).

Voluntary Appearance as Waiver of Defense of Lack of Personal Jurisdiction. — Nothing in the language of this rule prevents a defendant, prior to filing a answer or a motion in which he could set up a section (b) defense, from submitting himself to the jurisdiction of the court in which an action has been filed against him by formally entering his voluntary appearance, by seeking some affirmative relief at the hands of the court, or by utilizing the facilities of the court in some other manner inconsistent with the defense that the court has no jurisdiction over him, and once a defendant has submitted himself to the jurisdiction of the court by such conduct the defense of lack of jurisdiction over his person is no longer available to him. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

Nonresident defendant, by moving for a discretionary change of venue pursuant to G.S. 1-83(2) without first or simultaneously asserting his defenses under section (b) of this rule relating to jurisdiction and process, made a general appearance and voluntarily submitted himself to the jurisdiction of the court. Humphrey v. Sinnott, 84 N.C. App. 263, 352 S.E.2d 443 (1987).

Once defendant submitted herself to the jurisdiction of the court, then the defense of lack of jurisdiction over the person was no longer available to her. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

Right to Challenge Personal Jurisdiction Preserved Where General Appearance Made in Conjunction with or After Subsection (b)(2) Motion. — If a general appearance is made in conjunction with or after a subsection (b)(2) motion is properly filed, the right to challenge personal jurisdiction is preserved. Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212, modified and aff'd on other grounds on rehearing, 303 N.C. 367, 279 S.E.2d 840 (1981).

Where defendant's initial action was the filing of a motion which, inter alia, sought dismissal pursuant to subsection (b)(2) of this rule for lack of jurisdiction over his person, a subsequent general appearance would not have waived his right to challenge personal jurisdiction. Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

A general appearance will waive the right to challenge personal jurisdiction only when it is made prior to the proper filing of a subsection (b)(2) motion contesting jurisdiction over the person. Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

Where defendant's initial action was the filing of a motion which, inter alia, sought dismissal pursuant to subsection (b)(2) of this rule for lack of jurisdiction over his person, a subsequent general appearance would not have waived his right to challenge personal jurisdiction. Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

A general appearance by a party's attorney will dispense with process and service on the defendant; and the filing of an answer by the defendant's attorney, which does not include the defense of lack of personal jurisdiction, constitutes a waiver of this defense if the defense has not been raised in a prior motion. Grimsley v. Nelson, 117 N.C. App. 329, 451 S.E.2d 336 (1994), aff'd in part and rev'd in part, 342 N.C. 542, 467 S.E.2d 92 (1995).

Securing Enlargement of Time to Plead as General Appearance. — A defendant who, before asserting his defense that the court has no jurisdiction over his person by answer or pre-answer motion under sections (b) and (g) and subsection (h)(1), secures an enlargement of time in which to plead, is making a general appearance, thereby submitting to the court's jurisdiction and obviating the necessity of any service of summons. Philpott v. Kerns, 285 N.C. 225, 203 S.E.2d 778 (1974). See also, Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

In determining whether a general appearance was made, § 1-75.7 must be construed with this rule, since these statutes are part of the same enactment. Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212, modified and aff'd on other grounds on rehearing, 303 N.C. 367, 279 S.E.2d 840 (1981).

This rule and G.S. 1-75.7 must be construed together since they are a part of the same enactment. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974); Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978), appeal dismissed, 296 N.C. 740, 254 S.E.2d 183 (1979).

General Appearance Not Shown. — Because the filing of the answer was entirely consistent with this section and because the record revealed that the plaintiffs were fully aware of the fact that the attorney signing the answer represented the insurance company, there arises no presumption that the attorney represented the defendant. Accordingly, the answer did not constitute a general appearance by the defendant, and the defendant was not precluded from later raising the defense of lack of personal jurisdiction. Grimsley v. Nelson, 117 N.C. App. 329, 451 S.E.2d 336 (1994), aff'd in part and rev'd in part, 342 N.C. 542, 467 S.E.2d 92 (1995).

In a wrongful death case by the personal representative of the decedent, the case was properly dismissed where (1) the representative conceded that service of process was not properly made, and (2) the court also rejected the representative's argument that one of the defendant's appearances for various motions was a general appearance that waived jurisdiction; the court found that a motion for a continuance to respond to the complaint, for costs related to an earlier voluntary dismissal of a prior suit, and for extensive discovery did not constitute general appearances and did not waive the defendant's jurisdictional defenses based on failure of service. Draughon v. Harnett County Bd. of Educ., 166 N.C. App. 449, 602 S.E.2d 717, 2004 N.C. App. LEXIS 1784 (2004).

A defendant submits to the jurisdiction of the court by formally entering a voluntary appearance, by seeking some affirmative relief at the hands of the court, or by utilizing the facilities of the court in some manner inconsistent with the defense that the court has no jurisdiction over her. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

Evidence of Backdated Signature Voids Judgment Occurring Within 30 Days. — Wife who agreed to husband's request that she backdate her signature on the "Acceptance of Service" submitted sufficient testimony that she did so in support of her motion to set aside a judgment of absolute divorce on the grounds that the trial court was without jurisdiction to adjudicate the absolute divorce prior to the expiration of the requisite thirty days. Latimer v. Latimer, 136 N.C. App. 227, 522 S.E.2d 801, 1999 N.C. App. LEXIS 1313 (1999), decided prior to 2001 amendment to subsection (c).

Effects of Failure to Raise Issue And of Stipulating to Jurisdiction. — Where defendants raised the issues of failure to state a claim and lack of subject matter jurisdiction, but failed to raise the issue of personal jurisdiction, and stipulated in the record before the appellate court that they were properly before the trial court, the defendants could not argue that they were not subject to suit under Chapters 108A and 122C and G.S. 153A-77. Hobbs v. North Carolina Dep't of Human Resources, 135 N.C. App. 412, 520 S.E.2d 595, 1999 N.C. App. LEXIS 1146 (1999).

Defendant made a general appearance in a child custody proceeding and submitted herself to the jurisdiction of the court by making a motion invoking the adjudicatory power of the court to determine whether full faith and credit should be given to a custody decree entered in another state. Lynch v. Lynch, 302 N.C. 189, 274 S.E.2d 212, modified and aff'd on other grounds on rehearing, 303 N.C. 367, 279 S.E.2d 840 (1981).

Option of Presenting Lack of Jurisdiction by Pre-Answer Motion or Answer Substituted for Special Appearance. — This rule eliminated the special appearance and, in lieu thereof, gave a defendant the option of making the defense of lack of jurisdiction over the person by pre-answer motion or by answer, even though a defendant makes a general appearance when he files an answer. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974).

This rule did not abolish the concept of the voluntary or general appearance but did eliminate the special appearance, and, in lieu thereof, gave defendant the option of making the defense of lack of jurisdiction over the person by pre-answer motion or by answer. Lynch v. Lynch, 45 N.C. App. 391, 264 S.E.2d 114 (1980), aff'd in part and rev'd in part, 302 N.C. 189, 274 S.E.2d 212, modified and aff'd on other grounds on rehearing, 303 N.C. 367, 279 S.E.2d 840 (1981).

Where defendant admits the existence of jurisdiction in her answer, that fact is conclusively established and cannot be disputed. Harris v. Pembaur, 84 N.C. App. 666, 353 S.E.2d 673 (1987).

Filing Answer as Waiver of Right to Contest. — The defendant waived his right to contest lack of personal jurisdiction when he filed his answer without raising this defense. Jackson County ex rel. Child Support Enforcement Agency v. Swayney, 75 N.C. App. 629, 331 S.E.2d 145 (1985), rev'd in part on other grounds, 319 N.C. 52, 352 S.E.2d 413, cert. denied, 484 U.S. 826, 108 S. Ct. 93, 98 L. Ed. 2d 54 (1987).

In defendant's answer, he made a motion under subsection (b)(6) of this rule, and a res judicata motion, without making a motion to contest personal jurisdiction. By filing his answer without contesting personal jurisdiction, his right to challenge the court's exercise of personal jurisdiction over him was waived. Stern v. Stern, 89 N.C. App. 689, 367 S.E.2d 7 (1988).

Section 1-277(b) allows the immediate appeal of a denial of subsection (b)(2) motion, but not the immediate appeal of a denial of a subsection (b)(1) motion. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

An appeal lies immediately from the refusal to dismiss a cause for want of jurisdiction. In re Will of Lamb, 48 N.C. App. 122, 268 S.E.2d 831 (1980), rev'd on other grounds, 303 N.C. 452, 279 S.E.2d 781 (1981).

An appeal lies immediately from refusal by the trial court to dismiss a cause for want of jurisdiction over the person where the motion is made pursuant to subsection (b)(2) of this rule. Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670, cert. denied, 312 N.C. 621, 323 S.E.2d 921 (1984).

Jurisdiction over Incarcerated Father in Termination Proceeding. — Trial court properly asserted personal jurisdiction over a father, incarcerated in Pennsylvania, in a proceeding for termination of his parental rights over his 13 year old child, who resided in North Carolina, despite the father's lack of minimum contacts with North Carolina, where: (1) the father never had a custodial relationship with the child, nor did he have any significant personal or financial relationship with the child other than an occasional letter and a total of $125 in monies and gifts; (2) the relationship was unlikely to change in the future due to the father's lengthy incarceration and the child's unwillingness to see him; and (3) the father's only alternative for providing for care of the child was through the assistance of his parents, who had no relationship with the child, and even failed to attend the termination of parental rights hearing. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

In paternity suit, where trial court adequately inquired into defendant's contacts with this State and set its findings out in its order, without objection of defendant, the hearing which was held on defendant's motion to dismiss for lack of personal jurisdiction comported with all due process requirements. Cochran v. Wallace, 95 N.C. App. 167, 381 S.E.2d 853 (1989).

No Error in Denial of Motion. — Despite a distributor's claims that his manufacturer's export agent, who lived in Great Britain, had tortiously interfered with the distributor-manufacturer relationship, in that the agent hired the distributor's salesman with the intention of establishing his own distributorship, a trial court did not err in denying the distributor's motion, made pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b), to vacate its order in which it had dismissed the complaint on the ground that under the Due Process Clause, the trial court had no personal jurisdiction over the manager. Review under a Rule 60(b) motion was limited to determining whether a trial court had abused its discretion, the documents submitted with the motion would not have changed the trial court's ruling on the motion to dismiss, and the distributor had been given the opportunity to obtain and present the documents in the evidentiary hearing on the Rule 60(b) motion but had failed to do so. Deer Corp. v. Carter, 177 N.C. App. 314, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006).

Despite a distributor's claims that his manufacturer's export agent, who lived in Great Britain, had tortiously interfered with the distributor-manufacturer relationship, in that the agent hired the distributor's salesman with the intention of establishing his own distributorship, a trial court did not err in ruling that under the Due Process Clause, no personal jurisdiction existed over the manager. The personal knowledge requirement for documents and affidavits, as contained in G.S. 1A-1, N.C. R. Civ. P. 56(e), applied to motions to dismiss under G.S. 1A-1, N.C. R. Civ. P. 12(b)(2), not all parts of the distributor's affidavits and complaint were based on personal knowledge, and only those parts based on personal knowledge, which were insufficient to show personal jurisdiction, could be considered. Deer Corp. v. Carter, 177 N.C. App. 314, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006).

Appeal of Dismissal. — Appeal of a motion to dismiss under G.S. 1A-1, N.C. R. Civ. P. 12(b)(2) based on sovereign immunity was a question of personal jurisdiction rather than subject matter jurisdiction, and was immediately appealable. Meherrin Indian Tribe v. Lewis, — N.C. App. —, 677 S.E.2d 203, 2009 N.C. App. LEXIS 661 (2009).

VI. IMPROPER VENUE.

Venue Is Not Jurisdictional. — The principle that venue is not jurisdictional, but is only ground for removal to the proper county, if objection thereto is made in apt time and in the proper manner, appears to be fully supported by section (b) and subsection (h)(1) of this rule. Shaw v. Stiles, 13 N.C. App. 173, 185 S.E.2d 268 (1971).

Defense of improper venue may be raised in the answer if no pre-answer motions have been made. Swift & Co. v. Dan-Cleve Corp., 26 N.C. App. 494, 216 S.E.2d 464 (1975).

Where motion asserting improper venue is made in writing in apt time, question of removal becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

In the absence of waiver or consent of the parties, express or implied, when a motion for change of venue as a matter of right has been properly made in apt time, the court is in error thereafter to enter any order affecting the rights of the parties, save the order of removal. Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Court was not required to rule on motion for change of venue prior to granting plaintiffs' motions for possession of collateral, since an ancillary order of attachment had already been entered, since granting possession of the collateral to plaintiffs did not affect defendant's ultimate rights, and since the motion for change of venue involved a change within the district. Citicorp Person-to-Person Fin. Center, Inc. v. Stallings 601 Sales, Inc., 49 N.C. App. 187, 270 S.E.2d 567 (1980).

Motion for Change of Venue Under Subsection (B)(3) and G.S. 1-76. — Trial court erred in denying a store seller's motion to change venue, pursuant to G.S. 1A-1, Rule 12(b)(3), in the store purchaser's action, which alleged breach of the parties' contract, and which sought damages and specific enforcement of the agreement; the court noted that pursuant to G.S. 1-76, the outcome of the action involved a direct determination of an interest in real property of one store which was left out during the closing of the parties' agreement, and accordingly, the action was local and should have been brought in the county where that store was located. Fox Holdings, Inc. v. Wheatly Oil Co., 161 N.C. App. 47, 587 S.E.2d 429, 2003 N.C. App. LEXIS 1977 (2003).

Motion for Change of Venue Under Subsection (b)(3) and § 1-83(2). — Defendant's motion for change of venue properly was filed after the answer was filed because, although motions for change of venue based on improper venue, pursuant to subsection (b)(3) of this rule, must be filed prior to or with the answer, motions for change of venue based on the convenience of witnesses, pursuant to G.S. 1-83(2), must be filed after the answer is filed, and defendant's motion was based on the convenience of the witnesses. McCullough v. Branch

Banking & Trust Co., 136 N.C. App. 340, 524 S.E.2d 569 (2000).

Defense of Improper Venue Not Waived by Motion for Enlargement of Time. — While section (h) of this rule provides for waiver of the defense of improper venue where not joined in a motion made under this rule, this waiver is not applicable to a motion for enlargement of time made under G.S. 1A-1, Rule 6. Moseley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

Implied Waiver of Right to Change Venue. — Where in a divorce action almost a year passed between the time defendant filed motion for change of venue under subsection (b)(3) of this rule and the first hearing date, at which time defendant sought a continuance, and on the second hearing date five months later defendant failed to appear, the trial court was justified in finding an implied waiver of defendant's right to a change of venue by her failure to pursue her motion for removal. Miller v. Miller, 38 N.C. App. 95, 247 S.E.2d 278 (1978).

When a child was undisputedly present in the county over which a district court had jurisdiction when a petition to terminate the parental rights of the child's father was filed in that court, and the father did not seek a change of venue after the petition was filed, waiving any defect in venue under G.S. 1A-1, N.C. R. Civ. P. 12(b), the district court properly heard the petition. In re J.L.K., 165 N.C. App. 311, 598 S.E.2d 387, 2004 N.C. App. LEXIS 1162 (2004), cert. denied, 359 N.C. 68, 604 S.E.2d 314 (2004).

Forum Selection Clause. — Employer's motion to dismiss an employee's action alleging unlawful termination should have been made under G.S. 1A-1, N.C. R. Civ. P. 12(b)(3), not under G.S. 1A-1, N.C. R. Civ. P. 12(b)(1) and (2), because it raised the issue of whether North Carolina courts were barred from hearing the case by a forum selection clause in the parties' contract that specified that they would use courts in Los Angeles County (California) to resolve their disputes; however, the appellate court heard the employer's appeal from the trial court's judgment denying its motion because the parties tried the issue, and found that the forum selection clause did not bar North Carolina courts from tryng the employee's lawsuit. Hickox v. R&G Group Int'l, 161 N.C. App. 510, 588 S.E.2d 566, 2003 N.C. App. LEXIS 2184 (2003).

VII. INSUFFICIENCY OF PROCESS.

Sufficient Compliance Shown. — In a proceeding for termination of paternal rights, certified mail return receipt and defendant father's filed petition showed sufficient compliance with the service of process rules to raise a rebuttable presumption of valid service, which defendant did not rebut, where: (1) copies of the summons and complaint were sent by certified mail to the correctional institution where defendant was an inmate; (2) a certified receipt was signed and returned, presumably by a prison employee of suitable age and discretion authorized to sign the receipt on behalf of defendant; and (3) 18 days after service, defendant filed a petition for appointment of counsel. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

Correctable Error. — Trial court erred in granting defendants' motion to dismiss pursuant to subdivisions (b)(4) and (5) as the designation of the incorrect county on the civil summons form was not a jurisdictional defect but rather an irregularity or error in form correctable by amending the summons in accordance with Rule 4(i). Hazelwood v. Bailey, 339 N.C. 578, 453 S.E.2d 522 (1995).

Waiver of Insufficient Process by Making General Appearance. — Since the failure of a summons to comply with G.S. 7B-1106(a)(5) implicated the trial court's jurisdiction over the children, not over the termination of parental rights action as a whole, pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(h)(1), a general appearance by the children's guardian ad litem and attorney advocate waived any objection to the jurisdictional requirements of G.S. 7B-1101. In re J.T., 363 N.C. 1, 672 S.E.2d 17, 2009 N.C. LEXIS 113 (2009).

VIII. INSUFFICIENCY OF SERVICE.

Where there was no valid service of process, the court acquired no jurisdiction over defendant and defendant's motion to dismiss under this rule on jurisdictional grounds should have been allowed. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974).

Where the trial court record showed that plaintiff failed to request defendant's appearance in its Delayed Service of Complaint, the trial court found that no summons had ever been served on defendant and properly granted defendant's motion to dismiss. Hemmings v. Green, 122 N.C. App. 191, 468 S.E.2d 278 (1996).

Insufficiency of Service Not Waived by Taking Deposition After Filing Answer Raising the Defense. — Defendant did not waive the defense of insufficiency of service of process by taking plaintiff's deposition after answer was filed raising the jurisdictional defense. Wiles v. Welparnel Constr. Co., 34 N.C. App. 157, 237 S.E.2d 297 (1977), rev'd on other grounds, 295 N.C. 81, 243 S.E.2d 756 (1978).

Appeal. — An order ruling on the sufficiency of service of process is not immediately appealable. Seabrooke v. Hagin, 83 N.C. App. 60, 348 S.E.2d 614 (1986).

In a collection suit, the court of appeals did not reach a debtor's argument that the trial court erred in denying its motion to dismiss, pursuant to G.S. 1A-1-12(b)(5), on the ground the creditor did not comply with all requirements for service by publication, where the order from which the debtor sought appeal was interlocutory. Autec, Inc. v. Southlake Holdings, LLC, 171 N.C. App. 147, 613 S.E.2d 727, 2005 N.C. App. LEXIS 1162 (2005).

Service Not Insufficient. — A successful service of process occurring within thirty days after issuance of a summons is valid even if there has been a prior unsuccessful attempt at serving that same summons. An endorsement, alias summons or pluries summons are not necessary. Shiloh Methodist Church v. Keever Heating & Cooling Co., 127 N.C. App. 619, 492 S.E.2d 380 (1997), decided prior to 2001 amendment to subsection (c).

Defendant store's motion to dismiss stated with sufficient particularity the grounds alleged by citing G.S. 1A-1, Rule 12(b)(4) and 12(b)(5) and specified that plaintiffs, a husband and wife, failed to properly serve it as a corporation and instead served a mailroom employee; fact that the store filed the affidavit of the mailroom employee after its motion was insignificant, because the trial court gave plaintiffs the opportunity to respond and oppose the amended motion. Lane v. Winn-Dixie Charlotte, Inc., 169 N.C. App. 180, 609 S.E.2d 456, 2005 N.C. App. LEXIS 537 (2005).

Where defendant submitted only one witness affidavit disputing service of process, that one affidavit was insufficient to rebut the presumption that a return under G.S. 1A-1-4(j)(1)a. of valid service from a sheriff's deputy was proof of valid service; dismissal of plaintiff's complaint under G.S. 1A-1-12(b)(4), (5) for insufficient service was improper. Saliby v. Conners, 171 N.C. App. 435, 614 S.E.2d 416, 2005 N.C. App. LEXIS 1258 (2005).

IX. FAILURE TO STATE CLAIM.

A. In General.

Constitutional Issues. — To test the legal sufficiency of a complaint asserting constitutional issues, a party may move to dismiss under this rule. North Carolina E. Mun. Power v. Wake County, 100 N.C. App. 693, 398 S.E.2d 486 (1990), cert. denied, 329 N.C. 270, 407 S.E.2d 838 (1991).

Constitutional Violations by a Defendant in His Individual Capacity. — Plaintiffs' alleged state constitutional claims against defendant/police officer in his individual capacity were properly dismissed pursuant to this rule. Estate of Fennell v. Stephenson, 37 N.C. App. 430, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000).

Plaintiffs' state constitutional claim against defendant/police officer in his official capacity was improperly dismissed where they alleged that he unconstitutionally "detained or seized . . . [the decedent]" for which there is an adequate remedy provided by state law but which cause of action, false imprisonment, does not survive the death of a decedent. Estate of Fennell v. Stephenson, 37 N.C. App. 430, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000).

Plaintiffs' constitutional claim against defendant/police officer in his official capacity was properly dismissed where they alleged a state constitutional claim—i.e. that he unconstitutionally "searched . . . [decedent's] vehicle"—for which there was an adequate remedy provided by state law, a common law action for trespass to chattel. Estate of Fennell v. Stephenson, 37 N.C. App. 430, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000).

Where the plaintiffs had an adequate remedy at law, a wrongful death claim under G.S. 28A-18-2 which would compensate plaintiffs for the same alleged injuries. Estate of Fennell v. Stephenson, 37 N.C. App. 430, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000).

Lack of Standing. — A party has standing to initiate a lawsuit if he is a real party in interest; a motion to dismiss a party's claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to N.C. R. Civ. P. 12(b)(6). Slaughter v. Swicegood, 162 N.C. App. 457, 591 S.E.2d 577, 2004 N.C. App. LEXIS 190 (2004).

Where the trial court did not certify the order denying construction company's motion to dismiss an action brought by homeowners association as immediately appealable pursuant to G.S. 1A-1, Rule 54, and the construction company did not appear to be deprived of any substantial right which could not be protected by timely appeal from the ultimate disposition of the controversy on its merits, the appeal was dismissed. Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co., 175 N.C. App. 380, 623 S.E.2d 620, 2006 N.C. App. LEXIS 71 (2006).

Plaintiffs investors' claim of negligent misrepresentation was properly dismissed pursuant to this section where they failed to make pertinent inquiries as to accuracy of information received from defendant insurance agent and therefore could not show that they reasonably relied on his information; by the plain language admittedly used by the agent, plaintiffs should have been put on notice that the fact of whether the revitalized entity would be profitable remained a risk. Simms v. Prudential Life Ins. Co. of Am., 140 N.C. App.

529, 537 S.E.2d 237, 2000 N.C. App. LEXIS 1203 (2000).

The only purpose of a motion under subsection (b)(6) of this rule is to test the legal sufficiency of the pleading against which it is directed. In deciding such a motion the trial court is to treat the allegations of the pleading it challenges as true. Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984), rev'd in part and aff'd in part, 315 N.C. 103, 337 S.E.2d 528 (1985), cert. denied, 479 U.S. 835, 107 S. Ct. 131, 93 L. Ed. 2d 75 (1986).

The essential question on a motion under subsection (b)(6) of this rule is whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory. Barnaby v. Boardman, 70 N.C. App. 299, 318 S.E.2d 907, rev'd on other grounds, 313 N.C. 565, 330 S.E.2d 600 (1985).

The question for the court on a motion to dismiss is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. Harris v. NCNB Nat'l Bank, 85 N.C. App. 669, 355 S.E.2d 838 (1987).

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleadings, when taken as true, are legally sufficient to satisfy the elements of at least some legally recognized claim. Arroyo v. Scottie's Professional Window Cleaning, Inc., 120 N.C. App. 154, 461 S.E.2d 13 (1995), discretionary review improvidently allowed, 343 N.C. 118, 468 S.E.2d 58 (1996).

Where loan between brothers was secured by deed of trust and son of borrower was made trustee, because of the close family relationships of the parties, the question of when lender knew or should have known of trustee's alleged breach of fiduciary duty was question for trier of fact, and lender's action against trustee was not subject to dismissal on borrower's and trustee's motion to dismiss alleging the action was time barred under subsection (b)(6) of this rule. Dawn v. Dawn, 122 N.C. App. 493, 470 S.E.2d 341 (1996).

Complaint Must Be Liberally Construed. — In analyzing the sufficiency of the complaint under subsection (b)(6) of this rule, the complaint must be liberally construed. Dixon v. Stuart, 85 N.C. App. 338, 354 S.E.2d 757 (1987).

Failure to State Claim May Be Asserted in Responsive Pleading or by Motion to Dismiss. — When a pleader has failed to state a claim upon which relief can be granted, his adversary is permitted by subsection (b)(6) of this rule to assert this defense either in a responsive pleading or by motion to dismiss. Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

In ruling upon a subdivision (b)(6) motion, the trial court should liberally construe the complaint and should not dismiss the action unless it appears to a certainty that plaintiff is entitled to no relief under any statement of facts which could be proved in support of the claim. Arroyo v. Scottie's Professional Window Cleaning, Inc., 120 N.C. App. 154, 461 S.E.2d 13 (1995), discretionary review improvidently allowed, 343 N.C. 118, 468 S.E.2d 58 (1996).

Motion Under Subsection (b)(6) Available in Declaratory Judgment Action. — When the record shows that there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine existing controversy, this may be taken advantage of by a subsection (b)(6) motion to dismiss. Kirkman v. Kirkman, 42 N.C. App. 173, 256 S.E.2d 264, cert. denied, 298 N.C. 297, 259 S.E.2d 300 (1979).

When Motion Under Subsection (b)(6) May Be Made. — A motion to dismiss for failure to state a claim upon which relief may be granted under subsection (b)(6) of this rule may be made as late as trial upon the merits. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

A motion under subsection (b)(6) cannot be raised for the first time on appeal. Collyer v. Bell, 12 N.C. App. 653, 184 S.E.2d 414 (1971); Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

Where there has been a trial, a party cannot on appeal interpose the defense that the complaint fails to state a claim upon which relief can be granted. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

Subsection (b)(6) is an analogue to section (f), and the same tests as to legal principles apply. Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 204 (1977).

For discussion of the similarities and differences between motions under subsection (b)(6) of this rule and § 1A-1, Rule 56, see Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50, cert. denied, 298 N.C. 296, 259 S.E.2d 301 (1979).

Motion to dismiss is the usual and proper method of testing legal sufficiency of the complaint. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978); Lloyd v. Babb, 296 N.C. 416, 251 S.E.2d 843 (1979); Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Braun v. Glade Valley

Sch., Inc., 77 N.C. App. 83, 334 S.E.2d 404 (1985).

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971); Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978); McKinney Drilling Co. v. Nello L. Teer Co., 38 N.C. App. 472, 248 S.E.2d 444 (1978); Fowler v. Williamson, 39 N.C. App. 715, 251 S.E.2d 889 (1979); Snyder v. Freeman, 40 N.C. App. 348, 253 S.E.2d 10 (1979), rev'd, 300 N.C. 204, 266 S.E.2d 593 (1980); Kinlaw v. Long Mfg. N.C., Inc., 40 N.C. App. 641, 253 S.E.2d 629, rev'd on other grounds, 298 N.C. 494, 259 S.E.2d 552 (1979); GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979); Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50, cert. denied, 298 N.C. 296, 259 S.E.2d 301 (1979); United Leasing Corp. v. Miller, 45 N.C. App. 400, 263 S.E.2d 313, cert. denied, 300 N.C. 374, 267 S.E.2d 685 (1980); State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

Where it appears to a certainty that plaintiffs are entitled to no relief under any state of facts which could be proved in support of the claim, dismissal for failure to state a claim upon which relief can be granted is proper. Alamance County v. N.C. Dep't of Human Resources, 58 N.C. App. 748, 294 S.E.2d 377 (1982).

To prevent a dismissal under subsection (b)(6) of this rule, a party must (1) give sufficient notice of the events on which the claim is based to enable the adverse party to respond and prepare for trial, and (2) state enough to satisfy the substantive elements of at least some legally recognized claim. Hewes v. Johnston, 61 N.C. App. 603, 301 S.E.2d 120 (1983); Vinson v. McManus, 68 N.C. App. 763, 316 S.E.2d 98 (1984); Peele v. Provident Mut. Life Ins. Co., 90 N.C. App. 447, 368 S.E.2d 892, appeal dismissed, 323 N.C. 366, 373 S.E.2d 547 (1988).

The motion to dismiss under subsection (b)(6) of this rule tests the sufficiency of the complaint to state a claim for relief. Hendrix v. Hendrix, 67 N.C. App. 354, 313 S.E.2d 25 (1984).

A motion under subsection (b)(6) of this rule tests the legal sufficiency of the claim. The rules regarding the sufficiency of a complaint to withstand such a motion are equally applicable to a claim for relief presented in a counterclaim by the defendant. A counterclaim is sufficient to withstand the motion where no insurmountable bar to recovery on the claim appears on its face. Thus, the question becomes whether the counterclaim states a claim upon which relief can be granted on any theory. Chrysler Credit Corp. v. Rebhan, 66 N.C. App. 255, 311 S.E.2d 606 (1984).

A legal insufficiency may be due to an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

Where the facts are insufficient as a matter of law to constitute reasonable reliance on them, a complaint alleging fraud or negligent representation is properly dismissed. Hudson-Cole Dev. Corp. v. Beemer, 132 N.C. App. 341, 511 S.E.2d 309 (1999).

Motion Under Subsection (b)(6) Is Modern Equivalent of Demurrer. — A motion to dismiss for failure to state a claim upon which relief can be granted is the modern equivalent of a demurrer. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Green v. Best, 9 N.C. App. 599, 176 S.E.2d 853 (1970).

Which Performs Substantially Same Function as Demurrer. — The motion to dismiss under subsection (b)(6) of this rule performs substantially the same function as the old common-law general demurrer. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178, rehearing denied, 286 N.C. 547, 212 S.E.2d 169 (1974); Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Pierce v. Piver, 45 N.C. App. 111, 262 S.E.2d 320, appeal dismissed, 300 N.C. 375, 282 S.E.2d 228 (1980).

A motion under subsection (b)(6) of this rule performs substantially the same function as a demurrer for failure to state facts sufficient to constitute a cause of action. Hodges v. Wellons, 9 N.C. App. 152, 175 S.E.2d 690 (1970).

And Will Only Be Allowed When Demurrer Would Have Been Sustained. — The motion to dismiss will only be allowed when, under the former practice, a demurrer would have been sustained because the complaint affirmatively disclosed that the plaintiff had no cause of action against the defendant. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971); Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976).

Treatment of Demurrer as Motion Under Subsection (b)(6). — The trial court did not err in considering demurrers filed prior to the effective date of the Rules of Civil Procedure as motions under subsection (b)(6) of this rule where plaintiff was not taken by surprise because the grounds stated in the demurrers were grounds covered by the rule. Hodges v.

Wellons, 9 N.C. App. 152, 175 S.E.2d 690 (1970). See also, Green v. Best, 9 N.C. App. 599, 176 S.E.2d 853 (1970).

Motion to Dismiss Converted to Motion to Compel Arbitration. — Defendant's motion to dismiss pursuant to subsection (b)(6) of this rule based on "the terms and provisions of the parties' Employment Agreement which provides for binding arbitration" would be treated as an application to stay litigation and compel arbitration pursuant to former G.S. 1-567.3(a), and the order of dismissal would be vacated and the matter remanded to the trial court for further appropriate proceedings. Novacare Orthotics & Prosthetics E., Inc. v. Speelman, 137 N.C. App. 471, 528 S.E.2d 918, 2000 N.C. App. LEXIS 407 (2000).

Motion to Dismiss Treated as Motion for a More Definite Statement. — There was no abuse of discretion in the trial court's treating defendants' motion to dismiss, under G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) as a motion for a more definite statement., under G.S. 1A-1, N.C. R. Civ. P. 12(e), and then ordering plaintiff to file a second amended complaint, with a more definite statement. Page v. Mandel, 154 N.C. App. 94, 571 S.E.2d 635, 2002 N.C. App. LEXIS 1417 (2002), cert. denied, 356 N.C. 676, 577 S.E.2d 631 (2003).

Function of a motion to dismiss is to test the law of a claim, not the facts which support it. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979); Pierce v. Piver, 45 N.C. App. 111, 262 S.E.2d 320 (1980); Snyder v. Freeman, 300 N.C. 204, 266 S.E.2d 593 (1980); State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 233 (1981); Laumann v. Plakakis, 84 N.C. App. 131, 351 S.E.2d 765 (1987).

The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient. State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

In reviewing a Rule 12(b)(6) motion, a court must determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not; the trial court may grant this motion if there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. Dalenko v. Wake County Dep't of Human Servs., 157 N.C. App. 49, 578 S.E.2d 599, 2003 N.C. App. LEXIS 371 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 386 (2003), cert. denied, 540 U.S. 1178, 124 S. Ct. 1411, 158 L. Ed. 2d 79 (2004).

A ruling on the merits cannot be made on a motion to dismiss, Wilkes v. North Carolina State Bd. of Alcoholic Control, 44 N.C. App. 495, 261 S.E.2d 205 (1980), but see, Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988), annotated below.

Subsection (b)(6) as Adjudication on the Merits. — Section 1A-1, Rule 41(b) provides the basis for concluding that dismissal under subsection (b)(6) of this rule is an adjudication on the merits; therefore, a dismissal under subsection (b)(6) bars subsequent relitigation of the same claim. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Although well-pleaded factual allegations of a complaint are treated as true for purposes of a Rule 12(b)(6) motion, conclusions of law or unwarranted deductions of facts are not admitted; thus, while courts are to treat as true a plaintiff's factual allegations, it is a court's task to determine whether those allegations as a matter of law state a claim. Dalenko v. Wake County Dep't of Human Servs., 157 N.C. App. 49, 578 S.E.2d 599, 2003 N.C. App. LEXIS 371 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 386 (2003), cert. denied, 540 U.S. 1178, 124 S. Ct. 1411, 158 L. Ed. 2d 79 (2004).

Dismissal of an attorney's complaint against a medical records provider was based on G.S. 1A-1, Rule 12(b)(6), rather than Rule 12(b)(1), where the trial court had dismissed the action with prejudice; it was noted that a dismissal under Rule 12(b)(1) was not on the merits, and accordingly, was not given res judicata effect, whereas a dismissal under Rule 12(b)(6) barred subsequent relitigation of the same claim. Street v. Smart Corp., 157 N.C. App. 303, 578 S.E.2d 695 (2003).

Dismissal Improper Where Allegations Support Claims. — Dismissal was error as to the insured's and trustees' claims for fraud, negligent misrepresentation, and unfair and deceptive practices, given allegations supporting these claims; however, a constructive fraud claim was not supported and was properly dismissed. Hunter v. Guardian Life Ins. Co. of Am., 162 N.C. App. 477, 593 S.E.2d 595, 2004 N.C. App. LEXIS 174 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 48, 599 S.E.2d 49 (2004).

Allegations Treated as True. — For the purpose of a motion to dismiss, the allegations of the complaint are treated as true. Smith v. Ford Motor Co., 289 N.C. 71, 221 S.E.2d 282 (1976); Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976); Presnell v. Pell, 39 N.C. App. 538, 251 S.E.2d 692, aff'd in part and rev'd in part on other grounds, 298 N.C. 715, 260 S.E.2d 611 (1979); Fowler v. Williamson, 39 N.C. App. 715, 251 S.E.2d 889 (1979); Kinlaw v. Long Mfg. N.C., Inc., 40 N.C. App. 641, 253 S.E.2d 629, rev'd on other grounds, 298 N.C. 494, 259 S.E.2d 552 (1979); Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d

50, cert. denied, 298 N.C. 296, 259 S.E.2d 301 (1979); State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 233 (1981); Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed, 454 U.S. 959, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981); Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981); Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981); Mebane v. Board of Medical Exmrs., 55 N.C. App. 455, 286 S.E.2d 112, cert. denied and appeal dismissed, 305 N.C. 586, 292 S.E.2d 6 (1982); Ladd v. Estate of Kellenberger, 314 N.C. 477, 334 S.E.2d 751 (1985); Sorrell v. Sorrell's Farms & Ranches, Inc., 78 N.C. App. 415, 337 S.E.2d 595 (1985); Hawkins v. Webster, 78 N.C. App. 589, 337 S.E.2d 682 (1985); Fox v. Wilson, 85 N.C. App. 292, 354 S.E.2d 737 (1987); Peele v. Provident Mut. Life Ins. Co., 90 N.C. App. 447, 368 S.E.2d 892 (1988), appeal dismissed, 323 N.C. 366, 373 S.E.2d 547 (1988).

In ruling on a motion to dismiss for failure to state a claim, the allegations of the complaint must be viewed as admitted. Rawls v. Lampert, 58 N.C. App. 399, 293 S.E.2d 620 (1982).

In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Rawls v. Lampert, 58 N.C. App. 399, 293 S.E.2d 620 (1982); Andresen v. Eastern Realty Co., 60 N.C. App. 418, 298 S.E.2d 764 (1983); Ruffin v. Contractors & Materials, Inc., 69 N.C. App. 174, 316 S.E.2d 353 (1984); State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986); Warren v. Halifax County, 90 N.C. App. 271, 368 S.E.2d 47 (1988).

When a motion for judgment on the pleadings is made, all well-pleaded factual allegations in the nonmoving party's pleadings must be taken as true. Burton v. Kenyon, 46 N.C. App. 309, 264 S.E.2d 808 (1980); Rose v. Guilford County, 60 N.C. App. 170, 298 S.E.2d 200 (1982).

For purposes of ruling on a motion to dismiss, the well-pleaded material allegations of the complaint are taken as admitted. Snug Harbor Property Owners Ass'n v. Curran, 55 N.C. App. 199, 284 S.E.2d 752 (1981), cert. denied, 305 N.C. 302, 291 S.E.2d 151 (1982).

In an appellate review of a dismissal of a counterclaim under subdivision (b)(6) of this rule, the material allegations of fact alleged in the counterclaim were taken as admitted. Barnaby v. Boardman, 313 N.C. 565, 330 S.E.2d 600 (1985).

Where case was dismissed prior to trial pursuant to subdivision (b)(6), it is clear under North Carolina law that the court must treat the allegations of the complaint as true. Hickman ex rel. Womble v. McKoin, 337 N.C. 460, 446 S.E.2d 80 (1994).

But Not Conclusions or Unwarranted Deductions. — For the purpose of the motion to dismiss, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Lloyd v. Babb, 296 N.C. 416, 251 S.E.2d 843 (1979); Hoover v. Liberty Mut. Ins. Co., 84 N.C. App. 549, 353 S.E.2d 248 (1987); Hill v. Perkins, 84 N.C. App. 644, 353 S.E.2d 686 (1987).

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the allegations of the complaint must be viewed as admitted, and the motion should not be allowed unless the complaint affirmatively shows that plaintiff has no cause of action. Gatlin v. Bray, 81 N.C. App. 639, 344 S.E.2d 814 (1986).

On a motion to dismiss for failure to state a claim upon which relief can be granted, all allegations of fact are taken as true but conclusions of law are not. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

Concept of "Defective Statement of a Good Cause of Action" Abolished. — When G.S. 1A-1, Rule 7(c) abolished demurrers and decreed that pleas for insufficiency should not be used, it also abolished the concept of a defective statement of a good cause of action. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

Motion to Dismiss May Be Interposed to Defective Claim. — Generally speaking, the motion to dismiss under subsection (b)(6) of this rule may be successfully interposed to a complaint which states a defective claim or cause of action. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971); Brown v. Brown, 21 N.C. App. 435, 204 S.E.2d 534 (1974).

Subsection (b)(6) of this rule permits a motion to dismiss upon the ground that the complaint states a defective claim or cause of action. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

But Not to Defective Statement of Good Claim. — The motion to dismiss under subsection (b)(6) of this rule may not be successfully interposed to a complaint which was formerly labeled a "defective statement of a good cause of action." For such complaint, other provisions of this rule, the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971); Brown v. Brown, 21 N.C. App. 435, 204 S.E.2d 534 (1974); Deitz v. Jackson, 57 N.C. App. 275, 291 S.E.2d 282 (1982); Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 351 S.E.2d 109 (1986).

Subsection (b)(6) of this rule does not permit a motion to dismiss upon the ground that the complaint contains a defective statement of a good cause of action, relief for that defect being available under other sections of this rule. Dale v. Lattimore, 12 N.C. App. 348, 183 S.E.2d 417, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

If a complaint amounts to what was formerly called a "defective statement" of a good cause of action, a motion to dismiss under subsection (b)(6) of this rule should not be allowed. Other provisions of this rule, the rules governing discovery and the motion for summary judgment provide adequate procedure to obtain details not set out in a complaint. Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979).

Under the notice theory of pleading of the Rules of Civil Procedure a complaint should not be dismissed merely because it amounts to a defective statement of a good cause of action. Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354, cert. denied, 311 N.C. 758, 321 S.E.2d 136 (1984).

Where a petition requested relief not authorized by statute, the petition stated a defective claim, in that it requested relief the court was powerless to grant, regardless of what facts could be proved; and thus a motion to dismiss was properly granted. Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971).

Mere vagueness or lack of detail is not ground for a motion to dismiss. Such a deficiency should be attacked by a motion for a more definite statement. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971); Brown v. Brown, 21 N.C. App. 435, 204 S.E.2d 534 (1974); Benton v. W.H. Weaver Constr. Co., 28 N.C. App. 91, 220 S.E.2d 417 (1975); North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977).

While mere vagueness is not enough to dismiss the complaint, the complaint must state enough to satisfy the requirements of the substantive law giving rise to the claim; merely asserting a grievance is not enough. Braun v. Glade Valley Sch., Inc., 77 N.C. App. 83, 334 S.E.2d 404 (1985).

But Complaint Must State Substantive Elements of Some Recognized Claim. — Despite the liberal nature of the concept of notice pleading, a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under subsection (b)(6) of this rule. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979).

A complaint may be dismissed pursuant to subsection (b)(6) of this rule if there is an absence of law to support a claim of the sort made. Snyder v. Freeman, 40 N.C. App. 348, 253 S.E.2d 10 (1979), rev'd on other grounds, 300 N.C. 204, 266 S.E.2d 593 (1980); Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 315, 281 S.E.2d 652 (1981).

A claim for relief must still satisfy the requirements of the substantive laws which gave rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim. While an incorrect choice of theory should not result in dismissal of the claim, the allegations must suffice to state a claim under some legal theory. Morrow v. Kings Dep't Stores, Inc., 57 N.C. App. 13, 290 S.E.2d 732, cert. denied, 306 N.C. 385, 294 S.E.2d 210 (1982).

In order to withstand a motion to dismiss pursuant to subsection (b)(6) of this rule, the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must make allegations sufficient to satisfy the substantive elements of at least some recognized claim. Harris v. Duke Power Co., 83 N.C. App. 195, 349 S.E.2d 394 (1986), aff'd, 319 N.C. 627, 356 S.E.2d 357 (1987); Fox v. Wilson, 85 N.C. App. 292, 354 S.E.2d 737 (1987); Harris v. NCNB Nat'l Bank, 85 N.C. App. 669, 355 S.E.2d 838 (1987).

With the adoption of "notice pleading," mere vagueness or lack of detail is no longer ground for allowing a motion to dismiss. Gatlin v. Bray, 81 N.C. App. 639, 344 S.E.2d 814 (1986).

In order to survive a motion to dismiss under subsection (b)(6) of this rule, a plaintiff must only state enough to give the substantive elements of a legally recognized claim. Booher v. Frue, 86 N.C. App. 390, 358 S.E.2d 127 (1987), aff'd, 321 N.C. 590, 364 S.E.2d 141 (1988).

Particularity requirement of N.C. R. Civ. P. 7(b)(1) was met by a plaintiff with regard to upholding a trial court's judgment that plaintiff provided sufficient evidence to survive defendant insurance company's motion for summary judgment in a negligence and fraud action wherein one of the insurance company's agents misappropriated the plaintiff's annuity fund for his own gambling habit where the plaintiff presented sufficient allegations to support a jury finding that the insurance company failed to exercise reasonable skill, care, and diligence in allowing themselves to have been misled by the fraudulent acts of its agent or in failing to timely discover the fraud. White v. Consol. Planning, Inc., 166 N.C. App. 283, 603 S.E.2d 147, 2004 N.C. App. LEXIS 1780 (2004), cert.

denied, — N.C. —, 610 S.E.2d 717 (2005).

Complaint Sufficient to Withstand Motion to Dismiss. — Where complaint alleged the existence of an employment contract containing a specific duration of employment, as it is well established that this type of employment contract is not terminable at will, and plaintiff was not permitted to complete the contract's stated duration of employment, the breach of contract claim as alleged in the complaint was sufficient to withstand defendant's subdivision (b)(6) motion to dismiss. Brandis v. Lightmotive Fatman, Inc., 115 N.C. App. 59, 443 S.E.2d 887 (1994).

Plaintiff alleged sufficient facts in his complaint to state a claim for wrongful termination under the public policy exception to the employment at-will doctrine. Vereen v. Holden, 121 N.C. App. 779, 468 S.E.2d 471 (1996), cert. granted, appeal dismissed, 345 N.C. 646, 483 S.E.2d 719 (1997).

Where plaintiffs alleged facts sufficient to establish a prima facie case of negligence against town as well as sufficient to place plaintiffs' case within the "special duty" exception to the public duty doctrine and to withstand the town's defenses, the trial court erred by granting the town's motion to dismiss; complaint's factual allegations [e.g., that .4 mile from plaintiffs' burning house, fire chief decided to abandon plaintiffs' emergency call and instead ordered his crew to return to the fire station] were adequate to support a conclusion that fire chief's behavior was "malicious," "willful and wanton," or "outside of and beyond the scope of" his official duties as fire chief. Davis v. Messer, 119 N.C. App. 44, 457 S.E.2d 902 (1995), overruled on other grounds, Willis v. Town of Beaufort, 544 S.E.2d 600 (N.C. Ct. App. 2001).

Plaintiff, insurer of automobile which was pulling trailer, stated a claim for contribution against defendant, insurer of trailer involved in accident, where plaintiff acted in good faith in notifying defendant of claim and defendant was not prejudiced by delay in notice, and plaintiff acted to protect its own interest as insurer of automobile and was not a mere volunteer. Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 122 N.C. App. 449, 470 S.E.2d 556 (1996).

Where complaint, as reflected within the caption, body and claim for relief, indicated a suit against a crossing guard individually and in her official capacity, and alleged that crossing guard had a specific, ministerial duty to assist children, arising from fixed and designated facts, the plaintiff pled a claim against defendant in her individual capacity sufficient to overcome defendant's motion under this section to dismiss on the ground that defendant crossing guard was a public official immune to liability for ordinary negligence. Isenhour v. Hutto, 350 N.C. 601, 517 S.E.2d 121 (1999).

Where the facts alleged by the plaintiffs suggested that a special relationship existed between the plaintiffs and the defendants which would give rise to an exception to the public duty doctrine, dismissal at the pleading stage was inappropriate. Hobbs v. North Carolina Dep't of Human Resources, 135 N.C. App. 412, 520 S.E.2d 595, 1999 N.C. App. LEXIS 1146 (1999).

The trial court erred in dismissing the plaintiffs' complaint in the context of a Rule 12(b)(6) motion for failure to comply with the statutory requirements of a derivative action, pursuant to G.S. 55-7-42, where the plaintiffs had complied with G.S. 1A-1, Rule 9(c); G.S. 55-7-42 does not require that the complaint in a derivative proceeding state how the demand requirement was met although its predecessor statute (G.S. 55-7-40) required that a plaintiff allege his efforts "with particularity." Norman v. Nash Johnson & Sons' Farms, Inc., 140 N.C. App. 390, 537 S.E.2d 248, 2000 N.C. App. LEXIS 1207 (2000).

Under § 4-401 of the Uniform Commercial Code, G.S. 25-4-401, a bank may only charge its customers' accounts for "properly payable" items, and if the banks cashed checks payable to a third party with either no endorsement or with only the corporations' president's endorsement, such items were not properly payable; by alleging in one of its alternative theories that the banks cashed checks payable to a third party and turned the proceeds over to the president, the corporations' complaint stated at least one viable cause of action sufficient to defeat the banks' motion to dismiss under Rule 12(b)(6). Castle Worldwide, Inc. v. Southtrust Bank, 157 N.C. App. 518, 579 S.E.2d 478, 2003 N.C. App. LEXIS 730 (2003).

In an action which an injured party filed against a church and a landowner after the injured party was hurt at a church festival, the appellate court affirmed the trial court's judgment dismissing the injured party's action against the landowner, but reversed the trial court's judgment dismissing the injured party's claim against the church, because the injured party stated a claim for recovery by alleging that the church failed to use reasonable care when it allowed too many children to ride on a flatbed trailer without proper supervision and that the injured party was hurt while rescuing a child who almost fell off the trailer. Clontz v. St. Mark's Evangelical Lutheran Church, 157 N.C. App. 325, 578 S.E.2d 654, 2003 N.C. App. LEXIS 537 (2003), cert. denied, 357 N.C. 249, 582 S.E.2d 29 (2003).

Trial court properly denied a law firm's motion to dismiss under N.C. R. Civ. P. 12(b)(6) a claim by the attorneys who provided legal services pursuant to a contingency fee agreement and then were fired by the client; the discharged attorneys had a viable claim in North Carolina in quantum meruit against the former client or its subsequent representative. Guess v. Parrott, 160 N.C. App. 325, 585 S.E.2d 464, 2003 N.C. App. LEXIS 1798 (2003).

African-American employee who worked for a county department of social services had the right to pursue her claim that she was not promoted because of her race under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., under 42 U.S.C.S. § 1983, or under both laws, and the trial court erred when it dismissed her complaint because, although the complaint did not state that the employee was seeking relief under 42 U.S.C.S. § 1983, the facts she alleged were sufficient to state a claim for relief under § 1983. Enoch v. Inman, 164 N.C. App. 415, 596 S.E.2d 361, 2004 N.C. App. LEXIS 1006 (2004).

Superior court erroneously dismissed a claim filed by two of decedent's step-grandchildren that defendants, two of the decedent's other step-grandchildren, maliciously caused their step-grandmother to execute a will that left them only nominal bequests, as: (1) the movant step-grandchildren would not be able to obtain adequate relief through a caveat proceeding; and (2) it did not appear that the step-grandchildren could not prove a set of facts supporting their claim which would entitle them to relief. Murrow v. Henson, 172 N.C. App. 792, 616 S.E.2d 664, 2005 N.C. App. LEXIS 1809 (2005).

Upon Which Relief Can Be Granted Under Some Theory. — With regard to its sufficiency, the question is whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory. Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981); Hawkins v. Webster, 78 N.C. App. 589, 337 S.E.2d 682 (1985).

In order to survive a motion to dismiss, the allegations of a mislabeled claim must reveal that plaintiff has properly stated a claim under a different legal theory. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979).

For purposes of a motion to dismiss, the allegations in the complaint must be treated as true, and the complaint is sufficient if it supports relief on any theory. Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354, cert. denied, 311 N.C. 758, 321 S.E.2d 136 (1984).

A motion to dismiss for failure to state a claim upon which relief may be granted is addressed to whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiffs, give rise to a claim for relief on any theory. Ford v. Peaches Entertainment Corp., 83 N.C. App. 155, 349 S.E.2d 82 (1986), cert. denied, 318 N.C. 694, 351 S.E.2d 746 (1987).

Dismissal Not Necessitated by Incorrect Choice of Legal Theory. — In testing the sufficiency of a claim, the complaint must be liberally construed, and when the allegations give sufficient notice of the wrong of which plaintiff complains, incorrect choice of the legal theory upon which the claim is bottomed should not result in dismissal if the allegations are sufficient to state a claim under some legal theory. Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981), overruled on other grounds, Fowler v. Valencourt, 334 N.C. 345, 432 S.E.2d 306 (1993).

The theory of a claim is to be determined from the evidence and not from the pleadings. The fact that plaintiff might have mislabeled his claim is of no significance in ruling on a motion to dismiss pursuant to this rule. Warren v. Halifax County, 90 N.C. App. 271, 368 S.E.2d 47 (1988).

The facts pleaded in the complaint are the determining factors in deciding whether the complaint states a claim upon which relief can be granted; the legal theory set forth in the complaint does not determine the validity of the claim. Braun v. Glade Valley Sch., Inc., 77 N.C. App. 83, 334 S.E.2d 404 (1985).

In order to survive a motion to dismiss pursuant to subsection (b)(6) of this rule, a complaint for fraud must allege with particularity all material facts and circumstances constituting the fraud. But while the facts constituting fraud must be alleged with particularity, there is no requirement that any precise formula be followed or that any certain language be used. Carver v. Roberts, 78 N.C. App. 511, 337 S.E.2d 126 (1985).

Test for Sufficiency of Complaint. — A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant sufficient notice of the nature and basis of plaintiff's claim to enable him to answer and prepare for trial. Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970); Lewis v. Gastonia Air Serv., Inc., 16 N.C. App. 317, 192 S.E.2d 6 (1972); North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977); Presnell v. Pell, 39 N.C. App. 538, 251 S.E.2d 692, aff'd in part and rev'd in part on other grounds, 298 N.C. 715, 260 S.E.2d 611 (1979); Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50, cert. denied, 298 N.C. 296, 259 S.E.2d 301 (1979); United Leasing Corp. v. Miller, 45 N.C. App. 400, 263 S.E.2d 313, cert. denied, 300 N.C. 374, 267 S.E.2d 685 (1980); Stanley v. Stanley, 51 N.C. App. 172, 275 S.E.2d 546, cert. denied, 303 N.C. 182, 280 S.E.2d 454, appeal dismissed, 454 U.S. 959, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981); Noell v. Winston, 51 N.C. App. 455, 276 S.E.2d 766, cert. denied, 303 N.C. 315, 281 S.E.2d 652

(1981); Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981); Deitz v. Jackson, 57 N.C. App. 275, 291 S.E.2d 282 (1982); Dixon v. Stuart, 85 N.C. App. 338, 354 S.E.2d 757 (1987); Leonard v. Pugh, 86 N.C. App. 207, 356 S.E.2d 812 (1987).

It is error to grant defendant's motion to dismiss plaintiff's claim where no insurmountable bar to recovery appears on the face of the complaint and the complaint contains a statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved. Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972).

A pleading is sufficient if it gives enough notice of the events or transactions that produced the claim to enable the adverse party to understand the nature and basis of the claim, to file a responsive pleading, and, by using the rules provided for discovery, to get additional information needed for trial. North Carolina Nat'l Bank v. Wallens, 31 N.C. App. 721, 230 S.E.2d 690 (1976); Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890, cert. denied, 301 N.C. 94, 273 S.E.2d 299 (1980).

Under the notice theory of pleading, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of res judicata, and to show the type of case brought. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971); Brown v. Brown, 21 N.C. App. 435, 204 S.E.2d 534 (1974); Carolina Wire & Cable, Inc. v. Finnican, 46 N.C. App. 87, 264 S.E.2d 138 (1980).

Pleadings comply with the present concept of notice pleading if the allegations in the complaint give defendant sufficient notice of the nature and basis of plaintiffs' claim to file an answer, and the face of the complaint shows no insurmountable bar to recovery. Rose v. Guilford County, 60 N.C. App. 170, 298 S.E.2d 200 (1982); Gatlin v. Bray, 81 N.C. App. 639, 344 S.E.2d 814 (1986).

The complaint is adequate if it gives the defendant sufficient notice of the nature and basis of plaintiff's claim to enable him to answer and to prepare for trial, and to show the type of case brought. State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 233 (1981).

The sufficiency of a claim to withstand a motion to dismiss is tested by its success or failure in setting out a state of facts which, when liberally considered, would entitle plaintiff to some relief. If it appears to a certainty that no state of facts could be proved in support of the claim so as to entitle plaintiff to some relief, the complaint should be dismissed. Carolina Bldrs. Corp. v. AAA Dry Wall, Inc., 43 N.C. App. 444, 259 S.E.2d 364 (1979); Yates v. City of Raleigh, 46 N.C. App. 221, 264 S.E.2d 798 (1980).

A motion under subsection (b)(6) of this rule operates to test the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted. However, if the complaint discloses an unconditional affirmative defense which defeats the asserted claim, the motion will be granted and the action dismissed. Skinner v. E.F. Hutton & Co., 70 N.C. App. 517, 320 S.E.2d 424 (1984), rev'd in part on other grounds, 314 N.C. 267, 333 S.E.2d 236 (1985).

Under the "notice theory of pleading," a statement of a claim can withstand a motion to dismiss if it gives the other party notice of the nature and basis of the claim sufficient to enable the party to answer and prepare for trial. Barnaby v. Boardman, 70 N.C. App. 299, 318 S.E.2d 907, rev'd on other grounds, 313 N.C. 565, 330 S.E.2d 600 (1985).

In order to withstand a motion to dismiss pursuant to subsection (b)(6) of this rule, the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must make allegations sufficient to satisfy the substantive elements of at least some recognized claim. Stewart v. Allison, 86 N.C. App. 68, 356 S.E.2d 109 (1987).

To be legally sufficient, a claim must show on its face that there is no insurmountable bar to recovery and that the pleadings give the adverse party notice of the events giving rise to the claim so that the party understands the nature of the claim and is able to answer the allegations in the complaint and prepare for trial. Piedmont Ford Truck Sale, Inc. v. City of Greensboro, 90 N.C. App. 692, 370 S.E.2d 262, cert. denied, 323 N.C. 625, 374 S.E.2d 589 (1988), rev'd on other grounds, 324 N.C. 499, 380 S.E.2d 107 (1989).

In a conversion action, owners of leased portable hangers stated claim based on city's taking control of hangers pursuant to a bankruptcy clause in the agreement, even though plaintiff owners ability to recover depended on whether the hangers were in fact "trade fixtures" and thus personalty or improvements affixed to the realty. Garvin v. City of Fayetteville, 102 N.C. App. 121, 401 S.E.2d 133 (1991).

Unfair and Deceptive Trade Practices. — It was proper to dismiss a former employee's action that alleged that a former employer engaged in unfair and deceptive trade practices in violation of G.S. 75-1.1 where the employer changed its by-laws to prohibit former employees from applying to serve on its board until six years had elapsed since the date of last employment because such matters of internal corporate management did not affect commerce in the context of a claim of unfair and deceptive trade practices. Wilson v. Blue Ridge Elec. Mbrshp. Corp., 157 N.C. App. 355, 578 S.E.2d 692, 2003 N.C. App. LEXIS 541 (2003).

Because the buyers to a contract with the seller did not possess any contract rights due to the insufficiency of their consideration, they could not allege damages by virtue of any alleged unfair and deceptive acts of the seller relating to that alleged contract. McLamb v. T.P. Inc., 173 N.C. App. 586, 619 S.E.2d 577, 2005 N.C. App. LEXIS 2122 (2005).

Facts alleging unfair claim settlement practices were sufficient to state a claim for unfair trade practices under G.S. 58-63-15 so as to withstand a challenge under subdivision (b)(6) of this rule. Miller v. Nationwide Mut. Ins. Co., 112 N.C. App. 295, 435 S.E.2d 537 (1993), cert. denied, 335 N.C. 770, 442 S.E.2d 519 (1994).

Facts Alleging Unfair Claim Settlement Practices Were Insufficient. — Plaintiff who sued defendant/insurance company for unfair and deceptive practices and acts, when it raised his insurance premiums after paying a claim which he repeatedly informed the insurer was fraudulent, failed to state facts sufficient to survive summary judgment under G.S. 58-63-15(11)(b) and (c); where the defendant's advertising claimed that it did not want to pay false claims, plaintiff should have alleged that it did want to, not merely that it did, and where defendant failed to adequately investigate the claim, plaintiff should have alleged that the defendant did not act promptly in doing so. Cash v. State Farm Mut. Auto. Ins. Co., 137 N.C. App. 192, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

Plaintiff's claim for tortious breach of insurance contract and punitive damages, based on defendant's deciding to settle a claim which plaintiff claimed was fraudulent and subsequently raising his premiums, failed to state a claim for which relief could be granted; plaintiff failed to indicate that defendant/insurer's settlement with claimants rose to the level of aggravation defined in Taha v. Thompson, 120 N.C. App. 697, 704-05, 463 S.E.2d 553, 558 (1995), and he also failed to allege an intentional wrong by the insurer; and while he alleged that the claimants committed fraud be nowhere alleged that the insurer committed fraud by settling their claim. Cash v. State Farm Mut. Auto. Ins. Co., 137 N.C. App. 192, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

Allegations in amended complaint were sufficient to state a claim for relief based on a theory of negligence against an aircraft manufacturer in the preparation and publication of the information manual on mechanical functions. Driver v. Burlington Aviation, Inc., 110 N.C. App. 519, 430 S.E.2d 476 (1993).

Dismissal Is Precluded Absent Insurmountable Bar to Recovery. — A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. This rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery. Brown v. Brown, 21 N.C. App. 435, 204 S.E.2d 534 (1974); Carolina Wire & Cable, Inc. v. Finnican, 46 N.C. App. 87, 264 S.E.2d 138 (1980); Forbis v. Honeycutt, 48 N.C. App. 145, 268 S.E.2d 247, aff'd, 301 N.C. 699, 273 S.E.2d 240 (1980); Snug Harbor Property Owners Ass'n v. Curran, 55 N.C. App. 199, 284 S.E.2d 752 (1981), cert. denied, 305 N.C. 302, 291 S.E.2d 151 (1982); Ladd v. Estate of Kellenberger, 314 N.C. 477, 334 S.E.2d 751 (1985).

If a complaint meets the basic requirements set forth in G.S. 1A-1, Rule 8 and does not show upon its face that there is an insurmountable bar to recovery on the claim alleged, it is not subject to dismissal under subsection (b)(6) of this rule. Patterson v. Weatherspoon, 17 N.C. App. 236, 193 S.E.2d 585 (1972).

A complaint is deemed sufficient to withstand a motion to dismiss under this rule where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim. Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 304 S.E.2d 593 (1983), rev'd on other grounds, 310 N.C. 312, 312 S.E.2d 405, cert. denied, 310 N.C. 749, 315 S.E.2d 704; 469 U.S. 858, 105 S. Ct. 187, 83 L. Ed. 2d 121 (1984).

A complaint will not be dismissed for failure to state a valid claim unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Unless the face of the complaint shows an insurmountable bar to recovery, plaintiff's action should not be dismissed on the pleading. Lyon v. Continental Trading Co., 76 N.C. App. 499, 333 S.E.2d 774 (1985).

Subsection (b)(6) of this rule generally precludes dismissal except in those instances in which the face of the complaint discloses some insurmountable bar to recovery. Hawkins v. Webster, 78 N.C. App. 589, 337 S.E.2d 682 (1985).

And a complaint should not be dismissed unless it appears that plaintiff is entitled to no relief under any state of

facts which could be proved in support of the claim. Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972); Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976); Mazzucco v. North Carolina Bd. of Medical Exmrs., 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976); North Carolina Nat'l Bank v. Wallens, 31 N.C. App. 721, 230 S.E.2d 690 (1976); North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977); Kelly v. Briles, 35 N.C. App. 714, 242 S.E.2d 883 (1978); Eutaw Shopping Ctr., Inc. v. Glenn, 39 N.C. App. 67, 249 S.E.2d 459 (1978), cert. denied, 296 N.C. 737, 254 S.E.2d 177 (1979); Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); FDIC v. Loft Apts., Ltd. Partnership, 39 N.C. App. 473, 250 S.E.2d 693, cert. denied, 297 N.C. 176, 254 S.E.2d 39 (1979); O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979); Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979); Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979); Snyder v. Freeman, 300 N.C. 204, 266 S.E.2d 593 (1980); Whitfield v. Winslow, 48 N.C. App. 206, 268 S.E.2d 245, cert. denied, 301 N.C. 405, 273 S.E.2d 451 (1980); Crouse v. Woodruff, 48 N.C. App. 719, 269 S.E.2d 706 (1980); Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981); Mebane v. Board of Medical Exmrs., 55 N.C. App. 455, 286 S.E.2d 112, cert. denied, 305 N.C. 586, 292 S.E.2d 6 (1982); Morrow v. Kings Dep't Stores, Inc., 57 N.C. App. 13, 290 S.E.2d 732, cert. denied, 306 N.C. 385, 294 S.E.2d 210 (1982); Deitz v. Jackson, 57 N.C. App. 275, 291 S.E.2d 282 (1982); Rawls v. Lampert, 58 N.C. App. 399, 293 S.E.2d 620 (1982); Ruffin v. Contractors & Materials, Inc., 69 N.C. App. 174, 316 S.E.2d 353 (1984); Braun v. Glade Valley Sch., Inc., 77 N.C. App. 83, 334 S.E.2d 404 (1985); Sorrell v. Sorrell's Farms & Ranches, Inc., 78 N.C. App. 415, 337 S.E.2d 595 (1985); Bryant v. Pitt, 78 N.C. App. 801, 338 S.E.2d 588 (1986); Miller v. Parlor Furn. of Hickory, Inc., 79 N.C. App. 639, 339 S.E.2d 804, cert. denied, 484 U.S. 1043, 108 S. Ct. 777, 98 L. Ed. 2d 863 (1988), cert. denied and appeal dismissed, 316 N.C. 732, 345 S.E.2d 389 (1986); Stikeleather v. Willard, 83 N.C. App. 50, 348 S.E.2d 607 (1986); St. Paul Fire & Marine Ins. Co. v. Freeman-White Assocs., 86 N.C. App. 431, 358 S.E.2d 99 (1987); Booher v. Frue, 86 N.C. App. 390, 358 S.E.2d 127 (1987); Warren v. Halifax County, 90 N.C. App. 271, 368 S.E.2d 47 (1988); Peele v. Provident Mut. Life Ins. Co., 90 N.C. App. 447, 368 S.E.2d 892, appeal dismissed, 323 N.C. 366, 373 S.E.2d 547 (1988).

A complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. FDIC v. Loft Apts., Ltd. Partnership, 39 N.C. App. 473, 250 S.E.2d 693, cert. denied, 297 N.C. 176, 254 S.E.2d 39 (1979); O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979); Pedwell v. First Union Nat'l Bank, 51 N.C. App. 236, 275 S.E.2d 565 (1981); Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 304 S.E.2d 593 (1983), rev'd on other grounds, 310 N.C. 312, 312 S.E.2d 405, cert. denied, 310 N.C. 749, 315 S.E.2d 704, cert. denied, 469 U.S. 858, 105 S. Ct. 187, 83 L. Ed. 2d 121 (1984); Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983), cert. denied, 310 N.C. 476, 312 S.E.2d 882 (1984); Hull v. Floyd S. Pike Elec. Contractor, 64 N.C. App. 379, 307 S.E.2d 404 (1983); Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984); Briggs v. Rosenthal, 73 N.C. App. 672, 327 S.E.2d 308, cert. denied, 314 N.C. 114, 332 S.E.2d 479 (1985); Leonard v. Pugh, 86 N.C. App. 207, 356 S.E.2d 812 (1987).

A claim should be dismissed under subsection (b)(6) of this rule where it appears that plaintiff is entitled to no relief under any statement of facts which could be proven; this will occur when there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890, cert. denied, 301 N.C. 94, 273 S.E.2d 299 (1980).

A claim for relief should not suffer dismissal unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim. Andresen v. Eastern Realty Co., 60 N.C. App. 418, 298 S.E.2d 764 (1983); Ladd v. Estate of Kellenberger, 314 N.C. 477, 334 S.E.2d 751 (1985); Fox v. Wilson, 85 N.C. App. 292, 354 S.E.2d 737 (1987); Dixon v. Stuart, 85 N.C. App. 338, 354 S.E.2d 757 (1987); Harris v. NCNB Nat'l Bank, 85 N.C. App. 669, 355 S.E.2d 838 (1987).

A claim for relief should not be dismissed unless it appears beyond doubt that the party is entitled to no relief under any state of facts which could be presented in support of the claim. Barnaby v. Boardman, 70 N.C. App. 299, 318 S.E.2d 907 (1984), rev'd on other grounds, 313 N.C. 565, 330 S.E.2d 600 (1985).

An order granting a motion to dismiss is erroneous if the complaint, liberally construed, shows no insurmountable bar to recovery, as dismissal is generally precluded unless plaintiff can prove no set of facts to support the claim for relief. Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354, cert. denied, 311 N.C. 758, 321 S.E.2d 136 (1984).

A motion to dismiss pursuant to subsection (b)(6) of this rule is properly granted when the complaint affirmatively discloses to a certainty that even if the facts alleged therein were true, the plaintiff would be entitled to no relief. Plemmons v. City of Gastonia, 62 N.C. App. 470, 302 S.E.2d 905, cert. denied, 309 N.C. 322, 307 S.E.2d 165, 307 S.E.2d 166 (1983).

Dismissal of a complaint is proper under the provisions of subsection (b)(6) of this rule when one or more of the following three conditions is satisfied: (1) When the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim. Oates v. Jag, Inc., 314 N.C. 276, 333 S.E.2d 222 (1985).

A complaint should not be dismissed for failure to state a claim unless it appears to a certainty that plaintiff is legally entitled to no relief under any construction of the facts asserted. Powell v. Wold, 88 N.C. App. 61, 362 S.E.2d 796 (1987).

A claim should be dismissed under this rule where it appears that the plaintiff is entitled to no relief under any statement of facts which could be proven. Peoples Sec. Life Ins. Co. v. Hooks, 322 N.C. 216, 367 S.E.2d 647 (1988).

In reviewing the grant of a motion to dismiss for failure to state a claim, the question for the appellate court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory, whether properly labeled or not. Replacements, Ltd. v. MidweSterling, 133 N.C. App. 139, 515 S.E.2d 46 (1999).

The trial court properly dismissed a complaint alleging tortious interference with a contract which on its face admitted that defendants, minority shareholder and attorneys, had a legitimate business interest both in defendant's contract with another corporation which sought to buy its assets, as well as for mailing a letter informing that corporation of pending litigation. Filmar Racing v. Stewart, 141 N.C. App. 668, 541 S.E.2d 733, 2001 N.C. App. LEXIS 16 (2001).

Dismissal Proper in Medical Contract Dispute. — Since the termination of the contract with a doctor to provide anesthesiology services and entry into an exclusive contract with another company to provide the same services was not the legal equivalent of the termination of the doctor's medical staff privileges and the doctor maintained his privileges at the hospital, the trial court properly dismissed the doctor's action for failure to state a claim. Plummer v. Cmty. Gen. Hosp. of Thomasville, Inc., 155 N.C. App. 574, 573 S.E.2d 596, 2002 N.C. App. LEXIS 1583 (2002), cert. denied, 357 N.C. 63, 579 S.E.2d 392 (2003).

Complaint Without Merit May Be Dismissed. — A complaint may be dismissed on motion filed under subsection (b)(6) of this rule if it is clearly without merit; this want of merit may consist in an absence of law to support a claim of the sort made, or absence of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. Hodges v. Wellons, 9 N.C. App. 152, 175 S.E.2d 690 (1970); North Carolina Nat'l Bank v. McCarley & Co., 34 N.C. App. 689, 239 S.E.2d 583 (1977); Kinlaw v. Long Mfg. N.C., Inc., 298 N.C. 494, 259 S.E.2d 552 (1979); FDIC v. Loft Apts., Ltd. Partnership, 39 N.C. App. 473, 250 S.E.2d 693, cert. denied, 297 N.C. 176, 254 S.E.2d 39 (1979); Kinlaw v. Long Mfg. N.C., Inc., 40 N.C. App. 641, 253 S.E.2d 629, rev'd on other grounds, 298 N.C. 494, 259 S.E.2d 552 (1979); GASP v. Mecklenburg County, 42 N.C. App. 225, 256 S.E.2d 477 (1979); Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50, cert. denied, 298 N.C. 296, 259 S.E.2d 301 (1979); Snyder v. Freeman, 300 N.C. 204, 266 S.E.2d 593 (1980); Stanford v. Owens, 46 N.C. App. 388, 265 S.E.2d 617, cert. denied, 301 N.C. 95, 273 S.E.2d 300 (1980); Morrow v. Kings Dep't Stores, Inc., 57 N.C. App. 13, 290 S.E.2d 732, cert. denied, 306 N.C. 385, 294 S.E.2d 210 (1982); Lee v. Paragon Group Contractors, 78 N.C. App. 334, 337 S.E.2d 132 (1985).

A complaint may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support the claim, or in the disclosure of some fact that will necessarily defeat the claim. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979); Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, cert. denied, 298 N.C. 305, 259 S.E.2d 918 (1979); Pierce v. Piver, 45 N.C. App. 111, 262 S.E.2d 320 (1980); Rawls v. Lampert, 58 N.C. App. 399, 293 S.E.2d 620 (1982).

A motion to dismiss will be allowed if a complaint is clearly without merit; this lack of merit may consist in an absence of law to support the claim, or in the disclosure of some fact that will necessarily defeat the claim, or when the complaint shows on its face that there is an insurmountable bar. Collins v. Edwards, 54 N.C. App. 180, 282 S.E.2d 559 (1981).

Where plaintiffs' nuisance complaint made no allegations of defendant's intentional conduct but was merely a broad assertion to the effect that the location and operation of defendant's business was a nuisance to them and that the court should, therefore, grant plaintiffs' injunctive relief and damages, and where plaintiffs' complaint did not even assert that their remedy at law was inadequate so that they would be entitled to the equitable remedy of a permanent injunction, plaintiffs' complaint failed to state a complaint upon which relief could be granted. State v. Mercer, 84 N.C. App. 623, 353 S.E.2d 682 (1987).

A complaint must be dismissed under subsection (b)(6) of this rule when it is clear from the face of the complaint that plaintiffs cannot recover as a matter of law, where some fact essential to plaintiffs' case is missing, or where a fact is revealed in plaintiffs' complaint which defeats the action. Piedmont Ford Truck Sale, Inc. v. City of Greensboro, 90 N.C. App. 692, 370 S.E.2d 262, cert. denied, 323 N.C. 625, 374 S.E.2d 589 (1988), rev'd on other grounds, 324 N.C. 499, 380 S.E.2d 107 (1989).

As Where Pleaded Facts Defeat the Claim. — A complaint may be dismissed on motion filed under subsection (b)(6) of this rule where it pleads facts which will necessarily defeat the claim. Powell v. County of Haywood, 15 N.C. App. 109, 189 S.E.2d 785 (1972); Sunbow Indus., Inc. v. London, 58 N.C. App. 751, 294 S.E.2d 409, cert. denied, 307 N.C. 272, 299 S.E.2d 219 (1982).

In suit against insurance company, alleging, among other things, breach of contract and misrepresentation, trial court did not err in granting the insurance company's motion to dismiss, as the insured admitted in the complaint that he was not entitled to underinsured motorist coverage. Pinney v. State Farm Mut. Ins. Co., 146 N.C. App. 248, 552 S.E.2d 186, 2001 N.C. App. LEXIS 858 (2001), cert. denied, 356 N.C. 438, 572 S.E.2d 788 (2002).

Or Where Complaint Discloses Unconditional Affirmative Defense. — If the complaint discloses an unconditional affirmative defense which defeats the claim asserted or pleads facts which deny the right to any relief on the alleged claim it will be dismissed. Brown v. Brown, 21 N.C. App. 435, 204 S.E.2d 534 (1974); Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983), cert. denied, 310 N.C. 476, 312 S.E.2d 882 (1984).

When a complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, the motion to dismiss for failure to state a claim upon which relief can be granted will be granted and the action dismissed. Skinner v. E.F. Hutton & Co., 314 N.C. 267, 333 S.E.2d 236 (1985).

Once it is determined that the affirmative defense is properly before the trial court, dismissal under Rule 12(b)(6) on the grounds of the affirmative defense is proper if the complaint on its face reveals an insurmountable bar to recovery. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Or Where Plaintiff Is Not Entitled to Relief Requested. — The court correctly dismissed, pursuant to this section, the plaintiff's claim against the defendant county clerk alleging that he failed to comply with G.S. 1-117 and 7A-109(b)(6), where plaintiff was not entitled to have notice of lis pendens cross-indexed by the clerk on the public record. George v. Administrative Office of Courts, 142 N.C. App. 479, 542 S.E.2d 699, 2001 N.C. App. LEXIS 139 (2001).

Trial court did not err in granting an employer's motion under G.S. 1A-1, Rule 12(b)(6) dismissing employee's claim of wrongful discharge in violation of public policy because she engaged in a protected activity in requesting that the employer pay for a medical evaluation of a work-related injury; employee's request that the employer pay for a doctor's visit or other medical services was merely an abstract assertion, and was not an assertion of rights under the Workers' Compensation Act, G.S. 97-1 et seq. where there was no evidence that she filed a workers' compensation claim that would have triggered the statutory and common law protection against employer retaliation in violation of public policy. Whitings v. Wolfson Casing Corp., 173 N.C. App. 218, 618 S.E.2d 750, 2005 N.C. App. LEXIS 1916 (2005).

Or Where Plaintiffs Fail to Plead Damages. — The trial court properly dismissed the plaintiffs' claim for tortious interference with prospective economic advantage, pursuant to Rule 12(b)(6) where the plaintiffs failed to sufficiently plead damages. Walker v. Sloan, 137 N.C. App. 387, 529 S.E.2d 236, 2000 N.C. App. LEXIS 414 (2000).

Or Where Plaintiffs Fail to Demonstrate an Injury. — The trial court correctly dismissed, as failing to state a claim upon which relief could be granted, the plaintiffs' claim that the defendants/minority shareholders violated the prohibition against unfair and deceptive trade practices by ratifying the adverse actions of majority shareholder/manager who had would-be-stock-buyers/employees fired. Walker v. Sloan, 137 N.C. App. 387, 529 S.E.2d 236, 2000 N.C. App. LEXIS 414 (2000).

Where Plaintiffs Fail to Demonstrate Standing. — Temporary restraining order, under G.S. 1A-1-65(b), was denied as the State Employees Association of North Carolina, Inc. (SEANC) lacked standing to contest the reallocation of funds from the State retirement systems; the SEANC failed to demonstate that all of its members otherwise had standing to sue in their own right, and its complaint was dismissed for failure to state a cause of action, under G.S. 1A-1, N.C. R. Civ. P. 12(b)6), and for the lack of subject matter jurisdiction under Rule 12(h)(3). State Employees Ass'n of N.C., Inc. v. State, 154 N.C. App. 207, 573 S.E.2d 525, 2002 N.C. App. LEXIS 1451 (2002).

Where Plaintiffs Fail to Exhaust Administrative Remedies. — Under G.S. 1A-1-12, N.C. R. Civ. P. 12(b)(6), the trial court properly dismissed two animal welfare advocates' action challenging an animal control facility's euthanasia procedures and record-keeping for failure to exhaust administrative remedies, and where the advocates failed to allege either the inadequacy or the futility of the administrative remedy. Justice for Animals, Inc. v. Robeson County, 164 N.C. App. 366, 595 S.E.2d 773, 2004 N.C. App. LEXIS 813 (2004).

If Face of Complaint Discloses That Claim Is Barred. — A statute of limitations can be the basis for dismissal on a subdivision (b)(6) motion if the face of the complaint discloses that the plaintiff's claim is so barred. Reunion Land Co. v. Village of Marvin, 129 N.C. App. 249, 497 S.E.2d 446 (1998).

Trial court properly dismissed a North Carolina Retaliatory Employment Discrimination Act, G.S. 95-240 et seq., complaint under Rule 12(b)(6), where the right-to-sue letter from the North Carolina Department of Labor (NCDOL) stated that the administrative complaint to the NCDOL was untimely under G.S. 5-242(a). Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Claims for medical malpractice and wrongful death which an administrator filed against a doctor in July 2001, alleging that the administrator's mother died in April 1999 because the doctor misread a chest x-ray in February 1997, were barred by G.S. 1-15(c) and 1-53(4), and the trial court properly granted a motion to dismiss the action which the doctor and a professional corporation filed, pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(b)(6). Udzinski v. Lovin, 159 N.C. App. 272, 583 S.E.2d 648, 2003 N.C. App. LEXIS 1508 (2003), aff'd, 358 N.C. 534, 597 S.E.2d 703 (2004).

Dismissal Upheld. — The trial court properly dismissed action brought by doctors against accountants who had been engaged to advise them on business opportunities under G.S. 1A-1, Rule 12(b)(6), as doctors' complaint against accountants disclosed that its claims were either time-barred or lacked facts sufficient to state a claim for relief. Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002).

Backseat passenger of an accident vehicle was properly dismissed from a negligence suit under G.S. 1A-1-12(b)(6), because she had no special relationship to the unlicensed driver, she was not the owner-occupant of the vehicle, she was not on a joint enterprise with the driver, she had no legal right or duty to control the vehicle's operation, and she did not actually and negligently exercise control. Harris v. DaimlerChrysler Corp., 180 N.C. App. 551, 638 S.E.2d 260, 2006 N.C. App. LEXIS 2500 (2006).

Standard of Review. — For a motion based on G.S. 1A-1, Rule 12(b)(6), the standard of review is whether, construing the complaint liberally, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Appellate court reviews de novo rulings on motions made pursuant to G.S. 1A-1-12(b)(6). Toomer v. Branch Banking & Trust Co., 171 N.C. App. 58, 614 S.E.2d 328, 2005 N.C. App. LEXIS 1188 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

Appellate court reviewed the trial court's dismissal of the taxpayers' lawsuit to determine whether the allegations of the complaint, if treated as true, were sufficient to state a claim upon which relief could be granted under some legal theory. Coley v. State, 360 N.C. 493, 631 S.E.2d 121, 2006 N.C. LEXIS 594 (2006).

Where an affirmative defense is raised for the first time in a motion to dismiss under subsection (b)(6) of this rule, the motion must ordinarily refer expressly to the affirmative defense relied upon. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Absent a showing of prejudice, an affirmative defense may be raised by a Rule 12(b)(6) motion to dismiss. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

Where the nonmovant has not been surprised and has full opportunity to argue and present evidence on the affirmative defense, the failure of the motion filed under subsection (b)(6) of this rule to expressly refer to the affirmative defense will not bar consideration of the defense by the trial court. Johnson v. North Carolina DOT, 107 N.C. App. 63, 418 S.E.2d 700 (1992).

A complaint is without merit if (1) there is an absence of law to support a claim of the sort made; (2) there is an absence of fact sufficient to make a good claim; or (3) there is the disclosure of some fact which will defeat a claim. Home Elec. Co. v. Hall & Underdown Heating & Air Conditioning Co., 86 N.C. App. 540, 358 S.E.2d 539 (1987), aff'd, 322 N.C. 107, 366 S.E.2d 441 (1988).

The only times when dismissal is proper under subsection (b)(6) of this rule are: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face that some fact essential to plaintiff's claim is missing; and (3) when some fact disclosed in the complaint defeats the plaintiff's claim. Schloss Outdoor Adv. Co. v. City of Charlotte, 50 N.C. App. 150, 272 S.E.2d 920 (1980); Hull v. Floyd S. Pike Elec. Contractor, 64 N.C. App. 379, 307 S.E.2d 404 (1983); Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986); Hooper v. Liberty Mut. Ins. Co., 84 N.C. App. 549, 353 S.E.2d 248 (1987).

This rule provides that a complaint must be dismissed when on its face it appears that no law supports it, that some fact essential to it is missing or that some disclosed fact necessarily defeats it. Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 204 (1977); Mumford v. Hutton & Bourbonnais Co., 47 N.C. App. 440, 267 S.E.2d 511 (1980).

A complaint is dismissable for want of proof under subsection (b)(6) of this rule only when it appears that the proof needed is beyond the realm of possibility. Newton v. Whitaker, 83 N.C. App. 112, 349 S.E.2d 333, aff'd, 319 N.C. 455, 355 S.E.2d 138 (1986).

A complaint may be dismissed pursuant to subsection (b)(6) of this rule if there is no law to support the claim made, if there is an absence of facts sufficient to make a good claim, or if there is a disclosure of facts which will necessarily defeat the claim. Robertson v. Boyd, 88 N.C. App. 437, 363 S.E.2d 672 (1988).

The fact that the full extent of plaintiff's damages may be a matter of some speculation is no basis for the trial court to deny plaintiff any relief by dismissing its complaint. Carolina Wire & Cable, Inc. v. Finnican, 46 N.C. App. 87, 264 S.E.2d 138 (1980).

Insufficient Allegation of Special Damage as Basis for Dismissal. — Where special damage is an integral part of the claim for relief, its insufficient allegation could provide the basis for dismissal under subsection (b)(6) of this rule. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979).

A statute of limitations can be the basis for dismissal on a motion under subsection (b)(6) of this rule if the face of the complaint discloses that plaintiff's claim is so barred. Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

A statute of limitations defense is properly asserted in a motion to dismiss under subsection (b)(6). Horton v. Carolina Medicorp, Inc., 119 N.C. App. 777, 460 S.E.2d 567 (1995), rev'd on other grounds, 344 N.C. 133, 472 S.E.2d 778 (1996).

In a wrongful death case by the personal representative of the decedent, the case was properly dismissed because the representative failed to obtain a proper continuance of the time within which to serve the defendant an alias or pluries summon under G.S. 1A-1, N.C. R. Civ. P. 4(e), meaning that any alias summons would not relate back to the earlier summons and would represent the filing of a new complaint; any new complaint would be untimely under the two year statute of limitations for wrongful death under G.S. 1-53(4) and, therefore, dismissal of the complaint for failure to state a claim was proper. Draughon v. Harnett County Bd. of Educ., 166 N.C. App. 449, 602 S.E.2d 717, 2004 N.C. App. LEXIS 1784 (2004).

When the complaint discloses on its face that plaintiff's claim is barred by the statute of limitations, such defect may be taken advantage of by a motion to dismiss under subsection (b)(6) of this rule. FDIC v. Loft Apts., Ltd. Partnership, 39 N.C. App. 473, 250 S.E.2d 693, cert. denied, 297 N.C. 176, 254 S.E.2d 39 (1979); Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

Failure of Plaintiff Without Standing to State Wrongful Death Claim. — Since a wrongful death action may be brought only by the executor, administrator or collector of the decedent, the plaintiff, who was the adopted daughter of the decedent, could not maintain the action in her own name; therefore she failed to state a claim upon which relief could be granted, and the order dismissing her action under this rule was proper. Young v. Marshburn, 10 N.C. App. 729, 180 S.E.2d 43, cert. denied, 278 N.C. 703, 181 S.E.2d 603 (1971).

Mislabeled Motion to Dismiss. — Where defendants' motion was in fact a motion to dismiss for failure to state a claim upon which relief could be granted pursuant to this rule, and the effect of the trial court's judgment was to treat it as such, the label "judgment on the pleadings" which was inadvertently entered in the notice of hearing to plaintiff and the trial court's judgment could not have prejudiced plaintiff, the motion being properly treated according to its substance rather than its label. Harrell v. Whisenant, 53 N.C. App. 615, 281 S.E.2d 453 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 380 (1982).

As to application of § 1A-1, Rule 43(e) in ruling on motion to dismiss, see Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

Findings and Conclusions Not Required on Denial of Motion to Dismiss. — A trial judge is not required to make findings and conclusions with respect to an interlocutory order that is not appealable, such as is the case with the denial of a motion to dismiss. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Unless Required by Statute or Requested by Party. — Trial court is required to make findings of fact and conclusions of law on a motion to dismiss only when required by statute or requested by a party. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

A trial court cannot make "findings of fact" conclusive on appeal on a motion to dismiss for failure to state a claim under subsection (b)(6) of this rule. White v. White, 296 N.C. 661, 252 S.E.2d 698 (1979).

A motion to dismiss for failure to state a claim in an action for declaratory judgment is seldom appropriate, and will not be allowed simply because the plaintiff may not be able to prevail. Such motion is allowed only when there is no basis for declaratory relief, as when the complaint does not allege an actual, genuine existing controversy. A claim for declaratory relief is sufficient if the complaint alleges the existence of a real controversy arising out of the parties' opposing contentions and respective legal rights under a deed, will, or contract in writing. Morris v. Plyler Paper Stock Co., 89 N.C. App. 555, 366 S.E.2d 556 (1988).

Grant of Motion After Previous Denial by Another Judge. — Superior court erred in granting a motion under subsection (b)(6) of this rule after moving party's previous motion under subsection (b)(6) had been denied by another superior court judge. Jenkins v. Wheeler, 81 N.C. App. 512, 344 S.E.2d 371 (1986).

Motion Under § 1A-1, Rule 60(b) Not Proper After Denial of Subsection (b)(6) Motion. — Since the denial of a motion to dismiss is not a final judgment or order, a motion for relief from such an order could not, as a matter of law, be proper under G.S. 1A-1, Rule 60(b). O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

An order denying a motion under subsection (b)(6) of this rule is interlocutory and not appealable. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Ordinarily no appeal lies from denial of a motion to dismiss. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976); Terry v. Terry, 46 N.C. App. 583, 265 S.E.2d 463 (1980), rev'd on other grounds, 302 N.C. 77, 273 S.E.2d 674 (1981); Dworsky v. Travelers Ins. Co., 49 N.C. App. 446, 271 S.E.2d 522 (1980).

Ordinarily, there is no right of appeal from the refusal of a motion to dismiss, as refusal to dismiss generally will not seriously impair any right of defendant that cannot be corrected upon appeal from final judgment. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Ordinarily, a denial of a motion to dismiss under subsection (b)(6) of this rule merely serves to continue the action then pending. No final judgment is involved, and the disappointed movant is generally not deprived of any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on its merits. Thus, an adverse ruling on a motion under subsection (b)(6) is in most cases an interlocutory order from which no direct appeal may be taken. State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908, aff'd on rehearing, 299 N.C. 731, 265 S.E.2d 387, appeal dismissed, 449 U.S. 807, 101 S. Ct. 55, 66 L. Ed. 2d 11 (1980).

Denial of a motion to dismiss for failure to state a claim upon which relief can be granted is not a final determination within the meaning of G.S. 1-277(a), does not affect a substantial right, and is not appealable. Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

Denial of a motion to dismiss for failure to state a claim upon which relief can be granted is an interlocutory order from which no immediate appeal may be taken. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

No appeal lies as a matter of right from the denial of a subsection (b)(6) motion. Raines v. Thompson, 62 N.C. App. 752, 303 S.E.2d 413 (1983).

Appeal of Denial of Motion is Unavailable After Decision on Merits. — After the trial court denied the landlord's motion to dismiss the tenant's counterclaims pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(b)(6), and the case was tried with judgment issued on the merits, the landlord could not then seek review of the denial of his motion to dismiss. Pierce v. Reichard, 163 N.C. App. 294, 593 S.E.2d 787, 2004 N.C. App. LEXIS 382 (2004).

Appeal of Denial of Motion to Dismiss Heard. — Generally, the denial of a motion under subsection 12(b)(6) of this rule is interlocutory and not immediately appealable. However, where the court of appeals had proper jurisdiction over the other issues and because the parties desired an answer to a question which was fundamental in determining their rights, was also of public importance, and would aid State agencies in the performance of their duties, the court exercised its supervisory discretion to address on the merits the appeal. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curiam, 335 N.C. 158, 436 S.E.2d 821 (1993).

Summary Judgment Not Precluded by Earlier Denial of Motion Under Subsection (b)(6). — The denial of a motion to dismiss for failure to state a claim upon which relief can be granted, which merely challenges the sufficiency of the complaint, does not prevent the court's allowing a subsequent motion for summary judgment based on affidavits outside the complaint. Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

Denial of a motion to dismiss made under subsection (b)(6) of this rule does not prevent the court from thereafter allowing a subsequent motion for summary judgment made and supported as provided in G.S. 1A-1, Rule 56. Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978); Dull v. Mutual of Omaha Ins. Co., 85 N.C. App. 310, 354 S.E.2d 752 (1987); Burton v.

NCNB Nat'l Bank, 85 N.C. App. 702, 355 S.E.2d 800 (1987).

In a wrongful death action against a city and a railroad arising from a motorist's death after being struck by a train at a railroad crossing, after a trial court partially denied the city's motion to dismiss under Rule 12(b)(6) and 12(c), it was not precluded from granting the city's summary judgment motion. Wilkerson v. Norfolk S. Ry., 151 N.C. App. 332, 566 S.E.2d 104, 2002 N.C. App. LEXIS 744 (2002).

Rules Applicable to Counterclaims. — The rules regarding the sufficiency of a complaint to withstand a motion to dismiss pursuant to subsection (b)(6) of this rule, for failure to state a claim upon which relief can be granted, are equally applicable to a claim for relief by a defendant in a counterclaim. Barnaby v. Boardman, 70 N.C. App. 299, 318 S.E.2d 907 (1984), rev'd on other grounds, 313 N.C. 565, 330 S.E.2d 600 (1985).

And to Third-Party Complaints. — Where defendants/third-party plaintiffs, a car dealer and its agent, were sued for misrepresenting the condition of a car and filed a third-party complaint for contribution and indemnity against third-party defendant restorer, who repaired and then sold the car after it was involved in a collision, the trial court properly granted the restorer's N.C. R. Civ. P. 12(b)(6) motion to dismiss the third-party complaint for failure to state a claim upon which relief could be granted, as defendants failed to sufficiently allege that the restorer committed a tort against plaintiff buyers so as to render the restorer a joint tortfeasor. Bowman v. Alan Vester Ford Lincoln Mercury, 151 N.C. App. 603, 566 S.E.2d 818, 2002 N.C. App. LEXIS 886 (2002).

Appellate Court's Prior Decision Not Binding. — The appellate court's prior decision, in which it "vacated" an order dismissing the plaintiff's complaint for failure to state a claim, was not binding on the court on a later appeal of a judgment notwithstanding the verdict. While the appellate court, in the first appeal, held that the complaint disclosed no insurmountable bar to recover under at least one of the claims for relief, its inquiry in the second appeal was a very different one: Was the evidence introduced at trial, viewed in the light most favorable to the plaintiff, insufficient as a matter of law to support the jury's verdict? Pearce v. American Defender Life Ins. Co., 74 N.C. App. 620, 330 S.E.2d 9 (1985), rev'd in part on other grounds, 316 N.C. 461, 343 S.E.2d 174 (1986).

Failure to File Timely Complaint. — Under the statute of repose, a court properly granted a motion to dismiss when a complaint was filed more than six years after substantial completion of a house and, according to the complaint, the only acts subsequent to completion were repairs. Whitehurst v. Hurst Built, 156 N.C. App. 650, 577 S.E.2d 168, 2003 N.C. App. LEXIS 209 (2003).

Motion to Dismiss for Abuse of Process. — Allegations in complaint that defendant filed liens "for the purpose of injuring and destroying the credit business of the plaintiffs and in general to oppress the plaintiffs" and that the defendant knew they were without legal basis stated an ulterior motive and a willful act not proper in the regular course of the earlier legal proceeding, and therefore, the defendant's motion to dismiss the action for abuse of process was properly denied. Hewes v. Wolfe, 74 N.C. App. 610, 330 S.E.2d 16 (1985).

The public duty doctrine did not bar a claim against defendant/county for negligent inspection of plaintiffs' private residence. Thompson v. Waters, 351 N.C. 462, 526 S.E.2d 650, 2000 N.C. LEXIS 238 (2000).

The public duty doctrine did not bar a claim against the defendant/city for the alleged negligence of a 911 operator who delayed dispatching the fire department until six minutes after she received the call reporting the fire. Lovelace v. City of Shelby, 351 N.C. 458, 526 S.E.2d 652, 2000 N.C. LEXIS 237 (2000), appeal dismissed, 153 N.C. App. 378, 570 S.E.2d 136 (2002).

Challenge to Congressional Redistricting Plan. — Action brought by the Republican Party of North Carolina, thirty registered Republicans, nine registered Democrats, and three citizens not affiliated with either party to challenge the State's federal congressional redistricting plan was dismissed with prejudice under Rule 12(b)(6) for failure to state a claim. Pope v. Blue, 809 F. Supp. 392 (W.D.N.C. 1992), aff'd, 506 U.S. 801, 113 S. Ct. 30, 121 L. Ed. 2d 3 (1992).

Crossclaim Against Commissioner of DMV Held Barred. — Where the court determined that defendant as Commissioner of the DMV was a public official and therefore immune from liability for mere negligence, a crossclaim which alleged nothing more than negligence failed to state a claim for which relief could be granted. Columbus County Auto Auction, Inc. v. Aycock Auction Co., 90 N.C. App. 439, 368 S.E.2d 888 (1988).

Collateral Attack on Order Confirming Sheriff's Sale of Property. — Judgment debtor who did not appeal an order confirming a sheriff's sale of the judgment debtor's interest in property was not allowed to file an action collaterally attacking the order and the trial court properly dismissed the judgment debtor's action for failure to state a cause of action. Leary v. N.C. Forest Prods., Inc., 157 N.C. App. 396, 580 S.E.2d 1, 2003 N.C. App. LEXIS 745 (2003).

Complaint Concerning Loss of Bearer Bond Presented Basis for Declaratory Relief. — Plaintiff's complaint should not have been dismissed for failure to state a claim, since the court did not see an absence of law or fact to support plaintiff's claim or disclosure of a fact that necessarily defeated plaintiff's claim, and plaintiff's complaint concerning the loss of bearer bonds deposited with the Commissioner of Insurance presented a basis for declaratory relief. Selective Ins. Co. v. NCNB Nat'l Bank, 91 N.C. App. 597, 372 S.E.2d 876 (1988), rev'd on other grounds, 324 N.C. 248, 377 S.E.2d 756 (1989), cert. denied, 324 N.C. 248, 380 S.E.2d 521 (1989).

Failure to Allege Elements of Fraud. — Where defendants alleged the elements of false representation and concealment of material fact in general terms, they pleaded no facts which, if true, would have constituted fraudulent concealment by plaintiff of the financial condition of corporation. Consequently, defendants' allegation about books and records did not satisfy the particularity requirement of G.S. 1A-1, Rule 9(b), and dismissal of defendants' amended counterclaim under subsection (b)(6) of this rule was proper. Chesapeake Microfilm, Inc. v. Eastern Microfilm Sales & Serv., Inc., 91 N.C. App. 539, 372 S.E.2d 901 (1988).

Public Duty Doctrine Not a Shield from Liability Resulting from Ultrahazardous Activity. — The plaintiff stated a claim upon which relief could be granted when he alleged that defendant/city was strictly liable for the injuries which he sustained as a result of defendants' use of dynamite, an ultrahazardous activity. The public duty doctrine did not shield the city from liability for this claim because the protection afforded by the public duty doctrine does not extend to local governmental agencies other than law enforcement agencies engaged in their general duty to protect the public. Hargrove v. Billings & Garrett, Inc., 137 N.C. App. 759, 529 S.E.2d 693, 2000 N.C. App. LEXIS 535 (2000).

Failure to Allege Waiver of Immunity. — Where plaintiffs failed to allege in their complaint that defendant school board waived its immunity by the procurement of liability insurance to cover alleged negligence or tort, plaintiffs' complaint failed to state a cause of action as to defendant school board. Gunter v. Anders, 114 N.C. App. 61, 441 S.E.2d 167, aff'd on rehearing, 115 N.C. App. 331, 444 S.E.2d 685 (1994), cert. denied, 339 N.C. 612, 454 S.E.2d 250, rehearing dismissed, 339 N.C. 738, 454 S.E.2d 651 (1995).

County employee's claim for wrongful discharge failed to state a cause of action under G.S. 1A-1, N.C. R. Civ. P. 12(b)(6), where she failed to allege a waiver of sovereign immunity by the county and its officials, requiring dismissal; her Title VII action lacked subject matter jurisdiction pursuant to Rule 12(b)(1) where she failed to state whether she had exhausted her administrative remedies, requiring a remand for further determination. Paquette v. County of Durham, 155 N.C. App. 415, 573 S.E.2d 715, 2002 N.C. App. LEXIS 1619 (2002), cert. denied, 357 N.C. 165, 580 S.E.2d 695 (2003).

In a case in which plaintiff's daughter, as the personal representative of her father's estate, filed a negligence action against defendants, a human services agency, a social worker, and a guardian ad litem, for negligence involving incompetency and guardianship matters relating to her father, the trial court properly granted defendants' Rule 12(b)(6) motion to dismiss the complaint as against the agency and the social worker in the social worker's official capacity, as the complaint failed to state a claim against them by failing to allege a waiver of their sovereign immunity. Dalenko v. Wake County Dep't of Human Servs., 157 N.C. App. 49, 578 S.E.2d 599, 2003 N.C. App. LEXIS 371 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 386 (2003), cert. denied, 540 U.S. 1178, 124 S. Ct. 1411, 158 L. Ed. 2d 79 (2004).

Trial court properly dismissed an employee's wrongful termination complaint for failure to state a claim as the North Carolina Board of Nursing was a state agency that was entitled to a defense of sovereign immunity as the Board was enacted by G.S. 90-171.21, three members of the Board were appointed by the North Carolina Governor and the North Carolina legislature under G.S. 90-171.21(b), and its duties, as set forth in G.S. 90-171.23(b), served a public purpose; the employee failed to allege that the Board waived its sovereign immunity. Abbott v. N.C. Bd. of Nursing, 177 N.C. App. 45, 627 S.E.2d 482, 2006 N.C. App. LEXIS 714 (2006).

Trial court erred in denying state agencies' motion to dismiss a corporation's complaint, seeking a declaratory judgment that an E-Procurement fee was a tax not enacted by the legislature in violation of N.C. Const., Art. II, § 23 and a refund of the taxes under G.S. 105-267 because the corporation's claims were barred by the defense of sovereign immunity; the North Carolina Supreme Court's holding that sovereign immunity could not prevent a plaintiff from asserting a claim alleging a violation of his rights under the Declaration of Rights of the North Carolina Constitution was limited to alleged violations of personal rights and did not extend to the corporation's complaint because N.C. Const., Art. II, § 23 did not articulate any rights, only procedures to be followed. Petroleum Traders Corp. v. State, 190 N.C. App. 542, 660 S.E.2d 662, 2008 N.C. App. LEXIS 1003 (2008).

Waiver of Sovereign Immunity. — Trial court erred in dismissing, pursuant to G.S. 1A-1, Rule 12(b)(6), a construction company's breach of contract action against a state agency; G.S. 136-29 waived the agency's sovereign immunity, as the company complied with the statute and the claims arose under the contract. Battle Ridge Cos. v. N.C. DOT, 161 N.C. App. 156, 587 S.E.2d 426, 2003 N.C. App. LEXIS 1981 (2003), cert. denied, 358 N.C. 233, 594 S.E.2d 191 (2004).

Failure to Plead Exhaustion of Administrative Remedies. — County employee's claim for wrongful discharge failed to state a cause of action under G.S. 1A-1, N.C. R. Civ. P. 12(b)(6), where she failed to allege a waiver of sovereign immunity by the county and its officials, requiring dismissal; her Title VII action lacked subject matter jurisdiction pursuant to Rule 12(b)(1) where she failed to state whether she had exhausted her administrative remedies, requiring a remand for further determination. Paquette v. County of Durham, 155 N.C. App. 415, 573 S.E.2d 715, 2002 N.C. App. LEXIS 1619 (2002), cert. denied, 357 N.C. 165, 580 S.E.2d 695 (2003).

Improper to Consider Statute of Frauds. — It was inappropriate to consider, for purposes of a motion under subsection (b)(6) of this rule, whether a contract failed to comport with the statute of frauds, because the defense that the statute of frauds bars enforcement of a contract is an affirmative defense that can only be raised by answer or reply. Brooks Distrib. Co., Inc. v. Pugh, 324 N.C. 326, 378 S.E.2d 31 (1989).

A defendant may not take advantage of the provisions of the statute of frauds by a motion to dismiss for failure to state a claim upon which relief could be granted, which must be pleaded as an affirmative defense. Green v. Harbour, 113 N.C. App. 280, 437 S.E.2d 719 (1993).

Allegations of Plaintiff's Expenses Did Not State Claim. — Allegations made concerning the expenses the plaintiff incurred in presenting his claim and in preparing and pursuing his lawsuit did not state a claim that would support legal relief. Dailey v. Integon Gen. Ins. Corp., 75 N.C. App. 387, 331 S.E.2d 148 (1985), cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

Tort Action Brought by Improper Party. — Pursuant to subsection (b)(6) of this rule, trial court properly dismissed action brought against tortfeasor by employer of injured child's father, which had provided medical benefits for child through a self-funded employee benefit program. Harris-Teeter Super Mkts., Inc. v. Watts, 97 N.C. App. 101, 387 S.E.2d 203 (1990).

Complaint for Insurance Benefits Alleging Intentional Infliction of Emotional Distress. — Since a contract of insurance is a commercial transaction, absent allegations of specific facts which, if proved, would have demonstrated calculated intentional conduct causing emotional distress directed towards the claimant, a complaint for insurance benefits alleging intentional infliction of emotional distress did not withstand a motion to dismiss under subsection (b)(6) of this rule. Beasley v. National Sav. Life Ins. Co., 75 N.C. App. 104, 330 S.E.2d 207 (1985), discretionary review improvidently granted, 316 N.C. 372, 341 S.E.2d 338 (1986).

There is a difference between sufficiently alleging a claim and sufficiently proving it. Although the plaintiff clearly alleged a claim for the intentional infliction of emotional distress, there was no testimony whatsoever to indicate that he suffered emotional distress. Such an injury cannot be assumed, but must be proved by evidence. Dailey v. Integon Gen. Ins. Corp., 75 N.C. App. 387, 331 S.E.2d 148, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

Former jurors' complaint for intentional infliction of emotional distress was improperly dismissed because it sufficiently alleged defendant physician's conduct as extreme and outrageous; the complaint alleged that a letter sent by the defendant to community doctors, including the plaintiffs' primary care physicians, which categorized them as "Jurors who have found a doctor guilty," "People who have sued doctors," and "Others of whom I am leery" subjected plaintiffs to prejudice by the physicians in their local health care system. Burgess v. Busby, 142 N.C. App. 393, 544 S.E.2d 4, 2001 N.C. App. LEXIS 146 (2001).

Motion to Dismiss Improperly Granted. — Trial court erred in granting defendants' motion to dismiss the personal representative's negligence action because the allegations of the complaint did not necessarily dictate a finding of contributory negligence by the decedent where the fact that the decedent bypassed the crossing gate, in violation of G.S. 20-142.1, was evidence that could be considered in deciding whether the decedent breached the duty of exercising ordinary care. Sharp v. CSX Transp., Inc., 160 N.C. App. 241, 584 S.E.2d 888, 2003 N.C. App. LEXIS 1732 (2003).

Dismissal of the employee's claim for wrongful discharge in violation of public policy and her claim under North Carolina's Retaliatory Employment Discrimination Act (REDA), G.S. 95-240 et. seq., was reversed because the employee provided evidence that established that the employer admitted the employee was terminated for pursuing workers' compensation rights. Tarrant v. Freeway Foods of Greensboro, Inc., 163 N.C. App. 504, 593 S.E.2d 808, 2004 N.C. App. LEXIS 409 (2004), cert. denied, 358 N.C. 739, 603 S.E.2d 126 (2004).

Trial court erred in granting the seller's motion to dismiss in a case where the buyer sued the seller under multiple theories arising out of the sale of a log home package, after the parties had settled their dispute during trial, after the trial court had instructed them to file a stipulation of voluntary dismissal by a particular date, after they filed a stipulation on that date, and the buyer filed a complaint for breach of the settlement agreement and a second complaint stating his original causes of action; the one-year statute of limitations for refiling did not bar the buyer's second complaint because he filed it within one year of the date that the trial court directed the written stipulation of voluntary dismissal be filed, and, thus, the one-year refiling period began to run from that date and not the earlier date on which the buyer announced in open court that he intended to file an involuntary dismissal. Keyzer v. Amerlink, Ltd., 164 N.C. App. 761, 596 S.E.2d 878, 2004 N.C. App. LEXIS 1138 (2004).

For claims based on third-party beneficiary contract doctrine to withstand a motion to dismiss, plaintiffs' allegations must show: (1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental, benefit. Raritan River Steel Co. v. Cherry, Bekaert & Holland, 79 N.C. App. 81, 339 S.E.2d 62, reversed on other grounds, 329 N.C. 607, 407 S.E.2d 183 (1991), modified on other grounds, Raritan River Steel Co. v. Cherry, Bekaert & Holland, 322 N.C. 200, 367 S.E.2d 609 (1988).

Plaintiffs' allegation of a very general taking by aircraft overflights "within the past two years" failed to allege with reasonable specificity when the alleged appropriation or taking occurred; however, rather than dismissing the complaint altogether, the court should have required plaintiffs to come forward in accordance with defendant's motion for a more definite statement and plead the facts they possessed, so that the court could then rule on their timeliness and sufficiency. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

A claim should be dismissed under this rule where it appears that plaintiff is entitled to no relief under any statement of facts which could be proven; this will occur when there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. Garvin v. City of Fayetteville, 102 N.C. App. 121, 401 S.E.2d 133 (1991).

Dismissal as Adjudication on Merits. — With certain exceptions, G.S. 1A-1, Rule 41(b) provides that all dismissals, including those under subsection (b)(6) of this rule, operate as adjudications upon the merits unless the trial court specifies that the dismissal is without prejudice. Johnson v. Bollinger, 86 N.C. App. 1, 356 S.E.2d 378 (1987).

A dismissal with prejudice for failure to state a claim, including a dismissal under N.C. R. Civ. P. 12(b)(6), is a final judgment on the merits for res judicata purposes. Ashton v. City of Concord, 337 F. Supp. 2d 735, 2004 U.S. Dist. LEXIS 19217 (M.D.N.C. 2004).

Evidence Outside the Pleadings Not to Be Considered. — Where the trial court considered evidence outside the pleadings, motion to dismiss was improperly granted. Jacobs v. Royal Ins. Co. of Am., 128 N.C. App. 528, 495 S.E.2d 185 (1998).

Amendment After Dismissal. — A motion to dismiss under subsection (b)(6) of this rule is not a "responsive pleading" under G.S. 1A-1, Rule 15(a) and so does not itself terminate plaintiff's unconditional right to amend a complaint under G.S. 1A-1, Rule 15(a). However, once the trial court enters its dismissal under subsection (b)(6), plaintiff's right to amend under G.S. 1A-1, Rule 15(a) is terminated. Under certain limited circumstances set forth in G.S. 1A-1, Rules 59(e) and 60(b), a plaintiff may, however, seek to reopen the trial court's judgment and amend the complaint concurrently under G.S. 1A-1, Rule 15(a). Johnson v. Bollinger, 86 N.C. App. 1, 356 S.E.2d 378 (1987).

Claim Based on Repealed Statute Held Not Subject to Dismissal. — Claim based on former G.S. 168-6 held not subject to dismissal under subsection (b)(6) of this rule, notwithstanding the repeal of G.S. 168-6, where the complaint was sufficient to put defendants on notice of the events or transactions which produced the claim, and even though the General Assembly did not include a saving clause in the repeal of G.S. 168-6, the same remedy was immediately available to plaintiff for the same injury in the new act, without any intervening period in which plaintiff's claim was without legal redress. Buchanan v. Hunter Douglas, Inc., 87 N.C. App. 84, 359 S.E.2d 271, cert. denied, 321 N.C. 296, 362 S.E.2d 779 (1987).

Appeal of Dismissal. — When an action is dismissed with leave to amend, the proceeding is still pending and the plaintiff has no right to appeal such a dismissal interlocutory in nature. When the court allows amendment by the plaintiffs, relief in the trial court has not been entirely denied and appeal is premature. Day v. Coffey, 68 N.C. App. 509, 315 S.E.2d 96, cert. denied, 312 N.C. 82, 321 S.E.2d 894 (1984).

In a defamation action, the appeal of the candidate and campaign from the trial court's denial of their G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion was interlocutory, and the denial did not challenge a substantial right that was to be lost absent immediate appellate review pursuant to G.S. 1-277(a); the instant case was akin to a previous case in which an appeal from a motion for judgment on pleadings pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(c) was dismissed, and the instant case was distinguishable from a previous case in which an appeal on a ruling on a motion for summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56 was allowed, as a motion under G.S. 1A-1, N.C. R. Civ. P. 12(c) was more similar to a G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion. Grant v. Miller, 170 N.C. App. 184, 611 S.E.2d 477, 2005 N.C. App. LEXIS 902 (2005).

Appeal from the denial of the G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion to dismiss based on sovereign immunity affected a substantial right and was therefore immediately appealable. Meherrin Indian Tribe v. Lewis, — N.C. App. —, 677 S.E.2d 203, 2009 N.C. App. LEXIS 661 (2009).

When Denial of Motion May Be Reviewed on Appeal. — Ordinarily, denial of a motion to dismiss for failure to state a claim is an interlocutory order from which no immediate appeal may be taken. Nevertheless, where a decision of the principal question presented would expedite the administration of justice, or where the case involves a legal issue of public importance, appellate courts may exercise their discretion to determine such an appeal on its merits. Flaherty v. Hunt, 82 N.C. App. 112, 345 S.E.2d 426, cert. denied, 318 N.C. 505, 349 S.E.2d 859 (1986).

Review of Denial of Motion to Dismiss Not Available After Judgment on Merits. — Where an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986); Drain v. United Servs. Life Ins. Co., 85 N.C. App. 174, 354 S.E.2d 269, cert. denied, 320 N.C. 630, 360 S.E.2d 85 (1987).

An unsuccessful movant under subsection (b)(6) of this rule may not seek review of denial of such motion on appeal from judgment on the merits against him. Berrier v. Thrift, 107 N.C. App. 356, 420 S.E.2d 206 (1992), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

Breach of Contract Insufficient to Support Unfair Practices Claim. — The defendants' claim was properly dismissed pursuant to this section where their contention that the plaintiff did not follow through on an oral agreement to assist in purchasing a condominium, at most, stated a simple breach of contract, because they failed to allege any substantially aggravating circumstances which would give rise to an unfair or deceptive practices claim under G.S. 75-1.1. Miller v. Rose, 138 N.C. App. 582, 532 S.E.2d 228, 2000 N.C. App. LEXIS 777 (2000).

Claim for Concurrent Negligence. — For case holding plaintiff successfully stated a cause of action for concurrent negligence based upon the negligent acts of multiple defendants even though plaintiff could not allege which defendant had committed the injurious act, see McMillan ex rel. McMillan v. Mahoney, 99 N.C. App. 448, 393 S.E.2d 298 (1990).

Claim Against Parents for Negligence in Giving Air Rifles to Children. — For case holding plaintiff successfully stated a claim for negligence against parents for giving air rifles to their minor children (where plaintiff's injury was sustained after being shot by one of the children), see McMillan ex rel. McMillan v. Mahoney, 99 N.C. App. 448, 393 S.E.2d 298 (1990).

Claim for Failure to Follow Safety Requirements. — Where plaintiff alleged defendant was aware that the required safe methods for cleaning highly elevated windows were not being practiced, the defendant's management accepted and encouraged this fact, that defendant knew of supervisor's past record of ignoring safety requirements, and defendant had previously allowed exact cleaning job to be performed in the same inherently dangerous manner by this supervisor, these allegations were sufficient to state a legally cognizable claim that defendant intentionally engaged in conduct that it knew was substantially certain to cause serious injury or death. Arroyo v. Scottie's Professional Window Cleaning, Inc., 120 N.C. App. 154, 461 S.E.2d 13 (1995), discretionary review improvidently allowed, 343 N.C. 118, 468 S.E.2d 58 (1996).

Unfair and Deceptive Trade Practices Act. — Trial court properly granted defendants' motion pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) to dismiss an investor's action alleging violations of the Unfair and Deceptive Trade Practice Act (UDTPA), G.S. 75-1.1 and other claims; no authority existed for imposing a duty upon defendants, securities brokers, to oversee the manner in which the funds in question were invested, and securities transactions were not subject to the UDTPA, because such application would create overlapping supervision, enforcement, and liability in an area of law that was already pervasively regulated by state and federal statutes and agencies. Sterner v. Penn, 159 N.C. App. 626, 583 S.E.2d 670, 2003 N.C. App. LEXIS 1540 (2003).

Governmental Official Can Be Sued in Both Official and Individual Capacity. — A government employee in his official capacity is not in privity with himself in his individual capacity for purposes of res judicata; therefore, a prior lawsuit against an individual in his official capacity does not bar later relitigation of claims against that same individual in his personal capacity. Andrews v. Daw, 201 F.3d 521, 2000 U.S. App. LEXIS 999 (4th Cir. 2000).

Post-Trial Motion to Dismiss Improper. — Trial court in a granddaughter's claim for access to her relatives' gravesites under G.S. 65-75 [repealed] erred in allowing an owner to assert a motion to dismiss for failure to state a claim after trial, because such a motion was not permitted post-trial. Massey v. Hoffman, 184 N.C. App. 731, 647 S.E.2d 457, 2007 N.C. App. LEXIS 1595 (2007), appeal dismissed, review denied, 362 N.C. 360, 662 S.E.2d 907 (2008).

Dismissal Held Proper. — The trial court properly dismissed action brought by doctors against accountants who had been engaged to advise them on business opportunities under G.S. 1A-1, Rule 12(b)(6), as doctors' complaint against accountants disclosed that its claims were either time-barred or lacked facts sufficient to state a claim for relief. Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002).

Trial court's dismissal of a case claiming breach of a requirement contract was reversed; interpretation of the contract's termination language was a factual issue not appropriate for a G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) challenge. IWTMM, Inc. v. Forest Hills Rest Home, 156 N.C. App. 556, 577 S.E.2d 175, 2003 N.C. App. LEXIS 195 (2003).

Trial court properly dismissed the teachers' request for declaratory relief against the county school board under G.S. 115C-84.2 and G.S. 115C-301.1 as the teachers failed to plead all the facts necessary to disclose the existence of an actual controversy between the parties; furthermore, neither section expressly or implicitly created a private cause of action for the teachers. However, the trial court erred by dismissing the teachers' breach of contract claims against the school board as the teachers' allegations were sufficient to withstand the motion to dismiss. Lea v. Grier, 156 N.C. App. 503, 577 S.E.2d 411, 2003 N.C. App. LEXIS 238 (2003).

Since the landowners had the opportunity to present all affirmative defenses argued in their action for a permanent injunction during the condemnation proceedings, judicial economy counseled against litigating the same issues again; thus, the landowners' actions were properly dismissed for failure to state a cause of action. Nelson v. Town of Highlands, 159 N.C. App. 393, 583 S.E.2d 313, 2003 N.C. App. LEXIS 1516 (2003).

Since plaintiff general contractor did not allege negligence claims against defendant subcontractors that were not otherwise covered by contractual obligations, there was no tort-feasor, and thus, no statutory right to contribution under G.S. 1B-1; the trial court properly dismissed the claims against the subcontractors under G.S. 1A-1, Rule 12(b)(6). Kaleel Builders, Inc. v. Ashby, 161 N.C. App. 34, 587 S.E.2d 470, 2003 N.C. App. LEXIS 1993 (2003), cert. denied, 358 N.C. 235, 595 S.E.2d 152 (2004).

Where the accident occurred on April 12, 2000, and the uninsured motorist insurer was not served in the wrongful death action against the uninsured driver until July 3, 2002, the trial court properly dismissed the action under G.S. 1A-1, Rule 12, as the two-year wrongful death statute of limitations action under G.S.1-53(4) had expired. Sturdivant v. Andrews, 161 N.C. App. 177, 587 S.E.2d 510, 2003 N.C. App. LEXIS 2003 (2003), cert. denied, cert. dismissed, 358 N.C. 242, 594 S.E.2d 34 (2004).

Where the lifetime income beneficiaries of charitable trusts established in their complaint that the remainder beneficiary of the trusts, which was a charitable foundation, continued to exist and continued to make charitable distributions, the complaint on its face revealed that no law supported the beneficiaries' claim for reformation of the trust under the cy pres provisions of G.S. 36A-53(a); a trial court did not err in granting the foundation's motion to dismiss the beneficiaries' complaint. Morris v. E.A. Morris Charitable Found., 161 N.C. App. 673, 589 S.E.2d 414, 2003 N.C. App. LEXIS 2254 (2003), cert. denied, 358 N.C. 235, 593 S.E.2d 592 (2004).

Illegitimate child's complaint seeking a declaration that she was the sole heir of a decedent was properly dismissed where the complaint did not claim that the decedent was adjudged to be the child's father, or that the decedent had acknowledged himself to be the child's father in a written instrument which was duly executed and filed; absent G.S. 29-19(b), an illegitimate child had no right to inherit from his or her putative father, and, although a deoxyribonucleic acid (DNA) test had established that the decedent was the child's biological father, a positive DNA test was not listed in the the statute as a method of meeting the requirements to legitimate a child. Phillips v. Ledford, 162 N.C. App. 150, 590 S.E.2d 280, 2004 N.C. App. LEXIS 3 (2004), cert. denied, appeal dismissed, 358 N.C. 377, 597 S.E.2d 133 (2004).

Where a minority shareholder's complaint centered around an allegation that a corporation's directors and a buyer had engaged in a course of conduct designed to enable them to buy the shares of the minority at an unfair price, the complaint failed to adequately allege an unlawful or fraudulent transaction, and the complaint was properly dismissed. Osher v. Ridinger, 162 N.C. App. 155, 589 S.E.2d 905, 2004 N.C. App. LEXIS 37 (2004).

Trial court properly concluded that a lienholder which sued a county and the county's tax collector, alleging that the tax collector was negligent and violated the lienholder's constitutional rights when he failed to give the lienholder actual notice that a mobile home would be sold at a tax sale, did not state a claim upon which relief could be granted. Oakwood Acceptance Corp., LLC v. Massengill, 162 N.C. App. 199, 590 S.E.2d 412, 2004 N.C. App. LEXIS 118 (2004).

Former employee's breach of contract claim against his former employer was dismissed for failure to state a claim upon which relief could be granted because the employee was an at-will employee and, without supporting factual allegations, his claim that the employer's code of conduct was part of his employment contract failed. Guarascio v. New Hanover Health Network, Inc., 163 N.C. App. 160, 592 S.E.2d 612, 2004 N.C. App. LEXIS 301 (2004), cert. denied, 358 N.C. 375, 597 S.E.2d 130 (2004).

N.C. Gen. Stat. § 50B-1 et seq. does not establish victims of domestic violence as a protected class of persons or extend employment security status to such persons, and domestic violence victims were not members of a protected class or otherwise entitled to special treatment; the termination of the at will employment of a domestic violence victim did not violate public policy, and a trial court's dismissal of his wrongful termination suit was affirmed. Imes v. City of Asheville, 163 N.C. App. 668, 594 S.E.2d 397, 2004 N.C. App. LEXIS 583 (2004), aff'd, 359 N.C. 182, 606 S.E.2d 117 (2004).

Client's legal malpractice claim was properly dismissed under G.S. 1A-1, Rule 12(b)(6), as time barred, because the action was filed over three years after end of trial and, one count alleged negligence in trial strategy, response to pretrial stipulations, and discovery, all of which necessarily occurred before or during trial, while the second count alleged negligence in failure to challenge the validity of a prenuptial agreement on appeal, which was in adhering to the rules of court and thus, did not constitute malpractice. Ventriglia v. Deese, — N.C. App. —, 669 S.E.2d 817, 2008 N.C. App. LEXIS 2263 (2008).

Dismissal Held Improper. — In a case brought by mobile home owners against the manufacturer of those homes, alleging that the manufacturer had engaged in unfair and deceptive trade practices by recommending and selling the owners a defective mobile home tie-down system, the owners' claim that they should be allowed to recover the costs that they incurred to buy and install the defective tie down systems or the costs to retro-fit their tie-down system to one that provided a safe and reliable method to secure the homes in severe weather conditions and met the minimal governmental standards, stated a claim for actual injury sufficient to survive the manufacturer's motion to dismiss; a trial court's dismissal of the owners' claim was reversed. Coley v. Champion Home Builders Co., 162 N.C. App. 163, 590 S.E.2d 20, 2004 N.C. App. LEXIS 5 (2004), cert. denied, 358 N.C. 542, 599 S.E.2d 41 (2004).

Trial court erred in dismissing buyers' breach of implied warranty claim arising out of fact that they could not build the home they wanted to build on the property they bought from the seller that would comply with the property's restrictive covenants; evidence showed that the seller not only made misrepresentations about the property, but that the seller took steps to hinder the buyers from investigating the alleged misrepresentations and discovering that they could not build the home they wanted to build on the property. Little v. Stogner, 162 N.C. App. 25, 592 S.E.2d 5, 2004 N.C. App. LEXIS 13 (2004).

B. Conversion of Motion to Dismiss to Summary Judgment Motion.

When Motion to Dismiss Converted to Summary Judgment Motion. — A motion to dismiss for failure to state a claim is converted to a G.S. 1A-1, Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979); Piedmont Consultants of Statesville, Inc. v. Baba, 48 N.C. App. 160, 268 S.E.2d 222 (1980); Baugh v. Woodard, 56 N.C. App. 180, 287 S.E.2d 412, cert. denied, 305 N.C. 759, 292 S.E.2d 574 (1982).

Where extraneous matter is received and considered on a motion to dismiss under subsection (b)(6) of this rule, the motion should be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in G.S. 1A-1, Rule 56. Fowler v. Williamson, 39 N.C. App. 715, 251 S.E.2d 889 (1979); Roach v. City of Lenoir, 44 N.C. App. 608, 261 S.E.2d 299 (1980); Oliver v. Roberts, 49 N.C. App. 311, 271 S.E.2d 399 (1980).

By the provisions of section (b) of this rule itself, matters outside the pleading may be presented to the court and considered by it on a motion to dismiss under subsection (b)(6), in which case the motion will be treated as one for summary judgment under G.S. 1A-1, Rule 56. Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973).

Section (b) of this rule provides that on a motion under subsection (b)(6), if matters outside the pleadings are presented to and considered by the court, the motion will be treated as one for summary judgment and disposed of as provided in G.S. 1A-1, Rule 56. Parslow v. Parslow, 47 N.C. App. 84, 266 S.E.2d 746 (1980).

Where the record contains affidavits and indicates that the trial judge, in addition to considering the pleadings and attached exhibits, also heard counsel for both parties and considered briefs submitted by both parties, the motion for judgment on the pleadings under section (c) of this rule must be considered as though it was made under G.S. 1A-1, Rule 56. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

Where matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment under G.S. 1A-1, Rule 56. DeArmon v. B. Mears Corp., 312 N.C. 749, 325 S.E.2d 223 (1985); King v. Durham County Mental Health Developmental Disabilities & Substance Abuse Auth., 113 N.C. App. 341, 439 S.E.2d 771 (1994).

Where matters outside the pleadings are before the court, a motion to dismiss may be treated as a motion for summary judgment. Deans v. Layton, 89 N.C. App. 358, 366 S.E.2d 560, cert. denied, 322 N.C. 834, 371 S.E.2d 276 (1988).

When a trial court considers matters outside the pleadings, a motion under this rule is automatically converted into a motion for summary judgment. North Carolina Steel, Inc. v. National Council on Comp. Ins., 123 N.C. App. 163, 472 S.E.2d 578 (1996), aff'd in part and rev'd in part, 347 N.C. 627, 496 S.E.2d 369 (1998).

Where the trial court reviewed the evidence that was presented before the referee and found that there were no issues of material fact, the trial court was permitted to enter summary judgment, as the summary judgment entered in the instant case was analogous to where an appellate court treated a motion under G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) as a motion for summary judgment. Dockery v. Hocutt, 153 N.C. App. 744, 571 S.E.2d 81, 2002 N.C. App. LEXIS 1267 (2002).

Where the North Carolina Industrial Commission considers materials outside of the pleadings, a movant's motion to dismiss pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) was converted into a motion for summary judgment. Norman v. N.C. DOT, 161 N.C. App. 211, 588 S.E.2d 42, 2003 N.C. App. LEXIS 2043 (2003), review dismissed, review denied, 358 N.C. 235, 595 S.E.2d 153 (2004), cert. denied, 358 N.C. 545, 599 S.E.2d 404 (2004).

Dismissal of school bus driver's negligence action, based on the bus driver's failure to file the action as a compulsory counterclaim in earlier litigation, was reversed; the trial court considered matters outside the face of the bus driver's complaint in ordering the dismissal, which converted the motion to one for summary judgment, and the parties had not been given an opportunity to present evidence on whether the failure to file the compulsory counterclaim estopped the bus driver from bringing her claims in a separate action. Kemp v. Spivey, 166 N.C. App. 456, 602 S.E.2d 686, 2004 N.C. App. LEXIS 1781 (2004).

Trial court converted a G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion into a motion for summary judgment because the court considered matters outside of the pleadings in the form of exhibits, depositions, affidavits and discovery responses. Bailey v. Handee Hugo's, Inc., 173 N.C. App. 723, 620 S.E.2d 312, 2005 N.C. App. LEXIS 2302 (2005).

Because the trial court clearly considered matters outside the pleadings, the trial court properly treated defendants' G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion to dismiss as a motion for summary judgment under G.S. 1A-1, N.C. R. Civ. P. 56. Barbee v. Johnson, 190 N.C. App. 349, 660 S.E.2d 135, 2008 N.C. App. LEXIS 887 (2008).

Because the superior court considered matters outside the pleadings when the court heard an insurer's motion to dismiss the insureds' counterclaims, the appellate court reviewed the superior court's grant of the insurer's motion to dismiss as the grant of a motion for summary judgment. State Farm Mut. Auto. Ins. Co. v. Gaylor, 190 N.C. App. 448, 660 S.E.2d 104, 2008 N.C. App. LEXIS 821 (2008).

Motion Not Converted to Motion for Summary Judgment by Reference to Contract. — Defendant's motion to dismiss was not converted into one for summary judgment by the trial court's referring to the contract which was the subject of the action and was specifically referred to in the complaint. Coley v. North Carolina Nat'l Bank, 41 N.C. App. 121, 254 S.E.2d 217 (1979); Brooks Distrib. Co. v. Pugh, 91 N.C. App. 715, 373 S.E.2d 300 (1988), rev'd on other grounds, 324 N.C. 326, 378 S.E.2d 31 (1989).

Motion Not Converted to Motion For Summary Judgment By Reference To Administrative Complaint Or Rrigh-To-Sue Letter. — Where an employee referred in a complaint for a violation of the North Carolina Retaliatory Employment Discrimination Act, G.S. 95-240 et seq., to the administrative complaint and/or right-to-sue letter from the North Carolina Department of Labor, which were not attached to the complaint, and they formed the procedural basis for the complaint, the trial court did not convert the employer's motion to dismiss under Rule 12(b)(6) into one for summary judgment under G.S. 1A-1, Rule 56, by considering the unattached documents. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Summary judgment, like judgment on the pleadings, is appropriately granted only where no disputed issues of fact have been presented and the undisputed facts show that any party is entitled to judgment as a matter of law. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

The notice required in situations where a subsection (b)(6) motion is treated as a motion for summary judgment is procedural rather than constitutional. As such, the proper action for counsel to take is to request a continuance or additional time to produce evidence. Objections to timeliness are therefore not germane in such situations and the trial court has discretion, provided the opposing party has a "reasonable opportunity" to present pertinent material, to take and consider affidavits in support of a converted motion. By participating in the hearing and failing to request a continuance or additional time to produce evidence, a party waives his right to this procedural notice. Raintree Homeowners Ass'n v. Raintree Corp., 62 N.C. App. 668, 303 S.E.2d 579, cert. denied, 309 N.C. 462, 307 S.E.2d 366 (1983).

Complaint in Federal Court Incorporated by Reference Not Matter Outside Pleadings. — Where the plaintiff incorporated by reference in her complaint as an exhibit a complaint in a federal court action and a copy of it was attached, the complaint in the federal court action was not a matter outside the pleadings converting a motion to dismiss under subsection (b)(6) of this rule into a motion for summary judgment under G.S. 1A-1, Rule 56, since G.S. 1A-1, Rule 10(c) provides that such an exhibit is a part of the pleading for all purposes. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979).

Memoranda, Briefs and Oral Arguments Not Matters Outside the Pleading. — Memoranda of points and authorities as well as briefs and oral arguments are not considered matters outside the pleading for purposes converting a motion under this rule into a motion for summary judgment under G.S. 1A-1, Rule 56. Privette v. University of N.C., 96 N.C. App. 124, 385 S.E.2d 185 (1989).

Illustrative Cases. — Where plaintiff sought a personal judgment against owners based on its contract to drill a well and to have such personal judgment declared to be a specific lien on the property allegedly conveyed by owners to purchasers, but there was no allegation in the complaint that the purchasers were indebted to plaintiff in any amount, and subsequently plaintiff abandoned its claim for a personal judgment based on the contract to drill the well by taking a voluntary dismissal of its claim against owners, when the trial judge granted the purchasers motion to dismiss under subsection (b)(6) of this rule there was no debt or judgment to be secured by a lien on the property in question, and since the court necessarily considered matters outside the pleadings, i.e., the voluntary dismissal of plaintiff's claim for personal judgment against owners, order under subsection (b)(6) of this rule was converted to a summary judgment for the purchasers with respect to the dismissal of plaintiff's claim to have a lien imposed on the property. Johnson v. Builder's Transp., Inc., 79 N.C. App. 721, 340 S.E.2d 515 (1986).

Materials which constituted only requests, explanations, and arguments of counsel on both sides with respect to defendants' motions under subsection (b)(6) of this rule were matters outside the pleadings within the meaning of section (b) thereof. King v. Cape Fear Mem. Hosp., 96 N.C. App. 338, 385 S.E.2d 812 (1989), cert. denied, 326 N.C. 265, 389 S.E.2d 114 (1990).

Where, in a claim brought by mobile home owners alleging unfair and deceptive trade practices by the manufacturers of the homes, the parties presented to the trial court deposition testimony and affidavits, none of which was excluded by the trial court, the trial court's conversion of the manufacturers' N.C. R. Civ. P. 12(b)(6) motion into a N.C. R. Civ. P. 56 motion was proper; although the owners argued that they were not given a reasonable opportunity to present all pertinent material, the owners did not request a continuance or additional time to produce evidence, but fully participated in the hearing, and thus their claim was meritless. Belcher v. Fleetwood Enters., 162 N.C. App. 80, 590 S.E.2d 15, 2004 N.C. App. LEXIS 9 (2004).

Where, in support of their motion claiming that a legal malpractice claim against them was time barred, lawyers submitted a complaint filed against the client in a separate case and the client's answer to that complaint, which were not excluded by the trial court, the motion was treated as one for summary judgment. Bolton v. Crone, 162 N.C. App. 171, 589 S.E.2d 915, 2004 N.C. App. LEXIS 56 (2004).

Trial court's order indicated that it dismissed a complaint under N.C. R. Civ. P. 12(b)(6), and notably, did not mention any of the evidentiary matter appropriately considered on a motion for summary judgment; moreover, nothing in the record established that the trial court considered matters beyond the pleadings. Accordingly, the trial court did not convert the motion to dismiss into a summary judgment motion. Charlotte Motor Speedway, Inc. v. Tindall Corp., — N.C. App. —, 672 S.E.2d 691, 2009 N.C. App. LEXIS 120 (2009).

Court Lacked Jurisdiction To Convert After Timely Voluntary Dismissal. — Where plaintiff had a motion to amend his complaint pending before the trial court and, consequent to the defendants' motion to dismiss, filed a timely voluntary dismissal under Rule 41 (a)(1)(i), and the trial court had before it matters outside the pleadings, the trial court did not have jurisdiction to dismiss plaintiff's complaint with prejudice pursuant to subdivision (b)(6) of this rule. Schnitzlein v. Hardee's Food Sys., 134 N.C. App. 153, 516 S.E.2d 891, 1999 N.C. App. LEXIS 679 (1999), cert. denied, 351 N.C. 109, 540 S.E.2d 365 (1999).

X. FAILURE TO JOIN NECESSARY PARTY.

A defense of failure to join a necessary party must be raised in the trial court; it may not be asserted for the first time on appeal. Stancil v. Bruce Stancil Refrigeration, Inc., 81 N.C. App. 567, 344 S.E.2d 789, cert. denied, 318 N.C. 418, 349 S.E.2d 601 (1986), appeal dismissed, 94 N.C. App. 760, 381 S.E.2d 720 (1989).

Remedy for Failure to Join Necessary Party Is Motion to Dismiss. — Summary judgment is not a proper remedy for failure to join a necessary party. Rather, a motion to dismiss for failure to join a necessary party would be proper. Dildy v. Southeastern Fire Ins. Co., 13 N.C. App. 66, 185 S.E.2d 272 (1971).

Dismissal under subsection (b)(7) of this rule is proper only when the defect cannot be cured, and the court ordinarily should order a continuance for the absent party to be brought into the action and plead. Howell v. Fisher, 49 N.C. App. 488, 272 S.E.2d 19 (1980), cert. denied, 302 N.C. 218, 277 S.E.2d 69 (1981).

Trial court did not err in denying the town's motion to dismiss the newspaper's amended complaint for lack of standing and for the alleged failure to join a necessary party, the town clerk, as the newspaper was a party to the action who sought the disclosure of the alleged public records at issue, and thus the newspaper had standing to request the documents, and it was not necessary to join the town clerk to the action before all necessary parties to the action were before the trial court. Womack Newspapers, Inc. v. Town of Kitty Hawk, 181 N.C. App. 1, 639 S.E.2d 96, 2007 N.C. App. LEXIS 81 (2007).

Court to Decide Whether Absent Party Should Be Joined. — When faced with a motion under subsection (b)(7) of this rule, the court will decide if the absent party should be joined as a party. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971); Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

If it decides in the affirmative, the court will order him brought into the action. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971); Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Procedure Where Absentee Cannot Be Joined. — If the absentee cannot be joined, the court must then determine, by balancing the guiding factors set forth in G.S. 1A-1, Rule 19(b), whether to proceed without him or to dismiss the action. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

Under subsection (b)(7), dismissal is appropriate where the party ordered joined is not subject to the court's jurisdiction. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

A dismissal under subsection (b)(7) is not considered to be on the merits and is without prejudice. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

Trial court's order conditionally indicating that plaintiff homeowner association's tax refund action would be dismissed if certain necessary parties were not joined, erroneously indicated that such dismissal would be with prejudice; a dismissal for failure to join a necessary party, such as in response to a motion under N.C. R. Civ. P. 12(b)(7), was not a dismissal on the merits and could not be with prejudice. Fairfield Mt. Prop. Owners Ass'n v. Doolittle, 149 N.C. App. 486, 560 S.E.2d 604, 2002 N.C. App. LEXIS 189 (2002).

Failure to Join the County in Rezoning Dispute Was Fatal. — The trial court erred in denying the Board of Commissioners' motion to dismiss under G.S. 1A-1, Rule 12(b)(1), (2), (4), (6) and (7) where the plaintiffs brought their action challenging a rezoning solely against the Board and not against the County and where the plaintiffs' attempts to amend the complaint to substitute the county as the named defendant were ineffective as they occurred after the statute of limitations had run under G.S. 1-54.1 because G.S. 1A-1, Rule 15(c) is not authority for the relation back of claims against a new party. Piland v. Board of Comm'rs, 141 N.C. App. 293, 539 S.E.2d 669, 2000 N.C. App. LEXIS 1411 (2000).

XI. MOTION FOR JUDGMENT ON THE PLEADINGS.

Section (c) of this rule is identical to its federal counterpart. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974).

Motions Under Subsection (b)(6) and Section (c) Distinguished. — Principal difference between a motion for judgment on the pleadings and a motion to dismiss for failure to state a claim upon which relief can be granted is that a motion under section (c) of this rule is properly made after the pleadings are closed, while a motion under subsection (b)(6) of this rule must be made prior to or contemporaneously with the filing of the responsive pleading. Robertson v. Boyd, 88 N.C. App. 437, 363 S.E.2d 672 (1988).

The survival of an action after a motion under subsection (b)(6) of this rule is not the equivalent to the court determining that conflicting issues exist. No party is entitled to judgment as a matter of law under section (c). Cash v. State Farm Mut. Auto. Ins. Co., 137 N.C. App. 192, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

Motion for judgment on the pleadings operates substantially the same as under the Code system before adoption of the new Rules of Civil Procedure. Ragsdale v. Kennedy,

286 N.C. 130, 209 S.E.2d 494 (1974).

Function of section (c) of this rule is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974); High v. Parks, 42 N.C. App. 707, 257 S.E.2d 661, cert. denied, 298 N.C. 806, 262 S.E.2d 1 (1979).

Inapplicable to Post-Trial Motions. — Motions under section (c) of this rule are pretrial motions requiring a review of the pleadings; they cannot be employed to test the validity of post-trial motions. Scott v. Scott, 106 N.C. App. 379, 416 S.E.2d 583 (1992).

Judgment on the pleadings under section (c) is not favored by the law, and the nonmovant's pleadings will be liberally construed. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

A motion for judgment on the pleadings is not favored by the courts; pleadings alleged to state no cause of action or defense will be liberally construed in favor of the pleader. RGK, Inc. v. United States Fid. & Guar. Co., 292 N.C. 668, 235 S.E.2d 234 (1977).

Judgment on the pleadings pursuant to section (c) of this rule is not favored by the law, and the pleadings must be liberally construed in the light most favorable to the nonmoving parties. Pipkin v. Lassiter, 37 N.C. App. 36, 245 S.E.2d 105 (1978); DeTorre v. Shell Oil Co., 84 N.C. App. 501, 353 S.E.2d 269 (1987).

Judgment on the pleadings is not appropriate merely because the claimant's case is weak and he is unlikely to prevail on the merits. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976); Pipkin v. Lassiter, 37 N.C. App. 36, 245 S.E.2d 105 (1978).

Judgment on the pleadings is proper only when the pleadings fail to present any issue of fact for the jury. Gammon v. Clark, 25 N.C. App. 670, 214 S.E.2d 250 (1975).

A judgment on the pleadings based upon a plea of the statute of limitations is proper only when the pleadings fail to present any issue of fact for determination by a jury. Flexolite Elec., Ltd. v. Gilliam, 55 N.C. App. 86, 284 S.E.2d 523 (1981).

A motion for judgment on the pleadings is proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974); Pipkin v. Lassiter, 37 N.C. App. 36, 245 S.E.2d 105 (1978); DeTorre v. Shell Oil Co., 84 N.C. App. 501, 353 S.E.2d 269 (1987).

When pleadings do not resolve all factual issues, judgment on pleadings is generally inappropriate. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974).

The law does not authorize entry of a judgment on the pleadings in any case where the pleadings raise an issue of fact on any single material proposition. Cline v. Seagle, 27 N.C. App. 200, 218 S.E.2d 480 (1975).

Movant Must Prove Entitlement to Judgment as Matter of Law. — A motion for judgment on the pleadings pursuant to section (c) of this rule should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law. American Bank & Trust Co. v. Elzey, 26 N.C. App. 29, 214 S.E.2d 800, cert. denied, 288 N.C. 252, 217 S.E.2d 662 (1975); J.F. Wilkerson Contracting Co. v. Rowland, 29 N.C. App. 722, 225 S.E.2d 840, cert. denied, 290 N.C. 660, 228 S.E.2d 452 (1976); Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

Under section (c) of this rule, a party moving for judgment on the pleadings is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974); Shellhorn v. Brad Ragan, Inc., 38 N.C. App. 310, 248 S.E.2d 103, cert. denied, 295 N.C. 735, 249 S.E.2d 804 (1978); Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

The movant under section (c) of this rule must show, even when viewing the facts and permissible inferences in the light most favorable to the nonmoving party, that he is clearly entitled to judgment as a matter of law. DeTorre v. Shell Oil Co., 84 N.C. App. 501, 353 S.E.2d 269 (1987); Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142.

When a party moves for judgment on the pleadings, he admits two things for the purpose of his motion, namely: (1) the truth of all well-pleaded facts in the pleading of his adversary, together with all fair inferences to be drawn from such facts; and (2) the untruth of his own allegations insofar as they are controverted by the pleading of his adversary. Gammon v. Clark, 25 N.C. App. 670, 214 S.E.2d 250 (1975).

All well-pleaded factual allegations in the nonmoving party's pleadings are taken as true, and all contravening assertions in the nonmovant's pleadings are taken as false. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974); Shellhorn v. Brad Ragan, Inc., 38 N.C. App. 310, 248 S.E.2d 103, cert. denied, 295 N.C. 735, 249 S.E.2d 804 (1978).

Upon a motion for judgment on the pleadings under section (c) of this rule the allegations of the nonmovant are taken as true and all contravening assertions of the movant are taken as false. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

When a party moves for judgment on the pleadings, he admits the truth of all well-pleaded facts in the pleading of the opposing party and the untruth of his own allegations insofar as they are controverted by the pleadings of the opposing party. Pipkin v. Lassiter, 37 N.C. App. 36, 245 S.E.2d 105 (1978).

What Allegations in Nonmovant's Pleadings Deemed Admitted. — All allegations in the nonmovant's pleadings except conclusions of law, legally impossible facts and matters not admissible in evidence at the trial are deemed admitted by the movant for purposes of the motion. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974); Commercial Credit Equip. Corp. v. Thompson, 48 N.C. App. 594, 269 S.E.2d 286 (1980).

For the purpose of a motion for judgment on the pleadings, the movant is deemed to have admitted all factual allegations in the nonmovant's pleadings except those which are legally impossible and those not admissible in evidence. Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987).

Facts and permissible inferences are viewed in the light most favorable to nonmoving party in considering a motion for judgment on the pleadings. Ragsdale v. Kennedy, 286 N.C. 130, 209 S.E.2d 494 (1974); Shellhorn v. Brad Ragan, Inc., 38 N.C. App. 310, 248 S.E.2d 103, cert. denied, 295 N.C. 735, 249 S.E.2d 804 (1978); Rose v. Guilford County, 60 N.C. App. 170, 298 S.E.2d 200 (1982).

In considering a motion for judgment on the pleadings, the trial court is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. American Bank & Trust Co. v. Elzey, 26 N.C. App. 29, 214 S.E.2d 800, cert. denied, 288 N.C. 252, 217 S.E.2d 662 (1975); Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976); Burton v. Kenyon, 46 N.C. App. 309, 264 S.E.2d 808 (1980); Newbold v. Globe Life Ins. Co., 50 N.C. App. 628, 274 S.E.2d 905 (1981).

Evidence to Be Considered by Trial Judge. — In a motion for judgment on the pleadings the trial judge is to consider only the pleadings and any attached exhibits, which become part of the pleadings. No evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

Trial court did not err in considering a Resolution, ratifying the execution of an interlocal agreement between a city's board of education and a county, that was attached to the city's and county's G.S. 1A-1, N.C. R. Civ. P. 12(c) motion for judgment on the pleadings, even though the Resolution was not made part of the pleadings. The complaint for declaratory judgment made clear reference to the events that were memorialized in the Resolution, and any error was harmless because, by plaintiff's admission, the interlocal agreement was properly before the trial court. Reese v. Charlotte-Mecklenburg Bd. of Educ. & Mecklenburg, — N.C. App. —, 676 S.E.2d 481, 2009 N.C. App. LEXIS 532 (2009).

Trial court properly considered attachments to documents referred to in an objector's complaint in deciding a N.C. R. Civ. P. 12(c) motion to dismiss which was filed by a city and a county. By referencing an agreement in the objector's complaint, the objector placed the entire agreement, including all referenced attachments, before the trial court for consideration of the Rule 12(c) motion. Reese v. City of Charlotte, — N.C. App. —, 676 S.E.2d 493, 2009 N.C. App. LEXIS 506 (2009).

The Trial Court Cannot, on Its Own motion, Enter Judgment on the Pleadings. — The trial court was not authorized to enter judgment on the pleadings pursuant to this rule because neither party in a neglect proceeding moved for judgment on the pleadings. Thrift v. Buncombe County Dep't of Soc. Servs., 137 N.C. App. 559, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

Under section (c) of this rule the court is not required to find facts in a judgment on the pleadings since the facts determining disposition are those alleged in the pleadings; and the court cannot select some of the alleged facts as a basis for granting the motion on the pleadings if other allegations, together with the selected facts, establish material issues of fact. J.F. Wilkerson Contracting Co. v. Rowland, 29 N.C. App. 722, 225 S.E.2d 840, cert. denied, 290 N.C. 660, 228 S.E.2d 452 (1976).

Findings and Conclusions as Surplusage. — Findings of fact and conclusions of law in a judgment on the pleadings were surplusage and of no legal effect. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

When Summary Judgment Motion Treated as Motion for Judgment on Pleadings. — Where the record on appeal contained no affidavits, answers to interrogatories, or anything else other than the pleadings upon which to base a decision, a motion purportedly made under G.S. 1A-1, Rule 56 would be considered as a motion for judgment on the pleadings under section (c) of this rule. Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974); Town of Bladenboro v. McKeithan, 44 N.C. App. 459, 261 S.E.2d 260, appeal dismissed, 300 N.C. 202, 282 S.E.2d 228 (1980); Burton v. Kenyon, 46 N.C. App. 309, 264 S.E.2d 808 (1980).

A motion for judgment on the pleadings is inappropriate where the complaint is not fatally defective and matters outside the pleadings are presented to and considered by the court; under such circumstances the motion for judgment on the pleadings must be treated as a motion for summary judgment. Battle v.

Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

When Motion for Judgment on Pleadings Treated as Motion for Summary Judgment. — Where matters outside the pleadings were considered by the court in reaching its decision on the judgment on the pleadings, the motion for judgment on the pleadings was treated as if it were a motion for summary judgment. Helms v. Holland, 124 N.C. App. 629, 478 S.E.2d 513 (1996).

Deputy area director of a substance abuse area authority could not complain that she was not afforded a reasonable opportunity to prepare and present evidence for summary judgment when on the authority's motion for judgment on the pleadings the authority referred to but did not offer any evidence or materials to the trial court for consideration, but the director, over the authority's objection, requested the trial court to consider matters outside the pleadings by presenting at least three documents to the judge; furthermore, the trial judge based its judgment only on the pleadings and the arguments of counsel. Davis v. Durham Mental Health/Development Disabilities/Substance Abuse Area Auth., 165 N.C. App. 100, 598 S.E.2d 237, 2004 N.C. App. LEXIS 1156 (2004).

When 12(b)(6) Motion Converted to Motion for Judgment on the Pleadings. — Because the trial court could apply G.S. 1A-1, N.C. R. Civ. P. 12(c) sua sponte, it did not err in considering exhibits appended to the answer and converting the G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion to a G.S. 1A-1, N.C. R. Civ. P. 12(c) motion. S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, 189 N.C. App. 601, 659 S.E.2d 442, 2008 N.C. App. LEXIS 703 (2008).

Motion for Judgment on the Pleadings Treated as (12)(b)(6) Motion. — Although respondent styled his motion as one for judgment on the pleadings pursuant to Rule 12(c), the court treated it as a motion for failure to state a claim because (1) the basis for the motion was that the petition failed to state sufficient facts as required by G.S. 7A-289.25(6) [see now G.S. 7B-1104], and (2) a motion is treated according to its substance and not its label. In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, appeal dismissed, 332 N.C. 483, 424 S.E.2d 397 (1992).

Grant of Motion Held Proper. — The plaintiff was not prejudiced by dismissal of her case on the pleadings, where the defendant had requested dismissal for failure to state a claim, but plaintiff had received the pleadings two weeks prior to trial and the court could have rendered judgment on the pleadings sua sponte. Terrell v. Lawyers Mut. Liab. Ins., 131 N.C. App. 655, 507 S.E.2d 923 (1998).

Plaintiff's cause of action for constructive fraud against defendant/insurer, who settled a claim in spite of plaintiff's repeated protestations that claimants were acting fraudulently, failed because he did not present evidence of a fiduciary relationship between insurer/defendant and himself. Cash v. State Farm Mut. Auto. Ins. Co., 137 N.C. App. 192, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

A cause of action alleging breach of good faith will not lie when the insurer settles a claim within the monetary limits of the insured's policy; the insurer has the duty to consider the insured's interest, but may act in its own interest in settlement of the claim. Cash v. State Farm Mut. Auto. Ins. Co., 137 N.C. App. 192, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000).

Judgment on the pleadings in favor of an insurance company was affirmed where the plain language of a disability policy stated that the benefit payments under the policy were limited to a 36-month term. Gore v. Nationsbanc Ins. Co., 153 N.C. App. 520, 570 S.E.2d 115, 2002 N.C. App. LEXIS 1174 (2002).

Where a probation officer's memorandum filed in support of a G.S. 1A-1, Rule 12(c) motion for judgment on the pleadings contained no factual matters outside the pleadings, the trial court properly treated the motion as one for summary judgment. Lambert v. Cartwright, 160 N.C. App. 73, 584 S.E.2d 341, 2003 N.C. App. LEXIS 1674 (2003), cert. denied, 357 N.C. 658, 590 S.E.2d 268 (2003).

Trial court did not err in granting substance abuse area authority's motion for judgment on the deputy area director's pleadings because, taking the director's allegations as true, no genuine issue of material fact existed and the authority did not violate the North Carolina Open Meetings Law, G.S. 143-318.9 et. seq., to warrant the appointment of an interim area director to be declared null and void or a nullity. Davis v. Durham Mental Health/Development Disabilities/Substance Abuse Area Auth., 165 N.C. App. 100, 598 S.E.2d 237, 2004 N.C. App. LEXIS 1156 (2004).

Grant of Motion Held Error. — The trial court erred in granting defendant's counterclaim for mortgage payments without a hearing on the merits, where the pleadings did not establish due dates, nor did plaintiff admit that such payments were due. Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987).

Motion for judgment on the pleadings was not favored, and should not have been granted unless it appeared to a certainty that the plaintiff was entitled to no relief under any state of facts which could have been proved in support of the claim; a trial court's dismissal was reversed where the complaint adequately alleged claims of breach of contract, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, constructive fraud, and unfair trade practices. Governor's Club, Inc. v. Governors Club Ltd. P'ship., 152 N.C. App. 240, 567 S.E.2d 781, 2002 N.C. App. LEXIS 926 (2002), aff'd sub nom., 357 N.C. 46, 577 S.E.2d 620 (2003).

In a medical malpractice case, the trial court erred in granting the doctor and hospital's motions for judgment on the pleadings pursuant to subsection (c) of this rule and denying the injured party's motion to set aside the dismissal pursuant to G.S. 1A-1, Rule 60(b), where the injured party filed the case on the last day of a 120-day extension, filed an amended complaint containing the expert testimony certification, voluntarily dismissed the action, and later refiled the complaint; the statute of limitations for malpractice actions under G.S. 1-15(c) had not run, because the original complaint was timely filed, and the first action was properly dismissed without prejudice and properly re-filed within a year. Bass v. Durham County Hosp. Corp., 158 N.C. App. 217, 580 S.E.2d 738, 2003 N.C. App. LEXIS 1044 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

Because the trial court improperly struck the husband's answer, the trial court's allowance of the wife's motion for judgment on the pleadings under G.S. 1A-1, N.C. R. Civ. P. 12(c) also was error. Carpenter v. Carpenter, 189 N.C. App. 755, 659 S.E.2d 762, 2008 N.C. App. LEXIS 692 (2008).

Redundancy of Order Under Section (c). — Where all defendants made timely motions pursuant to subsection (b)(6) of this rule, which were granted by the trial court, the court's subsequent order pursuant to section (c) of this rule was redundant and would not be considered on appeal. Thus, the sole issue in the appeal was whether the trial court erred in granting defendants' motions under subsection (b)(6). Robertson v. Boyd, 88 N.C. App. 437, 363 S.E.2d 672 (1988).

As to appellate consideration of motion for judgment on pleadings, see Mills v. Koscot Interplanetary, Inc., 13 N.C. App. 681, 187 S.E.2d 372 (1972).

Motion to dismiss an appeal from the granting of a motion for judgment on the pleadings under N.C. R. Civ. P. 12(c) was granted because no substantial rights were affected; there was no showing that any defenses or arguments concerning actual malice in a First Amendment defamation claim would have been lost if the case was allowed to proceed. Boyce & Isley, PLLC v. Cooper, 169 N.C. App. 572, 611 S.E.2d 175, 2005 N.C. App. LEXIS 675 (2005).

Refusal to Grant Judgment on Pleadings on Grounds of Governmental Immunity. — Although normally an appeal does not lie from the denial of a motion for judgment on the pleadings, an immediate appeal will lie under subsection (c), as well as subsection (b), where the trial court refuses to grant a judgment on the pleadings for the state on the grounds of governmental immunity. Whitaker v. Clark, 109 N.C. App. 379, 427 S.E.2d 142, cert. denied, 333 N.C. 795, 431 S.E.2d 31 (1993).

City's motion for judgment on the pleadings, in a case alleging its negligence in failing to promptly dispatch the fire department to a burning house, asserting that the public duty doctrine protected it from liability, was properly denied because the public duty doctrine only applied narrowly to the failure of law enforcement to provide protection to specific individuals. Lovelace v. City of Shelby, 153 N.C. App. 378, 570 S.E.2d 136, 2002 N.C. App. LEXIS 1175 (2002), cert. denied, 356 N.C. 437, 572 S.E.2d 785 (2002).

Judgment on the Pleadings Inappropriate in an Adjudication of Neglect. — Just as a default judgment or judgment on the pleadings is inappropriate in a proceeding involving termination of parental rights, it is equally inappropriate in an adjudication of neglect. Thrift v. Buncombe County Dep't of Soc. Servs., 137 N.C. App. 559, 528 S.E.2d 394, 2000 N.C. App. LEXIS 417 (2000).

Summary judgment improper where plaintiffs' claim raised a genuine issue as to defendant's negligence in the design and construction of a retaining wall, the necessary costs to remedy the defects and the appropriate damages by submitting affidavits and photographs in support of their claim, and defendant submitted no material beyond its pleadings. Floraday v. Don Galloway Homes, Inc., 340 N.C. 223, 456 S.E.2d 303 (1995).

Standard of review. — Appellate court reviews de novo rulings on motions made pursuant to G.S. 1A-1-12(c). Toomer v. Branch Banking & Trust Co., 171 N.C. App. 58, 614 S.E.2d 328, 2005 N.C. App. LEXIS 1188 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

XII. MOTION FOR MORE DEFINITE STATEMENT.

Motion for a more definite statement is the most purely dilatory of all the motions available under the Rules of Civil Procedure. Ross v. Ross, 33 N.C. App. 447, 235 S.E.2d 405 (1977); Fisher v. Lamm, 66 N.C. App. 249, 311 S.E.2d 61 (1984).

Motion for more definite statement is not favored by the courts and is sparingly granted, because pleadings may be brief and lacking in factual detail, and because of the extensive discovery devices available to the movant. Ross v. Ross, 33 N.C. App. 447, 235 S.E.2d 405 (1977).

Vagueness as Grounds for Motion for More Definite Statement But Not Motion

to Dismiss. — Mere vagueness is not ground for a motion to dismiss, but a defendant is instead entitled to attack an allegation by a motion for a more definite statement under section (e) of this rule. Schloss Outdoor Adv. Co. v. City of Charlotte, 50 N.C. App. 150, 272 S.E.2d 920 (1980).

Motion for More Definite Statement Within Discretion of Court. — The granting or denial of a motion for a more definite statement rests in the sound discretion of the trial judge, and his ruling thereon will not be overturned on appeal absent a showing of abuse of discretion. Ross v. Ross, 33 N.C. App. 447, 235 S.E.2d 405 (1977).

So long as pleading meets requirements of § 1A-1, Rule 8 and fairly notifies the opposing party of the nature of the claim, a motion for more definite statement will not be granted. Ross v. Ross, 33 N.C. App. 447, 235 S.E.2d 405 (1977).

Special Damages. — Where plaintiff pleaded business losses as special damages, however vaguely and ambiguously, defendants' proper remedy was a motion for a more definite statement under section (e) of this rule, and not dismissal under subsection (b)(6) of this rule. Johnson v. Bollinger, 86 N.C. App. 1, 356 S.E.2d 378 (1987).

Dismissal for Failure to Comply. — Dismissal of an amended complaint for a failure to comply with a court order for a more definite statement was vacated, as the trial court had not considered lesser sanctions; the trial court had to at least consider lesser sanctions before imposing dismissal as a sanction in a civil case pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(e) or 41(b). Page v. Mandel, 154 N.C. App. 94, 571 S.E.2d 635, 2002 N.C. App. LEXIS 1417 (2002), cert. denied, 356 N.C. 676, 577 S.E.2d 631 (2003).

XIII. MOTION TO STRIKE.

The purpose of section (f) of this rule is to avoid expenditure of time and resources before trial by removing spurious issues, whether introduced by original or amended complaint. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

A motion under section (f) is a device to test the legal sufficiency of an affirmative defense. First-Citizens Bank & Trust Co. v. Akelaitis, 25 N.C. App. 522, 214 S.E.2d 281 (1975).

Section (f) of this rule requires that a motion to strike be made before responding to a pleading. Clouse v. Chairtown Motors, Inc., 14 N.C. App. 117, 187 S.E.2d 398 (1972).

Section (f) of this rule allows the court to strike improper allegations from any pleading. Although the reported cases do not address the application of section (f) of this rule to allegations added under G.S. 1A-1, Rule 15, the latter rule clearly governs pleadings practice, and motions to strike logically are available to test amended as well as original complaints. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Matter should not be stricken unless it has no possible bearing upon the litigation. If there is any question as to whether an issue may arise, the motion should be denied. Shellhorn v. Brad Ragan, Inc., 38 N.C. App. 310, 248 S.E.2d 103, cert. denied, 295 N.C. 735, 249 S.E.2d 804 (1978).

Trial court did not err in denying the town's motion to strike portions of the newspaper's amended complaint, as the allegations in the amended complaint questioned the town's compliance with the public records law and the town's later resolution to disclose certain records, and thus were relevant and material to the newspaper's claims in a case where the newspaper sought the disclosure of certain records it claimed were public records. Womack Newspapers, Inc. v. Town of Kitty Hawk, 181 N.C. App. 1, 639 S.E.2d 96, 2007 N.C. App. LEXIS 81 (2007).

Trial court did not abuse its discretion by denying a plaintiff's motion to strike a section of the defendant's answer, which section was designated as the "Overview" because the Overview asserted, in words or substance, that the actions of the defendants were lawful, and characterized the relief that the plaintiff sought as efforts to have the courts supervise the activities of governmental units. These parts were sufficiently related to the allegations of the complaints that the plaintiff was not entitled to have the motion to strike granted. Reese v. City of Charlotte, — N.C. App. —, 676 S.E.2d 493, 2009 N.C. App. LEXIS 506 (2009).

Motion to Strike Inappropriate for Failure to Timely File Answer. — Trial court erred in granting the wife's motion to strike the husband's pleadings because failure to timely file an answer was not grounds for striking a pleading under G.S. 1A-1, N.C. R. Civ. P. 12(f) and the answer that the husband did file raised matters that could have had a possible bearing on the litigation. Carpenter v. Carpenter, 189 N.C. App. 755, 659 S.E.2d 762, 2008 N.C. App. LEXIS 692 (2008).

Motion under Section (f) Not Proper to Challenge Notice of Dismissal Without Prejudice. — A motion to strike "any insufficient defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter" under section (f) of this rule is not the proper motion by which to challenge a notice of dismissal without prejudice. Travelers Ins. Co. v. Ryder Truck Rental, Inc., 34 N.C. App. 379, 238 S.E.2d 193 (1977).

"Short and Plain Statement" of Com-

plaint. — It was error for the court to strike a lengthy, highly detailed and technical complaint on the apparent grounds that it did not contain a short and plain statement of the facts. Section 1A-1, Rule 8 prescribes the minimum information that a pleading must contain; it does not require that a complaint contain only a "short and plain statement." Holley v. Burroughs Wellcome Co., 74 N.C. App. 736, 330 S.E.2d 228 (1985), aff'd, 318 N.C. 352, 348 S.E.2d 772 (1986).

Consideration of Untimely Motion Upheld. — Although plaintiff's motion to strike was not timely filed, because this section clearly states that the trial court may strike materials from the pleadings on its own initiative at any time, the trial court's consideration of the motion was permissible despite its untimeliness. Daily v. Mann Media, Inc., 95 N.C. App. 746, 384 S.E.2d 54 (1989), cert. denied, 326 N.C. 47, 389 S.E.2d 86 (1990).

Defense Stricken for Irrelevance. — Where defendant agreed to pay plaintiff severance pay in the event that the parties' business relationship ended, defendant was not entitled to plead as a defense that plaintiff's action was barred because he was terminated for cause, and accordingly, the trial court committed no error in striking that defense on the grounds that it was irrelevant and immaterial, having no possible bearing upon the litigation, and because the defense was legally insufficient. Daily v. Mann Media, Inc., 95 N.C. App. 746, 384 S.E.2d 54 (1989), cert. denied, 326 N.C. 47, 389 S.E.2d 86 (1990).

Employer's affirmative defense of frustration of purpose was stricken, under G.S. 1A-1, N.C. R. Civ. P. 12(b), as inapplicable to its breach of an agreement to pay its former employee retirement benefits. Faulconer v. Wysong & Miles Co., 155 N.C. App. 598, 574 S.E.2d 688, 2002 N.C. App. LEXIS 1572 (2002).

In an insurance case, an insured's third-party complaint against an alleged bailee whose alleged negligence caused the destruction of the property for which insurance coverage was sought, was properly stricken under G.S. 1A-1, N.C. R. Civ. P. 12(f), because the complaint was not filed in accordance with G.S. 1A-1, N.C. R. Civ. P. 15(a), and the statute of limitations on the claim it attempted to assert had run at the time a motion was made to amend the complaint to include that claim, and was therefore immaterial having no possible bearing on the litigation. Barnes v. Erie Ins. Exch., 156 N.C. App. 270, 576 S.E.2d 681, 2003 N.C. App. LEXIS 103 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

Affirmative Defense Allowed Because State Agency Waived Sovereign Immunity. — Trial court properly denied state transportation agency's motion to strike condemned landowners' affirmative defense of abuse of discretion since the state agency had waived sovereign immunity. DOT v. Blue, 147 N.C. App. 596, 556 S.E.2d 609, 2001 N.C. App. LEXIS 1235 (2001).

Objectionable Language Was Relevant to Motive. — Trial court did not abuse its discretion when it denied a G.S. 1A-1, N.C. R. Civ. P. 12(f), motion to strike the overview section of a count's answer to a complaint for declaratory relief. The answer complied with G.S. 1A-1, N.C. R. Civ. P. 8(b) and (c), the objectionable language ascribed a motive for plaintiff's institution of litigation that was personal to him as one engaged in business pursuits with an alternative plan for the subject properties, and the matter might have had a bearing upon the litigation. Reese v. Charlotte-Mecklenburg Bd. of Educ. & Mecklenburg, — N.C. App. —, 676 S.E.2d 481, 2009 N.C. App. LEXIS 532 (2009).

XIV. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-127, 1-134 and 1-153.*

A defect in jurisdiction over the subject matter cannot be cured by waiver, consent, amendment or otherwise. Anderson v. Atkinson, 235 N.C. 300, 69 S.E.2d 603 (1952), decided under former G.S. 1-134.

The objection that a prior action is pending between the same parties for the same cause is waived unless it is raised in the mode appointed by law. McDowell v. Blythe Bros. Co., 236 N.C. 396, 72 S.E.2d 860 (1952), decided under former G.S. 1-134.

The court may strike out irrelevant or redundant matter inserted in a pleading upon motion of any party aggrieved, aptly made. Wall v. England, 243 N.C. 36, 89 S.E.2d 785 (1955); Girard Trust Bank v. Easton, 3 N.C. App. 414, 165 S.E.2d 252 (1969), decided under former G.S. 1-153.

Irrelevant or redundant matter inserted in a pleading is subject to a motion to strike. Johnson v. Petree, 4 N.C. App. 20, 165 S.E.2d 757 (1969), decided under former G.S. 1-153.

A motion to strike, made in apt time, is made as a matter of right. Sullivan v. Johnson, 3 N.C. App. 581, 165 S.E.2d 507 (1969), decided under former G.S. 1-153.

A complaint must be fatally defective before it will be rejected as insufficient. Newman Mach. Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969), decided under former G.S. 1-127.

OPINIONS OF ATTORNEY GENERAL

District Court Judge May Consider Merits of Divorce Action Immediately After Filing of Defendant's Answer. — See opinion of Attorney General to Honorable Charles B. Deane, Jr., Senator, Seventeenth District, 43 N.C.A.G. 344 (1974).

Rule 13. Counterclaim and crossclaim.

(a) *Compulsory counterclaims.* — A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if

(1) At the time the action was commenced the claim was the subject of another pending action, or

(2) The opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

(b) *Permissive counterclaim.* — A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) *Counterclaim exceeding opposing claim.* — A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) *Counterclaim against the State of North Carolina.* — These rules shall not be construed to enlarge beyond the limits fixed by law the right to assert counterclaims or to claim credit against the State of North Carolina or an officer or agency thereof.

(e) *Counterclaim maturing or acquired after pleading.* — A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) *Omitted counterclaim.* — When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) *Crossclaim against coparty.* — A pleading may state as a crossclaim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such crossclaim may include a claim that the party against whom it is asserted is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.

(h) *Additional parties may be brought in.* — When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or crossclaim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.

(i) *Separate trial; separate judgment.* — If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or crossclaim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of. (1967, c. 954, s. 1.)

COMMENT

Sections (a) through (f) deal with counterclaims that must and those that may be asserted in an action, i.e., with compulsory and permissive counterclaims.

Compulsory counterclaims. — There is no current statutory provision which in terms makes any counterclaim compulsory. However, certain counterclaims have traditionally been made compulsory in effect by application of res judicata principles. The judicially evolved rule is that a party will be barred from maintaining an action if in a prior or pending action he could have obtained the same relief by permissive counterclaim and if a judgment for plaintiff in the former or pending action would collaterally estop the plaintiff in the second in respect of determinative issues. Thus, most typically, when a party is sued for damages arising out of negligent operation of an automobile, he must assert any claim for damages he may have arising out of the same occurrence by counterclaim, at peril of being barred from thereafter asserting the claim by separate action. Allen v. Salley, 179 N.C. 147, 101 S.E. 545 (1919). Rule 13(a) states this substantially, but with more directness, and in a way which avoids some possible question about the application of the North Carolina judicial rule to a second action when plaintiff in the first action lost. Basically, this rule should cause no actual change in the practice in respect to those claims which counsel for defendants will feel under compulsion to assert by counterclaim at peril of being barred to assert them separately.

Three necessary exceptions to the basic rule of compulsion are provided in this section. A counterclaim otherwise compulsory under the rule need not be asserted: (1) If parties necessary to its adjudication cannot be subjected to jurisdiction; or (2) if the pleader has already asserted the claim in another pending action; or (3) if to counterclaim would subject the pleader to personal jurisdiction in respect of a merely quasi in rem claim by the plaintiff, as to which the pleader is not otherwise amenable to personal jurisdiction. Furthermore, possible relief against the consequences of failure to assert a normally compulsory counterclaim is provided in section (f) which gives the court discretion to allow a compulsory counterclaim to be added by amendment.

Permissive counterclaim. — Under former code practice, two types of counterclaim were permissive: (1) Any contract claim existing at the commencement of the plaintiff's action, when the plaintiff's claim is in contract, and (2) any claim arising out of the same contract or transaction which is the basis of plaintiff's action (usually compulsory under the res judicata rule).

The rule in section (b) is much broader. In fact, it is unlimited in its terms — a pleader may at his option assert any claim he may have against an opponent which he is not compelled by section (a) to assert. This approach parallels that of the unlimited joinder of claims philosophy of Rule 18. The idea is that so far as the basic structuring of the litigation at the pleading stage is concerned, there should be unlimited ability to join opposing as well as parallel claims — and that the appropriate protection against trial of an overly complex case resulting from unlimited counterclaim assertion right is by severance for separate trial subsequently under Rule 42(b).

Section (c). — This section states existing case law in North Carolina. See 1 McIntosh, *North Carolina Practice and Procedure, § 1238 (2d ed. 1956).*

Section (d). — This section is self-explanatory.

Section (e). — This section allows the assertion by supplemental pleading, with leave of court, of counterclaims maturing or acquired after the pleader has already filed his defensive pleading. This is a direct and simple handling of a problem as to which confusion had existed under code practice. Under former § 1-137, a counterclaim might be asserted under the contract section only if it was in existence at the time of commencement of plaintiff's action, but no such limitation was stated with respect to counterclaims under the same transaction section. But, of course, these also may arise out of contract, and some confusion existed in applying the statute. See 1 McIntosh, *North Carolina Practice and Procedure,* § 1242 (2d ed. 1956). This rule makes no distinction based on types of counterclaim, but simply provides that any subsequently acquired counterclaim may, if the court deems it proper on a whole view of the matter, be injected into litigation after the initial pleading has already been served.

Crossclaims between parties similarly aligned, as coplaintiffs or codefendants. — Rule 13(g), following the general philosophy of an unlimited option by pleaders to join any claims and assert any counterclaims at the pleading stage, lays down a very liberal policy for asserting crossclaims between coparties. There is, however, a limitation, not found with respect to permissive claim joinder under Rule 18, or permissive counterclaim assertion under Rule 13(b). The crossclaim must arise out of the same transaction or occurrence on which the basic claims and counterclaims are based, or must relate to property which is the subject matter of the original action. Thus, coparties cannot as a matter of right inject claims between themselves which have not even a general historical relation to the basic claims in litigation between plaintiffs and defendants. But, given the general historical relation expressed in the concept, "arising out of the same transaction or occurrence," there is no further requirement that the crossclaim relate substantively to the basic claim or counterclaim — or that it in some way affect the party asserting these basic claims. Thus, most typically, where A sues B and C for personal injury damages as alleged joint tort-feasors, B and C may crossclaim against each other in respect of independent claims for personal injury or property damage alleged to have resulted from the same occurrence out of which A's claim arose. Certainly the most common bases for crossclaims are those for contribution or indemnification in respect of the crossclaimant's alleged liability, and the last sentence Rule 13(g) specifically authorizes these bases.

This represents a substantial departure from former code practice which, without specific statutory directive, had slowly evolved a much more restrictive judicial rule for permissible crossclaims between coparties. Thus, it was held under the code that the only permissible crossclaim was one for indemnification based on a noncontractual right (e.g., primary as opposed to secondary tort liability). Specifically forbidden was any crossclaim by one codefendant against another for: (1) Personal injury or property damage to the claimant, notwithstanding it "arose out of the same occurrence" as plaintiff's primary claim. Jarrett v. Brogdon, 256 N.C. 693, 124 S.E.2d 850 (1962); (2) contribution in respect of the crossclaimant's liability to plaintiff. Bass v. Lee, 255 N.C. 73, 120 S.E.2d 570 (1961); and (3) indemnification if based on an express or implied contract to indemnify crossclaimant in respect of his liability to plaintiff. Steele v. Moore-Flesher Hauling Co., 260 N.C. 486, 133 S.E.2d 197 (1963). See generally, tracing the evolution of the permissible crossclaim rules to their present state, Note, 40 N.C.L. Rev. 633 (1962).

Section (h). — This section states existing North Carolina case law. Bullard v. Berry Coal & Oil Co., 254 N.C. 756, 119 S.E.2d 910 (1961) (when A sues B in negligence and B counterclaims, B may have C brought in to defend against counterclaim on allegations that C is vicariously liable thereon in respect of A's alleged negligence).

Here again, with respect to the liberal attitude toward allowable crossclaims, the notion is that if over-complexity results for the purposes of trial, severance and separate trials under Rule 42(b) is the appropriate action, rather than preventing the assertion of crossclaims at the pleading stage.

Section (i). — This section incorporates the provisions of Rule 54(b) to allow the entering of "final judgment" in respect to particular counterclaims or crossclaims, notwithstanding the whole action is not yet ripe for judgment.

Legal Periodicals. — For comment on the definition and scope of res judicata in North Carolina, see 5 Wake Forest Intra. L. Rev. 315 (1969).

For note on relation back of barred counterclaims under section (f) of this rule, see 49 N.C.L. Rev. 134 (1970).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For note discussing the application of the compulsory counterclaim provision of this rule in divorce suits, see 57 N.C.L. Rev. 439 (1979).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. In General.
II. Counterclaims.
III. Crossclaims.

I. IN GENERAL.

Factors to Consider. — In analyzing whether two or more claims arose out of the same transaction or occurrence for purposes of the compulsory counterclaim rule, the Supreme Court of North Carolina adopts the following three federal caselaw factors for a court to consider: (1) whether the issues of fact and law raised by the claim and counterclaim are largely the same; (2) whether substantially the same evidence bears on both claims; and (3) whether any logical relationship exists between the two claims. Though application of the compulsory counterclaim rule is not reducible to any simple formula, a North Carolina court should inquire, at a minimum, into those three factors when deciding if a claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P., 359 N.C. 593, 614 S.E.2d

268, 2005 N.C. LEXIS 643 (2005).

Applied in Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975); Thompson v. Thompson, 26 N.C. App. 496, 216 S.E.2d 376 (1975); Harris v. Harris, 58 N.C. App. 314, 293 S.E.2d 602 (1982); Small v. Britt, 64 N.C. App. 533, 307 S.E.2d 771 (1983); Cyclone Roofing Co. v. David M. LaFave Co., 67 N.C. App. 278, 312 S.E.2d 709 (1984); Mid-South Constr. Co. v. Wilson, 71 N.C. App. 445, 322 S.E.2d 418 (1984); Basinger v. Basinger, 80 N.C. App. 554, 342 S.E.2d 549 (1986); United States Fire Ins. Co. v. Southeast Airmotive Corp., 102 N.C. App. 470, 402 S.E.2d 466 (1991); North Carolina Farm Bureau Mut. Ins. Co. v. Wingler, 110 N.C. App. 397, 429 S.E.2d 759 (1993); Walker v. Branch Banking & Trust Co., 133 N.C. App. 580, 515 S.E.2d 727 (1999); Batts v. Batts, 160 N.C. App. 554, 586 S.E.2d 550, 2003 N.C. App. LEXIS 1837 (2003); Sprinkle v. N.C. Wildlife Res. Comm'n, 165 N.C. App. 721, 600 S.E.2d 473, 2004 N.C. App. LEXIS 1513 (2004); Outlaw v. Johnson, 190 N.C. App. 233, 660 S.E.2d 550, 2008 N.C. App. LEXIS 907 (2008).

Cited in Watson v. Carr, 4 N.C. App. 287, 166 S.E.2d 503 (1969); Ingram v. Nationwide Mut. Ins. Co., 5 N.C. App. 255, 168 S.E.2d 224 (1969); Merchants Distribs., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972); Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974); Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399 (1978); Sloan v. Wells, 37 N.C. App. 177, 245 S.E.2d 529 (1978); Carolina Garage, Inc. v. Holston, 40 N.C. App. 400, 253 S.E.2d 7 (1979); Gardner v. Gardner, 300 N.C. 715, 268 S.E.2d 468 (1980); Rodgers v. Tindal, 46 N.C. App. 783, 266 S.E.2d 691 (1980); Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980); Cox v. Haworth, 304 N.C. 571, 284 S.E.2d 322 (1981); Townsend v. Bentley, 57 N.C. App. 581, 292 S.E.2d 19 (1982); Wood v. Wood, 60 N.C. App. 178, 298 S.E.2d 422 (1982); Moretz v. Northwestern Bank, 67 N.C. App. 312, 313 S.E.2d 8 (1984); Mrosla v. Feldman, 90 N.C. App. 261, 368 S.E.2d 39 (1988); Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991); Post & Front Properties, Ltd. v. Roanoke Constr. Co., 117 N.C. App. 93, 449 S.E.2d 765 (1994); Walker Frames v. Shively, 123 N.C. App. 643, 473 S.E.2d 776 (1996); Davis Lake Cmty. Ass'n v. Feldmann, 138 N.C. App. 322, 530 S.E.2d 870, 2000 N.C. App. LEXIS 609 (2000).

II. COUNTERCLAIMS.

The purpose of section (a) of this rule, making certain counterclaims compulsory, is to enable one court to resolve all related claims in one action, thereby avoiding a wasteful multiplicity of litigation. Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978); Stines v. Satterwhite, 58 N.C. App. 608, 294 S.E.2d 324 (1982); Carolina Squire, Inc. v. Champion Map Corp., 75 N.C. App. 194, 330 S.E.2d 36 (1985).

The term "at the time the action was commenced," as used in subsection (a)(1) of this rule, refers to the action against which the pleader is required to counterclaim, and not necessarily the primary action originally commencing the lawsuit. Thus, where defendant institutes a crossclaim and a third-party action, the court should look to the times of filing such crossclaim and third-party action to determine whether, at those times, there was pending an action whose claim involved the same subject matter as that of the proposed counterclaims. Faggart v. Biggers, 18 N.C. App. 366, 197 S.E.2d 75, cert. denied, 283 N.C. 752, 198 S.E.2d 721 (1973).

Counterclaims do not relate back to the date of the original pleading, so they are subject to statutes of limitations dated to the time the counterclaim is filed, not to the date of the complaint and answer. PharmaResearch Corp. v. Mash, 163 N.C. App. 419, 594 S.E.2d 148, 2004 N.C. App. LEXIS 410 (2004), cert. denied and dismissed, 358 N.C. 733, 601 S.E.2d 858 (2004).

Section (a) of this rule is a tool designed to further judicial economy. Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

Section (a) of this rule is a tool designed to further judicial economy. The tool should not be used to combine actions that, despite their origin in a common factual background, have no logical relationship to each other. Winston-Salem Joint Venture v. Cathy's Boutique, Inc., 72 N.C. App. 673, 325 S.E.2d 286 (1985).

In order to find that an action must be filed as a compulsory counterclaim pursuant to section (a) of this rule, a court must first find a logical relationship between the factual backgrounds of the two claims. In addition, the court must find a logical relationship between the nature of the actions. Winston-Salem Joint Venture v. Cathy's Boutique, Inc., 72 N.C. App. 673, 325 S.E.2d 286 (1985).

And Should Not Be Used to Combine Actions Without Logical Relationship. — Section (a) of this rule is a tool designed to further judicial economy. The tool should not be used to combine actions that, despite their origin in a common factual background, have no logical relationship to each other. Curlings v. Macemore, 57 N.C. App. 200, 290 S.E.2d 725 (1982).

A counterclaim is in the nature of an independent proceeding and is not automatically determined by a ruling in the principal claim. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

What Claims Must Be Asserted. — This rule requires a party to assert as a counterclaim any claim arising out of the same transaction or occurrence as the pending action, "at peril of being barred" from asserting the claim in a later action. Furr v. Noland, 103 N.C. App. 279, 404 S.E.2d 885 (1991).

Where plaintiff proffered its counterclaims one year and three months after the filing of the complaint, by that time extensive discovery had already taken place, the new counterclaims would have required evidence of transactions which occurred three to five years earlier, and plaintiff sought to allege unfair and deceptive business practices for the first time, defendants were not to be penalized with more discovery and litigation and, for the first time, be exposed to treble damages because plaintiff was initially acting pro se and its first attorney was dilatory. House Healers Restorations, Inc. v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Plaintiff/husband's claim to recoup money on two promissory notes executed by his wife during their marriage was a compulsory counterclaim in defendant's previously filed domestic action; and he should, therefore, have been granted leave, upon its dismissal, to file it properly in separate case. Hudson v. Hudson, 135 N.C. App. 97, 518 S.E.2d 811 (1999).

In an action in which a seller filed against a buyer, alleging breach of contract for failure to pay for goods, the buyer failed to assert counterclaims alleging breach of express warranty, breach of the implied warranty of merchantability, or breach of the implied warranty of fitness for a particular purpose at trial, and the appellate court refused to allow the buyer to assert those claims on appeal as a basis for reversing the trial court's order granting summary judgment in favor of the seller. Business Communs., Inc. v. Ki Networks, Inc., 157 N.C. App. 710, 580 S.E.2d 77, 2003 N.C. App. LEXIS 937 (2003).

To Be Compulsory, Counterclaim Must Exist When Pleading Is Served. — Under G.S. 1A-1, Rule 13(a), a party is required to plead as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction; under this rule, a counterclaim is compulsory only when it is in existence at the time of the serving of the pleading. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Where a claim is not mature at the time of the filing of the action, failure to bring it as a counterclaim does not serve as a bar to subsequent litigation on that claim; even where the claim matures after the pleadings have been filed but during the pendency of the action, the pleader is not required to supplement the pleadings with a compulsory counterclaim. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Once a claim has been denominated a compulsory counterclaim under section (a) of this rule, the question what must be done with it if it is filed as a subsequent, independent claim is not answered by the rule itself. Atkins v. Nash, 61 N.C. App. 488, 300 S.E.2d 880 (1983).

Logical Relationship Between Factual Backgrounds and Nature of Actions Required. — In order to find that an action must be filed as a compulsory counterclaim pursuant to section (a) of this rule, a court must first find a logical relationship between the factual backgrounds of the two claims. In addition, the court must find a logical relationship between the nature of the actions. Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980); Curlings v. Macemore, 57 N.C. App. 200, 290 S.E.2d 725 (1982).

Similarity in Nature of Action and Remedy Sought More Important Than Common Factual Transaction. — It is the similarity in the nature of the action and the remedy sought which seems to be more important in establishing when an action will be treated as a compulsory counterclaim, rather than a basis in a common factual transaction. Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

Section (a) of this rule does not require that the legal claims be identical. It is sufficient that the nature of the actions and the remedies sought are logically related in fact and law. Brooks v. Rogers, 82 N.C. App. 502, 346 S.E.2d 677 (1986).

In determining whether certain claims arose out of the same transaction or occurrence as a prior action for purposes of treating them as compulsory counterclaims, several factors are considered: (1) Whether the issues of fact and law are largely the same; (2) whether substantially the same evidence is involved in each action; and (3) whether there is a logical relationship between the two actions. Brooks v. Rogers, 82 N.C. App. 502, 346 S.E.2d 677 (1986).

Counterclaims were compulsory where they arose out of business dealings of the parties covering over a two-year period and the expenditure of over one million dollars, and where defendants conceded that the counterclaims were compulsory in their brief by stating that they "arise out of the same series of transactions as the claims in the original complaints," and that "a reasonable person would have brought all of the claims on the original complaints." House Healers Restorations, Inc.

v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Compulsory Counterclaim Not Limited to Facts Alleged in Original Complaint. — A compulsory counterclaim under section (a) of this rule is not limited to facts alleged in the original complaint, but includes logically related acts and conduct involving the parties. Powell Mfg. Co. v. Harrington Mfg. Co., 30 N.C. App. 97, 226 S.E.2d 173, appeal dismissed and cert. denied, 429 U.S. 1031, 97 S. Ct. 722, 50 L. Ed. 2d 743 (1977).

Where a compulsory counterclaim is filed as an independent action during the pendency of the prior action, it must be dismissed with leave to file it as a counterclaim in the prior action or stayed until final judgment has been entered in that action. Cloer v. Smith, 132 N.C. App. 569, 512 S.E.2d 779 (1999).

Trial court erred in failing to dismiss homeowners' Pitt County complaint against a contractor pursuant to G.S. 1A-1, N.C. R. Civ. P. 13(a) because the homeowners' claims were compulsory counterclaims in the contractor's previously filed New Hanover County action where (1) the factual and legal issues of the two cases arose out of a common factual background, (2) the evidence required to support the parties' claims was the same, and (3) there was a logical relationship between the two actions. Hendrix v. Advanced Metal Corp., — N.C. App. —, 672 S.E.2d 745, 2009 N.C. App. LEXIS 151 (2009).

Compulsory Counterclaim Rule Applied. — Church's suit for breach of contract, breach of express and implied warranties, and negligence/malpractice against a general contractor was barred pursuant to the compulsory counterclaim rule of G.S. 1A-1-13(a), because the church's claims all arose out of the same transaction that was settled in favor of the general contractor in a prior suit in another county wherein the general contractor sued the church to enforce a settlement agreement that had been entered into between the parties with regard to the construction dispute; the church was aware of its claims against the general contractor when the prior suit was brought. Jonesboro United Methodist Church v. Mullins-Sherman Architects, L.L.P., 359 N.C. 593, 614 S.E.2d 268, 2005 N.C. LEXIS 643 (2005).

Although the denial of a contractor's motion to dismiss pursuant to G.S. 1A-1, N.C. R. Civ. P. 13(a) was interlocutory, immediate appellate review was proper because of a prior action pending in another county. Hendrix v. Advanced Metal Corp., — N.C. App. —, 672 S.E.2d 745, 2009 N.C. App. LEXIS 151 (2009).

In order to give effect to the purpose of section (a) of this rule once its applicability to a second independent action has been determined, this second action must on motion be either (1) dismissed with leave to file it in the former case, or (2) stayed until the former case has been finally determined. Gardner v. Gardner, 294 N.C. 172, 240 S.E.2d 399 (1978); Stines v. Satterwhite, 58 N.C. App. 608, 294 S.E.2d 324 (1982); Atkins v. Nash, 61 N.C. App. 488, 300 S.E.2d 880 (1983).

If an action may be denominated a compulsory counterclaim in a prior action, it must be either (1) dismissed with leave to file it in the former case, or (2) stayed until the conclusion of the former case. However, because the purpose of section (a) of this rule is to combine related claims in one action, thereby avoiding a wasteful multiplicity of litigation, the option to stay the second action should be reserved for unusual circumstances. Brooks v. Rogers, 82 N.C. App. 502, 346 S.E.2d 677 (1986).

A motion to dismiss on grounds of a prior pending action should be treated as a motion pursuant to section (a) of this rule and should be allowed where the action arose out of the same transaction or occurrence which formed the basis of the movant's prior action. Atkins v. Nash, 61 N.C. App. 488, 300 S.E.2d 880 (1983).

Answer Treated as Counterclaim. — In a suit for absolute divorce, where defendant admitted the allegations of the complaint and prayed for an absolute divorce on the same grounds, the fact that defendant's pleading was labelled an "answer" did not preclude its being treated also as a counterclaim. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

The existence of wife's pending action for alimony without divorce did not affect her statutory right to plead a counterclaim seeking alimony without divorce based upon the same allegations when her husband brought a separate action for absolute divorce. VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978).

Allegations in Divorce Action Held Recrimination, Not Counterclaim. — In an action for divorce, defendant wife's allegations that plaintiff husband secured a deed of separation from her by fraud by representing that he had not been seeing another woman when in fact he was regularly committing adultery did not state or constitute a counterclaim for alimony or for child custody or support which could be asserted in an action for absolute divorce; the alleged misconduct set forth in wife's defense fell clearly within the doctrine of recrimination and was therefore not available to wife as a defense to husband's action for divorce. Edwards v. Edwards, 43 N.C. App. 296, 259 S.E.2d 11 (1979).

Summary Ejectment Action. — Tenant's claim that landlord improperly exercised summary ejectment was a compulsory counterclaim in summary ejectment proceeding as the issues of law and fact were largely the same, were logically related, and required substantially the same evidence. Cloer v. Smith, 132 N.C. App. 569, 512 S.E.2d 779 (1999).

Plaintiff landlord's claim for summary ejectment was not a compulsory counterclaim in tenant's prior action for breach of a lease agreement, breach of covenants of fitness and habitability and of the duty of repair, violations of the unfair trade practices statute, and conspiracy to deprive tenant of her civil rights, although both actions arose out of the same landlord and tenant relationship, since the nature of the actions and the remedies sought were too divergent. Twin City Apts., Inc v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

Tenants' claim arising from their landlords' alleged failure to maintain the septic system on the leased property was not a compulsory counterclaim in the landlords' earlier eviction suit; the tenants' separate, later claim asserting, inter alia, breach of contract and negligence arising from the septic problem was too divergent from the claim and the counterclaim in the earlier summary ejectment proceeding to be a compulsory counterclaim, and thus was not barred by res judicata. Murillo v. Daly, 169 N.C. App. 223, 609 S.E.2d 478, 2005 N.C. App. LEXIS 518 (2005).

Failure to Assert Counterclaim for Retaliatory Eviction on Appeal from Magistrate. — Plaintiffs' claims for retaliatory eviction were compulsory counterclaims which should have been asserted in the appeal from magistrate's judgment in prior summary ejectment proceeding—the amount in controversy would have prevented it from being asserted before the magistrate—and plaintiffs were, therefore, precluded by the doctrine of res judicata from asserting either of the claims in second action; the determinative question in both actions was whether plaintiffs breached their respective lease agreements, making defendants' termination of the lease agreements valid. Fickley v. Greystone Enters., 140 N.C. App. 258, 536 S.E.2d 331, 2000 N.C. App. LEXIS 1110 (2000).

Claim of Conversion Not Compulsory Counterclaim in Action on Contract. — Where plaintiff alleged that defendant stole property owned by plaintiff and where in prior action defendants sued plaintiff for breach of contract, trial court erred in finding that plaintiff's claim was a compulsory counterclaim to the prior action, since the issues of fact and law in plaintiff's conversion proceeding were different from the issues involved in defendant's action on the contract. Hailey v. Allgood Constr. Co., 95 N.C. App. 630, 383 S.E.2d 220 (1989).

Failure to assert a compulsory counterclaim will ordinarily bar future action on the claim. Hudspeth v. Bunzey, 35 N.C. App. 231, 241 S.E.2d 119, cert. denied, 294 N.C. 736, 244 S.E.2d 154 (1978).

Voluntary Dismissal of Compulsory Counterclaim as Bar to Later Suit. — Plaintiff may not maintain action on a claim which was a compulsory counterclaim in a prior lawsuit and on which plaintiff took a voluntary dismissal. Furr v. Noland, 103 N.C. App. 279, 404 S.E.2d 885 (1991).

This rule and the doctrine of res judicata would be completely undermined if parties were allowed to voluntarily dismiss and then later re-file compulsory counterclaims. The judicial economy promoted by this rule would be lost. Furr v. Noland, 103 N.C. App. 279, 404 S.E.2d 885 (1991).

But Assertion of Counterclaim Maturing After Original Answer Is Not Mandatory. — Although section (e) permits the court to allow a supplemental pleading to assert a counterclaim, matured or acquired, subsequent to the original answer, such supplemental pleading is not mandated and failure to assert such a counterclaim will not bar the claim. Driggers v. Commercial Credit Corp., 31 N.C. App. 561, 230 S.E.2d 201 (1976); Stines v. Satterwhite, 58 N.C. App. 608, 294 S.E.2d 324 (1982).

Denial of motion seeking to amend answer to allege compulsory counterclaim is immediately appealable. Hudspeth v. Bunzey, 35 N.C. App. 231, 241 S.E.2d 119, cert. denied, 294 N.C. 736, 244 S.E.2d 154 (1978).

Insurer failed to establish that unfair business practice claims presented in a subsequent action were compulsory counterclaims in a declaratory judgment action involving coverage because it failed to establish that the insured knew or reasonably should have known of all material facts necessary to assert all claims; the record supported the insured's claims that the facts which constituted the basis of the insured's claims were not fully known to the insured at the time the declaratory judgment action was filed, but rather, became clear to the insured throughout the pendency of that action. Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 563 S.E.2d 269, 2002 N.C. App. LEXIS 499 (2002).

Plaintiff insurer's recovery against defendant for intentional damage to property could not be offset by defendant's claim for child support owed to her by the insured, where defendant's counterclaim for child support was a compulsory counterclaim in an earlier action. North Carolina Farm Bureau Mut. Ins. Co. v. Balfour, 62 N.C. App. 580, 302 S.E.2d 922 (1983).

Claims Dismissed to Permit Joinder as Counterclaims in Pending Action. — Where suits were logically related, the same parties were involved, the issues arose out of the same agreement, and both suits occurred because of the same set of circumstances, plaintiff failed to demonstrate that any of his rights would be jeopardized if the issues were adjudicated in a single action; therefore, plaintiff's claims for monetary and injunctive relief should have been raised as a compulsory counterclaim in previously filed declaratory judgment action, and plaintiff's action should have been dismissed without prejudice to file these claims as a counterclaim in the pending action. Stevens v. Henry, 121 N.C. App. 150, 464 S.E.2d 704 (1995).

Claim for damages for breach of contract should have been raised as compulsory counterclaim in a previously filed declaratory judgment action, since both actions arose out of the same franchise agreement, both actions were brought about by the same set of occurrences, the damage claim was clearly extant during the pleading phase of the declaratory judgment action, none of the exceptions to the compulsory counterclaim provisions were applicable, and the plaintiff made no showing that its rights would have been jeopardized if all issues were adjudicated in a single action. Carolina Squire, Inc. v. Champion Map Corp., 75 N.C. App. 194, 330 S.E.2d 36 (1985).

Claim of Diversion of Partnership Assets and Accounting. — The original action claimed a diversion of partnership assets and sought a partnership accounting. A later abuse of process claim was that the plaintiffs in the original action, for ulterior motives, used their action to file lis pendens and liens against the property of the plaintiffs in the second action. The two claims, while possessing similar factual bases, required different proof, and the plaintiffs in the second action, by failing to plead a counterclaim in the first action, were not barred by res judicata from asserting their abuse of process claim. Hewes v. Wolfe, 74 N.C. App. 610, 330 S.E.2d 16 (1985).

A nonqualifying corporation, against which an action is brought in this State, may bring a compulsory counterclaim in that action. E & E Indus., Inc. v. Crown Textiles, Inc., 80 N.C. App. 508, 342 S.E.2d 397 (1986).

By suing in a forum of this State a foreign corporation which has not obtained a certificate of authority before the commencement of the action, a North Carolina corporation effectively waives any protection which G.S. 55-154 (see now G.S. 55-15-02) affords it from compulsory counterclaims asserted by the party sued. E & E Indus., Inc. v. Crown Textiles, Inc., 80 N.C. App. 508, 342 S.E.2d 397 (1986).

Joinder of Other Parties. — Section (a) of this rule clearly contemplates that all counterclaims arising out of the same transaction or occurrence be asserted, even if other parties must then be joined, as long as the court can acquire jurisdiction over them. Brooks v. Rogers, 82 N.C. App. 502, 346 S.E.2d 677 (1986).

Joinder of plaintiff's counsel was not "required for the granting of complete relief" as to defendants' counterclaim where defendants could not have asserted a valid claim against the counsel in the first place. Davis Lake Cmty. Ass'n v. Feldmann, 138 N.C. App. 292, 530 S.E.2d 865, 2000 N.C. App. LEXIS 598 (2000).

While it appeared, based on federal court interpretations of Fed. R. Civ. P. 13(a), that a school bus driver would be estopped from bringing negligence claims against an ambulance driver in a separate action because the claims constituted compulsory counterclaims that should have been presented in earlier litigation, dismissal of the bus driver's action was reversed; the trial court had considered matters outside the face of the complaint in ruling on the ambulance driver's motion to dismiss, and the parties had not been afforded the opportunity to address the estoppel issue. Kemp v. Spivey, 166 N.C. App. 456, 602 S.E.2d 686, 2004 N.C. App. LEXIS 1781 (2004).

Article 11 of Chapter 7B Contains Exclusive Procedures Used in Counterclaim for Termination of Parental Rights. — Given both the statement of legislative intent in G.S. 7B-1100(1) and the specificity of the procedures in G.S. 7B-100 et seq., Article 11 of Chapter 7B provides the exclusive procedures to be used in a termination of parental rights proceeding; a defendant therefore cannot rely on G.S. 1A-1, N.C. R. Civ. P. 13 as the basis for a counterclaim for termination of parental rights. In re S.D.W. & H.E.W., 187 N.C. App. 416, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

G.S. 7B-1100 et seq. does not provide a procedure through which a party may counterclaim for termination of parental rights in response to a complaint for child visitation; rather, Article 11 contemplates that a termination petition should be brought in a separate action. In re S.D.W. & H.E.W., 187 N.C. App. 416, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

Because G.S. 7B-1100 et seq. provided the exclusive procedures for a termination of parental rights proceeding and contemplated that a termination petition be brought in a separate action, the trial court lacked subject matter jurisdiction over a termination of parental rights action brought as a counterclaim to a visitation action; although the trial court had tried to rectify the error by having summonses issued under G.S. 7B-1106(a), the issuance of a summons alone did not vest a trial court with subject matter jurisdiction over an action that was never properly commenced. In re S.D.W. & H.E.W., 187 N.C. App. 416, 653 S.E.2d 429, 2007 N.C. App. LEXIS 2419 (2007).

III. CROSSCLAIMS.

Wider Range of Cross Actions Between Coparties Authorized. — The new Rules of Civil Procedure authorize a much wider range of cross actions between coparties than were heretofore permissible. Anderson v. Robinson, 275 N.C. 132, 165 S.E.2d 502 (1969).

Dismissal of Plaintiff's Claims Does Not Require Dismissal of Crossclaims. — Unless a crossclaim is dependent upon the plaintiff's original claim (as would be, e.g., a crossclaim for indemnity or contribution) or is purely defensive, the plaintiff's dismissal of its claims against all of the defendants does not require the dismissal of a crossclaim properly filed in the same action. Jennette Fruit & Produce Co. v. Seafare Corp., 75 N.C. App. 478, 331 S.E.2d 305 (1985).

Crossclaims Against State. — Allowing claims against the State for contribution and indemnification to be asserted as crossclaims accomplishes the legislative purpose behind section (g) of this rule and avoids absurd or bizarre consequences, by preventing the necessity of a second action before the Industrial Commission to settle claims between the coparties; an absurd result would be reached by allowing the State to be made a third-party defendant on a claim for contribution or indemnification, while prohibiting an identical claim to be made by a coparty in an action in which the State is already a party. Selective Ins. Co. v. NCNB Nat'l Bank, 324 N.C. 560, 380 S.E.2d 521 (1989).

State Held Liable as Coparty. — Where insurer sued bank and State for the loss or theft of bonds, State was held liable as a coparty under section (g) of this rule for purposes of contribution and indemnification to the same extent that the State would be held liable as a third-party defendant under G.S. 1A-1, Rule 14(c); since it was clear that the State was not immune from such claims substantively, and since the State was already properly before the court as a party defendant, there was no reason to exclude the State from the definition of a coparty under section (g) of this rule. Selective Ins. Co. v. NCNB Nat'l Bank, 324 N.C. 560, 380 S.E.2d 521 (1989).

Class Action Crossclaim. — The class of plaintiffs was entitled as a matter of law to proceed against impleaded defendant because plaintiffs' crossclaim related to the subject matter of the action and because the crossclaim merely realleged claims which the court found to be appropriate for class action procedure. Dublin v. UCR, Inc., 115 N.C. App. 209, 444 S.E.2d 455, 1994 N.C. App. LEXIS 609 (1994), cert. denied, 449 S.E.2d 569 (1994).

Rule 14. Third-party practice.

(a) *When defendant may bring in third party.* — At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. Leave to make the service need not be obtained if the third-party complaint is filed not later than 45 days after the answer to the complaint is served. Otherwise leave must be obtained on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defense to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and crossclaim against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and crossclaims as provided in Rule 13. Any party may move for severance, separate trial, or dismissal of the third-party claim. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

Where the normal statute of limitations period in an action arising on a contract is extended as provided in G.S. 1-47(2) or in any action arising on a contract or promissory note, upon motion of the defendant the court may order to be made parties additional defendants, including any party of whom the plaintiff is a subrogee, assignee, third-party beneficiary, endorsee, agent or transferee, or such other person as has received the benefit of the contract by transfer of interest.

(b) *When plaintiff may bring in third party.* — When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) *Rule applicable to State of North Carolina.* — Notwithstanding the provisions of the Tort Claims Act, the State of North Carolina may be made a third party under subsection (a) or a third-party defendant under subsection (b) in any tort action. In such cases, the same rules governing liability and the limits of liability of the State and its agencies shall apply as is provided for in the Tort Claims Act. (1967, c. 954, s. 1; 1969, c. 810, s. 2; 1975, c. 587, s. 1; 1981, c. 92; c. 810.)

COMMENT

Comment to this Rule as Originally Enacted. — Certainly one of the most unsatisfactory areas of North Carolina procedural law was that concerned with what has come to be called "third-party practice." By this is meant the basis upon which and the procedure whereby an original defendant (third-party plaintiff) may implead — have brought into the action — an additional party (third-party defendant) to defend against a claim over by the original defendant/third-party plaintiff. An adequate procedural rule dealing with this important and frequently encountered problem must at least: (1) Specify the substantive grounds permitting impleader, and (2) clearly set out the procedure by which it may be accomplished. For a comprehensive coverage, it should additionally prescribe the kinds of claims which, after impleader has been accomplished, may then be asserted by the parties — originally plaintiff, third-party plaintiff, and third-party defendants — inter se. North Carolina statutory law did none of these in adequate, direct terms. Because of the desirability of allowing impleader in some situations at least, the North Carolina court constructed a set of judicial rules for impleading by drawing upon certain statutes which suggested its use peripherally or in a specific situation, but which were completely inadequate if gauged by the standards of adequate coverage above suggested. Thus, former § 1-73, providing in part that the court might cause parties to be brought in when necessary to a complete determination of the controversy; former § 1-222, providing in part that a judgment might be given for or against one or more of several defendants, might determine the rights of the parties on each side, as between themselves, and might grant a defendant any affirmative relief to which entitled; and § 1-240, cryptically providing for the impleading of alleged joint tort-feasors by an original alleged tort-feasor defendant, were drawn upon by the court. As indicated, none of these statutes dealt directly with the basic problems: (a) Of grounds for impleading (except § 1-240, dealing narrowly with contribution between joint tort-feasors); (b) Of the procedure by which a third-party plaintiff actually impleads a third-party defendant; or (c) Of the kinds of claims that may, after impleader is accomplished, be asserted by the parties inter se.

Working with this completely inadequate statutory pattern, the court has, over the years, evolved rules and sanctioned procedures for impleading which can only be found by resort to the decided cases. These rules as evolved are, aside from the difficulty of locating them, subject to criticism because of their narrowness of approach to the grounds on which impleading is allowed in the first place, and then to the question of what claims may properly be asserted after impleading by the parties inter se. Thus, the basic rule which has evolved to control impleadings permits impleading only when the claim by the third-party plaintiff is for: (1) Contribution against an alleged joint tort-feasor under § 1-240, or (2) indemnification, but only when the indemnification right arises as a matter of law, and not when it arises by express or implied contract. See, for a summary of this rule and the basis of its evolution, 1 McIntosh, *North Carolina Practice and Procedure,* § 722 (2d edition 1956, with 1965 Supplement). The court is not always consistent in this distinction. See Davis v. Radford, 233 N.C. 283, 63 S.E.2d 822 (1951).

Beyond this, no systematic prescription of the additional claims which may thereafter be asserted between third-party plaintiff and third-party defendant, and between plaintiff and third-party defendant has been worked out in the North Carolina cases. And, as pointed out, this is not provided in the statutes. It is clear only that an impleaded third-party defendant may, but is not compelled to, assert against the third-party plaintiff any claim which would, as to the third-party plaintiff's claim, meet the permissive counterclaim test of former § 1-123. Norris v. Johnson, 246 N.C. 179, 97 S.E.2d 773 (1957) (permissive); Morgan v. Brooks, 241 N.C. 527, 85 S.E.2d 869 (1955) (but not compulsory).

None of the statutes drawn upon prescribed the exact procedure for impleading. Thus, there was no statutory directive as to whether it shall be done by "cross complaint" in the original defendant's answer, or by separate "third-party complaint"; as to whether it requires an order of court based upon motion and notice, or an order entered ex parte; nor as to what mode of service of the third-party complaint or cross complaint shall be utilized. In the absence of any such directive, a practice, generally standardized, but with many variants has been evolved. It has received at least indirect sanction from the court by constant reference to its use without comment. See 1 McIntosh, *North Carolina Practice and Procedure, § 722.5 (1965 Pocket Supplement). This practice is cumbersome, and, as indicated, not by any means completely standardized.*

In contrast to this most unsatisfactory situation, federal Rule 14 provides a directive for third-party practice which is comprehensive in its coverage. The substantive test for impleading is stated directly — a party may be impleaded "who is or may be liable to [the third-party plaintiff] for all or part of the plaintiff's claim against him." This obviously gives the right to implead for contribution and indemnification, where the substantive right to those remedies exists by statute or common law. This is the limit of the impleading right judicially evolved under North Carolina practice. The federal rule is construed to go beyond this and allow impleading for indemnification where the right to be indemnified has arisen out of contract. See, e.g., Watkins v. Baltimore & O. Ry., 29 F. Supp. 700 (W.D. Pa. 1939). This would broaden the North Carolina approach. Note that it still does not allow impleading on as liberal a basis as exists for crossclaims between parties originally joined as defendants. There, under federal Rule 13, the only requirement is relation between the crossclaim and the transaction or occurrence forming the basis of plaintiff's claim.

Beyond the direct and plain statement of the substantive test for impleading, the federal rule prescribes clearly and concisely the procedure for impleading where the right exists. This, as pointed out, is not done in the North Carolina statutes.

Finally, federal Rule 14 concludes with a clear statement, likewise lacking in State statutes, of the various claims which may, after a third-party defendant is impleaded, be asserted by the various parties inter se. Here, as in the joinder statutes, the safeguard against undue complexity which might result under this rule's liberal allowance of permissible cross and counterclaims is stated to be severance of claims in advance of trial.

It should be noted that federal Rule 14 is of course entirely procedural — it does not, indeed cannot — affect any substantive rights. Thus, it does not allow impleader unless the substantive right exists under State law. Accordingly, then, adoption of this rule does not affect any of the North Carolina substantive law of contribution or indemnification.

Comment to the 1969 Amendment. — (a) G.S. 1-47(2) was amended to provide that where an action is brought on a sealed instrument, the defendant or defendants in such action may file a counterclaim arising out of the same transaction or transactions as are the subject of plaintiff's claim, although a shorter period of limitation would otherwise apply to defendant's counterclaim.

The second paragraph of Rule 14 was amended to provide that in such actions, or in any action arising on a contract or promissory note, the defendant may have additional defendants brought into the action. Such additional defendants cannot escape liability by passage of time or by transferring of contract rights.

Editor's Note. — Session Laws 1969, c. 810, which added the second paragraph of section (a) of this rule, provides in s. 2: "It is the purpose of this section to insure that if a suit may be maintained on a contract against one contracting party, the other contracting party will not be allowed to escape his contractual obligations by the passage of time or the transfer of contract rights."

G.S. 1-240, referred to in the Comment to this Rule as originally enacted, set out above, has been repealed. For general information regarding the official comments to the North Carolina Rules of Civil Procedure, see the Editor's Note under the heading for this chapter.

Legal Periodicals. — For article on waiver of defense clauses in consumer contracts, see 48 N.C.L. Rev. 545 (1970).

For article on legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

The purpose of this rule is to promote judicial efficiency and convenience of the parties by eliminating circuity of action. Heath v. Board of Comm'rs, 292 N.C. 369, 233 S.E.2d 889 (1977).

This rule is intended to provide a mechanism for disposing of multiple claims arising from a single set of facts in one action expeditiously and economically. Heath v. Board of Comm'rs, 292 N.C. 369, 233 S.E.2d 889 (1977).

This rule does not create any substantive rights where none existed before. Heath v. Board of Comm'rs, 292 N.C. 369, 233 S.E.2d 889 (1977).

This rule permits the defendant as a third-party plaintiff to cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of plaintiff's claim against him. Cody v. Department of Transp., 60 N.C. App. 724, 300 S.E.2d 25 (1983).

Refiling by Third Party Plaintiff After Voluntary Dismissal. — A third-party plaintiff who originally files a third-party complaint within the time limits set out in this rule and subsequently enters a voluntary dismissal may, within one year, refile the complaint or an amended complaint without leave of court. Clark v. Visiting Health Prof'ls, Inc., 136 N.C. App. 505, 524 S.E.2d 605, 2000 N.C. App. LEXIS 63 (2000).

Amendment of Third-Party Complaint. — Plaintiff filing a claim against a third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the defendant/third-party plaintiff must follow the requirements pursuant to G.S. 1A-1, N.C. R. Civ. P. 15(a) in order to amend the plaintiff's original complaint; when the defendant or third-party plaintiff has filed an answer to the plaintiff's original complaint, in order for the plaintiff to assert a claim against the third-party defendant, he must amend his complaint by leave of court or by written consent of the adverse party. Barnes v. Erie Ins. Exch., 156 N.C. App. 270, 576 S.E.2d 681, 2003 N.C. App. LEXIS 103 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

This rule anticipates the disposition in one trial of cases involving multiple parties. It is particularly adapted to cases where the liability of a third-party defendant is contingent upon liability of another party, and upon claims the exact amount of which is not fixed at the beginning of trial. Cody v. Department of Transp., 60 N.C. App. 724, 300 S.E.2d 25 (1983).

This rule anticipates the disposition in one trial of cases involving multiple parties. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Third-Party Defendant's Liability Need Not Have Been Determined Previously. — This section allows a party to implead a party or parties that may be liable to him. It is not necessary that the third-party defendant's liability be previously determined. Rouse v. Maxwell, 40 N.C. App. 538, 253 S.E.2d 326, appeal dismissed, 298 N.C. 570, 261 S.E.2d 124 (1979).

When a third-party defendant has an opportunity to participate fully in the determination of third-party plaintiff's liability, it is bound by a judgment in favor of the original plaintiff. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Third-Party Defendant Not Liable Where Original Defendant Not Liable. — If the original defendant is not liable to the original plaintiff, the third-party defendant is not liable to the original defendant. Jones v. Collins, 58 N.C. App. 753, 294 S.E.2d 384 (1982).

Where a personal injury action filed against the Pender County Board of Education was dismissed, the appeal of the dismissal of the Board's third-party claims against the architecture firm seeking, under G.S. 1A-1, Rule 14(a), indemnity and contribution, was moot, as the viability of the third-party claims was dependent upon the survival of the original action. Spearman v. Pender County Bd. of Educ., 175 N.C. App. 410, 623 S.E.2d 331, 2006 N.C. App. LEXIS 61 (2006).

Where the Pender County Board of Education filed a third-party complaint against the architectural firm seeking indemnification or contribution under G.S. 1A-1, Rule 14(a) in the injured parties' personal injury action against the Board, dismissal of the injured parties' claim against the Board prevented the Board from asserting a viable claim against the firm; as a result, dismissal of the third-party complaint was proper, and appeal from that dismissal was moot. Zizzo v. Pender County Bd. of Educ., 175 N.C. App. 402, 623 S.E.2d 328, 2006 N.C. App. LEXIS 64 (2006).

Third-Party May Be Joined for Contribution. — Under this rule, an original defendant may bring in a third-party defendant for contribution to the original defendant for a part of his liability to the plaintiff. Jones v. Collins, 58 N.C. App. 753, 294 S.E.2d 384 (1982).

Third-Party Claim Against Plaintiff's Agent Barred. — If the third-party defendant were the plaintiff's agent, the court would be correct in dismissing the third-party claim if the third-party defendant was negligent, since under the doctrine of respondeat superior the plaintiff would be barred from recovery from the original defendant and if the original defendant were not liable to plaintiff, the original defendant could not recover of the third-party defendant. Jones v. Collins, 58 N.C. App. 753, 294 S.E.2d 384 (1982).

Person Impleaded Not Automatically Liable for Entire Amount. — While section (a) of this rule permits a defendant to implead a person not a party to the action who is or may be liable to defendant for all or part of the plaintiff's claim against him, it does not follow that a person who has been impleaded is automatically liable for the entire amount of the judgment in the main action. Heath v. Board of Comm'r, 40 N.C. App. 233, 252 S.E.2d 543, cert. denied, 297 N.C. 453, 256 S.E.2d 807 (1979).

Allowing a defendant indemnitee to implead a third-party defendant before the indemnitee has paid the debt owing to the plaintiff does not create any new substantive rights in the indemnitee. But a cause of action now arises in the indemnitee where he impleads a third-party defendant before he pays the claim for which the indemnitor must reimburse him. Heath v. Board of Comm'rs, 292 N.C. 369, 233 S.E.2d 889 (1977).

State may be joined as a third-party defendant, whether in an action for contribution or in an action for indemnification, in the State courts. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982); Columbus County Auto Auction, Inc. v. Aycock Auction Co., 90 N.C. App. 439, 368 S.E.2d 888 (1988).

The provisions of the tort claims act have been modified and superceded under the provisions of of G.S. 1A-1, Rule 14(c), plaintiffs may now bring direct claims against the State once the State has been made a third-party defendant in a tort action, and such claims do not have to be made before the North Carolina Industrial Commission. Batts v. Batts, 160 N.C. App. 554, 586 S.E.2d 550, 2003 N.C. App. LEXIS 1837 (2003), cert. denied, 358 N.C. 153, 592 S.E.2d 553 (2004).

As Evidenced by the 1981 Amendment. — The essence of the 1981 amendment evidences the legislature's intent to allow the State to be sued as a third-party defendant in the State courts. This was the legislature's initial intention in enacting section (c) of this rule, and the 1981 amendment is a clarification of this rather than an alteration. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982).

Where the State was the subject of an action as a third-party defendant for indemnification pursuant to subsection (c) of this rule, the trial court erred when it dismissed a third-party complaint against the Department of Transportation. Columbus County Auto Auction, Inc. v. Aycock Auction Co., 90 N.C. App. 439, 368 S.E.2d 888 (1988).

Standing of Third-Party Defendant to Appeal. — Where third-party defendant not only had an opportunity to participate, but, in fact, did fully participate in the determination of third-party plaintiff's liability and was bound by the judgment in favor of plaintiff entered against defendants as third-party plaintiffs, it was clearly an aggrieved party within the meaning of G.S. 1-271; therefore, third-party defendant had standing to appeal the judgment entered against third-party plaintiffs. Barker v. Agee, 326 N.C. 470, 389 S.E.2d 803 (1990).

Same Allegations As in Original Plaintiff's Complaint. — Trial court did not err by denying the motion to dismiss the complaint against it by the Division of Forest Resources, which asserted liability under the Tort Claims Act by third-party plaintiffs because the complaints against an individual forest ranger had been dismissed, since plaintiff's allegations as to the Division of Forest Resources were identical to those made by third-party plaintiffs and the claims arose out the same transaction and occurrence that was the subject matter of plaintiff's original claim. Myers v. McGrady, 170 N.C. App. 501, 613 S.E.2d 334, 2005 N.C. App. LEXIS 1087 (2005), rev'd and remanded, review improvidently allowed, 350 N.C. 460, 628 S.E.2d 761 (2006).

Dismissal of Third-Party Complaint. — In divorce action where husband filed an answer in which he asserted a counterclaim against wife and a third-party complaint against third-party defendant bank and where he alleged that wife fraudulently obtained an equity line of credit from the bank, secured by a deed of trust on the marital home, without his knowledge and consent and through his forged signature which was purportedly "witnessed" by bank employees, the court did not err in dismissing the third-party complaint; wife's claims against husband were for an absolute divorce and for an equitable distribution of the marital property, and the bank could not be held liable to husband should an absolute divorce be granted; if the transaction resulting in the deed of trust is found to have been entered into without husband's consent and knowledge, the debts secured by the deed of trust would be held to be separate to wife; any misconduct by wife affecting the value of the property would also be considered in distributing the property. McCollum v. McCollum, 102 N.C. App. 347, 401 S.E.2d 773 (1991).

In an insurance case, the trial court correctly granted summary judgment dismissing an insured's claim against the bailee of the insured's vehicle, whose alleged negligence caused a fire that destroyed the vehicle, because the insured attempted to assert that claim as a third-party claim, under G.S. 1A-1, N.C. R. Civ. P. 14(a), after an insurer answered the insured's original complaint, effectively amending that complaint without complying with G.S. 1A-1, N.C. R. Civ. P. 15. Barnes v. Erie Ins. Exch., 156 N.C. App. 270, 576 S.E.2d 681, 2003 N.C. App. LEXIS 103 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

Party Dismissed from Action Not Bound by Judgment Therein. — The general rule that a person who was once a party to an action, but has been dismissed from it, is not bound by a judgment entered therein after he ceases to be a party is not altered by this rule, particularly where the third-party defendant has not had an opportunity to contest the determinations made in the main action. Heath v. Board of Comm'r, 40 N.C. App. 233, 252 S.E.2d 543, cert. denied, 297 N.C. 453, 256 S.E.2d 807 (1979).

Where circumstances require separate trials after an impleader under this rule, the better practice is to try the principal action first. Falls Sales Co. v. Board of Transp., 292 N.C. 437, 233 S.E.2d 569 (1977).

Even though, under section (c) of this rule, the State may be made a third party in a tort action, the rules governing liability and the limits of liability of the State and its agencies as provided in the State Tort Claims Act, G.S. 143-291 et seq., apply. Guthrie v. North Carolina State Ports Auth., 307 N.C. 522, 299 S.E.2d 618 (1983).

Impleaded Negligence Claim Barred by Public Duty Doctrine. — Denial of the motion to dismiss and for judgment on the pleadings filed by the North Carolina Division of Forest Resources (NCDFR), a division of the North Carolina Department of Environment and Natural Resources (NCDENR), was reversed as the public duty doctrine applied to negligence claims filed under the North Carolina Tort Claims Act, G.S. 143-291 et seq., against NCDENR for the alleged mismanagement of forest fires; as G.S. 113-51, 113-52, 113-54, and 113-55, which set forth the powers and duties of NCDENR and appointed state forest rangers, were designed to protect the citizens of North Carolina as a whole, NCDENR did not owe a specific duty to the administratrix of a decedent killed in a car accident allegedly due to a forest ranger's negligence in managing a forest fire or to the other drivers and owners of cars involved in the accident and their negligence complaints failed to state a claim. Myers v. McGrady, 360 N.C. 460, 628 S.E.2d 761, 2006 N.C. LEXIS 47 (2006).

Applied in Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663 (1972); Smith v. Garrett, 32 N.C. App. 108, 230 S.E.2d 775 (1977); Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983); Atkins v. Peek, — N.C. App. —, 668 S.E.2d 63, 2008 N.C. App. LEXIS 2007 (2008).

Cited in Ingram v. Nationwide Mut. Ins. Co., 5 N.C. App. 255, 168 S.E.2d 224 (1969); Abdella v. Stringfellow, 8 N.C. App. 480, 174 S.E.2d 661 (1970); Green v. Duke Power Co., 50 N.C. App. 646, 274 S.E.2d 889 (1981); Huyck Corp. v. C.C. Mangum, Inc., 58 N.C. App. 532, 293 S.E.2d 846 (1982); Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987); Sky City Stores, Inc. v. United Overton Corp., 90 N.C. App. 124, 367 S.E.2d 338 (1988); Selective Ins. Co. v. NCNB Nat'l Bank, 324 N.C. 560, 380 S.E.2d 521 (1989); Haas v. Caldwell Sys., 98 N.C. App. 679, 392 S.E.2d 110 (1990); Dick Parker Ford, Inc. v. Bradshaw, 102 N.C. App. 529, 402 S.E.2d 878 (1991); Honeycutt v. F & M Bank, 126 N.C. App. 816, 487 S.E.2d 166 (1997); Hunter v. Kennedy, 128 N.C. App. 84, 493 S.E.2d 327 (1997); Ruff v. Parex, Inc., 131 N.C. App. 534, 508 S.E.2d 524 (1998); Hudson-Cole Dev. Corp. v. Beemer, 132 N.C. App. 341, 511 S.E.2d 309 (1999); A.H. Beck Found. Co. v. Jones Bros., 166 N.C. App. 672, 603 S.E.2d 819, 2004 N.C. App. LEXIS 2023 (2004).

Rule 15. Amended and supplemental pleadings.

(a) *Amendments.* — A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.

(b) *Amendments to conform to the evidence.* — When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment, but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) *Relation back of amendments.* — A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

(d) *Supplemental pleadings.* — Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor. (1967, c. 954, s. 1.)

COMMENT

This rule is, except for section (c), substantially a counterpart to federal Rule 15. Section (c) is drawn from the New York Civil Practice Law and Rules, Rule 3025. As such, it deals with a most critical aspect of the whole approach of these rules to the pleading function. This is most obvious in its basic directive for the allowing of amendments to pleading. In this aspect, its approach is generally that of the codes, with the basic theme being to allow amendment as of right up to the time that the opponent has taken his initial position by responsive pleading, and thereafter to make the privilege to amend more and more difficult to obtain as the litigation progresses and positions may accordingly have become more and more hardened on the basis of the original pleadings. However, a fundamental change of approach from existing practice is taken in (1) the generality with which this basic theme is formulated and (2) this rule's abandonment in terms of the whole variance conception so integral a part of the code amendment scheme.

Section (a). — This section first states the rule for amendment as of right up to responsive pleading time, thus basically making no change in the former law, § 1-161. But then, in dealing with the whole problem of discretionary amendments after this time and up to the time that amendments are sought to conform to proof already adduced, this rule merely lays down the simple directive that leave to amend in this interval shall be freely given "when justice so requires." This is a deliberate abandonment of the typical code approach, as found in former § 1-163, which attempted in tortuous fashion to lay down detailed directives for the exercise of this discretion. The result of this code formulation has been to necessitate equally tortured judicial construction which, instructively, still continues, 100 years after the code's adoption. See, e.g., Perkins v. Langdon, 233 N.C. 240, 63 S.E.2d 565 (1951). However, the phrase "as justice requires" has acted as an effective limitation on the amendment privilege in the federal courts. For when, on a whole view of the matter, as is frequently the case, it is determined that justice does not require a particular amendment, or that, to the contrary, positive injustice to the opposing party would result, amendment has been denied. See, e.g., Friedman v. Transamerica Corp., 5 F.R.D. 115 (D. Del. 1946); Portsmouth Baseball Corp. v. Frick, 21 F.R.D. 318 (S.D.N.Y. 1958). This is a much preferable type directive to the detailed code directive which has seemed to necessitate an obviously mechanical jurisprudence in its application. Perkins v. Langdon, supra.

The last sentence of section (a) involves a departure of obvious import from the federal rule timetable.

Section (b). — This section involves the second major change in concept from code practice. Dealing with the problem of trial time amendments necessitated by the failure of proof to conform in some degree with pleadings, it deliberately abandons the laboriously constructed code scheme of immaterial variance, material variance and total failure of proof (former §§ 1-168, 1-169), and lays down a directive based directly upon the truly legitimate policy consideration which should control amendment privilege here, namely, whether, notwithstanding variance of some degree, there has nevertheless been informed consent to try the issues on the evidence presented. Here again, limitation on amendment privilege is sufficiently insured by the phrases, "when the presentation of the merits of the action will be served thereby," and its twin, "and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him." Indeed, it seems quite clear that the code directive was actually designed to get the same result, but that the very detail of its formulation led to a drift into a very mechanical approach which has now largely subverted the "litigation by consent" doctrine in North Carolina. See Note, 41 N.C.L. Rev. 647 (1963). Finally, the last sentence of this section inserts a final safeguard in its reminder of the continuance possibility.

Section (c). — This section deals with the extremely difficult matter of determining when amendments should "relate back" for statute of limitation purposes by posing the broad question of the relation between the new matter and the basic aggregate of historical facts upon which the original claim or defense is based. This deliberately avoids the more abstruse inquiry under the codes as to whether the amendment involves a "wholly different cause of action or defense." It is believed that this approach is a distinct improvement in its express reliance on the truly valid consideration of identity in the historical fact sense. Wachtell's comment on the provision in the New York Civil Practice Law and Rules from which section (c) is drawn is equally pertinent here. The rule, he says, is that "a cause of action in an amended pleading will be deemed to relate back to the commencement of the action if the original pleading gave notice of the transactions, occurrences, or series of transactions or occurrences to be proved under the amended pleading. The amended pleading will therefore relate back if the new pleading merely amplifies the old cause of action, or now even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved. For example, an amended cause of action for damages for breach of a contract would relate back where the original pleading alleged an action in equity to rescind the contract for fraud. And an amended cause of action against defendants for breach of an implied warranty of agency in entering into a contract would relate back even though the original pleading had alleged a cause of action upon the contract against the defendants as principals." Wachtell, *N.Y. Practice Under the C.P.L.R.* (1963), p. 141.

Section (d). — This section is in effect a general counterpart to former § 1-167, without some of the specific detail. No practical change in the procedure for filing supplemental pleadings should result under this rule.

Legal Periodicals. — For case law survey as to amendment of pleadings, see 45 N.C.L. Rev. 836 (1967).

For note on specificity in pleading under G.S. 1A-1, Rule 8(a)(1), see 48 N.C.L. Rev. 636 (1970).

For note on relation back of barred counterclaims under G.S. 1A-1, Rule 13(f), see 49 N.C.L. Rev. 134 (1970).

For comment, "Rule 15 of the new Rules of Civil Procedure: Method of Amending Complaints," see 7 Wake Forest L. Rev. 641 (1971).

For survey of 1972 case law on trial of issues by implied consent under section (b) of this rule, see 51 N.C.L. Rev. 1003 (1973).

For detailed analytic discussion of section (b) of this rule, see 12 Wake Forest L. Rev. 405 (1976).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

For survey of 1983 law on civil procedure, see 62 N.C.L. Rev. 1107 (1984).

For note, "The North Carolina Court of Appeals Provides a Solution to the Business Name Game," see 66 N.C.L. Rev. 1064 (1988).

For survey, "Rule 15(c) and the Relation Back of Corrected Party Names," see 73 N.C.L. Rev. 2189 (1995).

For article, "Crossman v. Moore: The End of Relation Back with Regard to Corrected Party Names in North Carolina," see 74 N.C.L. Rev. 2000 (1996).

CASE NOTES

I. In General.
II. Amendments to Conform to Evidence.
III. Relation Back of Amendments.
IV. Supplemental Pleadings.
V. Decisions under Prior Law.

I. IN GENERAL.

This rule reflects the general policy of proceeding to the merits of an action. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

The rules achieve their purpose of insuring a speedy trial on the merits by providing for and encouraging liberal amendments to conform pleadings and evidence under section (a), by pretrial order under G.S. 1A-1, Rule 16, during and after reception of evidence under section (b) of this rule, and after entry of judgment under section (b) and G.S. 1A-1, Rules 59 and 60. Such amendments are made upon motion and with leave of court, by express consent, and by implied consent. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

The Rules of Civil Procedure achieve their purpose of assuring a speedy trial by providing for and encouraging liberal amendments to the pleadings under this rule. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

As a general rule, once judgment is entered, amendment of the complaint is not allowed unless the judgment is set aside or vacated under G.S. 1A-1, Rule 59 or G.S. 1A-1, Rule 60. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

The pleading with particularity required by G.S. 1A-1, Rule 9(b) is complemented by section (b) of this rule. Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

Federal Rule Compared with Section (a). — Except for differences in time allotments, section (a) of this rule is identical to its federal counterpart. Gro-Mar Pub. Relations, Inc. v. Billy Jack Enters., Inc., 36 N.C. App. 673, 245 S.E.2d 782 (1978).

Section (a) of this rule is virtually identical to its federal counterpart. United Leasing Corp. v. Miller, 60 N.C. App. 40, 298 S.E.2d 409 (1982), cert. denied, 308 N.C. 194, 302 S.E.2d 248 (1983).

As the official comment makes clear, the last sentence of section (a) of this rule was expressly intended to depart from the federal rule time table. Hyder v. Dergance, 76 N.C. App. 317, 332 S.E.2d 713 (1985).

As to liberal construction of this rule, see Watson v. Watson, 49 N.C. App. 58, 270 S.E.2d 542 (1980).

Issue Tried by Implied Consent of Parties Though Not in Pleadings. — In case alleging retaliatory discharge where both parties introduced a considerable amount of evidence regarding the financial condition of defendant and its relation to the termination of plaintiff's employment, the financial hardship issue was tried by the implied consent of the parties and should have been treated as if it was raised in the pleadings. Johnson v. Friends of Weymouth, Inc., 120 N.C. App. 255, 461 S.E.2d 801 (1995).

Employer's motion to dismiss an employee's action alleging unlawful termination should have been made under G.S. 1A-1, N.C. R. Civ. P. 12(b)(3), not under G.S. 1A-1, N.C. R. Civ. P. 12(b)(1) and (2), because it raised the issue of whether North Carolina courts were barred from hearing the case by a forum selection clause in the parties' contract which specified that they would use courts in Los Angeles County (California) to resolve their disputes; however, the appellate court heard the employer's appeal from the trial court's judgment denying its motion because the parties tried the issue, and found that the forum selection clause did not bar North Carolina courts from tryng the employee's lawsuit. Hickox v. R&G Group Int'l, 161 N.C. App. 510, 588 S.E.2d 566, 2003 N.C. App. LEXIS 2184 (2003).

Implied Consent Not Shown. — In a wrongful death action based on the medical specialist's medical malpractice, the trial court did not err in failing to instruct the jury on insulating negligence because the specialist did not plead insulating negligence and it was not evident from the record that both parties understood the issue was to be tried by implied consent as provided in G.S. 1A-1, Rule 15(b). The evidence tended to show independent acts of negligence by two parties, the specialist and another doctor who was a former codefendant, which united to cause a single injury. Boykin v. Kim, 174 N.C. App. 278, 620 S.E.2d 707, 2005 N.C. App. LEXIS 2396 (2005).

This rule contemplates liberality on the part of the court in allowing amendments to the pleadings. Performance Motors, Inc. v. Allen, 20 N.C. App. 445, 201 S.E.2d 513 (1974); Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

Liberal amendment of pleadings is encouraged by the Rules of Civil Procedure. McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

It is fundamental to the concepts embodied in section (b) of this rule that amendments to pleadings and relation back of such amendments should be liberal in their allowance and application. The rule, in fact, encourages liberal amendment of pleadings. Discretion in the trial judge is not unlimited, however, and the amendment should not be granted when the opposing party would be prejudiced. Roper v. Thomas, 60 N.C. App. 64, 298 S.E.2d 424 (1982), cert. denied, 308 N.C. 191, 302 S.E.2d 244 (1983).

The Rules of Civil Procedure permit a liberal use of amendments to a party's theory of recovery. Taylor v. Gillespie, 66 N.C. App. 302, 311 S.E.2d 362, cert. denied, 310 N.C. 748, 315 S.E.2d 710 (1984).

Leave to amend should be freely given. Carolina Garage, Inc. v. Holston, 40 N.C. App. 400, 253 S.E.2d 7 (1979); Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880, cert. denied, 306 N.C. 558, 294 S.E.2d 224 (1982).

And amendments should always be freely allowed unless some material prejudice is demonstrated, for it is the essence of the rules that decisions be had on the merits and not be avoided on the basis of mere technicalities. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972); Phillips v. Phillips, 46 N.C. App. 558, 265 S.E.2d 441 (1980); Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

Leave to amend should be freely given except where the party objecting can show that he would be materially prejudiced. Auman v. Easter, 36 N.C. App. 551, 244 S.E.2d 728, cert. denied, 295 N.C. 548, 248 S.E.2d 725 (1978); Boudreau v. Baughman, 86 N.C. App. 165, 356 S.E.2d 907 (1987), rev'd and remanded in part, modified and aff'd in part, 322 N.C. 331, 368 S.E.2d 849 (1988).

This rule allows issues to be raised by liberal amendments to pleadings, and, in some cases, by the evidence, the effect of the rule being to allow amendment by implied consent to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case. Taylor v. Gillespie, 66 N.C. App. 302, 311 S.E.2d 362, cert. denied, 310 N.C. 748, 315 S.E.2d 710 (1984).

But Court May Consider Counter vailing Legislative Purposes. — While leave of court shall be freely given when justice so requires, and while justice might often so require where a layman appearing pro se inadvertently fails to conform to technical legal requirements, judicial discretion may properly be exercised to subordinate these concerns to readily discernible countervailing legislative intent. Jones v. Boyce, 60 N.C. App. 585, 299 S.E.2d 298 (1983).

Justification for Denial of Motion to Amend. — Although a trial court is not required to state specific reasons for denial of a motion to amend, reasons that would justify a denial are (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments. Chicopee, Inc. v. Sims Metal Works, Inc., 98 N.C. App. 423, 391 S.E.2d 211, cert. denied, 327 N.C. 426, 395 S.E.2d 674 (1990).

Reasons justifying denial of an amendment are: (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments. Martin v. Hare, 78 N.C. App. 358, 337 S.E.2d 632 (1985).

Reasons justifying denial of a motion to amend include (a) undue delay, (b) undue prejudice, and (c) futility of amendment. Members Interior Constr., Inc. v. Leader Constr. Co., 124 N.C. App. 121, 476 S.E.2d 399 (1996).

Proper reasons for denying a motion to amend include undue delay by the moving party, unfair prejudice to the nonmoving party, bad faith, futility of the amendment, and repeated failure to cure defects by previous amendments. Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 510 S.E.2d 690 (1999).

Undue Delay. — The trial court did not abuse its discretion in denying plaintiffs' motion to amend which was made almost three months after the defendants' answer and nearly five months after plaintiffs' original complaint. Walker v. Sloan, 137 N.C. App. 387, 529 S.E.2d 236, 2000 N.C. App. LEXIS 414 (2000).

Trial court did not abuse its discretion in denying the purchasers leave to amend their complaint where undue delay was a proper reason for denying a motion to amend a pleading; the record showed that the purchasers filed their complaint February 21, 2001 and did not move to amend their complaint until April 17, 2002. Wall v. Fry, 162 N.C. App. 73, 590 S.E.2d 283, 2004 N.C. App. LEXIS 61 (2004).

Ad agency's failure to offer a credible explanation for the delay in moving to amend pursuant to G.S. 1A-1, N.C. R. Civ. P. 15(a) warranted the trial court's decision to deny the ad agency's request to add counterclaims of fraud and unfair and deceptive trade practices. Since the ad agency moved after the 30-day deadline for amending without leave, the trial court acted within its discretion in denying the motion to amend, especially since the ad agency at no time offered to explain the more than three-month delay in moving for leave to amend after it filed its answer. Media Network, Inc. v. Long Haymes Carr, Inc., — N.C. App. —, 678 S.E.2d 671, 2009 N.C. App. LEXIS 774 (2009).

Amendment to Correct Name. — If the effect of an amendment is merely to correct the name of a person already in court, there is no prejudice. This is true even though the change relates back to the date of the original complaint. Thorpe v. Wilson, 58 N.C. App. 292, 293 S.E.2d 675 (1982).

Trial court erred in denying the injured party's motion to amend the complaint because the injured party's error was a misnomer, the intended defendant (the executor) was served, and the amendment would not prejudice the executor. Pierce v. Johnson, 154 N.C. App. 34, 571 S.E.2d 661, 2002 N.C. App. LEXIS 1406 (2002).

Because an owner's G.S. 1A-1, N.C. R. Civ. P. 4(i), 15 motion to amend merely sought to correct the name of the guarantor, who was already before the court, and because the guarantor would have suffered no material prejudice by the amendment, the owner was entitled to amend the complaint to include the correct spelling of the guarantor's last name. Langley v. Baughman, — N.C. App. —, 670 S.E.2d 913, 2009 N.C. App. LEXIS 51 (2009).

Six Months Delay Too Long to Amend Name. — When, after being informed by named defendant that they were not the proper defendant, plaintiffs waited over six months to file amended complaint, defendant properly asserted the statute of limitations as a bar to plaintiffs' effort to correct the name of the party already in court. Franklin v. Winn Dixie Raleigh, Inc., 117 N.C. App. 28, 450 S.E.2d 24 (1994), aff'd, 342 N.C. 404, 464 S.E.2d 46 (1995).

This Rule applies to adoption proceedings. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Joinder of Putative Father in Adoption Proceedings. — Even if putative father's consent to adoption was necessary, petitioners' failure to join him at the time they filed their original adoption petition did not authorize the trial court to dismiss the adoption proceeding without first giving petitioners the opportunity to join putative father within a reasonable time. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Rule Inapplicable in Action to Terminate Parental Rights. — Because the trial court erred in allowing the county department of social services to amend the petitions to terminate a mother's parental rights to conform to the evidence, the original petitions failed to put the mother on notice that G.S. 7B-1111(a)(2) would be a possible ground to support termination, and G.S. 1A-1, N.C. R. Civ. P. 15(b) did not apply, the termination order was reversed. In re B.L.H., 190 N.C. App. 142, 660 S.E.2d 255, 2008 N.C. App. LEXIS 831 (2008).

Failure to Make Motion in Timely Fashion. — Trial court did not err in denying plaintiffs' motion to amend their complaint where plaintiffs knew of the purchase of insurance for nearly two and a half years, and failed to amend their complaint to allege this until the motions hearing when defendants moved to dismiss the action based on plaintiffs' failure to so plead. Gunter v. Anders, 115 N.C. App. 331, 444 S.E.2d 685 (1994), cert. denied, 339 N.C. 612, 454 S.E.2d 250, cert. dismissed, 339 N.C. 738, 454 S.E.2d 651 (1995).

Amendment in Order to State Legal Theory. — Discretionary amendments are to be freely granted unless the opposing party would be prejudiced; amending pleadings to more accurately state the legal theory supported by the factual allegations already present in the complaint would not result in unfair surprise to defendant. Smith v. Nationwide Mut. Fire Ins. Co., 96 N.C. App. 215, 385 S.E.2d 152 (1989), cert. denied, 326 N.C. 365, 389 S.E.2d 816 (1990).

Amendment to Add Defense. — Trial court did not err by allowing defendants to amend their respective answers to add defense that renewal insurance policy gave insufficient notice. North River Ins. Co. v. Young, 117 N.C. App. 663, 453 S.E.2d 205 (1995).

Amendment to Withdraw Jury Request. — Plaintiff in a personal injury case could not unilaterally withdraw her jury request once defendant filed his motion to set aside default judgment, nor could she file an amendment pursuant to this rule to withdraw her request and, thereby, contravene the strictures of G.S. 1A-1, Rule 38. Cabe v. Worley, 140 N.C. App. 250, 536 S.E.2d 328, 2000 N.C. App. LEXIS 1111 (2000).

Amendment to Include Medical Malpractice Certification. — Where defendants had not filed any responsive pleading, only a Rule 12(b)(6) motion to dismiss, court incorrectly denied plaintiffs' motion to amend complaint to include a Rule 9(j) certification. Brisson v. Santoriello, 134 N.C. App. 65, 516 S.E.2d 911, 1999 N.C. App. LEXIS 666 (1999).

Amendment to add a G.S. 58-63-15(11) claim was denied where it was not shown that defendant understood the alleged extraneous evidence was aimed at establishing a violation of G.S. 58-63-15(11) rather than proving an issue actually raised by the pleadings. Members Interior Constr., Inc. v. Leader Constr. Co., 124 N.C. App. 121, 476 S.E.2d 399 (1996).

Amendment to Petition for Certiorari. — The trial court had the authority to grant an adjoining property owner's motion to amend her petition for certiorari, despite her failure to allege that she was an aggrieved party, since the petition was a "pleading" within the meaning of this rule. Darnell v. Town of Franklin, 131 N.C. App. 846, 508 S.E.2d 841 (1998).

Amendment to Add New Party. — Although a declaratory judgment action against a State Department of Motor Vehicles' (DMV) practice of charging a fee for a handicapped placard was dismissed due to the State's sovereign immunity from suit, which had not been waived, the trial court found no violation of the Americans with Disabilities Act (ADA), 42 U.S.C.S. § 12101 et seq.; a motion seeking to amend the complaint pursuant to G.S. 1A-1, N.C. R. Civ. P. 15(a), in order to add the Commissioner of the DMV as a party was denied because such would have changed the legal issues presented and also, the ADA could not be brought against an individual pursuant to 42 U.S.C.S. § 12132. Brown v. N.C. DMV, 155 N.C. App. 436, 573 S.E.2d 246, 2002 N.C. App.

LEXIS 1622 (2002), cert. denied, 357 N.C. 62, 579 S.E.2d 271 (2003).

Although a substantial right was affected and immediately appealable under G.S. 1A-1, Rule 54(b), where undue delay or prejudice would have resulted, a trial court did not abuse its discretion in denying a custodian's G.S. 1A-1, Rule 15(a) motion to add two defendants to a complaint. Carter v. Rockingham County Bd. of Educ., 158 N.C. App. 687, 582 S.E.2d 69, 2003 N.C. App. LEXIS 1279 (2003).

Trial court properly denied an alleged accident victim's motion to add a necessary party under G.S. 1A-1, N.C. R. Civ. P. 15, because an amendment to add a new party would have been futile and unduly prejudicial; further, the statute of limitations had run and would not stand against a new party, and the relation back doctrine, which extended periods for pursuing claims, did not apply to a party. Bailey v. Handee Hugo's, Inc., 173 N.C. App. 723, 620 S.E.2d 312, 2005 N.C. App. LEXIS 2302 (2005).

Shareholder was not a New Party. — State could add a claim against a shareholder, contingent on the State's subsequent ability to demonstrate that the shareholder and a corporation were alter egos. The State made the necessary showings at the pleading stage to establish that the corporation was operated as a mere instrumentality of the shareholder; therefore, G.S. 1-54(2)'s one-year statute of limitations was tolled as to the shareholder, and the addition of the shareholder as a party related back and did not violate N.C. R. Civ. P. 15(c). State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 362 N.C. 431, 666 S.E.2d 107, 2008 N.C. LEXIS 687 (2008).

Plaintiff's right to amend is lost if trial court grants defendant's motion for judgment on the pleadings, even where trial court grants plaintiff leave to amend on the court's own motion. Sentry Enters., Inc. v. Canal Wood Corp., 94 N.C. App. 293, 380 S.E.2d 152 (1989).

Effect on Jurisdiction. — When original process has been served properly and amendments to it are to make process and pleadings consistent, the court will retain jurisdiction. Jones v. Whitaker, 59 N.C. App. 223, 296 S.E.2d 27 (1982).

Burden of Party Objecting to Amendment. — The party objecting to an amendment has the burden of specifying the grounds of objection and of satisfying the court that he will be prejudiced by admission of the evidence or by litigation of the issues raised by the evidence. The objecting party must meet these requirements in order to avoid "litigation by consent" or allowance of a motion to amend. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972); Watson v. Watson, 49 N.C. App. 58, 270 S.E.2d 542 (1980).

Leave to amend should be freely given when justice so requires, and the burden is on the party objecting to the amendment to show that he would be prejudiced thereby. Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977); Gro-Mar Pub. Relations, Inc. v. Billy Jack Enters., Inc., 36 N.C. App. 673, 245 S.E.2d 782 (1978); F. Indus., Inc. v. Cox, 45 N.C. App. 595, 263 S.E.2d 791 (1980); Kinnard v. Mecklenburg Fair, Ltd., 46 N.C. App. 725, 266 S.E.2d 14, aff'd, 301 N.C. 522, 271 S.E.2d 909 (1980).

The party objecting to the amendment has the burden of satisfying the trial court that he would be prejudiced thereby. Carolina Garage, Inc. v. Holston, 40 N.C. App. 400, 253 S.E.2d 7 (1979); Watson v. Watson, 49 N.C. App. 58, 270 S.E.2d 542 (1980); Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880, cert. denied, 306 N.C. 558, 294 S.E.2d 224 (1982).

The party objecting to the amendment has the burden of establishing it will be materially prejudiced by the amendment. North River Ins. Co. v. Young, 117 N.C. App. 663, 453 S.E.2d 205 (1995).

Plaintiffs Should Have Sought Leave to Amend Although Claim Raised in Answer. — Where the essence of plaintiffs' complaint and amended complaint was that defendants made unauthorized and unwarranted diversions of school bond proceeds to purposes other than those authorized by the bond resolution, namely for purchase and renovation of the Square D facility, and where neither complaint included an allegation that monies from other sources of revenue were improperly diverted, although defense, asserted in the answer of the Board of Education defendants, raised a claim of misappropriation of revenues other than bond proceeds, the trial court did not err in limiting denial of defendants' motions to dismiss to only the allegations relating to the propriety of the expenditure of school bond proceeds on the Square D facility; if plaintiffs desired to add a claim that defendants diverted sources of revenue other than school bond proceeds, plaintiffs should have sought leave to amend under this rule. Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164, cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992).

The burden is upon the party objecting to the amendment to set forth the grounds for his objection and to establish that he will be prejudiced if the motion is allowed. Rogers v. Rogers, 39 N.C. App. 635, 251 S.E.2d 663 (1979); Helena Chem. Co. v. Rivenbark, 45 N.C. App. 517, 263 S.E.2d 305 (1980); Evans v. Craddock, 61 N.C. App. 438, 300 S.E.2d 908 (1983).

The burden is on the objecting party to show that he would be prejudiced by an amendment. Henry v. Deen, 61 N.C. App. 189, 300 S.E.2d 707 (1983), rev'd on other grounds, 310 N.C. 75, 310 S.E.2d 326 (1984); Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

The party opposing an amendment carries

the burden of demonstrating prejudice. In a complicated medical malpractice case, particularly where discovery has been hotly contested and important evidence turns up missing, merely showing delay beyond the statutory period will not suffice as evidence of prejudice. To hold otherwise would negate the very policies embodied in this rule, i.e., liberal allowance of amendments, and availability of relation back, to ensure that controversies are decided on the merits. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

The party who objects to the amendment has the burden of proving prejudice. Peed v. Peed, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (1985).

For amendment to be proper under this rule, there must be evidence of an unpleaded issue introduced without objection, and it must appear that the parties understood, or at least reasonably should have understood, that the evidence was aimed at an issue not expressly pleaded. Yet, even when the evidence is objected to on the grounds that it is not within the issues raised by the pleadings, the court will freely allow amendments to present the merits of the case when the objecting party fails to satisfy the court that he would be prejudiced in the trial on its merits. Peed v. Peed, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (1985); Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

Consent Presumed Absent Objection on Proper Grounds. — If opposing counsel fails to object on the proper grounds, a presumption will arise that consent is given to the broadened scope of the trial. Under this presumption all issues raised will be treated as if they were in the pleadings. Harris v. Bridges, 59 N.C. App. 195, 296 S.E.2d 299 (1982).

Where a party offers evidence at trial which introduces a new issue and there is no objection by the opposing party, the opposing party is viewed as having consented to the admission of the evidence and the pleadings are deemed amended to include the new issue. Byrd v. Byrd, 62 N.C. App. 438, 303 S.E.2d 205 (1983).

Where defendant did not object to the introduction of certain evidence, the pleadings were amended by implication. Formal permission of the court was not required, although the better practice is that the party benefitted should move to amend the pleadings to reflect the theory of recovery. By failing to make timely objection to the introduction of the evidence at variance with the pleadings, defendant waived his right to assert such ground on appeal. Taylor v. Gillespie, 66 N.C. App. 302, 311 S.E.2d 362, cert. denied, 310 N.C. 748, 315 S.E.2d 710 (1984).

Where the opposing party does not object to evidence outside the issues raised by the pleadings, the issue is tried with his implied consent. Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

The defendant indicated his consent to the amended complaint, allegedly filed without leave of the court or the written consent of the defendant, by filing an answer, by responding to the allegations within it, and by submitting materials in support of his motion for summary judgment. Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), rev'd on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986).

A formal amendment is needed only when evidence is objected to at trial as not within the scope of the pleadings. Taylor v. Gillespie, 66 N.C. App. 302, 311 S.E.2d 362, cert. denied, 310 N.C. 748, 315 S.E.2d 710 (1984).

Under certain circumstances a pleading may be deemed amended by implication when evidence outside the scope of the pleading has been received without objection, which evidence constitutes a substantial feature of a case; in such situation no formal amendment of the pleading is required. Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

Unless Evidence Is Also Relevant to Support Issue Raised by Pleadings. — Under North Carolina's "notice theory of pleading," a trial proceeds on the issues raised by the pleadings unless the pleadings are amended. If an issue not raised by the pleadings is tried by the "implied consent" of the parties, the pleadings are deemed amended. When, however, the evidence used to support the new issue would also be relevant to support the issue raised by the pleadings, the defendant has not been put on notice of plaintiff's new or alternate theory. Gilbert v. Thomas, 64 N.C. App. 582, 307 S.E.2d 853 (1983).

Discretion of Court. — Whether a motion to amend a pleading is allowed or denied is addressed to the sound discretion of the court and is accorded great deference. North River Ins. Co. v. Young, 117 N.C. App. 663, 453 S.E.2d 205 (1995).

Trial court did not abuse the court's discretion by allowing the public administrators' complaints and the trustees cross-claims against a trustee to be amended because: (1) the administrators filed the amended complaints with the written consent of the trustees; (2) the administrators filed a motion to amend their complaint, seeking leave of court to file the amended complaint, although such motion was filed after the amended complaint; and (3) the trustee did not argue that the trustee was prejudiced by the filing of the amended complaints and cross-claims. Babb v. Graham, 190 N.C. App. 463, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

The trial court has broad discretion in permitting or denying amendments. Helson's Premiums & Gifts, Inc. v. Duncan, 9

N.C. App. 653, 177 S.E.2d 428 (1970); Galligan v. Smith, 14 N.C. App. 220, 188 S.E.2d 31, cert. denied, 281 N.C. 514, 189 S.E.2d 36 (1972).

In a motion to amend addressed to the sound discretion of the trial judge, the trial court has broad discretion in permitting or denying amendments. Markham v. Johnson, 15 N.C. App. 139, 189 S.E.2d 588, cert. denied, 281 N.C. 758, 191 S.E.2d 356 (1972).

Section (a) of this rule gives trial courts extensive discretion in determining whether or not leave to amend will be granted after the time for amending as a matter of course has expired. Willow Mt. Corp. v. Parker, 37 N.C. App. 718, 247 S.E.2d 11, cert. denied, 295 N.C. 738, 248 S.E.2d 867 (1978); Tyson v. Ciba-Geigy Corp., 82 N.C. App. 626, 347 S.E.2d 473 (1986).

A motion for leave to file an amended complaint is addressed to the discretion of the trial court. Flores v. Caldwell, 14 N.C. App. 144, 187 S.E.2d 377 (1972).

The motion to amend is properly addressed to the discretion of the trial court, who must weigh the motion in light of the attendant circumstances. Gladstein v. South Square Assocs., 39 N.C. App. 171, 249 S.E.2d 827 (1978), cert. denied, 296 N.C. 736, 254 S.E.2d 178 (1979); Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880, cert. denied, 306 N.C. 558, 294 S.E.2d 224 (1982).

This rule provides for broad discretion on the part of the court in allowing motions to amend a complaint after the answer is filed. Forbes v. Pillmon, 18 N.C. App. 439, 197 S.E.2d 226 (1973).

Rulings on motions to amend after the expiration of the statutory period are within the discretion of the trial court; that discretion is clearly not abused when granting the motion would be a futile gesture. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

A motion to amend a pleading, made more than 30 days after the original pleading is served, is addressed to the discretion of the trial court. Norlin Indus., Inc. v. Music Arts, Inc., 67 N.C. App. 300, 313 S.E.2d 166, cert. denied, 311 N.C. 403, 319 S.E.2d 273 (1984).

Under this rule, the trial judge had broad discretion to permit or deny defendant's motion to amend her answer to allege a counterclaim six months after her original answer was filed, whether the counterclaim to be alleged was compulsory or permissive. Grant & Hastings, P.A. v. Arlin, 77 N.C. App. 813, 336 S.E.2d 111 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 894 (1986).

Ruling on defendant's motion to amend its answer is within the discretion of the trial court. Hatfield v. Jefferson Std. Life Ins. Co., 85 N.C. App. 438, 355 S.E.2d 199, cert. denied, 320 N.C. 512, 358 S.E.2d 519 (1987).

Trial court has broad discretion in permitting or denying amendments after the time for amending as a matter of law has expired. Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110, cert. denied, 320 N.C. 790, 361 S.E.2d 70 (1987), overruled on other grounds, Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Wife did not show a trial court abused its discretion under G.S. 1A-1-15(a) by denying her motion to amend her counterclaim for alimony because: (1) her claim that her husband was estopped from asserting the validity of her claims had no support in the record and was improper; and (2) her assertion that an amendment should have been allowed "in the interest of justice" offered no reason to find an abuse of discretion, and the fact that her motion was filed ten months after the husband responded to her counterclaim suggested delay as a reason justifying the denial of her motion. Coleman v. Coleman, 182 N.C. App. 25, 641 S.E.2d 332, 2007 N.C. App. LEXIS 475 (2007).

But Judge's Discretion Is Not Unlimited. — Although the ruling on a motion to allow supplemental pleadings is within the trial judge's discretion, that discretion is not unlimited. Generally, however, the motion should be allowed unless its allowance would impose a substantial injustice upon the opposing party. VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978).

Although the spirit of the North Carolina Rules of Civil Procedure is to permit parties to proceed on the merits without the strict and technical pleading rules of the past, the rules still provide some protection for parties who may be prejudiced by liberal amendments. Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984).

While the grant or denial of an opportunity to amend pleadings is within the discretion of the trial court, the refusal to grant such leave without any justifying reason for the denial is not an exercise of discretion; it is merely abuse of that discretion. Coffey v. Coffey, 94 N.C. App. 717, 381 S.E.2d 467 (1989).

In the absence of any apparent or declared reason — such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. — the leave sought should, as the rules require, be freely given. Of course, the grant or denial of an opportunity to amend is within the discretion of the court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion. Henry v. Deen, 61 N.C. App. 189, 300 S.E.2d 707 (1983), rev'd on other grounds, 310 N.C. 75, 310 S.E.2d 326 (1984).

Court's Ruling Not Reviewable Absent Showing of Abuse. — A motion to amend the pleadings is addressed to the discretion of the trial judge, and is not reviewable on appeal in the absence of a showing of an abuse of discretion. Mangum v. Surles, 12 N.C. App. 547, 183 S.E.2d 839 (1971), rev'd on other grounds, 281 N.C. 91, 187 S.E.2d 697 (1972); Carolina Garage, Inc. v. Holston, 40 N.C. App. 400, 253 S.E.2d 7 (1979); Tyson v. Ciba-Geigy Corp., 82 N.C. App. 626, 347 S.E.2d 473 (1986); Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110, cert. denied, 320 N.C. 790, 361 S.E.2d 70 (1987), overruled on other grounds, Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

The discretion of the trial court in allowing amendments is not reviewable absent a showing of abuse thereof. Willow Mt. Corp. v. Parker, 37 N.C. App. 718, 247 S.E.2d 11, cert. denied, 295 N.C. 738, 248 S.E.2d 867 (1978); Evans v. Craddock, 61 N.C. App. 438, 300 S.E.2d 908 (1983); Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986); Boudreau v. Baughman, 86 N.C. App. 165, 356 S.E.2d 907 (1987), rev'd and remanded in part, modified and aff'd in part, 322 N.C. 331, 368 S.E.2d 849 (1988), modified on other grounds, 316 N.C. 16, 340 S.E.2d 397 (1986).

The trial judge has broad discretionary powers to permit amendments to any pleading, and the court's ruling is not reviewable on appeal in absence of a showing of abuse of discretion. Rogers v. Rogers, 39 N.C. App. 635, 251 S.E.2d 663 (1979).

While the burden is on the party objecting to the amendment to show that he would be prejudiced thereby, a motion under section (a) of this rule is addressed to the sound discretion of the trial judge, and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion. Edwards v. Edwards, 43 N.C. App. 296, 259 S.E.2d 11 (1979); United Leasing Corp. v. Miller, 60 N.C. App. 40, 298 S.E.2d 409 (1982), cert. denied, 308 N.C. 194, 302 S.E.2d 248 (1983).

A motion to amend under this rule is addressed to the sound discretion of the trial judge, and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion. Smith v. McRary, 306 N.C. 664, 295 S.E.2d 444 (1982); Doub v. Doub, 68 N.C. App. 718, 315 S.E.2d 732, modified on other grounds, 313 N.C. 169, 326 S.E.2d 259 (1985); Mauney v. Morris, 73 N.C. App. 589, 327 S.E.2d 248 (1985), rev'd on other grounds, 316 N.C. 16, 340 S.E.2d 397 (1986).

Discretion in allowing amendment of pleadings is vested in the trial judge, and his ruling will not be disturbed on appeal absent a showing of prejudice to the opposing party. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

A motion to amend is directed to the discretion of the trial court, and the exercise of the court's discretion is not reviewable absent a clear showing of abuse. Martin v. Hare, 78 N.C. App. 358, 337 S.E.2d 632 (1985); Pressman v. UNC, 78 N.C. App. 296, 337 S.E.2d 644 (1985).

A motion to amend is addressed to the discretion of the trial court and is not reviewable on appeal absent a showing of abuse of discretion. DOT v. Bollinger, 121 N.C. App. 606, 468 S.E.2d 796 (1996).

After the statutory time for amending pleadings as a matter of course has elapsed, a motion to amend a complaint pursuant to section (a) of this rule is addressed to the sound discretion of the trial judge, and the denial of such motion is not reviewable on appeal absent a clear showing of abuse. Caldwell's Well Drilling, Inc. v. Moore, 79 N.C. App. 730, 340 S.E.2d 518 (1986).

Summary Judgment May Precede Unverified Amended Pleadings. — While it is error for the trial court to grant a motion for summary judgment without first ruling on a party's motion to amend its pleadings, this error is harmless when the amended pleadings are unverified, because the trial court may not consider an unverified pleading when ruling on a motion for summary judgment. Allen R. Tew, P.A. v. Brown, 135 N.C. App. 763, 522 S.E.2d 127, 1999 N.C. App. LEXIS 1230 (1999), cert. denied, 352 N.C. 145, 531 S.E.2d 213 (2000).

Motion Must Be Weighed in Light of Circumstances. — In deciding whether or not to allow an amendment, the trial court must weigh the motion in light of the attendant circumstances. Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110, cert. denied, 320 N.C. 790, 361 S.E.2d 70 (1987), overruled on other grounds, Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Absent any declared reason for denial of leave to amend, the appellate court may examine any apparent reasons for such denial. Kinnard v. Mecklenburg Fair, Ltd., 46 N.C. App. 725, 266 S.E.2d 14, aff'd, 301 N.C. 522, 271 S.E.2d 909 (1980); United Leasing Corp. v. Miller, 60 N.C. App. 40, 298 S.E.2d 409 (1982), cert. denied, 308 N.C. 194, 302 S.E.2d 248 (1983); Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110, cert. denied, 320 N.C. 790, 361 S.E.2d 70 (1987), overruled on other grounds, Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991); Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 510 S.E.2d 690 (1999).

Denial of a motion to amend without a justifying reason and no showing of prejudice to defendant, and apparently based on a misapprehension of the law, is an abuse of discretion and reversible error. Henry v. Deen, 61 N.C. App. 189, 300 S.E.2d 707 (1983), rev'd on other grounds, 310 N.C. 75, 310 S.E.2d 326 (1984).

Denying a motion to amend without giving a reason for the denial is an abuse of discretion. Delta Envtl. Consultants of N.C., Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 510 S.E.2d 690 (1999).

Judge May Not Strike Motion Already Allowed by Another Judge. — When one judge allows a motion to amend a pleading in his discretion and the amendment is made in accordance with the authority granted, a second judge may not strike it on the ground that the first erred in allowing it. He is under the necessity of observing the terms of the judgment allowing the party to amend. Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972).

Nor, Absent Changed Conditions, Allow Motion Already Denied. — When one superior court judge, in the exercise of his discretion, has made an order denying a motion to amend, absent changed conditions another superior court judge may not thereafter allow the motion. Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972).

The power to allow amendments may not be exercised to upset or destroy the efficacy of a validly entered and jurisdictionally sound consent decree previously issued, in which the defense sought to be added by the amendment had been denied. Tridyn Indus., Inc. v. American Mut. Liab. Ins. Co., 46 N.C. App. 91, 264 S.E.2d 357 (1980).

A superior court judge erred in allowing defendant insurer to amend its answer to reassert the defense of lack of timely notice of a claim, where the parties had earlier agreed to a consent judgment striking the late notice defense, as this action contravened the rule that one superior court judge may not modify, overrule, or change the judgment of another superior court judge in the same action, and as the consent judgment was the binding contract of the parties, which could not be modified without the parties' consent. Tridyn Indus., Inc. v. American Mut. Liab. Ins. Co., 46 N.C. App. 91, 264 S.E.2d 357 (1980).

Effect of G.S. 1A-1, Rule 12(a)(1)a. — In an action arising from a contract dispute, the court held that although section (a) of this rule mandates that defendant could only amend his answer after obtaining the court's permission of plaintiff's written consent, G.S. 1A-1, Rule 12(a)(1)a expressly authorized defendant to file without permission those portions of his amended answer which were a responsive pleading to the paragraphs of the complaint subject to defendant's motion to strike. Brenner v. Little Red Sch. House, Ltd., 302 N.C. 207, 274 S.E.2d 206 (1981).

Amendment After Dismissal Under G.S. 1A-1, Rule 12(b)(6). — A motion to dismiss under G.S. 1A-1, Rule 12(b)(6) is not a "responsive pleading" under section (a) of this rule and so does not itself terminate plaintiff's unconditional right to amend a complaint under section (a). However, once the trial court enters its dismissal under G.S. 1A-1, Rule 12(b)(6), plaintiff's right to amend under section (a) is terminated. Under certain limited circumstances set forth in G.S. 1A-1, Rules 59(e) and 60(b), a plaintiff may, however, seek to reopen the trial court's judgment and amend the complaint concurrently under section (a). Johnson v. Bollinger, 86 N.C. App. 1, 356 S.E.2d 378 (1987).

Construction with G.S. 1A-1, Rule 12(a)(1)(b). — Specific requirements of G.S. 1A-1, Rule 12(a)(1)(b) control where in conflict with the general requirements of G.S. 1A-1, Rule 15(a); thus, a response to an amended complaint following a motion for a more definite statement was due within 20 days; however, because the answer was filed, albeit late, before default was entered and because there was no prejudice, it was not improper to deny a motion to strike the response. Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003).

Amendment Substituting or Adding Party. — If the effect of an amendment is to substitute for the defendant a new party, or to add another party, such amendment amounts to a new and independent cause of action and cannot be permitted when the statute of limitations has run. Callicutt v. American Honda Motor Co., 37 N.C. App. 210, 245 S.E.2d 558 (1978).

While G.S. 1A-1, Rule 15 permits the relation-back doctrine to extend periods for pursuing claims, it does not apply to parties. Estate of Fennell v. Stephenson, 354 N.C. 327, 554 S.E.2d 629, 2001 N.C. LEXIS 1096 (2001).

There is no time limit under this rule within which a party must move to amend. Gladstein v. South Square Assocs., 39 N.C. App. 171, 249 S.E.2d 827 (1978), cert. denied, 296 N.C. 736, 254 S.E.2d 178 (1979); Watson v. Watson, 49 N.C. App. 58, 270 S.E.2d 542 (1980).

Right to Amend Foreclosed by Dismissal of Action. — The granting of defendants' motion to dismiss a medical malpractice action pursuant to G.S. 1A-1, Rule 12(c) on the grounds that the action was barred by G.S. 1-52 foreclosed the plaintiffs' right to amend their complaint pursuant to section (a) of this rule. Harris v. Family Medical Ctr., 38 N.C. App. 716, 248 S.E.2d 768 (1978).

Trial court's denial of plaintiff's motion to amend upheld. House of Raeford Farms, Inc. v. City of Raeford, 104 N.C. App. 280, 408 S.E.2d 885 (1991).

The trial judge did not abuse his discretion in denying defendant's second motion to amend his answer, alleging wife's pre-divorce adultery, that was heard on the eve of trial, where the record showed: (1) that defendant amended his answer once, (2) that over four years had passed since the original answer and first amendment was filed, and (3) that extensive discovery and numerous court proceedings had occurred in the interim. Walker v. Walker, 143 N.C. App. 414, 546 S.E.2d 625, 2001 N.C. App. LEXIS 295 (2001).

Trial court's refusal to allow plaintiffs' last minute motion to amend their complaint for a second time on the date calendared for defendants' motion to dismiss did not constitute an abuse of discretion. Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002).

Homeowners association's motion to amend its complaint was properly denied because the issues stated in the amended complaint were at the heart of another action filed by the association appealing the approval of a developer's site plan, and the association could not be allowed to pursue concurrent actions based on the same legal arguments. Beau Rivage Homeowners Ass'n v. Billy Earl, L.L.C., 163 N.C. App. 325, 593 S.E.2d 120, 2004 N.C. App. LEXIS 366 (2004).

Denial of Defendants' Motion to Amend Answer. — Where defendants moved to amend their answer almost a full year from filing it and after both parties had conducted extensive discovery, and where, if the trial court had allowed amendment, plaintiffs would have been required to produce evidence of party's negligence approximately five years after the accident, at least on grounds of defendants' undue delay and undue prejudice to plaintiffs, the trial court was justified in denying defendants' motion to amend their answer. Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991).

Amendment Properly Denied When Summary Judgment Granted. — The trial court did not abuse its discretion in denying defendant's motion to amend his answer to "elaborate on his expenses as a setoff" where at the same time it granted summary judgment rejecting defendant's setoff theory, as amendment of the complaint would have been futile. Olive v. Williams, 42 N.C. App. 380, 257 S.E.2d 90 (1979).

Denial of Amendment on Day of Hearing Upheld. — The trial court did not err in denying plaintiff's motion to amend his pleading in an action attacking an annexation ordinance to include a further section alleging failure on the part of defendant town to meet the prerequisites to annexation set forth in G.S. 160A-47(3), where the motion to amend was not made until the day of hearing, since allowance of such amendment would have constituted unnecessary delay in an expedited hearing procedure. Moody v. Town of Carrboro, 301 N.C. 318, 271 S.E.2d 265 (1980), rehearing denied, 301 N.C. 728, 274 S.E.2d 230 (1981).

Filing of Amended Complaint During Hearing on Motion to Dismiss. — Where the plaintiff filed his amended complaint four minutes after the hearing on defendants' motion to dismiss began, and defendants had only filed a motion to dismiss (which was not a responsive pleading); while it was unlikely that the drafters of G.S. 1A-1, N.C. R. Civ. P. 15(a), intended "any time" to encompass plaintiff serving his amended complaint during a hearing, defendants' failure to present a record of objections to this last minute act by plaintiff or provide a verbatim transcript indicating whether the court took issue with the amended complaint compelled the conclusion that the complaint was timely filed. Beck v. City of Durham, 154 N.C. App. 221, 573 S.E.2d 183, 2002 N.C. App. LEXIS 1440 (2002).

Filing of Assumed Name Certificate. — When church officials sued, in the name of the church diocese, seceders from the church to recover church property, the officials' failure to allege the filing of an assumed name certificate was not fatal because the officials amended their complaint before the seceders filed an answer, as allowed by G.S. 1A-1, Rule 15(a), to substitute the names of the diocesan trustees for the diocese. Daniel v. Wray, 158 N.C. App. 161, 580 S.E.2d 711, 2003 N.C. App. LEXIS 1038 (2003).

Motion to amend complaint in a negligence action by adding a verification and by precisely pleading proximate cause should have been granted even though the motion was made on the same day the court signed a summary judgment order, since the defendants would have suffered no prejudice, and the amendment to correct technical pleading defects under G.S. 1A-1, Rule 56(e) would have facilitated consideration of the action on all the evidence available to the court. Gladstein v. South Square Assocs., 39 N.C. App. 171, 249 S.E.2d 827 (1978), cert. denied, 296 N.C. 736, 254 S.E.2d 178 (1979).

Amendment Considered in Interests of Justice Despite Late Filing and Lack of Leave to File. — Although plaintiff's amended complaint was filed some 13 months after defendant's answer was served, and the trial court did not grant leave to file the amended complaint, the Court of Appeals addressed the merits of this case to prevent manifest injustice. Truesdale v. University of N.C., 91 N.C. App. 186, 371 S.E.2d 503 (1988), cert. denied, 323 N.C. 706, 377 S.E.2d 230, 493 U.S. 808, 110 S. Ct. 50, 107 L. Ed. 2d 19 (1989), overruled on other grounds, Corum v. University of N.C. ex rel. Bd. of Governors, 330 N.C. 761, 413 S.E.2d 276, reh'g denied, 331 N.C. 558, 418 S.E.2d 664, cert. denied, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992).

Denial of plaintiff's motion to strike

amended answer is tantamount to permitting defendant to file the amended answer. Performance Motors, Inc. v. Allen, 20 N.C. App. 445, 201 S.E.2d 513 (1974).

When the complaint is amended defendant should be entitled to amend his answer to meet the contents of the new complaint. Hence, the trial court erred in allowing a motion for summary judgment on the same day that he allowed plaintiff's motion to amend the complaint, as the defendants should have been given time within which to answer before the hearing on the motion for summary judgment. Turner Halsey Co. v. Lawrence Knitting Mills, Inc., 38 N.C. App. 569, 248 S.E.2d 342 (1978).

Denial of Amendment Containing Only Surplusage. — Where the proposed amendment is no more than surplusage, denial of the plaintiff's motion to amend is not an abuse of discretion. Smith v. McRary, 306 N.C. 664, 295 S.E.2d 444 (1982).

Denial of motion to amend answer to allege compulsory counterclaim is immediately appealable. Hudspeth v. Bunzey, 35 N.C. App. 231, 241 S.E.2d 119, cert. denied, 294 N.C. 736, 244 S.E.2d 154 (1978).

Denial of Motion to Amend Is Interlocutory. — An order denying a motion to amend pleadings is an interlocutory order, and is not immediately appealable. Buchanan v. Rose, 59 N.C. App. 351, 296 S.E.2d 508 (1982).

An order allowing amendment of a pleading is interlocutory and not appealable. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Applicability of Rule to Motions. — The philosophy of this rule should apply not only to pleadings but also to motions where there is no material prejudice to the opposing party. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

If an order allowing amendment and adding a party defendant is void for lack of notice to the original defendant, it is void for all purposes. Pask v. Corbitt, 28 N.C. App. 100, 220 S.E.2d 378 (1975).

The filing of a reply is not an amendment to the pleadings. Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

Motions to Strike Are Available to Test Amended Complaints. — G.S. 1A-1, Rule 12(f) allows the court to strike improper allegations from any pleading. Although the reported cases do not address application of G.S. 1A-1, Rule 12(f) to allegations added under this rule, the latter rule clearly governs pleadings practice, and motions to strike logically are available to test amended as well as original complaints. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Use of Allegations Not Denied Until Amendment of Answer as Evidential Admissions. — Allegations in a complaint not initially denied by answer, but subsequently denied in an amended answer, may constitute evidential admissions, reflecting something which a party has once said. However, to take advantage of evidential admissions, the opponent must introduce them into evidence. The introduction of "all the admissions of record" does not place this evidence before the jury at trial in the sense of drawing the jury's attention to the specific allegations of the complaint and the specific answers thereto. Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983).

Once party amends pleading without leave of court as permitted by section (a) of this rule, the opposing party has 30 days in which to respond; the rule does not distinguish between minor and major amendments. Hyder v. Dergance, 76 N.C. App. 317, 332 S.E.2d 713 (1985).

Amendment Adding Plaintiff and Alleging That Defendant Was Conducting Business Under Corporate Name. — In an action brought by agents of a landowner seeking damages for the defendants' failure to construct a pond, the defendants failed to demonstrate prejudice from amendments to the pleading adding an additional plaintiff — the landowner — and inserting additional language that one of the defendants was conducting business under a corporate name. Neither of these amendments brought out any new material, changed the theory of the case, or in any way surprised the defendants. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

Motion Held Timely. — Where plaintiff filed his motion to amend his complaint to add a cause of action to enforce a materialman's or laborer's lien on December 8, 1983, and the last day he had furnished material or labor to defendants' property was June 15, 1983, his motion was thus filed within the 180-day period set forth in G.S. 44A-13(a), as the date of the filing of the motion, rather than the date on which the court ruled on it, was the crucial date in measuring the period of limitations. Plaintiff's amendment was therefore not barred by the statute of limitations, and whether it would "relate back" to the filing of the original complaint was immaterial. Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

Failure of trial court to state specific reasons for denial of motion to amend does not preclude appellate court from examining the reasons for denial. Martin v. Hare, 78 N.C. App. 358, 337 S.E.2d 632 (1985).

The trial court did not err by denying the plaintiffs' motion to amend complaint by adding an additional cause of action one year and seven months after the original filing of the complaint and only seven days before the hearing of a motion for summary judgment, which motion was filed nine months after the extensive discovery conducted in the case was complete. Pressman v. UNC, 78 N.C. App. 296, 337 S.E.2d 644 (1985).

In civil action wherein plaintiff alleged a contract with defendants to drill a well in property owned by them, which property was conveyed by defendants to purchasers, the trial court did not abuse its discretion in denying motion to amend plaintiff's complaint to allege that defendants acted as agent for purchasers, which motion was made when the case came on for hearing on defendants' motions to dismiss under G.S. 1A-1, Rule 12(b), as in their answer defendants had alleged that they were acting as agents for purchasers in contracting with plaintiff to drill the well, which answer was filed on January 4, 1985, and plaintiff did not make its motion to amend until April 22, 1985. Caldwell's Well Drilling, Inc. v. Moore, 79 N.C. App. 730, 340 S.E.2d 518 (1986).

The trial court did not err in denying plaintiff's motion to amend complaint where plaintiffs' motion to amend was filed seven months after defendant's original answer admitted that defendant owned and was operating automobile and nearly six months after defendant offered certificate of title as proof of ownership and requested plaintiffs to admit that defendant owned the automobile, and despite the fact that plaintiffs' motion was filed only six weeks after deposition of witness to the accident was taken, codefendant being the driver of the car, co-defendant's motion for summary judgment had already been filed and over three years had passed since the accident without any mention of liability based on codefendant's operation of the vehicle. Brown v. Lyons, 93 N.C. App. 453, 378 S.E.2d 243 (1989).

Where motion to amend was filed over a year after the original complaint, and the requested amendment purported to add a seventh cause of action, but the cause of action was ambiguous and no relief was requested, the trial court did not abuse its discretion in denying the motion to amend the complaint. Outer Banks Contractors v. Daniels & Daniels Constr., Inc., 111 N.C. App. 725, 433 S.E.2d 759 (1993).

The trial court did not abuse its discretion in denying plaintiff's Motion to Amend where the decision to deny was a reasoned one made to prevent unfair prejudice to the defendant town. Chicora Country Club, Inc. v. Town of Erwin, 128 N.C. App. 101, 493 S.E.2d 797 (1997).

The trial court properly denied plaintiff's motion to amend its complaint where, when several parties filed answers before plaintiff filed its motion to amend, plaintiff's right to amend as a matter of course terminated regardless of the fact that affirmative relief was not being sought against the parties in question; furthermore, the motion had been filed at the same time as the hearing on defendants' motion to dismiss for failure to state a claim upon which relief could be granted. Pinewood Homes, Inc. v. Harris, 184 N.C. App. 597, 646 S.E.2d 826, 2007 N.C. App. LEXIS 1630 (2007).

Trial court did not err by failing to address a former employee's alleged motions to amend because the employee's alleged oral request to amend was contingent upon the trial court's dismissal of the case and did not adequately inform either the trial court or defendants that the employee truly intended to amend her complaint, but instead, the employee indicated a mere willingness to amend her complaint; the employee's alleged written motion, which took the form of a letter addressed to the trial judge and copied to defense counsel, did not meet the requirements of a written motion to amend under G.S. 1A-1, Rules 7 and 10 because the letter contained no designation, caption, or numbered paragraphs, it was not filed with the trial court, and even assuming arguendo that the letter could be construed as a motion to amend, the employee failed to show any abuse of discretion in the trial court's decision to not allow the amendment. Helm v. Appalachian State Univ., — N.C. App. —, 670 S.E.2d 571, 2008 N.C. App. LEXIS 2251 (2008).

Where insufficient evidence existed to support defendant's claim, allowing defendant to amend its pleadings to include such a claim would be futile, the trial court did not err in denying defendant's motion to amend. IRT Property Co. v. Papagayo, Inc., 112 N.C. App. 318, 435 S.E.2d 565 (1993), rev'd on other grounds, 338 N.C. 293, 449 S.E.2d 459 (1994).

Motion to Amend Denied. — Superior court did not abuse its discretion in denying defendants' motion to amend their answer to interpose two new defenses where the motion to amend was filed more than five years after the compliant was filed. Isenhour v. Universal Underwriters Ins. Co., 345 N.C. 151, 478 S.E.2d 197 (1996).

Motion to Amend Allowed. — Because the father failed to demonstrate prejudice, the trial court did not err in allowing the grandparents to amend their complaint for custody of a minor child to add a claim for child support. David N. v. Jason N., 164 N.C. App. 687, 596 S.E.2d 266, 2004 N.C. App. LEXIS 963 (2004).

Denial of Motion to Amend Held Proper. — Denial of the motion to amend was proper because the insureds did not file a motion for leave to amend until almost an hour after dismissal; an oral offer to amend at the dismissal hearing was insufficient. Hunter v. Guardian Life Ins. Co. of Am., 162 N.C. App. 477, 593 S.E.2d 595, 2004 N.C. App. LEXIS 174 (2004), cert. denied, 358 N.C. 543, 599 S.E.2d 48, 599 S.E.2d 49 (2004).

Trial court properly denied an inmate's post-verdict motion to amend his pleadings to add federal claims under 42 U.S.C.S.

§ 1983 and 42 U.S.C.S. § 1988 with regard to his assault and battery suit against a deputy sheriff because such claims were only presentable in federal court. Cunningham v. Riley, — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 511 (Mar. 15, 2005).

Applied in McNamara v. Kerr-McGee Chem. Corp., 328 F. Supp. 1058 (E.D.N.C. 1971); Williams v. Nationwide Ins. Co., 12 N.C. App. 131, 182 S.E.2d 653 (1971); Southwire Co. v. Long Mfg. Co., 12 N.C. App. 335, 183 S.E.2d 253 (1971); Clary v. Nivens, 12 N.C. App. 690, 184 S.E.2d 374 (1971); Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972); Davis v. Connell, 14 N.C. App. 23, 187 S.E.2d 360 (1972); Merchants Distribs., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972); Windfield Corp. v. McCallum Inspection Co., 18 N.C. App. 168, 196 S.E.2d 607 (1973); McCarley v. McCarley, 24 N.C. App. 373, 210 S.E.2d 531 (1975); Andrews v. North Carolina Farm Bureau Mut. Ins. Co., 26 N.C. App. 163, 215 S.E.2d 373 (1975); Philco Fin. Corp. v. Mitchell, 26 N.C. App. 264, 215 S.E.2d 823 (1975); Johnson v. Northwestern Bank, 27 N.C. App. 240, 218 S.E.2d 722 (1975); Griffin v. Wheeler-Leonard & Co., 290 N.C. 185, 225 S.E.2d 557 (1976); Northside Properties, Inc. v. Ko-Ko Mart, Inc., 28 N.C. App. 532, 222 S.E.2d 267 (1976); Johnson v. Austin, 29 N.C. App. 415, 224 S.E.2d 293 (1976); ITT-Industrial Credit Co. v. Milo Concrete Co., 31 N.C. App. 450, 229 S.E.2d 814 (1976); McRae v. Moore, 33 N.C. App. 116, 234 S.E.2d 419 (1977); Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399 (1978); Board of Transp. v. Royster, 40 N.C. App. 1, 251 S.E.2d 921 (1979); Harrington v. Collins, 40 N.C. App. 530, 253 S.E.2d 288 (1979); Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 40 N.C. App. 675, 253 S.E.2d 621 (1979); Smith v. Staton, 41 N.C. App. 395, 255 S.E.2d 310 (1979); Lewis v. Boling, 42 N.C. App. 597, 257 S.E.2d 486 (1979); Coker v. Stevens, 43 N.C. App. 352, 258 S.E.2d 794 (1979); Lupo v. Powell, 44 N.C. App. 35, 259 S.E.2d 777 (1979); Eubanks v. First Protection Life Ins. Co., 44 N.C. App. 224, 261 S.E.2d 28 (1979); Quail Hollow E. Condominium Ass'n v. Donald J. Scholz Co., 47 N.C. App. 518, 268 S.E.2d 12 (1980); Lee v. Regan, 47 N.C. App. 544, 267 S.E.2d 909 (1980); Vance Trucking Co. v. Phillips, 51 N.C. App. 85, 275 S.E.2d 497 (1981); Terry v. Lowrance Hosp., 54 N.C. App. 663, 284 S.E.2d 128 (1981); In re Smith, 56 N.C. App. 142, 287 S.E.2d 440 (1982); Rudder v. Lawton, 62 N.C. App. 277, 302 S.E.2d 487 (1983); Gay v. Gay, 62 N.C. App. 288, 302 S.E.2d 495 (1983); Swindell v. Overton, 62 N.C. App. 160, 302 S.E.2d 841 (1983); FMS Mgt. Sys. v. Thomas, 65 N.C. App. 561, 309 S.E.2d 697 (1983); Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984); Federated Mut. Ins. Co. v. Hardin, 67 N.C. App. 487, 313 S.E.2d 801 (1984); Bryant v. Nationwide Mut. Fire Ins. Co., 67 N.C. App. 616, 313 S.E.2d 803 (1984); Degree v. Degree, 72 N.C. App. 668, 325 S.E.2d 36 (1985); Griffin v. Baucom, 74 N.C. App. 282, 328 S.E.2d 38 (1985); Crowder v. North Carolina Farm Bureau Mut. Ins. Co., 79 N.C. App. 551, 340 S.E.2d 127 (1986); Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986); Sampson-Bladen Oil Co. v. Walters, 86 N.C. App. 173, 356 S.E.2d 805 (1987); MCB Ltd. v. McGowan, 86 N.C. App. 607, 359 S.E.2d 50 (1987); Ledford v. Martin, 87 N.C. App. 88, 359 S.E.2d 505 (1987); Hawkins v. Houser, 91 N.C. App. 266, 371 S.E.2d 297 (1988); White v. Union County, 93 N.C. App. 148, 377 S.E.2d 93 (1989); City of Raleigh v. College Campus Apts., Inc., 94 N.C. App. 280, 380 S.E.2d 163 (1989); Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Patel, 98 N.C. App. 134, 389 S.E.2d 604 (1990); County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990); Marina Food Assocs. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824 (1990); News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992); Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992); Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Freese v. Smith, 110 N.C. App. 28, 428 S.E.2d 841 (1993); Coble Cranes & Equip. Co. v. B & W Utils., Inc., 111 N.C. App. 910, 433 S.E.2d 464 (1993); Miller v. Talton, 112 N.C. App. 484, 435 S.E.2d 793 (1993); House Healers Restorations, Inc. v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993); North Carolina Council of Churches v. State, 120 N.C. App. 84, 461 S.E.2d 354 (1995); Sykes v. Keiltex Indus., Inc., 123 N.C. App. 482, 473 S.E.2d 341 (1996); Sloan v. Miller Bldg. Corp., 128 N.C. App. 37, 493 S.E.2d 460 (1997); Sidden v. Mailman, 137 N.C. App. 669, 529 S.E.2d 266, 2000 N.C. App. LEXIS 493 (2000); FNB Southeast v. Lane, 160 N.C. App. 535, 586 S.E.2d 530, 2003 N.C. App. LEXIS 1821 (2003); Sylva Shops, Ltd. P'ship v. Hibbard, 175 N.C. App. 423, 623 S.E.2d 785, 2006 N.C. App. LEXIS 181 (2006); In re L.T.R., 181 N.C. App. 376, 639 S.E.2d 122, 2007 N.C. App. LEXIS 157 (2007); Marriott v. Chatham County, 187 N.C. App. 491, 654 S.E.2d 13, 2007 N.C. App. LEXIS 2430 (2007); Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008); Brown v. Kindred Nursing Ctrs. East, L.L.C., — N.C. App. —, 675 S.E.2d 687, 2009 N.C. App. LEXIS 505 (2009).

Cited in Magnolia Apts., Inc. v. Hanes, 8 N.C. App. 394, 174 S.E.2d 828 (1970); Rea v. Hardware Mut. Cas. Co., 15 N.C. App. 620, 190 S.E.2d 708 (1972); Spartan Leasing, Inc. v. Brown, 14 N.C. App. 383, 188 S.E.2d 574 (1972); Livengood v. Piedmont & N. Ry., 18 N.C.

App. 352, 197 S.E.2d 66 (1973); Thacker v. Harris, 22 N.C. App. 103, 205 S.E.2d 744 (1974); Brown v. Moore, 286 N.C. 664, 213 S.E.2d 342 (1975); Griffeth v. Watts, 24 N.C. App. 440, 210 S.E.2d 902 (1975); Price v. J.C. Penney Co., 26 N.C. App. 249, 216 S.E.2d 154 (1975); McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976); Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976); Malloy v. Malloy, 33 N.C. App. 56, 234 S.E.2d 199 (1977); Murphy v. Murphy, 295 N.C. 390, 245 S.E.2d 693 (1978); Allis-Chalmers Corp. v. Davis, 37 N.C. App. 114, 245 S.E.2d 566 (1978); Hodges v. Hodges, 37 N.C. App. 459, 246 S.E.2d 812 (1978); Deutsch v. Fisher, 39 N.C. App. 304, 250 S.E.2d 304 (1979); McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979); Thompson v. Northwestern Sec. Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397 (1980); Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176 (1981); Cranford v. Helms, 53 N.C. App. 337, 280 S.E.2d 756 (1981); Deal v. Christenbury, 50 N.C. App. 600, 274 S.E.2d 867 (1981); Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981); Maybank v. S.S. Kresge Co., 302 N.C. 129, 273 S.E.2d 681 (1981); Graves v. Walston, 302 N.C. 332, 275 S.E.2d 485 (1981); Ingle v. Allen, 53 N.C. App. 627, 281 S.E.2d 406 (1981); Townsend v. Bentley, 57 N.C. App. 581, 292 S.E.2d 19 (1982); Carolina Bldrs. Corp. v. Gelder & Assocs., 56 N.C. App. 638, 289 S.E.2d 628 (1982); Green v. Duke Power Co., 305 N.C. 603, 290 S.E.2d 593 (1982); Wood v. Wood, 60 N.C. App. 178, 298 S.E.2d 422 (1982); Carter v. Parsons, 61 N.C. App. 412, 301 S.E.2d 405 (1983); Wright v. Commercial Union Ins. Co., 63 N.C. App. 465, 305 S.E.2d 190 (1983); Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983); VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985); Carver v. Roberts, 78 N.C. App. 511, 337 S.E.2d 126 (1985); Raritan River Steel Co. v. Cherry, Bekaert & Holland, 79 N.C. App. 81, 339 S.E.2d 62 (1986); Denny v. Hinton, 110 F.R.D. 434 (M.D.N.C. 1986); Raleigh-Durham Airport Auth. v. Howard, 88 N.C. App. 207, 363 S.E.2d 184 (1987); American Marble Corp. v. Crawford, 84 N.C. App. 86, 351 S.E.2d 848 (1987); William F. Freeman, Inc. v. Alderman Photo Co., 89 N.C. App. 73, 365 S.E.2d 183 (1988); Smith v. Buckhram, 91 N.C. App. 355, 372 S.E.2d 90 (1988); Corwin v. Dickey, 91 N.C. App. 725, 373 S.E.2d 149 (1988); Ballance v. Dunn, 96 N.C. App. 286, 385 S.E.2d 522 (1989); Sharrard, McGee & Co. v. Suz's Software, Inc., 100 N.C. App. 428, 396 S.E.2d 815 (1990); Stewart Office Suppliers, Inc. v. First Union Nat'l Bank, 97 N.C. App. 353, 388 S.E.2d 599 (1990); Carolina-Atlantic Distribs., Inc. v. Boyce Insulation Co., 99 N.C. App. 577, 393 S.E.2d 337 (1990); Ford v. NCNB Corp., 104 N.C. App. 172, 408 S.E.2d 738 (1991); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269 (1992); Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992); Golden Rule Ins. Co. v. Long, 113 N.C. App. 187, 439 S.E.2d 599 (1993); Garrity v. Morrisville Zoning Bd. of Adjustment, 115 N.C. App. 273, 444 S.E.2d 653 (1994); City of Winston-Salem v. Yarbrough, 117 N.C. App. 340, 451 S.E.2d 358, 1994 N.C. App. LEXIS 1259 (1994); Qurneh v. Colie, 122 N.C. App. 553, 471 S.E.2d 433 (1996); Denning-Boyles v. WCES, Inc., 123 N.C. App. 409, 473 S.E.2d 38 (1996); Webster Enters., Inc. v. Selective Ins. Co., 125 N.C. App. 36, 479 S.E.2d 243 (1996); Wicker v. Holland, 128 N.C. App. 524, 495 S.E.2d 398 (1998); Paris v. Woolard, 128 N.C. App. 416, 497 S.E.2d 283 (1998); Yancey v. Lea, 139 N.C. App. 76, 532 S.E.2d 560, 2000 N.C. App. LEXIS 798 (2000); Estate of Fennell v. Stephenson, 37 N.C. App. 430, 528 S.E.2d 911, 2000 N.C. App. LEXIS 428 (2000); Williamson v. Bullington, 139 N.C. App. 571, 534 S.E.2d 254, 2000 N.C. App. LEXIS 987 (2000); Warren v. GMC, 142 N.C. App. 316, 542 S.E.2d 317, 2001 N.C. App. LEXIS 80 (2001); Harrold v. Dowd, 149 N.C. App. 777, 561 S.E.2d 914, 2002 N.C. App. LEXIS 309 (2002); Ausley v. Bishop, 150 N.C. App. 56, 564 S.E.2d 252, 2002 N.C. App. LEXIS 382 (2002); Miller v. B.H.B. Enters., Inc., 152 N.C. App. 532, 568 S.E.2d 219, 2002 N.C. App. LEXIS 960 (2002); Barnes v. Erie Ins. Exch., 156 N.C. App. 270, 576 S.E.2d 681, 2003 N.C. App. LEXIS 103 (2003); PharmaResearch Corp. v. Mash, 163 N.C. App. 419, 594 S.E.2d 148, 2004 N.C. App. LEXIS 410 (2004); Draughon v. Harnett County Bd. of Educ., 166 N.C. App. 449, 602 S.E.2d 717, 2004 N.C. App. LEXIS 1784 (2004).

II. AMENDMENTS TO CONFORM TO EVIDENCE.

The pleading with particularity required by G.S. 1A-1, Rule 9(b) is complemented by section (b) of this rule. Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

Section (b) of this rule is essentially a verbatim copy of federal Rule 15(b), and therefore federal decisions interpreting this rule are apposite. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

Section (b) of this rule was enacted to eliminate the waste, delay and injustice which sometimes resulted from belated confrontations between insufficient allegations and plenary proof. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

Purpose in adopting section (b) of this rule was to alter the strict code doctrine of variance which existed under the prior law. W & H Graphics, Inc. v. Hamby, 48 N.C. App. 82, 268 S.E.2d 567 (1980).

Section (b) of this rule represents a departure from the former strict code doctrine of variance by allowing issues to be raised by liberal amendments to pleadings, and in some cases, by the evidence. Peed v. Peed, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (1985).

And the Significance of the Doctrine Has Been Drastically Reduced. — Under the new Rules of Civil Procedure, the significance of the doctrine of variance has been drastically reduced. Hardison v. Williams, 21 N.C. App. 670, 205 S.E.2d 551 (1974).

Under these rules the trial must proceed within the issues raised by the broad pleadings unless the pleadings are amended. But the thrust of this rule seems to destroy the former strict code doctrine of variance by allowing issues to be raised by liberal amendments to pleadings and, in some cases, by the evidence. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

The enactment of the North Carolina Rules of Civil Procedure, especially this rule, virtually destroyed the former strict code doctrine of variance. Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981).

The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried. Fowler v. Johnson, 18 N.C. App. 707, 198 S.E.2d 4 (1973); Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), overruled on other grounds, Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

Need for amendment under section (b) of this rule does not arise unless the evidence raises issues. Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc., 52 N.C. App. 549, 279 S.E.2d 32 (1981).

The trial judge is allowed broad discretion in ruling on motions under section (b) of this rule. Auman v. Easter, 36 N.C. App. 551, 244 S.E.2d 728, cert. denied, 295 N.C. 548, 248 S.E.2d 725 (1978).

Conforming Amendments Should Not Be Allowed Where They Fail to Support Action or Defense. — Conforming amendments under section (b) of this rule are within the sound discretion of the court and should not be allowed where they fail to support the action or defense upon the merits. Murphy v. Murphy, 34 N.C. App. 677, 239 S.E.2d 597 (1977), aff'd in part and rev'd in part on other grounds, 295 N.C. 390, 245 S.E.2d 693 (1978).

An amendment which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried is not permissible, even though there is evidence in the record, introduced as relevant to some other issue, which would support the amendment. Fowler v. Johnson, 18 N.C. App. 707, 198 S.E.2d 4 (1973); Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), overruled on other grounds, Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

This rule does not permit judgment by ambush. Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), overruled on other grounds, Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

And Court's Decision May Not Be Based on Issues Tried Inadvertently. — The implication of section (b) of this rule is that a trial court may not base its decision upon an issue that was tried inadvertently. Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection. At least it must appear that the parties understood the evidence to be aimed at the unpleaded issue. Munchak Corp. v. Caldwell, 37 N.C. App. 240, 246 S.E.2d 13, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

An amendment to conform to the evidence is appropriate only where sufficient evidence has been presented at trial without objection to raise an issue not originally pleaded and where the parties understood, or reasonably should have understood, that the introduction of such evidence was directed to an issue not embraced by the pleadings. W & H Graphics, Inc. v. Hamby, 48 N.C. App. 82, 268 S.E.2d 567 (1980).

In order for pleadings to be amended to conform to the proof pursuant to this rule, there must be evidence of an unpleaded issue introduced without objection, and it must appear that the parties understood, or at least reasonably should have understood, that the evidence was aimed at an issue not expressly pleaded. Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975), overruled on other grounds, Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982); Evans v. Craddock, 61 N.C. App. 438, 300 S.E.2d 908 (1983).

Under section (b) of this rule, the rule of "litigation by consent" is applied when no objection is made on the specific ground that the evidence offered is not within the issues raised by the pleadings. In such case the rule amends the pleadings to conform to the evidence and allows any issue raised by the evidence to go to the jury. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Where no objection is made to evidence on the ground that it is outside the issues raised by the pleadings, the issue raised by the evidence is before the trial court for determination. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972); Harris v. Bridges, 59 N.C. App. 195, 296 S.E.2d 299 (1982).

Where no objection is raised at trial on the grounds that the proffered evidence is not within the scope of the pleadings, no formal amendment is required and the pleadings are deemed amended by implication. Wohlfahrt v. Schneider, 82 N.C. App. 69, 345 S.E.2d 448 (1986).

The effect of this rule is to allow amendment by implied consent to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case, i.e., where he had a fair opportunity to defend his case. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Party who fails to object to evidence is initially presumed to have given implied consent by silence. He can avoid this only by satisfying the court that under the circumstances his consent to having certain issues considered by the trier of fact should not be implied from his failure to object to particular evidence. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

Failure of a party to object to evidence offered at trial on the specific grounds that the evidence was outside the pleadings results in trial of those issues by implied consent. Lea Co. v. North Carolina Bd. of Transp., 57 N.C. App. 392, 291 S.E.2d 844, aff'd, 317 N.C. 254, 345 S.E.2d 355 (1986), aff'd, 308 N.C. 603, 304 S.E.2d 164 (1983).

To limit the scope of the issues raised by the evidence at trial, it is the duty of the opponent to object specifically to evidence offered at trial as being outside the scope of the pleadings. Absent objection, the party will be deemed to have impliedly consented to trial of the issues. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

Where one of the "new" issues in an amended complaint was sufficiently pled in the complaint, defendant had notice and could not complain of its amendment; where evidence sustaining the other issues in the complaint did not tend to support any properly pled issue and because defendant never specifically objected to that evidence as being outside the scope of the pleadings, he impliedly consented to trial on those issues. Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

Although a property owner did not plead a special duty in the owner's complaint, after the defense to the public duty doctrine was pled, the owner's evidence with respect to the issue, to which the North Carolina Department of Environment and Natural Resources (NCDENR) did not object, was an implied amendment to conform to the evidence under N.C. R. Civ. P. 15(b); NCDENR could not argue prejudice when it voluntarily stipulated to the facts. Watts v. N.C. Dep't of Env't & Natural Res., 182 N.C. App. 178, 641 S.E.2d 811, 2007 N.C. App. LEXIS 595 (2007), aff'd in part, modified in part, 362 N.C. 487, 666 S.E.2d 752 (2008).

Absent Objection to Variance, Pleadings Deemed Amended. — Under this rule, when the plaintiff offers evidence at trial which varies from his complaint and introduces a new issue, the defendant may object; if the defendant does not object, he is viewed as having consented to admission of the evidence, and the pleadings are deemed amended to include the new issue. Hardison v. Williams, 21 N.C. App. 670, 205 S.E.2d 551 (1974).

Trial court did not err in ruling on an issue concerning the validity of a foreclosure action because, although the issue was not set forth in the complaint, plaintiff mortgage company offered evidence to the trial court regarding the issue to which defendant grantee did not object; thus, the trial court properly considered the matter pursuant to N.C. R. Civ. P. 15(b). Citifinancial Mortg. Co. v. Gray, 187 N.C. App. 82, 652 S.E.2d 321, 2007 N.C. App. LEXIS 2316 (2007).

Implied-consent principle would not apply where omitted allegation was necessary to confer jurisdiction. Eudy v. Eudy, 24 N.C. App. 516, 211 S.E.2d 536, modified on other grounds, 288 N.C. 71, 215 S.E.2d 782 (1975).

Better Practice Is Motion for Leave to Amend. — Better practice dictates that even where pleadings are deemed amended under the theory of litigation by consent, the party receiving the benefit of the rule should move for leave of court to amend, so that the pleadings will actually reflect the theory of recovery. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972); Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974).

Even though technically no amendment is required when issues are tried by implied consent, the better practice is to move to amend the pleadings to actually reflect the theory of recovery. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

But failure to make the amendment will not jeopardize a verdict or judgment based upon competent evidence. If an amendment to conform the pleadings to the proof should have been made in order to support the judgment, the appellate court will presume it to have been made. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972); Harris v. Bridges, 59 N.C. App. 195, 296 S.E.2d 299 (1982).

Where an issue not raised by the pleadings has been tried by express or implied consent, answered by the jury or the judge, and the judgment rendered on the verdict has been affirmed on appeal, the failure to amend should not, and does not, affect the results of the trial which has been had upon the merits. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

While it is the better practice to amend the pleadings so that they actually reflect the theory of recovery, failure to do so may be without real import. Coley v. Eudy, 51 N.C. App. 310, 276 S.E.2d 462 (1981).

The pleadings are regarded as amended to conform to the proof, even though the defaulting pleader makes no formal motion to amend. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

Amendment Should Actually Be Made Where Retrial Is Ordered. — When a retrial is ordered for failure to submit issues raised by the evidence which were not in the pleadings, or for failure of the court to allow an amendment in order to conform the pleadings to the proof, or for erroneous entry of a dismissal or directed verdict upon the ground of a fatal variance between allegation and proof, the amendment to the pleadings must actually be made, as the judge who presides is entitled to know the theory and the state of the case confronting him. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

The court has authority under section (b) of this rule to permit an amendment to the pleadings at any time when there is no material prejudice to the opposing party and such amendment will serve to present the action on its merits. Clark v. Barber, 20 N.C. App. 603, 202 S.E.2d 347 (1974); Williams v. Sapp, 83 N.C. App. 116, 349 S.E.2d 304 (1986).

An amendment to conform the pleadings to the evidence may be offered even after oral argument. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

Amendment to Conform to Evidence After Jury Argument Not Error. — The trial judge does not commit error in permitting defendants to amend their answer to conform to the evidence after the evidence on both sides is in and after the parties have argued the case to the jury. Reid v. Consolidated Bus Lines, 16 N.C. App. 186, 191 S.E.2d 247 (1972).

It is not error to allow an amendment to conform made late in the trial, even after the jury arguments. Peed v. Peed, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (1985).

Burden of Party Objecting to Admission of Varying Evidence. — If the defendant objects to evidence at trial which varies the complaint and introduces a new issue, he has the burden of proving that he would be prejudiced by admission of the varying evidence. Hardison v. Williams, 21 N.C. App. 670, 205 S.E.2d 551 (1974).

Even when a timely specific objection is made, the party objecting must show some actual prejudice arising from a proposed amendment, i.e., some undue disadvantage or difficulty in presenting the merits of its case. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

Specific Objections Required. — Under section (b) of this rule, a party attempting to limit the trial of issues by implied consent must object specifically to evidence outside the scope of the original pleadings; otherwise, allowing an amendment to conform the pleadings to the evidence will not be error, and, in fact, is not even technically necessary. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Defendant Must Have Notice of What He Is Litigating. — Although there is an exception to the rule that where a claim is not pleaded, the trial court may not place it before the jury, which arises when no objection is made to evidence on the ground that it is outside the issues raised by the pleadings, to give rise to this exception to the pleading requirement the evidence admitted without objection must be clearly irrelevant to any causes of action properly pleaded. Otherwise a defendant would not be on notice that he was litigating an issue other than those pleaded. J.M. Westall & Co. v. Windswept View of Asheville, Inc., 97 N.C. App. 71, 387 S.E.2d 67 (1990), cert. denied, 327 N.C. 139, 394 S.E.2d 175 (1990).

Amendment Denied Absent Notice and Consent by Opposing Party. — At the close of the evidence in the trial of a personal injury action, the injured party could not amend her complaint to state a claim for gross negligence because the opposing party had no notice of that claim, nor did he impliedly consent to it during the trial. Bass v. Johnson, 149 N.C. App. 152, 560 S.E.2d 841, 2002 N.C. App. LEXIS 134 (2002).

Where the evidence which supports an unpleaded issue also tends to support an issue properly raised by the pleadings, no objection to such evidence is necessary and the failure to object does not amount to implied consent to try the unpleaded issue. Tyson v. Ciba-Geigy Corp., 82 N.C. App. 626, 347 S.E.2d 473 (1986).

In passing upon a trial judge's ruling as to a directed verdict, the Court of Appeals cannot review the case as the parties might have tried it; rather, the court must review the case as it was tried below, as reflected in the record on appeal. Where evidence which supported a claim for fraud was also relevant to the issue of mutual mistake raised in plaintiff's complaint, its admission did not constitute "implied consent" to try the issue of fraud. Accordingly, if plaintiff was to prevail on his contention that the court erred in granting defendant's motion for a directed verdict, he was required to have done so on the pleaded ground of mutual mistake. Howell v. Waters, 82 N.C. App. 481, 347 S.E.2d 65 (1986), cert. denied, 318 N.C. 694, 351 S.E.2d 747 (1987).

Amendment of Pleadings to Conform to Evidence Admitted over Objection Permitted. — This rule permits amendment of pleadings to conform to the evidence even where the evidence is admitted over objection.

Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972).

Absent Prejudice to Objecting Party. — Even when the evidence is objected to on the ground that it is not within the issue raised by the pleadings, the court will freely allow amendments to present the merits of the case when the objecting party fails to satisfy the court that he would be prejudiced in the trial on its merits. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Amendment Where Defendants Had Notice in Pretrial Order Not Error. — The trial court did not err in allowing the plaintiff to amend his complaint to state a violation of the Act where the defendants clearly failed to pay him commissions earned as required by G.S. 95-25.6 and 95-25.7; and where the plaintiff raised the violation in the pretrial order which defendants signed and, thereby, put them on notice of the claims against them. Fulk v. Piedmont Music Ctr., 138 N.C. App. 425, 531 S.E.2d 476 (2000).

Allowance of Amendment Upheld. — Where defendant did not object to any evidence as being outside the pleadings, it was not necessary to amend the pleadings, and there was thus no abuse of discretion in allowing plaintiff to amend its complaint to conform to the evidence. Lea Co. v. North Carolina Bd. of Transp., 57 N.C. App. 392, 291 S.E.2d 844, aff'd, 317 N.C. 254, 345 S.E.2d 355 (1986), aff'd, 308 N.C. 603, 304 S.E.2d 164 (1983).

Trial court did not err in granting a plaintiff the remedy of a resulting trust even though it was not specifically requested in the complaint, since the complaint and the evidence presented at trial, as well as the motion to amend, served as notice to the defendant that a resulting trust was a possible remedy. Meekins v. Box, 152 N.C. App. 379, 567 S.E.2d 422, 2002 N.C. App. LEXIS 925 (2002).

When not raised by the pleadings, the issue of usury may still be tried if raised by express or implied consent of the parties at trial. Wallace Men's Wear, Inc. v. Harris, 28 N.C. App. 153, 220 S.E.2d 390 (1975), cert. denied, 289 N.C. 298, 222 S.E.2d 703 (1976).

Failure to plead an affirmative defense ordinarily results in waiver thereof. However, the parties may still try the issue by express or implied consent. Nationwide Mut. Ins. Co. v. Edwards, 67 N.C. App. 1, 312 S.E.2d 656 (1984).

Amendment to Add Affirmative Defense of Contributory Negligence. — Defendant was properly permitted to amend pleadings under G.S. 1A-1, N.C. R. Civ. P. 15(b) to add an affirmative defense of contributory negligence because the evidence raised an issue of contributory negligence where plaintiff observed defendant approaching in the wrong lane and took no evasive action. Alford v. Lowery, 154 N.C. App. 486, 573 S.E.2d 543, 2002 N.C. App. LEXIS 1459 (2002).

Where the record disclosed that the case was tried as though the statute of frauds was properly pleaded, section (b) of this rule applied, and the appeal would be treated as though the statute of frauds had been properly pleaded. Bercegeay v. Surfside Realty Co., 16 N.C. App. 718, 193 S.E.2d 356 (1972).

In an action to recover for injuries sustained when a golf cart rented from defendants rolled backwards down a hill and overturned while being operated by plaintiff, wherein plaintiff alleged that defendants were negligent in failing to warn him of defective brakes on the golf cart, the pleadings were amended by implied consent to conform to the evidence and broaden the issue of negligence so that the jury could consider whether defendants breached a duty to plaintiff by furnishing a golf cart which they knew had no brakes on it when going backwards, where defendants failed to object to plaintiff's testimony outside the pleadings that individual defendant told him at the accident scene that defendants' golf carts had no brakes on them while going backwards. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

In an action to set aside a deed, where plaintiff introduced evidence, not supported by the pleadings, that defendants fraudulently induced her to sign the deed by representing the instrument to be a note, and defendants failed to object to such evidence on the ground that it was outside the issues raised by the pleadings, plaintiff was entitled as a matter of law to have the issue of fraud submitted to the jury and to amend her complaint to conform her pleadings to the evidence. Mangum v. Surles, 281 N.C. 91, 187 S.E.2d 697 (1972).

Fact that defendant had announced that he would not introduce evidence when motion to amend was made, nothing more appearing, did not give rise to prejudice. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

Ruling on Motion Under Section (b) of this Rule Not Reviewable Absent Abuse of Discretion. — While amendment of pleadings may be made, even late in the trial or after judgment, in order to conform the pleadings to the evidence and raise issues tried by the express or implied consent of the parties, the trial court's ruling upon such a motion is not reviewable absent an abuse of discretion. Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 87 N.C. App. 438, 361 S.E.2d 608 (1987).

Reduction of Interest Being Sought. — Where plaintiff in complaint sought interest in excess of the 12% allowed under G.S. 24-1.1, but presented evidence as to the amount of interest when calculated at 12% per annum, the trial court did not abuse its discretion in granting an amendment to the pleadings so as to reduce the interest sought to that calculated at 12% per annum. Northwestern Bank v. Barber, 79 N.C. App. 425, 339 S.E.2d 452, cert. denied, 316 N.C. 733, 345 S.E.2d 391 (1986).

Conversion of Condemnation Proceeding into Quiet Title Action. — Trial court did not err by applying section (b) of this rule in such a way as to convert condemnation proceeding brought by private condemnors, with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

In an action alleging medical malpractice, although the plaintiff presented evidence tending to show that the defendant-physician altered emergency room records, they were not permitted to amend their pleadings under section (b) of this rule. This was not simply an "act of negligence," but was a separate cause of action, which the defendant was not prepared to defend against and to which he did not impliedly consent to the trial of. Paris v. Kreitz, 75 N.C. App. 365, 331 S.E.2d 234, cert. denied, 315 N.C. 185, 337 S.E.2d 858 (1985).

Where there was no warning in the complaint of a punitive damages claim, and no consent by defendant to such a claim, it was within the discretion of the trial court to deny plaintiff's motion to amend to add a claim for punitive damages based upon gross negligence. Enns v. Zayre Corp., 116 N.C. App. 687, 449 S.E.2d 478 (1994), cert. denied, 339 N.C. 737, 454 S.E.2d 649, aff'd, per curiam, 342 N.C. 406, 464 S.E.2d 298 (1995).

III. RELATION BACK OF AMENDMENTS.

Section (c) Is More Liberal Than Federal Rule. — Section (c) of this rule is more liberal in allowing amendments than the comparable federal rule. In North Carolina even a new cause of action can be said to relate back for amendment purposes. Humphries v. Going, 59 F.R.D. 583 (E.D.N.C. 1973).

Federal Decisions as Aid in Construction. — Federal decisions considering the question of whether an original pleading gave notice of a claim set forth in the amended pleading should provide enlightenment in construing this rule. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 318 N.C. 511, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

Guidance from New York Decisions. — Since section (c) of this rule is modeled after Sec. 203(e) of the New York Civil Practice Law and Rules, New York decisions provide guidance for relation back in North Carolina. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 318 N.C. 511, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

Criteria for Determining Whether Amendment Relates Back. — Whether an amendment to a pleading relates back under subsection (c) of this rule does not depend on an analysis of whether it states a new cause of action; it depends, rather, on whether the original pleading gives notice of the transactions, occurrences, or series of transactions or occurrences to be proved pursuant to the amended pleading. Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

The decisive test for relation back remains notice in the original pleading of the transactions or occurrences to be proved pursuant to the amended pleading. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Under the Rules of Civil Procedure, whether an amendment will relate back does not depend upon whether it states a new cause of action, but upon whether the original pleading gave defendants sufficient notice of the proposed new claim. Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

Whether an amended complaint will relate back to the original complaint does not depend upon whether it states a new cause of action, but instead, upon whether the original pleading gave defendants sufficient notice of the proposed amended claim. Pyco Supply Co. v. American Centennial Ins. Co., 321 N.C. 435, 364 S.E.2d 380 (1988).

The notice requirement of this section cannot be met where an amendment has the effect of adding a new party to the action, as opposed to correcting a misnomer. Bob Killian Tire, Inc. v. Day Enters., Inc., 131 N.C. App. 330, 506 S.E.2d 752 (1998).

For an amended claim to relate back to the date of the original pleading, it will depend upon whether the original pleading gave sufficient notice of the proposed amended claim; because a policyholder's original complaint against her insurer raised claims that went only to the face of the policies and the interpretation of its terms, and since it did not provide any allegations concerning the conduct of the contracting parties, an amendment to the complaint to add a claim of fraud did not relate back to the date of the original pleading. State Farm Fire & Cas. Co. v. Darsie, 161 N.C. App. 542, 589 S.E.2d 391, 2003 N.C. App. LEXIS 2257 (2003), cert. denied, 358 N.C. 241, 594 S.E.2d 194 (2004), cert. dismissed, 358 N.C. 241, 594 S.E.2d 193 (2004).

This rule does not apply to the naming of a new party-defendant to an action; it is not authority for the relation back of a claim against a new party. Crossman v. Moore, 341 N.C. 185, 459 S.E.2d 715 (1995).

Attempt to Amend to Add New Party

Ineffective in Rezoning Dispute. — The trial court erred in denying the Board of Commissioners' motion to dismiss under G.S. 1A-1, Rule 12(b)(1), (2), (4), (6) and (7) where the plaintiffs brought their action challenging a rezoning solely against the Board and not against the County and where the plaintiffs' attempts to amend the complaint to substitute the county as the named defendant were ineffective as they occurred after the statute of limitations had run under G.S. 1-54.1 because G.S. 1A-1, Rule 15(c) is not authority for the relation back of claims against a new party. Piland v. Board of Comm'rs, 141 N.C. App. 293, 539 S.E.2d 669, 2000 N.C. App. LEXIS 1411 (2000).

An amended complaint, which named the defendant in his individual capacity, had the effect of adding a new party and did not relate back to the filing of the original complaint. White v. Crisp, 138 N.C. App. 516, 530 S.E.2d 87, 2000 N.C. App. LEXIS 638 (2000).

Nature of Time Restriction Is Not Determinative. — The determination of whether a claim asserted in an amended pleading relates back does not hinge on whether a time restriction is deemed a statute of limitation or repose. Rather, the proper test is whether the original pleading gave notice of the transactions, occurrences, or series of transactions or occurrences which formed the basis of the amended pleading. If the original pleading gave such notice, the claim survives by relating back in time, without regard to whether the time restraint attempting to cut its life short is a statute of repose or limitation. Pyco Supply Co. v. American Centennial Ins. Co., 321 N.C. 435, 364 S.E.2d 380 (1988).

Treatment of Supplemental Pleadings. — For relation back purposes, supplemental pleadings filed pursuant to section (d) of this rule are treated the same as amendments filed pursuant to other sections of this rule. Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

Relation Back of Supplemental Pleading Changing Capacity in Which Plaintiff Sues. — Where the original pleading gives notice of the transactions and occurrences upon which the claim is based, a supplemental pleading that merely changes the capacity in which the plaintiff sues relates back to the commencement of the action as provided in section (c) of this rule. Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

Where at the time defamation suits were instituted no actionable damages existed, and the claims alleged did not become actionable within the time provided by the statute of limitations for the instituting of suits in slander actions, supplementary pleadings alleging special damages could not relate back to the filing of the original complaints. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

Complaint May Not Be Amended to Create New Relief Against Nonparty Strangers. — This rule does not allow a plaintiff to abandon one cause and its relief against one set of defendants, and amend that complaint to create a new relief against a group of nonparty strangers and their interests. Lawyers Title Ins. Corp. v. Langdon, 91 N.C. App. 382, 371 S.E.2d 727 (1988), cert. denied, 324 N.C. 335, 378 S.E.2d 793 (1989).

Amending a claim for a monetary award to include a G.S. 44A-13 claim to enforce a lien against non-parties without allowing any type of notice does not fall within a reasonable interpretation of section (c) of this rule. Lawyers Title Ins. Corp. v. Langdon, 91 N.C. App. 382, 371 S.E.2d 727 (1988), cert. denied, 324 N.C. 335, 378 S.E.2d 793 (1989).

Medical malpractice complaint that failed to include the certification requirement of G.S. 1A-1, Rule 9(j) could not be subsequently amended pursuant to section (a) of this rule, by adding the certification and having that amendment relate back, pursuant to section (c) of this rule. Keith v. Northern Hosp. Dist., 129 N.C. App. 402, 499 S.E.2d 200 (1998), cert. denied, 348 N.C. 693, 511 S.E.2d 646 (1998).

The plaintiff could avail herself of a Rule 15 amendment to cure the lack of 9(j) certification in her medical malpractice complaint which she filed on the final day of the 120-day extension to the three-year statute of limitations. Thigpen v. Ngo, 143 N.C. App. 223, 552 S.E.2d 641, 2001 N.C. App. LEXIS 274 (2001), cert. granted, 353 N.C. 734, 552 S.E.2d 635 (2001).

In a medical malpractice case, the trial court erred in granting the doctor and hospital's motions for judgment on the pleadings and denying the injured party's motion to set aside the dismissal where the injured party filed the case on the last day of a 120-day extension, filed an amended complaint containing the expert testimony certification, voluntarily dismissed the action, and later refiled the complaint; the statute of limitations for malpractice actions under subsection (c) of this rule had not run, because the original complaint was timely filed, and the first action was properly dismissed without prejudice and properly re-filed within a year. Bass v. Durham County Hosp. Corp., 158 N.C. App. 217, 580 S.E.2d 738, 2003 N.C. App. LEXIS 1044 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

Amendment to action against a partnership which added an individual partner as defendant was tantamount to the addition of a new party, and the plaintiff's amendment would not relate back to the filing of the original action. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 83 N.C. App.

512, 349 S.E.2d 873 (1986), reconsideration denied, 318 N.C. 702, 351 S.E.2d 760 (1987).

Amendment of Date Permitted. — Where both the original and amended complaints allege that plaintiff was injured in a collision between a vehicle driven by defendant and another vehicle in which plaintiff was a passenger, aside from the changes made by the first amended complaint, the only difference between the original and the second amended complaint is the year in which the accident occurred and that is sufficient to give the notice called for by Rule 15(c). Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

Amendment Prior to Expiration of Statute of Limitations. — The trial court erred in concluding that any attempt by the plaintiff to amend her complaint would have been futile in that the amendment would not relate back to the original filing of the complaint, where the plaintiff sought leave to amend her complaint prior to the expiration of the relevant statute of limitations. Zenobile v. McKecuen, 144 N.C. App. 104, 548 S.E.2d 756, 2001 N.C. App. LEXIS 328 (2001), cert. denied, 354 N.C. 75, 553 S.E.2d 214 (2001).

Plaintiff's original complaint held to have given notice of amended claim. Pyco Supply Co. v. American Centennial Ins. Co., 321 N.C. 435, 364 S.E.2d 380 (1988).

Amended Complaint Deemed to Relate Back. — Where plaintiff made no contradictory allegations, and the allegations of his amended complaint were based on the same transaction or occurrence as his original complaint, pursuant to section (c) of this rule plaintiff's amended complaint would be deemed to relate back to the filing date of his original complaint. Kwan-Sa You v. Roe, 97 N.C. App. 1, 387 S.E.2d 188 (1990).

Relation Back Denied. — Trial court did not err in refusing to allow relation back of a complaint where the proper party did not know that, but for a mistake concerning identity, the action would have brought against him within the period prescribed by law. Crossman v. Moore, 115 N.C. App. 372, 444 S.E.2d 630 (1994), aff'd, 341 N.C. 185, 459 S.E.2d 715 (1995).

Plaintiff's amended complaint did not relate back to the date of the original complaint, because the plaintiff failed to establish that the added parties received notice or should have known of the action against them within the limitation period. Stewart Enters. v. MRM Constr. Co., 116 N.C. App. 604, 449 S.E.2d 20 (1994).

Since amendment to complaint could not relate back to the original pleading, plaintiffs' claim against hospital was barred by the statute of limitations. Medford v. Haywood County Hosp. Found., 115 N.C. App. 474, 444 S.E.2d 699, cert. granted, 337 N.C. 802, 449 S.E.2d 747 (1994).

Because subsection (c) of this rule allows the addition of new claims, but not new parties, plaintiff's additional claims against city and it's officers in their official capacities did not relate back and did not take on the filing date of original complaint. Rogerson v. Fitzpatrick, 121 N.C. App. 728, 468 S.E.2d 447 (1996).

An amended complaint named a new party and did not relate back to the date of filing the original complaint, where a property owner brought an action against an individual to recover damages, and the amendment substituted a corporate defendant for the individual defendant. Bob Killian Tire, Inc. v. Day Enters., Inc., 131 N.C. App. 330, 506 S.E.2d 752 (1998).

In an insurance case, the insured's motion to amend his complaint to state a claim against an alleged bailee whose alleged negligence caused the destruction of the property for which insurance coverage was being sought, was properly denied, because it was made after the applicable statute of limitations had expired, and the amendment sought could not properly relate back to the filing of the original complaint under G.S. 1A-1, N.C. R. Civ. P. 15(c). Barnes v. Erie Ins. Exch., 156 N.C. App. 270, 576 S.E.2d 681, 2003 N.C. App. LEXIS 103 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

Because an estate administrator was not served until after the statute of limitations in G.S. 1-52(16) had expired, and because there was no indication of any subterfuge or delay by the administrator that prevented the driver from timely amending the complaint, pursuant to G.S. 1A-1, N.C. R. Civ. P. 15(c), the driver's amended complaint did not relate back to the date of the original filing of the complaint. Reece v. Smith, 188 N.C. App. 605, 655 S.E.2d 911, 2008 N.C. App. LEXIS 191 (2008).

Addition of New Plaintiffs Related Back for Venue Purposes. — When an action was amended as of right under G.S. 1A-1-15 to add new plaintiffs, who unlike the existing parties lived in the county in question, defendants' motion for a change of venue was properly denied; as the claims of the new plaintiffs were virtually identical to those of the existing plaintiffs, and the new plaintiffs and the original ones were similarly situated, the claims would be deemed interposed as of the filing of the original complaint for venue purposes. Baldwin v. Wilkie, 179 N.C. App. 567, 635 S.E.2d 431, 2006 N.C. App. LEXIS 1977 (2006).

Relation Back of Claim for Punitive Damages. — Plaintiff's claim for punitive damages would not be dismissed, even though the original action did not seek punitive but only compensatory damages, as even if the request for punitive damages were a new claim, the new cause of action related back to the time of the original complaint. Porter v. Groat, 713 F.

Supp. 893 (M.D.N.C. 1989).

Amendment to Adoption Petition Held Not to Relate Back. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining the putative father's address, was filed with an adoption petition in lieu of the affidavit required by G.S. 48-13, a subsequently filed affidavit did not relate back to the original filing date of the petition so as to cut off the rights of the putative father who filed a legitimation petition to G.S. 49-10 before the affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

Venue Held Proper. — Under section (c) of this rule, when an amended complaint is filed as a matter of right before any responsive pleading is filed by the original defendant, and the original complaint gave notice of the transactions or occurrences referred to in the amended complaint, the claims asserted in the amended complaint are deemed to have been interposed at the time the claim in the original pleading was interposed. Thus, since corporate defendant was a resident of Wake County for venue purposes, because it had a place of business there, and was deemed to have been a defendant in the action at its commencement by operation of section (c) of this rule, though not added until later, venue there was not improper, and order of removal was erroneous. Oak Manor, Inc. v. Neil Realty Co., 88 N.C. App. 402, 363 S.E.2d 382, cert. denied, 322 N.C. 482, 370 S.E.2d 226 (1988).

Order allowing estates to amend their complaint in a medical malpractice suit was not immediately appealable where the issues of a hospital's claim that, without immediate review, it lost the right to avoid trial altogether by (1) raising the statute of limitations, (2) raising "estoppel by laches" as an affirmative defense, or (3) having the amended complaint dismissed for failure to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j), were not brought before the trial court, and no substantial right was lost by the failure to allow immediate review; the estates were also entitled to sanctions against the hospital. Estate of Spell v. Ghanem, 175 N.C. App. 191, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

IV. SUPPLEMENTAL PLEADINGS.

The distinction between supplemental pleadings and amendments is that supplemental pleadings relate to occurrences, transactions and events which may have happened since the date of the pleadings sought to be supplemented, whereas amendments relate to occurrences, transactions and events that could have been, but for some reason were not, alleged in the pleadings sought to be amended. Williams v. Rutherford Freight Lines, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

Supplemental Pleading Not a Matter of Right. — This rule permits but does not require a trial court to allow a supplemental pleading. In any event, it does not appear to be a matter of right, and it seems clear that a court may deny a supplemental pleading to substitute parties if the allowance of such a pleading would be unjust. Deutsch v. Fisher, 32 N.C. App. 688, 233 S.E.2d 646 (1977).

Supplemental pleadings may be allowed upon a party's motion in the trial court's discretion, not as a matter of right, upon such terms as are just. Miller v. Ruth's of N.C., Inc., 69 N.C. App. 153, 316 S.E.2d 622, cert. denied, 312 N.C. 494, 322 S.E.2d 557 (1984).

Policy with Regard to Allowing Supplemental Pleadings. — The rule that a motion to allow supplemental pleadings should ordinarily be granted is based upon the policy that a party should be protected from the harm which may occur if he is prevented from litigating certain issues merely by virtue of the court's denial of such a motion. VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978).

Motions to allow supplemental pleadings should be freely granted unless their allowance would impose a substantial injustice upon the opposing party. Miller v. Ruth's of N.C., Inc., 69 N.C. App. 153, 316 S.E.2d 622, cert. denied, 312 N.C. 494, 322 S.E.2d 557 (1984).

When Motion to Allow Supplemental Pleading Should Be Allowed. — Although the ruling on a motion to allow supplemental pleadings is within the trial judge's discretion, that discretion is not unlimited. Generally, the motion should be allowed unless its allowance would impose a substantial injustice upon the opposing party, for it is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities. Foy v. Foy, 57 N.C. App. 128, 290 S.E.2d 748 (1982).

In ruling on a motion to allow a supplemental pleading, the trial court should focus on any resulting unfairness which might occur to the party opposing the motion. Absent any apparent or declared reason for its denial, the motion should be granted. In order to facilitate litigation of related issues in a single action, the court may impose terms or conditions upon the allowance of the motion whenever the terms appear to be required by considerations of fairness. VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978).

Amendment to Update Amount of Arrearage Under Contract. — Where the amount of defendant's arrearage under a contract was an issue raised by the pleadings, and an amendment only served to bring the cause of action up-to-date, it was not error for the trial judge either to permit the plaintiff to introduce evidence of defendant's arrearage between the date she filed and the date of the trial or to allow the plaintiff to "amend" her complaint to include the additional amount owed to her. McKnight v. McKnight, 25 N.C. App. 246, 212 S.E.2d 902, cert. denied, 287 N.C. 466, 215 S.E.2d 624 (1975).

Supplemental Pleading to Show Change in Capacity in Which Plaintiff Sues. — G.S. 1A-1, Rule 17(a) expressly authorizes the substitution of one party for another. This rule, particularly section (c), when considered in light of G.S. 1A-1, Rule 17(a), just as clearly authorizes a change in capacity in which the same plaintiff brings his claim. Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

Where defendants had full notice of the transactions and occurrences upon which a wrongful death claim was based, and the claim was originally filed within the period of limitations by plaintiff in capacity as a foreign administrator, defendants could not be prejudiced by allowing plaintiff by supplemental pleading to show change in capacity to that of locally qualified ancillary administrator, even though this change occurred after the period of limitations had run. Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

Where the original pleading gives sufficient notice of the transaction and occurrences upon which the claim is based, a supplemental pleading that merely changes the capacity in which the plaintiff sues relates back to the commencement of the action. Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992).

Third-Party Complaint. — In an insurance case, the trial court correctly granted summary judgment dismissing an insured's claim against the bailee of the insured's vehicle, whose alleged negligence caused a fire which destroyed the vehicle, because the insured attempted to assert that claim as a third-party claim, under G.S. 1A-1, N.C. R. Civ. P. 14(a), after an insurer answered the insured's original complaint, effectively amending that complaint without complying with G.S. 1A-1, N.C. R. Civ. P. 15. Barnes v. Erie Ins. Exch., 156 N.C. App. 270, 576 S.E.2d 681, 2003 N.C. App. LEXIS 103 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

Plaintiff filing a claim against a third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the defendant/third-party plaintiff must follow the requirements pursuant to G.S. 1A-1, N.C. R. Civ. P. 15(a) in order to amend the plaintiff's original complaint; when the defendant or third-party plaintiff has filed an answer to the plaintiff's original complaint, in order for the plaintiff to assert a claim against the third-party defendant, he must amend his complaint by leave of court or by written consent of the adverse party. Barnes v. Erie Ins. Exch., 156 N.C. App. 270, 576 S.E.2d 681, 2003 N.C. App. LEXIS 103 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

Motion to Add Wrongful Discharge Claim Improperly Denied. — Trial court erred in denying an employee's motion to amend his complaint under subsection (a) of this rule to add an additional claim of common law wrongful discharge as the employee's collective bargaining agreement was not in evidence to show that the employee was not an at-will employee; the supplement to the complaint may not have been futile. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Amendment to Include Additional Retaliatory Employment Acts Properly Denied Under G.S. 1A-1, Rule 15(d). — Trial court properly denied an employee's motion to amend his complaint to add an additional retaliatory act as the North Carolina Retaliatory Employment Discrimination Act, G.S. 95-240 et seq., requires that the claim be filed with the North Carolina Department of Labor before initiating suit; as the claim was not filed with the NCDOL, adding the additional retaliatory act under subsection (d) of this rule was futile. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

V. DECISIONS UNDER PRIOR LAW.

Editor's Note. — *The cases cited below were decided under former G.S. 1-161, 1-163 and 1-167.*

The judge has broad discretionary powers to permit amendments to any pleading, process or proceeding, either before or after judgment. George A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 140 S.E.2d 362 (1965).

The superior court possesses an inherent discretionary power to amend pleadings at any time, and amendments should be liberally allowed. Gilliam Furn., Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

The presiding judge has almost unlimited authority to permit amendments either before or after judgment. Dobias v. White, 240 N.C. 680, 83 S.E.2d 785 (1954); Casstevens v. Wilkes Tel. Membership Corp., 254 N.C. 746, 120 S.E.2d 94 (1961).

The superior courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless prohibited by some statute, or unless vested rights are interfered with. Gilchrist v. Kitchen, 86 N.C. 20 (1882); Cantwell v. Herring, 127 N.C. 81, 37

S.E. 140 (1900); Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954).

The lower court may allow or disallow such amendments as it may think proper in the exercise of sound discretion, bearing in mind, of course, that the nature of the cause of action as previously chartered may not be substantially changed. Goldston Bros. v. Newkirk, 234 N.C. 279, 67 S.E.2d 69 (1951).

By Inserting Material Allegations or Conforming Pleading or Proceeding to the Facts. — The court in its discretion may, before or after judgment, amend any pleading by inserting other allegations material to the case, or, when the amendment does not change the claim substantially, by conforming the pleading or proceeding to the facts. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964).

And the Court's Ruling Is Not Reviewable. — Whether the trial court should allow an amendment to the pleadings rests in the court's sound discretion, and the court's ruling thereon is not reviewable on appeal. Sawyer v. Cowell, 241 N.C. 681, 86 S.E.2d 431 (1955).

Absent Manifest Abuse. — An order allowing plaintiff to file an amended complaint and defendant time thereafter to answer is made in the court's discretion, and as such is not reviewable in the absence of manifest abuse. Williams v. Denning, 260 N.C. 539, 133 S.E.2d 150 (1963).

The motion to amend is addressed to the discretion of the court and the court's decision thereon is not subject to review, there being no showing or contention that the court abused its discretion. Perfecting Serv. Co. v. Product Dev. & Sales Co., 264 N.C. 79, 140 S.E.2d 763 (1965).

Where a motion to amend is denied in the discretion of the trial judge, his ruling is not reviewable in the absence of a clear showing of abuse of discretion. Consolidated Vending Co. v. Turner, 267 N.C. 576, 148 S.E.2d 531 (1966).

The discretionary denial by the trial court of a motion to amend the pleadings and process is not reviewable in the absence of a manifest abuse of discretion. Crump v. Eckerd's, Inc., 241 N.C. 489, 85 S.E.2d 607 (1955).

When Amendment Is Permissible. — Unless its effect is to add a new cause of action or change the subject matter of the original action, no objection can successfully be urged where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated. Lefler v. C.W. Lane & Co., 170 N.C. 181, 86 S.E. 1022 (1915); City of Wilmington v. Board of Educ., 210 N.C. 197, 185 S.E. 767 (1936); Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954).

A trial court may permit a pleading to be amended at any time unless the amendment in effect modifies or changes the cause of action and deprives defendant of a fair opportunity to assemble and present his evidence relative to the matters asserted in the amendment. Thompson v. Seaboard Air Line R.R., 248 N.C. 577, 104 S.E.2d 181 (1958).

An amendment is permitted, in the discretion of the court, when the amendment does not change substantially the claim or defense. Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

Filing of Supplemental Complaint Is Within Court's Discretion. — It is within the discretionary power of the trial court to allow the filing of a supplemental complaint. Speas v. City of Greensboro, 204 N.C. 239, 167 S.E. 807 (1933).

Court's Power Is Broader as to Amendments Proposed Before Trial. — The scope of the court's power to allow amendments is broader when dealing with amendments proposed before trial than during or after trial. Modern Elec. Co. v. Dennis, 255 N.C. 64, 120 S.E.2d 533 (1961); George A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 140 S.E.2d 362 (1965); Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

Amendment Which Only Adds to Original Cause Not Abuse of Discretion. — The allowance of an amendment which only adds to the original cause of action is not such substantial change as to amount to an abuse of discretion. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964); Gilliam Furn., Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

Amendment to Conform to Evidence Permissible. — An amendment to a complaint which makes the pleading conform to the evidence, and does not change the claim of the plaintiff, is permissible. Chaffin v. Brame, 233 N.C. 377, 64 S.E.2d 276 (1951).

Right to amend pleadings does not permit the litigant to set up a wholly different cause of action or to change substantially the form of the action originally sued upon. Anderson v. Atkinson, 235 N.C. 300, 69 S.E.2d 603 (1952); Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

The court may not permit a litigant to set up by amendment a wholly different cause of action or an inconsistent cause. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964); Lane v. Griswold, 273 N.C. 1, 159 S.E.2d 338 (1968).

When Amendment Introducing New Cause May Be Allowed. — It is permissible to allow plaintiff to introduce a new cause of action by way of amendment if the facts constituting the new cause of action arise out of or are connected with the transactions upon which the original complaint is based. Gilliam Furn., Inc. v. Bentwood, Inc., 267 N.C. 119, 147 S.E.2d 612 (1966).

Where no statute of limitations was involved, it was permissible to allow a plaintiff to introduce a new cause of action by way of amendment for damages for detention of property, possession of which was sought by the action as begun, if the facts constituting the new cause of action arose out of or were connected with the transactions upon which the original complaint was based. Mica Indus. v. Penland, 249 N.C. 602, 107 S.E.2d 120 (1959).

Where plaintiff, in amendments to her complaint, for the first time stated facts sufficient to constitute a cause of action, the cause of action then stated embraced relevant facts connected with the transactions forming the subject of her prior pleadings. Hence, absent the bar of an applicable statute of limitations, such new cause of action could be introduced by way of amendment of plaintiff's prior pleadings. Stamey v. Rutherfordton Elec. Membership Corp., 249 N.C. 90, 105 S.E.2d 282 (1958).

After the time allowed for answering a pleading has expired, such pleading may not be amended as a matter of right, but only in the discretion of the court. Consolidated Vending Co. v. Turner, 267 N.C. 576, 148 S.E. 531 (1966).

Extension of Time for Filing Amendment. — Where an amended complaint is filed after expiration of the time allowed in the order permitting the filing of the amendment, the trial court has the discretionary power to enter an order extending the time for the filing of the amendment to the date of the hearing and to overrule defendant's motion to strike which was made on the ground that the amendment was filed after the expiration of the time allowed. Alexander v. Brown, 236 N.C. 212, 72 S.E.2d 522 (1952).

When Defective Summons May Be Amended. — When a summons bears the seal of the clerk and there is evidence it actually emanated from the clerk's office, or bears the jurat of the clerk and his signature appears below the cost bond, the paper bears internal evidence of its official character, and the defect may be cured by amendment. When it does not bear some such evidence, it is void and not subject to amendment. Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952).

If the summons bears internal evidence of its official origin and of the purpose for which it was issued, it comes within the definition of original process and may be amended by permitting the clerk to sign nunc pro tunc. This rule is subject to the limitation that such alteration of the record must not disturb or impair any intervening rights of third parties. Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952).

If there is nothing upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons but no summons at all. The curative power of amendment may not be invoked when there is nothing upon the face of the paper to give assurance that it received the sanction of the clerk before it was delivered to the sheriff to be served. Boone v. Sparrow, 235 N.C. 396, 70 S.E.2d 204 (1952).

Amendment of Caption to Designate Plaintiff as Administratrix. — The court has plenary power to permit plaintiff, who in fact was duly appointed administratrix at the time a complaint was filed, to amend the caption in the complaint in order to designate herself as administratrix in conformity with the allegation in the complaint. Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963).

Bringing in Insurance Company Which Has Paid Part of Plaintiff's Loss. — An insurance company which pays the insured for a part of the loss is entitled to share to the extent of its payment in the proceeds of the judgment in the action brought by the insured against the tort-feasor to recover the total amount of the loss, and may be brought into the action by the court in the exercise of its discretionary power to make new parties, at the instance of the insured or the tort-feasor, either in the capacity of an additional plaintiff or in the capacity of an additional defendant. Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952), commented on in 31 N.C.L. Rev. 224 (1953).

Amendment of Complaint Under Wrongful Death Statute to Bring Action Within Federal Employers' Liability Act. — Where complaint alleged damages for wrongful death under State statute, but the evidence showed that the deceased was an employee of a railroad company and was fatally injured while engaged in the discharge of his duties in interstate commerce, the court plainly had the power to allow plaintiff to amend so as to allege that the parties were engaged in interstate commerce and that plaintiff was the sole dependent of the deceased, so as to bring the action within the Federal Employers' Liability Act, notwithstanding such amendment was allowed more than three years after the death of decedent. Graham v. Atlantic Coast Line R.R., 240 N.C. 338, 82 S.E.2d 346 (1954).

Amendment Alleging Failure of Defendant to Keep Proper Lookout. — Where the facts alleged in a complaint were sufficient to imply by a fair and reasonable intendment that defendant failed to keep a proper lookout, the court had the discretionary power, even after judgment, to permit plaintiff to amend to allege such failure specifically. Moreover, the court had the authority to allow such amendment even if the original complaint did not allege by necessary implication defendant's failure to keep a proper lookout. Simrel v. Meeler, 238 N.C. 668, 78 S.E.2d 766 (1953).

Amendment as to Identity of Driver of Automobile. — In an action involving negligent operation of an automobile resulting in death, it was not error to allow, upon motion made after verdict, an amendment to conform the complaint to the finding of the jury as to the identity of the driver of the automobile, where the crucial fact in respect to defendant's liability was not the identity of the driver, but that defendant, the owner of the automobile, permitted or directed its operation. Litaker v. Bost, 247 N.C. 298, 101 S.E.2d 31 (1957).

Substitution of Another Corporation for Original Plaintiff Not Permitted. — In an action for an injunction by plaintiff corporation arising out of a contract entered into between another corporation and the defendant, the trial court did not have the power to substitute the other corporation as plaintiff in lieu of the original plaintiff. Orkin Exterminating Co. v. O'Hanlon, 243 N.C. 457, 91 S.E.2d 222 (1956).

Motion Made After Verdict. — Where a motion for leave to amend a complaint to conform to the facts established by the verdict was not made until after the verdict, it was not error to grant it, since the trial below was conducted as if the amendment had been made and the amendment did not substantially change the plaintiff's claim. Litaker v. Bost, 247 N.C. 298, 101 S.E.2d 31 (1957).

Amendment Not Permitted Five Days Before Appeal to Be Heard. — A proposed amendment which set up a wholly different cause of action or substantially changed the action originally sued upon could not be permitted five days before an appeal was to be heard in the Supreme Court. George A. Hormel & Co. v. City of Winston-Salem, 263 N.C. 666, 140 S.E.2d 362 (1965).

Rule 16. Pre-trial procedure; formulating issues.

(a) In any action, the judge may in his discretion direct the attorneys for the parties to appear before him for a conference to consider

(1) The simplification and formulation of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability or necessity of a reference of the case, either in whole or in part;
(6) Matters of which the court is to be asked to take judicial notice;
(7) Such other matters as may aid in the disposition of the action.

If a conference is held, the judge may make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. If any issue for trial as stated in the order is not raised by the pleadings in accordance with the provisions of Rule 8, upon motion of any party, the order shall require amendment of the pleadings.

(b) In a medical malpractice action as defined in G.S. 90-21.11, at the close of the discovery period scheduled pursuant to Rule 26(f1), the judge shall schedule a final conference. After the conference, the judge shall refer any consent order calendaring the case for trial to the senior resident superior court judge or the chief district court judge, who shall approve the consent order unless he finds that:

(1) The date specified in the order is unavailable,
(2) The terms of the order unreasonably delay the trial, or
(3) The ends of justice would not be served by approving the order.

If the senior resident superior court judge or the chief district court judge does not approve the consent order, he shall calendar the case for trial.

In calendaring the case, the court shall take into consideration the nature and complexity of the case, the proximity and convenience of witnesses, the needs of counsel for both parties concerning their respective calendars, the benefits of an early disposition and such other matters as the court may deem proper. (1967, c. 954, s. 1; 1987, c. 859, s. 4.)

COMMENT

While the Rules of Civil Procedure do not envisage a pretrial conference in every case, they do contemplate a significant role for such conferences. The Commission knows that where former statutes have been used systematically, excellent results have been achieved. 36 N.C.L. Rev. 521 (1958).

Two significant changes are embodied in this rule. First, whether there is to be a pretrial conference is made an entirely discretionary matter with the judge. It was the Commission's view that pretrial cannot function effectively unless the judge himself is committed to the desirability of a resort to the procedure. Second, a requirement has been added that if the pretrial order contains an issue not raised by the pleadings, the court, on motion of any party, shall order an amendment.

Legal Periodicals. — For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965).

For article on pretrial and discovery, see 5 Wake Forest Intra. L. Rev. 95 (1969).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For note on the use of motions in limine in North Carolina courts, see 35 W.F.L. Rev. 1079 (2001).

CASE NOTES

The rules achieve their purpose of insuring a speedy trial on the merits of a case by providing for and encouraging liberal amendments to conform pleadings and evidence under G.S. 1A-1, Rule 15(a), by pretrial order under this rule, during and after reception of evidence under G.S. 1A-1, Rule 15(b), and after entry of judgment under G.S. 1A-1, Rules 15(b), 59 and 60. Such amendments are made upon motion and with leave of court, by express consent, and by implied consent. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

The purpose of a pretrial conference is to consider specifics, among them motions to amend pleadings, issues, references, admissions, judicial notice, and other matters which may aid in the disposition of the cause. Whitaker v. Beasley, 261 N.C. 733, 136 S.E.2d 127 (1964); Smith v. City of Rockingham, 268 N.C. 697, 151 S.E.2d 568 (1966), decided under former § 1-169.1.

Admissions or Stipulations Not to Be Forced. — Although the pretrial conference is a mechanism intended to resolve those issues which are not genuinely in dispute, nothing in this rule affords a basis for forcing the parties into admissions or stipulations where there is a genuine dispute. Amick v. Shipley, 43 N.C. App. 507, 259 S.E.2d 329 (1979).

Names of Witnesses and List of Exhibits. — With the exception of expert trial witnesses, whose identities are discoverable under G.S. 1A-1, Rule 26(b)(4), a party is not entitled to find out, by discovery, which witnesses his opponent intends to call, or the documents and exhibits a party opponent intends to present at the trial; instead, the names of witnesses and lists of exhibits a party opponent intends to use at trial are obtainable through a pretrial conference. King v. Koucouliotes, 108 N.C. App. 751, 425 S.E.2d 462, cert. granted, 334 N.C. 163, 432 S.E.2d 361, discretionary review improvidently granted, 335 N.C. 164, 436 S.E.2d 132 (1993).

Signed Writing Evidencing Admissions, Agreements or Stipulations. — While this rule allows the court to enter an order reciting action taken at the conference, present custom and better practice require that admissions, agreements, or stipulations entered into by counsel at the pretrial stage be evidenced by a signed writing. Amick v. Shipley, 43 N.C. App. 507, 259 S.E.2d 329 (1979).

Matters for Judicial Notice to Be Brought to Court's Attention. — It is desirable and contemplated by subsection (a)(6) of this rule that counsel bring to the court's attention, in pretrial conference, those matters of which it will be asked to take judicial notice. State v. Dancy, 297 N.C. 40, 252 S.E.2d 514 (1979).

The trial judge is not required to make an independent search for data of which he may take judicial notice; counsel should supply him with appropriate data. State v. Dancy, 297 N.C. 40, 252 S.E.2d 514 (1979).

Discretion of Court. — Admission of evidence not delineated in the pretrial order is within the sound discretion of the trial court.

Alston v. Monk, 92 N.C. App. 59, 373 S.E.2d 463 (1988), cert. denied, 324 N.C. 246, 378 S.E.2d 420 (1989).

Trial court properly dismissed, pursuant to G.S. 1A-1, N.C. R. Civ. P. 12, plaintiff's action seeking to recover money allegedly owed to plaintiff by defendants from the sale and consignment of jewelry; pursuant to G.S. 55-15-02, a foreign corporation that transacted business in North Carolina was barred from maintaining an action in any state court unless it had obtained a certificate of authority to transact business prior to trial, plaintiff's actions of selling and consigning jewelry to North Carolina jewelers constituted transaction of business pursuant to G.S. 55-15-01(b), the trial court acted within its discretion when it addressed this issue pursuant to G.S. 1A-1, N.C. R. Civ. P. 16 prior to trial as the issue was dispositive of the action, and the trial court was not required by G.S. 55-15-02 to continue the case to allow plaintiff to obtain a certificate of authority. Harold Lang Jewelers, Inc. v. Johnson, 156 N.C. App. 187, 576 S.E.2d 360, 2003 N.C. App. LEXIS 73 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 765 (2003).

Pretrial Order Interlocutory and Not Appealable. — A pretrial order denying plaintiffs' motion to amend and resolving issues to be submitted to the jury is interlocutory and not appealable. Lazenby v. Godwin, 49 N.C. App. 300, 271 S.E.2d 69 (1980).

A pretrial order is an interlocutory order, from which an appeal does not lie. Green v. Western & S. Life Ins. Co., 250 N.C. 730, 110 S.E.2d 321 (1959); Smith v. City of Rockingham, 268 N.C. 697, 151 S.E.2d 568 (1966), decided under former § 1-169.1.

Exclusion of Documents Not Listed in Pretrial Order. — In an action for malicious prosecution and intentional infliction of emotional distress, where plaintiff attempted to offer into evidence a copy of indictment and order quashing such indictment at the close of defendant's case without advance notice to defendant listing the documents as exhibits in the pretrial order, the trial court did not abuse its discretion by not admitting the documents into evidence. Lay v. Mangum, 87 N.C. App. 251, 360 S.E.2d 481 (1987).

Failure to Find Stipulated Facts. — Especially in light of the conclusive nature of stipulations, and the binding effect of pretrial orders, failure to find facts stipulated to in a pretrial order can hardly be prejudicial. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Objection At Trial Required to Preserve Denial of Motion in Limine for Appeal. — Motion in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the movant fails to further object to that evidence at the time it is offered at trial. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Right to Appeal Waived. — Passenger waived her right to appeal the denial of her motion in limine seeking to preclude the testimony of the driver of a car involved in an accident with the car in which the passenger was riding as to her conversation with the passenger following the accident; the passenger failed to object to the testimony when it was allowed at trial. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Applied in Page v. Sloan, 12 N.C. App. 433, 183 S.E.2d 813 (1971); Hamilton v. Hamilton, 296 N.C. 574, 251 S.E.2d 441 (1979); Heath v. Board of Comm'n, 40 N.C. App. 233, 252 S.E.2d 543 (1979); Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981); Gilbert v. Thomas, 64 N.C. App. 582, 307 S.E.2d 853 (1983); State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247 (1984); White v. Davis, 163 N.C. App. 21, 592 S.E.2d 265, 2004 N.C. App. LEXIS 256 (2004).

Cited in Fisher v. Jones, 15 N.C. App. 737, 190 S.E.2d 663 (1972); Knight v. Duke Power Co., 34 N.C. App. 218, 237 S.E.2d 574 (1977); A-S-P Assocs. v. City of Raleigh, 38 N.C. App. 271, 247 S.E.2d 800 (1978); Thomas v. Poole, 54 N.C. App. 239, 282 S.E.2d 515 (1981); Wall v. Stout, 61 N.C. App. 576, 301 S.E.2d 467 (1983); Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814 (1984); Smith v. North Carolina Farm Bureau Mut. Ins. Co., 321 N.C. 60, 361 S.E.2d 571 (1987); Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643 (1988); Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994); Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995); Inman v. Inman, 136 N.C. App. 707, 525 S.E.2d 820, 2000 N.C. App. LEXIS 136 (2000); Warren v. GMC, 142 N.C. App. 316, 542 S.E.2d 317, 2001 N.C. App. LEXIS 80 (2001).

ARTICLE 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

(a) *Real party in interest.* — Every claim shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State so provides, an action for the use or benefit of another shall be brought in the name of the State of North Carolina. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Infants, incompetents, etc.* —

(1) Infants, etc., Sue by Guardian or Guardian Ad Litem. — In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if the action or proceeding is against such guardian, or if there is no such known guardian, then such persons may appear by guardian ad litem.

(2) Infants, etc., Defend by Guardian Ad Litem. — In actions or special proceedings when any of the defendants are infants or incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, or incompetent persons, and fix and tax his fee as part of the costs. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants.

All orders or final judgments duly entered in any action or special proceeding prior to April 8, 1974, when any of the defendants were infants or incompetent persons, whether residents or nonresidents of this State, and were defended therein by a general or testamentary guardian or guardian ad litem, and summons and complaint or petition in said action or special proceeding were duly served upon the guardian or guardian ad litem and answer duly filed by said guardian or guardian ad litem, shall be good and valid notwithstanding that said order or final judgment was entered less than 20 days after notice of the summons and complaint served upon said guardian or guardian ad litem.

(3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian. — Notwithstanding the provisions of subsections (b)(1) and (b)(2), a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant, or insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

(4) Appointment of Guardian Ad Litem for Unborn Persons. — In all actions in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem to defend on behalf of such unborn person. Service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service upon such unborn person would have had if such person had been living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(5) Appointment of Guardian Ad Litem for Corporations, Trusts, or Other Entities Not in Existence. — In all actions which involve the construction of wills, trusts, contracts or written instruments, or the determination of the ownership of property or the disposition or distribution of property pursuant to the provisions of a will, trust, contract or written instrument, if such will, trust, contract or written instrument provides benefits for disposition or distribution of property to a corporation, a trust, or an entity thereafter to be formed for the purpose of carrying into effect some provision of the said will, trust, contract or written instrument, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem for such corporation, trust or other entity. Service upon the guardian ad litem appointed for such corporation, trust or other entity shall have the same force and effect as service upon such corporation, trust or entity would have had if such corporation, trust or other entity had been in existence. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(6) Repealed by Sessions Laws 1981, c. 599, s. 1.

(7) Miscellaneous Provisions. — The provisions of this rule are in addition to any other remedies or procedures authorized or permitted by law, and it shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or nonexistent corporations, trusts or other entities may be represented in or bound by any judgment or order entered in any action or special proceeding. This rule shall apply to all pending actions and special proceedings to which it may be constitutionally applicable. All judgments and orders heretofore entered in any action in which a guardian or guardians ad litem have been appointed for

any unborn person or persons or any nonexistent corporations, trusts or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if this rule had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation.

(c) *Guardian ad litem for infants, insane or incompetent persons; appointment procedure.* — When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:

(1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.

(2) When an infant is defendant and service under Rule 4(j)(1)a is made upon him the appointment may be made upon the written application of any relative or friend of said infant, or, if no such application is made within 10 days after service of summons, upon the written application of any other party to the action or, at any time by the court on its own motion.

(3) When an infant or insane or incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon the written application of any relative or friend of said infant, or upon the written application of any other party to the action, or by the court on its own motion, before completion of publication, whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.

(4) When an insane or incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

(d) *Guardian ad litem for persons not ascertained or for persons, trusts or corporations not in being.* — When under the terms of a written instrument, or for any other reason, a person or persons who are not in being, or any corporation, trust, or other legal entity which is not in being, may be or may become legally or equitably interested in any property, real or personal, the court in which an action or proceeding of any kind relative to or affecting such property is pending, may, upon the written application of any party to such action or proceeding or of other person interested, appoint a guardian ad litem to represent such person or persons not ascertained or such persons, trusts or corporations not in being.

(e) *Duty of guardian ad litem; effect of judgment or decree where party represented by guardian ad litem.* — Any guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered. (1967, c. 954, s. 1; 1969, c. 895, ss. 5, 6; 1971, c. 1156, ss. 3, 4; 1973, c. 1199; 1981, c. 599, s. 1; 1987, c. 550, s. 13.)

COMMENT

Comment to this Rule as Originally Enacted. — For historical reasons, an apparently necessary component of any procedural code or bloc of rules is a statement of the real party in interest generality, i.e., that action must be prosecuted in the name of the "real party in interest," as opposed to the name of any other person who may have a technical or nominal interest in the claim. This was deemed necessary for the purpose of allowing assignees of choses in action to sue in their own names to recover on the chose, a thing forbidden at common law — and this was probably the only thing had in mind in the original code. But the basic statement in the code was not so limited; hence, it was necessary also to add some obvious qualifications to the basic directive that actions can only be brought in the name of the presently beneficially interested — the "real" — party. Thus, certain fiduciaries should be allowed to sue in their own names on claims in which only their beneficiaries have beneficial — "real" — interests. Furthermore, the third-party contract beneficiary has well established substantive rights which he should be allowed to sue for in his own name, notwithstanding the contract parties alone are "real" parties to the contract and hence, possibly, to the rights arising under it. Finally, some exception was needed to take into account the fact that specific statutes may sometimes give rights to sue in their own names to parties not technically real parties in interest. Through what appears to be sheer whimsy in codification the original code "real party in interest" draft section, which put both the generality and its exception into one section, was modified in the North Carolina code version to separate the two components. Thus § 1-57 states the generality, while the exceptions were stated in former § 1-63. The federal Rule 17(a) dealing with the same matters, returns to the original code pattern and states both the generality and its exception as a connected whole. The rule as presented here tracks the federal rule, and rejects the State code separation of the concepts. No change of central substance is made from the present directive. Consequently, there is no reason to anticipate any change in real party in interest case law arising from this form of statement.

Closely related to the real party in interest generality and its exceptions is the problem of formal representation of persons not sui generis for the purpose of prosecuting and defending actions as to which the parties formally represented have the true beneficial interest — the problem, in short, of the appointment of, the appearance by, and the prosecution and defense of actions through guardians for infants and incompetents. Here, the present State statutory law is substantially retained, with some attempt to clean up and make more comprehensive the whole pattern.

Comment to the 1969 Amendment. — (a) The 1969 amendment to Rule 17(a) eliminates another technical ground of possible dismissal. It provides that no action is to be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the section by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Correction and substitution of parties was known both to the common law and the code practice. This amendment is merely another step in that direction and avoids needless delay and technical disposition of a meritorious action.

(b) (6) The amendment to Rule 17 designated as (6) [now repealed] merely acknowledges that an infant who is competent to marry, and who is 18 years of age or older, is also competent to prosecute or defend the listed domestic relations action without the appointment of a guardian ad litem.

The amendment also renumbered former subsection (6) of section (b) as subsection (7).

Cross References. — As to service of summons on natural persons under disability, see G.S. 1A-1, Rule 4(j)(2). As to nothing in G.S. 35A-1101 et seq. interfering with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b) of the North

Carolina Rules of Civil Procedure, see G.S. 35A-1102. As to minor veterans, see G.S. 165-16.

Legal Periodicals. — For note on requirement of notice for appointment of guardians ad litem and next friends, see 48 N.C.L. Rev. 92 (1969).

For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969).

For article on parties and joinder, see 5 Wake Forest Intra. L. Rev. 119 (1969).

For article on legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For comment analyzing North Carolina guardianship laws, see 54 N.C.L. Rev. 389 (1976).

For a survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

For article, "More Reasons for Abolishing Federal Rule of Civil Procedure 17(a): The Problem of the Proper Plaintiff and Insurance Subrogation," see 68 N.C.L. Rev. 893 (1990).

For comment, "A Clarification of the Standard of Mental Capacity in North Carolina for Legal Transactions of the Elderly," see 32 Wake Forest L. Rev. 563 (1997).

For article, "Holding, Dictum ... Whatever," 25 N.C. Cent. L.J. 139 (2003).

CASE NOTES

I. In General.
II. Real Party in Interest.
III. Infants and Incompetents.
IV. Decisions under Prior Law.

I. IN GENERAL.

Applicability of Rule to Both Plaintiff and Defendant. — Although this rule by its terms applies only to parties plaintiff, the rule is applicable to parties defendant as well. Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206, cert. denied, 293 N.C. 159, 236 S.E.2d 704 (1977).

No Jurisdiction to Enter Order Where No Claim for Relief in Motion Papers. — Trial court lacked subject matter jurisdiction to enter an order on the county Department of Social Services' (DSS) "motion in the cause," which was made at the previous direction of the trial court for DSS to petition for termination of a mother's parental rights, where the motion lacked any request for relief, as required by G.S. 1A-1, Rule 7(b)(1); although the trial court had subject matter jurisdiction over termination proceedings and motions therein, pursuant to G.S. 7B-200(a)(4) and 7B-1101, it was bound to follow the Rules of Civil Procedure in such an action, based on subdivision (c)(2) of this rule, and accordingly, the motion was found to be insufficient. In re McKinney, 158 N.C. App. 441, 581 S.E.2d 793, 2003 N.C. App. LEXIS 1191 (2003).

The procedure for the revocation of the letters testamentary of an administratrix as set forth in G.S. 28A-9-1 is a "special proceeding," and the Clerk had statutory authority to appoint the guardian ad litem. In re Estate of Sturman, 93 N.C. App. 473, 378 S.E.2d 204 (1989).

Application to Termination of Parental Rights Proceedings. — Trial court erred in denying the father's motion to set aside the order entered against him that terminated his parental rights in his minor daughter; the record showed that the summons that was issued in his case was not served upon him within the time limit for service of process under the civil procedure rule then in effect and since that rule applied to civil actions or special proceedings such as a termination of parental rights case, the order was entered without the trial court having acquired personal jurisdiction over the father, and thus was void. In re A.B.D., 173 N.C. App. 77, 617 S.E.2d 707, 2005 N.C. App. LEXIS 1925 (2005).

In an action to terminate the mother's parental rights, the trial court did not err in failing to conduct a hearing on whether to appoint a guardian ad litem for the mother because there were no circumstances of the type that, of brought to the judge's attention, would have raised a substantial question regarding the mother's competency. In re S.N.H., 177 N.C. App. 82, 627 S.E.2d 510, 2006 N.C. App. LEXIS 717 (2006).

G.S. 7B-1101 Did Not Require the Appointment of a Guardian Ad Litem for the Mother As the Parental Termination Proceedings Did Not Focus on the Mother's Incompentency. — Trial court terminated a mother's parental rights based on: (1) neglect; (2) wilfully leaving the children in foster care for more than 12 months without showing reasonable progress; (3) wilfully failing to provide financial support to the children; and (4) abandonment of the children for at least six months immediately preceding the filing of the petition for termination of parental rights; the mother did not request that a guardian ad litem (GAL) be appointed. Also, the petition for termination of her parental rights did not allege the mother's incapability to parent the children, and no allegations were asserted, and no showing was made that the mother was incompetent; thus, the trial court was not required to appoint a GAL to the mother under either G.S. 7B-1101 and 35A-1101, or G.S. 1A-1-17 . In re D.H., 177 N.C. App. 700, 629 S.E.2d 920, 2006 N.C. App. LEXIS 1195 (2006).

Applied in McNamara v. Kerr-McGee Chem. Corp., 328 F. Supp. 1058 (E.D.N.C. 1971); Presnell v. Trollinger Inv. Co., 20 N.C. App. 722, 202 S.E.2d 493 (1974); Reeves v. Jurney, 29 N.C. App. 739, 225 S.E.2d 615 (1976); Eubanks v. First Protection Life Ins. Co., 44 N.C. App. 224, 261 S.E.2d 28 (1979); Genesco, Inc. v. Cone Mills Corp., 604 F.2d 281 (4th Cir. 1979); Malloy v. Durham County Dep't of Social Servs., 58 N.C. App. 61, 293 S.E.2d 285 (1982); Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984); Fraser v. Di Santi, 75 N.C. App. 654, 331 S.E.2d 217 (1985); Westinghouse v. Hair, 107 N.C. App. 106, 418 S.E.2d 532 (1992); Lawrence v. Wetherington, 108 N.C. App. 543, 423 S.E.2d 829 (1993); In re D.S.C., 168 N.C. App. 168, 607 S.E.2d 43, 2005 N.C. App. LEXIS 172 (2005).

Cited in Andrex Indus. Corp. v. Western Carolina Warehousing Co., 35 N.C. App. 122, 239 S.E.2d 850 (1978); In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981); Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984); In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985); L. Richardson Mem. Hosp. v. Allen, 72 N.C. App. 499, 325 S.E.2d 40 (1985); Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986); Duke Power Co. v. Daniels, 86 N.C. App. 469, 358 S.E.2d 87 (1987); Union Grove Milling & Mfg. Co. v. Faw, 109 N.C. App. 248, 426 S.E.2d 476 (1993); Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993); Kane Plaza Assocs. v. Chadwick, 126 N.C. App. 661, 486 S.E.2d 465 (1997); Maynor v. Onslow County, 127 N.C. App. 102, 488 S.E.2d 289 (1997); Energy Investors Fund, L.P. v. Metric Constructors, Inc., 351 N.C. 331, 525 S.E.2d 441, 2000 N.C. LEXIS 129 (2000); Fox v. Health Force, Inc., 143 N.C. App. 501, 547 S.E.2d 83, 2001 N.C. App. LEXIS 298 (2001); Whittaker v. Furniture Factory Outlet Shops, 145 N.C. App. 169, 550 S.E.2d 822, 2001 N.C. App. LEXIS 552 (2001); Pierce v. Johnson, 154 N.C. App. 34, 571 S.E.2d 661, 2002 N.C. App. LEXIS 1406 (2002); Beau Rivage Homeowners Ass'n v. Billy Earl, L.L.C., 163 N.C. App. 325, 593 S.E.2d 120, 2004 N.C. App. LEXIS 366 (2004); PharmaResearch Corp. v. Mash, 163 N.C. App. 419, 594 S.E.2d 148, 2004 N.C. App. LEXIS 410 (2004); In re O.C., 171 N.C. App. 457, 615 S.E.2d 391, 2005 N.C. App. LEXIS 1272 (2005); Trent v. River Place, LLC, 179 N.C. App. 72, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006); In re D.C., 183 N.C. App. 344, 644 S.E.2d 640, 2007 N.C. App. LEXIS 1168 (2007); In re L.B., 187 N.C. App. 326, 653 S.E.2d 240, 2007 N.C. App. LEXIS 2456 (2007).

II. REAL PARTY IN INTEREST.

Substitution of Real Party in Interest Required. — Where original suit was brought against general contractor by homeowners who sought damages for alleged defects in stucco applied to their house, and in the settlement the general contractor's insurance carrier paid the homeowners, who in exchange dismissed the general contractor and assigned all rights they had to the insurance carrier, the insurance company, not the general contractor, was the real party in interest on the third-party complaint filed by the general contractor. However, the trial court should not have granted summary judgment in third-party defendants' favor on the third-party complaint until a reasonable time had passed for the insurance carrier to substitute itself for the general contractor, and should have refused to deal with the merits until the absent parties were brought into the action or should have corrected the defect itself. Land v. Tall House Bldg. Co., 150 N.C. App. 132, 563 S.E.2d 8, 2002 N.C. App. LEXIS 405 (2002).

Section (a) of this rule is identical to federal Rule 17(a). Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

Section (a) of this rule deals not only with real party in interest questions, but also with questions relating to capacity to sue, which are not solely governed by G.S. 1A-1, Rule 9. Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

Necessary Joinder Rules Compared with Real Party in Interest Provisions. — While the real party in interest provisions of this rule are for the parties' benefit and may be waived if no objection is raised, the necessary joinder rules of G.S. 1A-1, Rule 19 place a mandatory duty on the court to protect its own jurisdiction to enter valid and binding judgments. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

While a party may waive its right to be sued by a real party in interest, G.S. 1A-1, Rule 19 requires the court to join as a necessary party any persons "united in interest" and/or any persons without whom a complete determination of the claim cannot be made. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Only Real Party in Interest May Prosecute Claim. — Under G.S. 1-57 and section (a) of this rule, only the real party in interest may prosecute a claim. Crowell v. Chapman, 306 N.C. 540, 293 S.E.2d 767 (1982).

A real party in interest is a party who is benefited or injured by the judgment in the case. Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206, cert. denied, 293 N.C. 159, 236 S.E.2d 704 (1977); Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

And who by substantive law has the legal right to enforce the claim in question. Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206, cert. denied, 293 N.C. 159, 236 S.E.2d 704 (1977); Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

Party Must Be Interested in Subject Matter of Litigation. — An interest which warrants making a person a party is not merely an interest in the action involved, but some interest in the subject matter of the litigation. Reliance Ins. Co. v. Walker, 33 N.C. App. 15, 234 S.E.2d 206, cert. denied, 293 N.C. 159, 236 S.E.2d 704 (1977).

The real party in interest is the one who is entitled to receive the fruits of the litigation (i.e., the damages). Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

Attorney Not Proper in Action Against Medical Records Copier. — Attorney's action against a medical records copier, which alleged that the copier charged excessive fees for records obtained on behalf of personal injury clients, was properly dismissed where it was held that the attorney was not the real party in interest pursuant to subsection (a) of this rule and G.S. 1-57 because he was not ultimately liable for the costs thereof pursuant to the dictates of N.C. Rev. R. Prof. Conduct 1.8, and accordingly, he lacked standing to bring the action in his own name; he was not entitled to substitute his clients as the proper parties because no request to do so was made in a timely fashion. Street v. Smart Corp., 157 N.C. App. 303, 578 S.E.2d 695 (2003).

Beneficiary as Real Party in Interest in Wrongful Death Action. — In an action to recover damages for wrongful death, the real party in interest is the beneficiary under the statute for whom recovery is sought, and not the administrator. King v. Grindstaff, 284 N.C. 348, 200 S.E.2d 799 (1973).

The mere appointment of an agent does not make him the real party in interest. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

In a breach of contract action, the evidence clearly established an agency relationship, as it disclosed that certain individuals, the original plaintiffs, negotiated the construction of a pond on behalf of a landowner. The real party in interest was the landowner. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

An assignee for purposes of collection is not a "real party in interest." Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

Assignee of Franchisor. — In action for alleged breach of franchise agreement, plaintiff, as assignee of the franchisor, was a real party in interest, and had the right to enforce the contract against the defendant. Wiener King Sys. v. Brooks, 628 F. Supp. 843 (W.D.N.C. 1986).

Absence of the real party in interest did not constitute a "fatal defect" where the opposing party failed to show real prejudice in not having had the real party joined at the original trial. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

Absence of necessary parties does not merit a nonsuit. Instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and plead. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

But Proceedings Should Cease Until Necessary Parties Are Brought in. — Where a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

Correction of Defect of Parties by Courts' Own Motion. — In the absence of a proper motion by a competent person, a defect of the parties should be corrected by ruling of the court ex mero motu. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

Right of Third-Party Beneficiary to Sue. — Whether a third-party beneficiary has a right of action depends upon the substantive law. If by substantive law the beneficiary has a right of action, the beneficiary may sue, and the party with whom or in whose name the contract was made may also sue and need not join the beneficiary. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

A third-party beneficiary to a contract is entitled to maintain an action for its breach, but this rule is not applicable where the contract is not made for the direct benefit of the third party and any benefit accruing to him is merely incidental. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

Ratification by, or Joinder or Substitution of, the Real Party in Interest. — When church officials sued seceders from the church to recover church property, the national church was a real party in interest, because, under its canons, it could claim the property, but the failure to join the national church did not require dismissal of the complaint because, under subsection (a) of this rule, an action was not to be dismissed on the ground that it was not prosecuted in the name of the real party in interest until a reasonable time was allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest, and no real prejudice to the seceders was shown. Daniel v. Wray, 158 N.C. App. 161, 580 S.E.2d 711, 2003 N.C. App. LEXIS 1038 (2003).

Substitution of Real Party in Interest After Running of Limitations. — Under this rule, the real party in interest in a case is not precluded from being made the plaintiff after the statute of limitations has run on a claim timely filed by one who lacked the capacity to sue because he was not the real party in interest. Rather, under this rule, a reasonable time must be allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

Change in Capacity in Which Plaintiff Sues. — Section (a) of this rule expressly authorizes the substitution of one party for another, and G.S. 1A-1, Rule 15, particularly section (c), when considered in light of section (a), just as clearly authorizes a change in capacity in which the same plaintiff brings his claim. Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

Where defendants had full notice of the transactions and occurrences upon which a wrongful death claim was based, and the claim was originally filed within the period of limitations by plaintiff in the capacity of a foreign administrator, they could in no way be prejudiced by allowing plaintiff by supplemental pleading to show change in capacity to that of locally qualified ancillary administrator, even though this change occurred after the period of limitations had run. Burcl v. North Carolina Baptist Hosp., 306 N.C. 214, 293 S.E.2d 85 (1982).

Standing of Association to Bring Suit. — An association may properly bring suit only if: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Landfall Group Against Paid Transferability v. Landfall Club, Inc., 117 N.C. App. 270, 450 S.E.2d 513 (1994).

Dismissal of Former Owner Mandated. — Where plaintiff sued a class of defendants pursuant to G.S. 1A-1, Rule 23, but thereafter lost her status as a real party in interest by conveying the property that was the subject of the suit and filed a notice of voluntary dismissal under G.S. 1A-1, Rule 41(a), upon which the new owners were joined as plaintiffs, the trial judge should have dismissed the original plaintiff as no longer a real party in interest. Crowell v. Chapman, 306 N.C. 540, 293 S.E.2d 767 (1982).

Ratification of Commencement of Action. — Participation by counsel for employer and insurance carrier in action as counsel for plaintiff was a ratification of the commencement of the action within a reasonable time after the motion of dismissal was made. Long v. Coble, 11 N.C. App. 624, 182 S.E.2d 234, cert. denied, 279 N.C. 395, 183 S.E.2d 246 (1971).

In a bank merger, the surviving bank or its transferee has the legal right to enforce a claim because the surviving bank succeeds to the merged bank's holder status by operation of law. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

Insurer as Necessary Party. — Where whether or not insurer's legal title to plaintiff's claims was partial or complete, insurer clearly acquired some enforceable legal interest in the subject matter of the action by virtue of the assignment provided by subrogation receipt, given insurer's interest in all of plaintiff's claims, a determination of such claims would necessarily prejudice insurer's interests in them, and insurer was therefore a necessary party under G.S. 1A-1, Rule 19. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Status of Insured Assignor — Where Insurer's Payments Exceed Loss. — Where there is no genuine dispute that insurer's payments exceeded the insured's full loss, the trial court may summarily determine an objection to the insured's real party in interest status. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Same — Where Extent of Insured's Loss Not Yet Determined. — Trial court could not enter summary judgment against plaintiff based on section (a) of this rule where plaintiff's status as a partial assignor and real party in interest could not be determined until the factual issue of the extent of plaintiff's entire loss was determined. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Same — Where Insured Retains Separable Interest. — If plaintiff assignor retained any separable legal interest in the subject matter of its claims, then both plaintiff and insurer assignee would be real parties in interest under section (a) of this rule in the subject matter of the litigation. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Trust Beneficiaries. — Trust beneficiaries did not have standing to sue former trustees who managed a charitable remainder unitrust, and the trial court erred when it refused to dismiss the beneficiaries as parties to a lawsuit which a successor trustee filed against former trustees. Slaughter v. Swicegood, 162 N.C. App. 457, 591 S.E.2d 577, 2004 N.C. App. LEXIS 190 (2004).

III. INFANTS AND INCOMPETENTS.

Editor's Note. *— The case of Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971), and similar cases cited below have expanded a trial court's authority under this rule by giving the trial court the ability to determine competency in certain circumstances. That authority is brought into question by Culton v. Culton, 96 N.C. App. 620, 386 S.E. 2d 592 (1989). In Culton, the issue before the North Carolina Supreme Court was a Court of Appeals holding that G.S. 35A-1101 et seq. preempted the Rutledge line of cases, and that the trial court therefore lacked jurisdiction to determine the defendant's competency. The Court of Appeals had agreed with the plaintiff's objection to the district court's appointment of a guardian ad litem on behalf of the defendant on the grounds that before a guardian ad litem can be appointed under this rule, incompetency must be determined in a proceeding brought under G.S. 35A-1101 et seq. The North Carolina Supreme Court reversed the decision of the Court of Appeals on procedural grounds, holding that the plaintiff lacked standing to challenge on appeal the appointment of a guardian ad litem on behalf of the defendant.*

The General Assembly, however, completely superseded the holding of the Court of Appeals in Culton by passing Session Laws 2003-236, s. 4, which amended G.S. 35A-1102 to provide that "nothing in [G.S. 35A-1101 et seq.] shall interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b) of the North Carolina Rules of Civil Procedure."

Chapter 35A Sets Forth Sole Procedure for Determining Incompetency. — Although this rule may have once allowed the trial court to conduct a competency hearing, that procedure was preempted on October 1, 1987, by the enactment of G.S. 35A-1101 et seq., which sets forth the sole procedure for determining incompetency of infants and adults. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990) (holding that plaintiff lacked standing to challenge on appeal the district court's appointment of guardian ad litem for defendant).

And Adjudication of Incompetency Must Take Place Within Perimeters of Chapter 35A. — The language of G.S. 35A-1102 requires any adjudication of incompetency to take place within the perimeters of Chapter 35A, even if the person sought to be declared incompetent does not challenge the action. However, this rule still exists as a means of appointment of a guardian ad litem where incompetency has already been determined. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990) (holding that plaintiff lacked standing to challenge on appeal the district court's appointment of guardian ad litem for defendant).

Infants and persons non compos mentis are peculiarly entitled to the protection of the court, and a principal means for extending this protection is by appointment of a guardian or, where appropriate, a guardian ad litem. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971). But see Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990) (holding that plaintiff lacked standing to challenge on appeal the district court's appointment of guardian ad litem for defendant), and G.S. 35A-1101 et seq.

Former Practice Changed. — The practice which formerly prevailed in this State, that an infant plaintiff appeared by his next friend, has been changed. Sadler v. Purser, 12 N.C. App. 206, 182 S.E.2d 850 (1971).

Power to Defend. — Given supreme court precedent, the limited powers granted to a guardian of the person in G.S. 35A-1241, and the implied requirement of North Carolina's Rules of Civil Procedure that imposed the requirement of appointment of a guardian ad litem where no general or testamentary guardian had been appointed under G.S. 1A-1-17(b)(2), a ward of a guardian of the person was neither properly sued nor served in the absence of a guardian ad litem or general guardian, and the verdict against the ward was set aside. Clawser v. Campbell, 184 N.C. App. 526, 646 S.E.2d 779, 2007 N.C. App. LEXIS 1467 (2007).

The change effected is more than a mere change in nomenclature, since substantial differences have been recognized between the powers and duties of a next friend and those of a duly appointed guardian ad litem. Sadler v. Purser, 12 N.C. App. 206, 182 S.E.2d 850 (1971).

Now Infant or Incompetent Plaintiff Must Appear by Guardian or Guardian Ad Litem. — Now in actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, they must appear by general or testamentary guardian, if they have any within the State, or by duly appointed guardian ad litem. Sadler v. Purser, 12 N.C. App. 206, 182 S.E.2d 850 (1971). But see Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990) (holding that plaintiff lacked standing to challenge on appeal the district court's appointment of guardian ad litem for defendant), and G.S. 35A-1101 et seq.

And Not by Next Friend. — This rule makes no reference to a "next friend," but provides for the appointment of a guardian or guardian ad litem for infants and incompetents who are parties, whether plaintiff or defendant, in any civil action. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971). But see Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990) (holding that plaintiff lacked standing to challenge on appeal the district court's appointment of guardian ad litem for defendant), and G.S. 35A-1101 et seq.

Whether appointment of a guardian ad litem for a minor is necessary is controlled by section (b) of this rule. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Substitution as Party Plaintiff. — Where the real party in interest was a minor, and the record did not show that a guardian had been appointed, the action should not have been dismissed, but the real party must be given a reasonable opportunity to be substituted as a party plaintiff. Freeman v. Blue Cross & Blue Shield, 123 N.C. App. 260, 472 S.E.2d 595 (1996).

It is ordinarily desirable that an incompetent's litigation be conducted by a general guardian, who, being in control of his ward's affairs, can relate the effect of the litigation to the incompetent's entire estate. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969). See now G.S. 35A-1101 et seq.

Jurisdiction of Court to Appoint Guardian Ad Litem for Adult Plaintiff. — An adult plaintiff who is not an idiot or lunatic must be non compos mentis before the court has jurisdiction to appoint a guardian ad litem for him. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969). See now G.S. 35A-1101 et seq.

Either party, or the court upon its own motion, may initiate proceedings for appointment of a guardian ad litem before any hearing on the merits. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971). But see Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990) (holding that plaintiff lacked standing to challenge on appeal the district court's appointment of guardian ad litem for defendant), and G.S. 35A-1101 et seq.

The statute does not require, nor does it imply that it is the respondent's responsibility to ask for appointment of the guardian ad litem. Richard v. Michna, 110 N.C. App. 810, 431 S.E.2d 485 (1993).

Guardian Ad Litem Must Always be Appointed for Minor Child in Legitimacy Proceeding. — G.S. 49-10 specifies the procedures to be followed in a proceeding pursuant to G.S. 49-12.1, and provides that a child is a necessary party to a legitimation proceeding. G.S. 49-12.1(a) states specifically that if the child is a minor, a guardian ad litem must be appointed to represent the child; however, regardless of whether G.S. 49-12.1 required this, appointment of a guardian ad litem for the minor child is mandated by G.S. 1A-1, N.C. R. Civ. P. 17. In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

Duty to Protect Child's Interest in Determination of Biological Father. — Appointment of a guardian ad litem does not dictate the form and inquiry of the proceeding; rather, the duties of the guardian ad litem are dictated by the action or proceeding in which the guardian ad litem has been appointed. In the context of a legitimation proceeding, where the inquiry of the court is whether the petitioner is the biological father of the minor child, the guardian ad litem must defend on behalf of the child in a manner that assures that the child's interest in the determination of his or her biological father is protected. In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

Appeal from Order Appointing Guardian Ad Litem. — Plaintiff gave notice of appeal from an interlocutory order, namely, one granting defendant's motions for the appointment of a guardian ad litem. As this order was not a final judgment, for plaintiff to have been entitled to appeal of right from the order, plaintiff was required to establish that the order either: (1) affected a substantial right, or (2) in effect determined the action and prevented a judgment from which appeal might be taken, or (3) discontinued the action, or (4) granted or refused a new trial. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

Standing to Challenge Appointment on Appeal. — Because he was not an aggrieved party, plaintiff had no standing to challenge on appeal trial court's order appointing a guardian ad litem for defendant. Culton v. Culton, 327 N.C. 624, 398 S.E.2d 323 (1990).

Party Asserting Competency Is Entitled to Notice and Opportunity to Be Heard. — When a party's lack of mental capacity is asserted and denied, and he has not previously been adjudicated incompetent to manage his affairs, he is entitled to notice and an opportunity to be heard before the judge can appoint a guardian ad litem for him. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969). But see Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990) (holding that plaintiff lacked standing to challenge on appeal the district court's appointment of guardian ad litem for defendant), and G.S. 35A-1101 et seq.

Normally, a litigant has a fundamental right to select the attorney who will represent him in his lawsuit, to conduct his litigation according to his own judgment and inclination, and, if the case is to be compromised, to have it settled upon terms which are satisfactory to him. If this right is taken from him upon a factual finding which he disputes, fundamental fairness and the constitutional requirements of due process require that he be given an opportunity to defend and be heard. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969). See now G.S. 35A-1101 et seq.

If the trial judge determines after voir dire examination that a substantial question as to a party's competency is raised, notice and opportunity to be heard must then be given the party for whom appointment of a guardian is proposed, as a person for whom a guardian ad litem is proposed is entitled to notice as in case of an inquisition of lunacy under G.S. 35-2 (now repealed). Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971). But see Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990) (holding that plaintiff lacked standing to challenge on appeal the district court's appointment of guardian ad litem for defendant), and G.S. 35A-1101 et seq.

Appointment Made Without Notice and Opportunity to Be Heard Is Void. — Where the plaintiff had no notice that her competency to manage her affairs was challenged nor an opportunity to be heard on the issue, the order appointing a guardian ad litem for her was void, and his settlements of her actions, notwithstanding the fact that they were approved by the court, were not binding upon her. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969). See now G.S. 35A-1101 et seq.

An inquisition is not always a condition precedent for appointment of a guardian ad litem. In an emergency, when it is necessary, pendente lite, to safeguard the property of a person non compos mentis whose incompetency has not been adjudicated, the protection of the court may be invoked in his behalf by one acting as guardian ad litem. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969). See now G.S. 35A-1101 et seq.

A guardian ad litem must always be appointed for a minor child in a termination proceeding, regardless of whether respondent filed an answer denying material allegations of the petition. In re Barnes, 97 N.C. App. 325, 388 S.E.2d 237 (1990); In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991), cert. denied, 330 N.C. 612, 413 S.E.2d 800 (1992).

Guardian ad Litem's Powers Limited. — A guardian ad litem has no authority to receive money or administer the litigant's property. His powers are coterminous with the beginning and end of the litigation in which he is appointed. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

A Guardian Ad Litem Must Always Be Appointed for An Incapable Parent in a Termination Proceeding. — When a Division of Social Services pursues termination on the grounds of parental incapability under G.S. 7B-1111(a)(6), the parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right. A guardian ad litem shall also be appointed. In re Shepard, 162 N.C. App. 215, 591 S.E.2d 1, 2004 N.C. App. LEXIS 129 (2004).

When it was alleged that a mother's parental rights to two children should be terminated because she (1) neglected them while they were in an agency's care within the meaning of G.S. 7B-101, under G.S. 7B-1111(a)(1), (2) willfully left the children in foster care for more than 12 months without showing reasonable progress to correct the conditions that led to their removal, under G.S. 7B-1111(a)(2), and (3) willfully failed to pay a reasonable portion of the cost of the children's care while in an agency's custody, under G.S. 7B-1111(a)(3), there was no requirement that a guardian ad litem be appointed for the parent, even though the petition made reference to the mother's drug abuse and mental illness, because there was no allegation under G.S. 7B-1111(a)(6) that the mother was incapable of caring for her children, she did not seek a guardian ad litem, and the trial court properly inquired into her competency, under G.S. 1A-1, N.C. R. Civ. P. 17. In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

G.S. 7B-1101.1 requires that a guardian ad litem be appointed in accordance with the provisions of G.S. 1A-1, N.C. R. Civ. P. 17 to represent a parent, meaning that where an allegation is made that parental rights should be terminated, a trial court is required to conduct a hearing to determine whether a guardian ad litem should be appointed to represent the parent, and an allegation under G.S. 7B-1111(a)(6) serves as a triggering mechanism, alerting the trial court that it should conduct a hearing to determine whether a guardian ad litem should be appointed; at the hearing, the trial court must determine whether the parents are incompetent within the meaning of G.S. 35A-1101, such that the individual would be unable to aid in their defense at the termination of parental rights proceeding, and the trial court should always keep in mind that the appointment of a guardian ad litem will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination. In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

Substitution of General Guardian for Guardian Ad Litem. — Since the trial court clearly had authority under this rule to determine whether it was expedient for a guardian ad litem to bring and maintain an action for an incompetent when the incompetent had a general guardian or trustee in the State, the trial court manifestly had authority to substitute the general guardian or trustee as party plaintiff for the guardian ad litem in an action brought on behalf of the incompetent. Gaskins v. McCotter, 52 N.C. App. 322, 278 S.E.2d 302 (1981). But see Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990) (holding that plaintiff lacked standing to challenge on appeal the district court's appointment of guardian ad litem for defendant), and G.S. 35A-1101 et seq.

Defendant could not collaterally attack a competency hearing and appointment of a general guardian for plaintiff where defendant's intention obviously was to avoid substitution of the real party in interest, the general guardian, by attacking the validity of the proceeding in which the general guardian was appointed. Hearon v. Hearon, 44 N.C. App. 361, 261 S.E.2d 9 (1979).

Where an incompetent plaintiff died after institution of action by her next friend, and the court authorized and directed substitution of her administrator as the new plaintiff, failure to make such substitution required dismissal of appeal by the court against appellant's next friend. Ginn v. Smith, 20 N.C. App. 526, 201 S.E.2d 739 (1974).

Minors Who Had Vested Interest in Who Administered Estate Were Under Purview of Rule. — Minor heirs had a vested interest in who administered the estate of their deceased father and were entitled under G.S. 28A-9-1 to appeal the decision of the Clerk on the revocation issue. This was sufficient to bring the matter within the purview of G.S. 1A-1, Rule 17 providing it was an "action or special proceeding." In re Estate of Sturman, 93 N.C. App. 473, 378 S.E.2d 204 (1989).

Fees of Guardian Ad Litem Properly Taxed as Costs. — Having properly appointed guardian ad litem, the trial court was within its discretion to assess as an item of costs the fees of the guardian ad litem and to tax those fees to either party or apportion them between the parties. Van Every v. McGuire, 125 N.C. App. 578, 481 S.E.2d 377 (1997), aff'd, 348 N.C. 58, 497 S.E.2d 689 (1998).

G.S. 7B-602(b)(1) did not require the appointment of a guardian ad litem for the father as the dependency allegations did not focus on the father's incapacity; rather, the majority of the dependency allegations focused on the father's alleged abuse and neglect as exhibited by his noncompliance with court-ordered domestic violence counseling and a pattern of abuse against his wife and other children. In re H. W., 163 N.C. App. 438, 594 S.E.2d 211, 2004 N.C. App. LEXIS 414 (2004).

In a termination of parental rights action, the trial court should have inquired into the mother's competency pursuant to G.S. 1A-1, N.C. R. Civ. P. 17, given the allegations made by the Department of Social Services that the mother had problems controlling the mother's anger, tended to be aggressive towards others, and lacked an understanding of the mother's prior neglect of the minor children. In re N.A.L., — N.C. App. —, 666 S.E.2d 768, 2008 N.C. App. LEXIS 1763 (2008).

IV. DECISIONS UNDER PRIOR LAW.

Editor's Note. — *The cases cited below were decided under former G.S. 1-63 through G.S. 1-65.*

Fiduciaries are not made real parties in interest, but are empowered to bring an action for the real beneficiaries. Lawson v. Langley, 211 N.C. 526, 191 S.E. 229 (1937).

The trustee of an express trust may sue without joining the cestui que trust. Richardson v. Richardson, 261 N.C. 521, 135 S.E.2d 532 (1964).

Or May Join the Cestui Que Trust. — A trustee may sue in his own name or may join his cestui que trust. Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 129 S.E.2d 222 (1963).

Beneficiary of Express Trust Not a Necessary Party. — Under former G.S. 1-63, an executor or trustee of an express trust could sue without joining with him the party equitably interested. Biggs v. Williams, 66 N.C. 427 (1872); Davidson v. Elms, 67 N.C. 228 (1872). See Jones v. McKinnon, 87 N.C. 294 (1882).

Beneficiary Not Excluded from Suit Involving Abuse of Trustee's Authority. — Former G.S. 1-63 did not apply so as to exclude the beneficiary as a necessary party in a suit involving the question of whether the trustee had exceeded his authority under the terms of the instrument creating the trust, where the interests of the beneficiary might be seriously affected. Barbee v. Penny, 172 N.C. 653, 90 S.E. 805 (1916).

The "trustee of an express trust" does not include the personal representative of such trustee. Alexander v. Wriston, 81 N.C. 191 (1879).

Plaintiff Assignee as Trustee of Express Trust. — An answer setting forth that another person was the real owner of a note sued upon, but that it was assigned to the plaintiff, was to be taken as meaning that the plaintiff was trustee of an express trust, and so was properly plaintiff. Rankin v. Allison, 64 N.C. 673 (1870).

When a person contracts in his own name for the benefit of another, he is to be regarded as the trustee of an express trust, whether the name of the beneficiary is disclosed or not. Winders v. Hill, 141 N.C. 694, 54 S.E. 440 (1906).

Attorney Transferee as Trustee of Express Trust. — Where a plaintiff transferred a claim, upon which an action was subsequently brought, to an attorney at law for collection, with directions to him to apply the proceeds to demands which he held for collection against the plaintiff due other parties, the effect of the transfer was to vest ownership of the claim in the attorney as a "trustee of an express trust," and the action should have been brought in his name alone, or in conjunction with the names of the cestuis que trustent. Wynne v. Heck, 92 N.C. 414 (1885).

As to suits by agents, see Martin v. Mask, 158 N.C. 436, 74 S.E. 343 (1912).

Suit upon Administration Bond. — In a suit upon an administration bond, the next of kin of the intestate are not necessary parties, and in such a suit the administrator of the principal in the bond need not be joined. Flack v. Dawson, 69 N.C. 42 (1873).

Where a judgment creditor has assigned the judgment as security, an action may be brought by him without joining the assignee. Chatham v. Mecklenburg Realty Co., 180 N.C. 500, 105 S.E. 329 (1920).

Where a judgment is assigned to a trustee for the benefit of a judgment debtor entitled to indemnity, trustee may maintain action for indemnity without joining the cestui que trust. Ingram v. Nationwide Mut. Ins. Co., 258 N.C. 632, 129 S.E.2d 222 (1963).

Where a note was made payable to "J, cashier," and collateral security was delivered to him, he being a member and cashier of the firm of "C & J," the owners of the debt, an action for the foreclosure of the mortgage security was properly brought in his name, as he was the holder of the collateral as trustee for the firm. Jenkins v. Wilkinson, 113 N.C. 532, 18 S.E. 696 (1893).

Where a consent judgment directed named persons to sell and convey land, to collect the proceeds, to pay the taxes lawfully due, and to distribute the balance as directed, the persons named were trustees of an express trust, notwithstanding the fact that the judgment denominated them as commissioners, and therefore such persons were authorized to maintain an action for recovery of taxes unlawfully paid, without joinder of the beneficial owners of the property. Rand v. Wilson County, 243 N.C. 43, 89 S.E.2d 779 (1955).

Where a widow as executrix distributed in settlement the remaining personalty to herself as life tenant in accordance with the will, and the property then inured to the benefit of the remaindermen, she became functus officio as to such property. An administrator c.t.a., appointed after her death, was likewise functus officio and was not empowered to maintain an action to recover such property from her administrators, since it was no longer part of his testator's estate and was not subject to further administration. Darden v. Boyette, 247 N.C. 26, 100 S.E.2d 359 (1957).

Rights and Interests of Infants to Be Protected by Courts. — Infants are favorites of the courts, and the courts are duty-bound to protect their rights and interests in all actions and proceedings whether they are represented by guardians or not; and the Supreme Court will scan with extra care all records affecting the interest of minors. Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962).

The object of the appointment of a guardian ad litem is to protect the interest of the infant defendant, to which protection he is entitled at every stage of the proceeding. Graham v. Floyd, 214 N.C. 77, 197 S.E. 873 (1938).

Power to Appoint and Remove Guardian Ad Litem. — The superior court has, independently of statute, the power to appoint a guardian ad litem for an infant defendant. It may, at any time during the progress of the cause, for sufficient reason looking to the proper protection of the infant's interests, remove a guardian theretofore appointed and name some other person. Moreover, there is no good reason why the clerk who acts as and for the court may not do the same in special proceedings pending before him. Carraway v. Lassiter, 139 N.C. 145, 51 S.E. 968 (1905).

Duty of Court in Appointing Guardian Ad Litem. — It is the duty of courts to have special regard for infants and their rights and interests when they come within their cognizance, since they cannot adequately take care of themselves. Hence, it is a serious mistake to suppose that a next friend or a guardian ad litem should be appointed upon simple suggestion; this should be done upon proper application in writing and due consideration by the court. The court should know who is appointed, and that such person is capable and trustworthy. Morris v. Gentry, 89 N.C. 248 (1883).

Mandatory Nature of Appointment Provisions. — Infants are, in many cases, the wards of the courts, and these forms, enacted as safeguards thrown around the helpless, who are often the victims of the crafty, are enforced as being mandatory, and not directory only. Those who venture to act in defiance of them must take the risk of their action being declared void or set aside. Moore v. Gidney, 75 N.C. 34 (1876).

Judgments Not Vitiated by Mere Irregularities in Appointing Guardians Ad Litem. — The provisions in regard to the appointment of guardians ad litem should be strictly observed, but mere irregularities in observing them, not affecting a substantial right, will not vitiate judgments and decrees obtained in the action or proceeding in which such irregularities exist. Ward v. Lowndes, 96 N.C. 367, 2 S.E. 591 (1887); White v. Morris, 107 N.C. 92, 12 S.E. 80 (1890); Cox v. Cox, 221 N.C. 19, 18 S.E.2d 713 (1942).

Failure to Serve Minor Personally as Mere Irregularity. — Where the interests of the minor have been presented and an answer has been filed by his general guardian or guardian ad litem, the failure to serve on the minor personally is only an irregularity, to be corrected, if at all, by motion in the cause. Matthews v. Joyce, 85 N.C. 258 (1881); Carraway v. Lassiter, 139 N.C. 145, 51 S.E. 968 (1905); Rackley v. Roberts, 147 N.C. 201, 60 S.E. 975 (1908); Glisson v. Glisson, 153 N.C. 185, 69 S.E. 55 (1910); Harris v. Bennett, 160 N.C. 339, 76 S.E. 217 (1912); Groves v. Ware, 182 N.C. 553, 109 S.E. 568 (1921).

Presumption of Proper Appointment. — Where the lands of infants are sold under an order of the superior court upon an ex parte petition in which the infants are represented by next friends, it is presumed that the court protected their interests and was careful to see that they suffered no prejudice. Tyson v. Belcher, 102 N.C. 112, 9 S.E. 634 (1889).

Appointment Valid When Infant Accepted Service. — The appointment of a guardian ad litem was valid although the infant was not regularly served with process, but had only accepted service thereof. Cates v. Pickett, 97 N.C. 21, 1 S.E. 763 (1887).

Plaintiff is not bound to move for appointment of a guardian ad litem for an infant defendant, and his failure to do so is not such laches as will work a discontinuance of the action. Turner v. Douglass, 72 N.C. 127 (1875).

A mere colorable interest, if at all adverse, is sufficient to disqualify either a guardian ad litem or his attorney from appearing for an infant defendant. Molyneux v. Huey, 81 N.C. 106 (1879); Ellis v. Massenburg, 126 N.C. 129, 35 S.E. 240 (1900).

Person with Interest Hostile to Infants. — Any person who has an interest in an action hostile to that of the infants involved will not be allowed to conduct the action on their behalf, whether he be guardian or next friend. George v. High, 85 N.C. 113 (1881).

Nominal Plaintiff Disqualified to Represent Infant Defendants. — A plaintiff of record, though nominal and made so without his consent, was utterly disqualified to appear for any infant defendants. His most faithful performance of duty and energetic and persistent defense, in every way commendable and approved by the court, would not relieve the impropriety of his appointment as guardian ad litem, so long as his name appeared on the plaintiff side of the docket. Ellis v. Massenburg, 126 N.C. 129, 35 S.E. 240 (1900).

Appointment Where General Guardian Is Plaintiff. — In a special proceeding by an executor to sell lands, the clerk had the power to appoint a guardian ad litem for an infant defendant, where the executor was the general guardian of such infant. Carraway v. Lassiter, 139 N.C. 145, 51 S.E. 968 (1905).

Appointment of Guardian Ad Litem on Day of Trial. — Where a guardian ad litem for infants and incompetents is appointed on the day of trial, and such guardian accepts service and copies of the pleadings and files his answer the same day, the judgment is irregular and may be declared void or set aside. Simms v. Sampson, 221 N.C. 379, 20 S.E.2d 554 (1942).

Foreign or Domestic Corporation Cannot Be Appointed. — Only a person whose fitness has first been ascertained by the court is eligible for appointment by the court as representative of a minor to institute suit, and neither a foreign nor domestic corporation may be appointed. In re Will of Roediger, 209 N.C. 470, 184 S.E. 74 (1936).

Treatment of Suit Brought by Foreign Guardian. — A guardian appointed in another state has no authority to represent his wards in suits and proceedings in this State, but when he brings suit for them as guardian such suit will be treated as if he were next friend. Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887).

Where an infant had a general guardian, such guardian was the only one who could defend on behalf of the infant, and defense by a subsequently appointed guardian ad litem was a nullity. Narron v. Musgrave, 236 N.C. 388, 73 S.E.2d 6 (1952).

Representation of Minor Heir by Administrator in Proceeding to Sell Land. — In an ex parte proceeding to sell land for assets, infant heirs are represented by a guardian, and the order of sale must be approved by the judge. While it is irregular for the administrator in such case to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation, or elsewhere in the proceeding, such irregularity will not vitiate the title of the purchaser. Syme v. Trice, 96 N.C. 243, 1 S.E. 480 (1887); Harris v. Brown, 123 N.C. 419, 31 S.E. 877 (1898).

Suit by Representative of Infant Widow. — In dissenting from her husband's will and applying for a year's allowance, widow who was a minor without a guardian could be represented by a representative, duly appointed. Hollmon v. Hollmon, 125 N.C. 29, 34 S.E. 99 (1899).

Appearance of Husband Unnecessary. — Where an infant feme covert cestui que trust who had no general guardian appeared in a proceeding for the appointment of a trustee by guardian ad litem, the husband did not need to appear. Roseman v. Roseman, 127 N.C. 494, 37 S.E. 518 (1900).

Duty of Guardian Ad Litem. — It is the duty of a next friend to represent the infant, to see that the witnesses are present at the trial of the infant's case, and to do all things which are required to secure a judgment favorable to the infant. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Power of Guardian Ad Litem Limited. — The power of a next friend is strictly limited to the performance of the precise duty imposed upon him by the order appointing him, that is, the prosecution of the particular action in which he was appointed. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Failure to Plead Infancy of Petitioner as Waiver of Such Defense. — Where a minor petitioned for a writ of habeas corpus in her own name, and not by next friend, and the record on appeal failed to show that the respondent pleaded the infancy of the petitioner as a defense, it was considered as waived. In re Allen, 238 N.C. 367, 77 S.E.2d 907 (1953).

Appealability of Order Appointing Guardian Ad Litem. — An order appointing a next friend for plaintiff is an order affecting a substantial right from which plaintiff may appeal. Hagins v. Redevelopment Comm'n, 1 N.C. App. 40, 159 S.E.2d 584 (1968), rev'd on other grounds, 275 N.C. 90, 165 S.E.2d 490 (1969).

Defendant cannot object to representative appointed by trial judge. Carroll v. Montgomery, 128 N.C. 278, 38 S.E. 874 (1901).

Authority of Guardian Ad Litem Not Subject to Collateral Attack. — The presence of a guardian ad litem to represent an infant party, and his recognition by the court in proceeding with the cause, precludes an inquiry into his authority in a collateral proceeding. Sumner v. Sessoms, 94 N.C. 371 (1886). See also, Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887).

When Collateral Attack on Judgment Precluded. — Where infant defendants were served with a summons in proceedings for the partition of land and a guardian ad litem was appointed, a judgment affirming the sale could not be set aside in a collateral proceeding for alleged fraud or irregularity. Smith v. Gray, 116 N.C. 311, 21 S.E. 200 (1895).

Binding Effect of Judgment on Represented Infants. — Infants without general guardians may appear by their representative, appointed in the manner prescribed, and judgments rendered in such proceedings, otherwise valid, are binding upon and conclusive of the rights of infants in the same manner and to the same extent as persons sui juris. Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887); Settle v. Settle, 141 N.C. 553, 54 S.E. 445 (1906).

Whether a new trial will be ordered for failure to appoint a guardian ad litem will depend upon the circumstances of the particular case as to whether the infant or infants have been fully protected in their rights and property; a new trial will not be granted for mere technical error which could have affected the result, but only for error which is prejudicial or harmful. Tart v. Register, 257 N.C. 161, 125 S.E.2d 754 (1962).

Judgment Against Infants Neither Served Nor Represented by Guardian Ad Litem Void. — Where it appears that there was no service of process upon infant defendants, and no guardian was appointed to protect their interests, a judgment rendered against them is absolutely void ab initio, and may be set aside at any time for irregularity. Mason v. Miles, 63 N.C. 564 (1869); Larkins v. Bullard, 88 N.C. 35 (1883). See White v. Albertson, 14 N.C. 241 (1831); Pearson v. Nesbitt, 12 N.C. 315 (1832).

Judgment or Order Voidable Where Infant Appears by Attorney. — A judgment for or against an infant, when he appears by attorney but has no guardian or next friend, is not void, but only voidable. Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887).

In an action against an infant who appears by an attorney, an order changing the venue is not irregular or void; it is erroneous, and may be reversed or vacated upon application of the infant, upon his arriving at age of majority. Turner v. Douglass, 72 N.C. 127 (1875).

Attainment of Majority Pendente Lite. — Where an infant institutes an action in his own name and arrives at full age before trial, the judgment is binding on both plaintiff and defendant. Hicks v. Beam, 112 N.C. 642, 17 S.E. 490 (1893).

Judgment Against Infant Held Void. — Where an infant was not served, and his guardian ad litem appeared and answered but interposed no real defense, and the court entered judgment on the day of the appointment of the guardian ad litem, the judgment against the infant was void for want of jurisdiction. Narron v. Musgrave, 236 N.C. 388, 73 S.E.2d 6 (1952).

Proceedings Held Not Conclusive upon Infant Defendants. — A decree for the sale of land in a special proceeding was not conclusive upon infant defendants who were not served with process, but who were represented by a guardian ad litem, appointed before the petition was filed on nomination of plaintiff, and who filed an answer prepared for him at plaintiff's instance and without inquiry as to the rights of the infant defendants. Moore v. Gidney, 75 N.C. 34 (1876); Gulley v. Macy, 81 N.C. 356 (1879).

In a suit to enforce a tax lien by foreclosure, where the affidavit, orders and notices appeared sufficient in form to constitute service by publication of notice of summons in accordance with prescribed procedure upon all persons named therein, including heirs at law, both adult and minors, the minors, if any, not having been represented by a guardian ad litem, would not be bound by the judgment of confirmation rendered in the action. McIver Park v. Brinn, 223 N.C. 502, 27 S.E.2d 548 (1943).

Infants as Real Parties Plaintiff. — One who conducts a suit as guardian or next friend for infants is not a party of record, but the infants themselves are the real plaintiffs. George v. High, 85 N.C. 113 (1881); Krachanake v. Acme Mfg. Co., 175 N.C. 435, 95 S.E. 851 (1918).

It is not essential that an infant should know that an action has been brought in his favor by a representative, as his incapacity to judge for himself is presumed, but the court may inquire into the propriety of the action and take such steps as may be necessary. Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887).

As to defense by one appointed to prosecute right for infant, see County of Johnston v. Ellis, 226 N.C. 268, 38 S.E.2d 31 (1946).

It is competent for attorney and guardian ad litem to waive a jury trial for infants, even where they have not been regularly served with summons. White v. Morris, 107 N.C. 92, 12 S.E. 80 (1890).

Consent to Judgment or Compromise. — In the case of infant parties, the guardian ad litem or guardian cannot consent to a judgment or compromise without investigation and approval by the court. State ex rel. Hagins v. Phipps, 1 N.C. App. 63, 159 S.E.2d 601 (1968).

Satisfaction of Judgment in Favor of Infant. — Under the statutes of this State, only the clerk or the legal guardian of an infant has authority to receive payment and satisfy a judgment rendered in favor of an infant, and the defendant must pay the judgment to the clerk of the superior court, who holds the funds until the minor reaches his majority or until a general guardian is appointed for him, unless the sum is $1,000 (now $2,000) or less, when he may disburse it himself under the terms of G.S. 7A-111. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Inquisition to Determine Insanity Not Condition Precedent to Appointment. — The court is under duty to appoint a guardian ad litem for a defendant who is non compos mentis and who has no general guardian, and an inquisition to determine the sanity of the defendant is not a condition precedent to such appointment. Moore v. Lewis, 250 N.C. 77, 108 S.E.2d 26 (1959), appeal dismissed, 361 U.S. 232, 80 S. Ct. 371, 4 L. Ed. 2d 350 (1960).

Where allegation of insanity of husband was admitted by demurrer, suit could be brought by his next friend, even though no inquisition of lunacy was had; and the wife could bring the action as such next friend, where she was regularly appointed. Abbott v. Hancock, 123 N.C. 99, 31 S.E. 268 (1898).

Payment of Costs by Representative. — While the representative is not, strictly speaking, a party to the action, and generally will not be taxed with costs, yet where the court finds the fact that he officiously procured his appointment, or was guilty of mismanagement or bad faith, it may tax him with costs. Smith v. Smith, 108 N.C. 365, 12 S.E. 1045, 13 S.E. 113 (1891).

Attorneys' Fees for Prosecution of Guardian. — Where it is proper for the attorneys for a ward, employed by his representative, to receive compensation out of the estate for the prosecution of an action against the guardian, the amount is for the sole determination of the court, irrespective of any contract that may have been made, to be fixed with regard to the value of the services in relation to that of the estate. In re Stone, 176 N.C. 336, 97 S.E. 216 (1918).

Rule 18. Joinder of claims and remedies.

(a) *Joinder of claims.* — A party asserting a claim for relief as an original claim, counterclaim, cross claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

(b) *Joinder of remedies; fraudulent conveyances.* — Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money. (1967, c. 954, s. 1; 1969, c. 895, s. 7.)

COMMENT

General Comment on the Problems Dealt with in the Joinder Rules, Rules 18 to 21. — The fundamental problem sought to be controlled by so-called joinder rules is that of the size which a single lawsuit shall on the one hand be compelled, and, on the other hand, permitted to assume. Hence, the rules of compulsory (minimum allowable size) and permissive (maximum allowable size) joinder. Since size depends both upon the number of claims (causes of action) and parties potentially involved, the rules of joinder have traditionally been separately framed in terms of parties and claims (causes of action).

Permissive Joinder. — The underlying policy controlling maximum permissible size is clear and has always been at least tacitly agreed upon under all procedural systems — namely, that the size should be as large as is compatible with orderly handling of issues and fairness to those parties not necessarily interested in all phases of the lawsuit as finally structured. This in turn is based upon the obvious — that economy of judicial effort is achieved by the resolution in one suit of as many claims, concluding as many parties, as is possible. The rub has come in laying down workable directions which are fairly simple in statement; which nevertheless deal adequately with the potentially two-dimensional nature of the joinder problem (both parties and causes); and which, though couched in a form concrete enough for ready application, state what is essentially a quite flexibly conceived goal, i.e., maximum size commensurate with orderly handling of issues and fairness to all parties. One way to solve what is essentially a very difficult drafting problem is to lay down a fairly rigid, hence easily expressed, limitation in the kinds of cause of action which may be joined. If this is done, the problem of too many parties tends to take care of itself, since under traditional conceptions of the structure of a "cause of action," such a single judicial unit rarely has multiple parties aligned on either side of it (typically only when the substantive law contemplates the existence of parties jointly, or jointly or severally, entitled or obligated). Thus, in most cases of attempted joinder of multiple parties there will be a more basic joinder of causes of action which will come under control of the limitation applicable to joinder of causes. This was the common-law approach, which started out allowing only one claim to be made in any action, and finally relaxed only to the point of allowing joinder of causes when they all fell within one of the "forms of action." The code draftsmen, wedded to this approach, essentially codified it, merely using new terminology, e.g., "contract," in place of old "assumpsit," to define the categories within which joinder of claims is permissive. This approach is artificial, and actually loses sight of the basic policy which should control here, but it is simple to put into directive form, and it "works," albeit at the expense of legitimate considerations. When coupled, as it typically is in the codes, with procedural devices provided to attack misjoinder preliminary to trial, it produces a vast amount of skirmishing at this stage before trial is ever reached. This is the history of application of the code joinder rules. Here the emphasis is on artificial restriction of size, with leeway provided for movement in the direction of enlargement only through the power in judges to consolidate causes not technically subject to joinder.

Another approach, which is also simple of statement, is to go in exactly the opposite direction and state a basic directive for practically unlimited joinder of claims at the pleading stage, limited only by considerations of fairness to any parties not potentially interested in the totality of the lawsuit as then structured, leaving the burden on the judiciary to move in a restricted direction by exercise of the power of severance closer to trial time. This dispenses with pleading stage skirmishes over the alignment of the suit in terms of parties and claims, and defers ultimate structuring while preserving to the parties at this stage all the benefits of an ongoing uninterrupted lawsuit. This last is essentially a description of the federal rule approach to the problem of maximum permissible size or permissive joinder.

Compulsory Joinder. — Going to the problem of minimum allowable size (compulsory joinder), the Commission found that the underlying policy consideration here has traditionally been to insure that all "necessary" or "indispensable" parties should be involved in a lawsuit before it proceeds to trial, or certainly before it proceeds to judgment. Necessity and indispensability have always been viewed in this context as involving two aspects: First, necessity from the standpoint of the judicial economy of concluding in one lawsuit the total potential range of the controversy as defined in the pleadings; Second, necessity from the standpoint of avoiding undue practical prejudice to absent parties (notwithstanding they are not legally concluded) by proceeding to trial and judgment without their presence.

There has never been considered to be any corresponding necessity to compel joinder of several causes of action, hence there have not been rules of "compulsory joinder of causes." The res judicata principle of merger by judgment arises at this stage in the form of the rule against "splitting a cause of action." This, in effect, sets the minimum allowable size of a lawsuit, so far as causes of action is concerned, at one such unit. Beyond this there is no compulsion to "join." Thus, the rules of compulsory joinder have always been rules of compulsory joinder of parties. Here, too, the problem has been to draft concretely to express the essentially flexible consideration of "necessity" above summarized. There has always been general agreement that all parties jointly entitled or obligated were "necessary" in the sense compelling their joinder, and this has been the rule from common-law days, through the codes, and under federal practice. Beyond the "jointly interested" or "united in interest" area, however, the directives have had to rely simply on general formulations of necessity in the sense above discussed. There is remarkably little change in phraseology designed to express this essential notion under the federal rule formulation from that under the codes.

Multiple Causes and Parties. — A particularly difficult problem in framing permissive joinder directives is occasioned by the necessity for taking into account the possibility of both multiple causes and parties. As indicated, despite the inextricably two-dimensional nature of the joinder problem where multiple causes and parties are involved, the traditional approach has been to frame the joinder rules as if joinder of parties and causes were two separate and independent problems. Of course, where there is but a single claim (cause of action) the joinder rule directed solely at the party joinder limitations is completely adequate to control the matter. But where separately framed directives are used, they must be interrelated in some fashion in order to take into account the possibility of joinder of both claims and parties in a single suit. This poses a logical difficulty which has actually defied any but artificial solutions in any system which has sought to impose separately conceived limitations on joinder of parties and causes, and then to interrelate these limitations. Thus, one code solution has been (as in North Carolina) to resolve this logical dilemma by adding to the basic limitations on joinder of causes the all inclusive limitation that all causes must affect all parties. This is a possible solution, but it achieves relative certainty (only relative) at the expense of truly valid considerations of maximum permissible lawsuit size. Another approach, much more likely to achieve the desired goals, is to allow unlimited joinder of claims as such, and to impose limitations only in respect of parties, which limitations apply whether there is but a single or multiple causes of action (claims) involved. This is the federal rules approach and it has proven in practice not only to be more certain of application in given cases, but also to allow closer approximation to the true goals of permissive joinder, i.e., to allow as much to be concluded in any lawsuit as is commensurate with orderly handling of issues and fairness to parties not interested in the entire scope of the suit. Here again, ultimate protection against confusion of issues and unfairness can be provided by severance power reposed in the judiciary, and so it is under the federal rules approach.

Comment on Rule 18 as Originally Enacted. — This is an exact tracking of the federal rule. This reflects the view that the joinder conceptions expressed in this rule are much preferable to the code approach as previously incorporated essentially in former §§ 1-123, 1-68 and 1-69.

The first sentence of section (a) starts with the simplest possible situation by stating the basic rule for permissive joinder of claims as between just two parties. This rule is simply for potentially unlimited joinder, without regard to number and nature. If this be thought to open the door to vast confusion by encouraging an unfettered joinder of numerous completely unrelated claims, two things should be remembered. First, as a practical matter, human affairs do not often contrive to give many legal claims to any particular individual against another particular individual at times close enough together to raise even the possibility of their joinder in a single action. Furthermore, to the extent multiple claims do arise close enough in point of time to raise the joinder possibility, they are extremely likely to arise out of the same basic historical occurrences or transactions, thus presenting fair ground for inclusion in one lawsuit. Secondly, if, however, too numerous claims are allowed to be joined in the pleadings in a particular case, this does not mean that they must therefore be tried in the same case. Both Rules 20(b) and 42(b) contain express mandates to sever claims prior to trial for separate trial where orderliness and fairness require this.

The second sentence posits the more complicated situation of multiple parties and multiple claims, and reiterates the basic rule of unlimited joinder of claims in this situation but with the proviso that the limitations on permissive party joinder (as expressed in Rules 19, 20, and 22) are to be observed. As indicated in the General Comment to this bloc of rules, this is a much more preferable way in logic to handle the difficult problem of interrelating limitations on multiple claim and multiple party joinder than is the code way. The party joinder rules impose quite realistic and sufficient restrictions on unfettered joinder of claims here. For where both multiple claims and multiple parties are involved, two unifying factors in respect of the various parties vis-a-vis the various claims must exist to allow the claims to be joined, i.e., (1) all the claims must arise out of the same aggregation of historical facts (same "transaction or occurrence, etc."), and (2) there must be in respect of all parties some common question of law or fact necessarily to be determined in the action. This is a much more easily understandable and applicable restriction than is the vague "all causes must affect all parties" restriction which underlies all other tests for permissive joinder of claims under the former code approach. It also gets more truly at the valid limiting consideration which should control the maximum size, i.e., the avoidance of too numerous historically unrelated issues in a single action wherein not all the parties are interested in the resolution of all the issues.

The third sentence quite logically makes these rules for permissive joinder of claims and of parties and claims applicable to crossclaims and third-party claims when the integral requirements for prosecuting such claims are met.

By contrast with this logically conceived and well-stated directive for permissive joinder of claims in both the single and multiple party situations, the code approach in former § 1-123 was poorly conceived and has led to logically absurd and unjustifiable results. Thus, for example, in a single party context under this statute, A may sue B in one action for breach of two entirely different contracts, since both causes fall within one of the listed categories of joinable claims, Lyon v. Atlantic C.L.R.R., 165 N.C. 143, 81 S.E. 1 (1914); but A may not in one action sue B, his employer, for (1) negligent injury, and (2) wrongful discharge from employment when A refuses to sign a release as to the negligence claim, because the two causes do not fall within any of the listed categories, not even the "same transaction" category. Pressley v. Great Atl. & Pac. Tea Co., 226 N.C. 518, 39 S.E.2d 382 (1946). In the multiple party context the "joker provision" that notwithstanding claims may be otherwise joinable, they may not be joined if all of them do not affect all parties, has given rise to quite unpredictable results from case to case. For example, in Branch Banking & Trust Co. v. Pierce, 195 N.C. 717, 143 S.E. 524 (1928), against the contention that all causes did not affect all parties, plaintiff was allowed to join several claims against various officers and directors of a corporation, alleging mismanagement notwithstanding the alleged several acts extended over a period of years during all of which it did not appear all the defendants were serving; while in Gattis v. Kilgo, 125 N.C. 133, 34 S.E. 246 (1899), A was not allowed to join a cause of action against B for slander with a cause against B and three others for subsequent publication of the same slander, because all causes did not affect all parties. Legitimate considerations of trial convenience were frequently not served by this Code directive. Thus, most typically, while it will prevent A and B from joining in a negligence case against C from injuries received by the same actionable negligence of C, the courts quite frequently consolidate for trial the separate nonjoinable claims of A and B for trial convenience.

Section (b) establishes a rule of permissive joinder, whose obvious import is to avoid the circuity of action necessitated by successive actions if such joinder were not expressly authorized by rule. The effect of this rule is to codify North Carolina case law in respect of the money claim, fraudulent conveyance joinder. Dawson Bank v. Harris, 84 N.C. 206 (1881) (establishing rule consistently followed since).

Comment on 1969 Amendment to Rule 18. — (a) Although Rule 18(a) was rewritten by the 1969 amendment, it appears that together with other rules affecting joinder of claims, especially Rules 13 and 14, a very liberal joinder of claims practice will be permissible. If there are multiple parties, then the parties' rules will have to be consulted.

Legal Periodicals. — For article on legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

CASE NOTES

Rules Not Applicable to Counterclaims. — This rule applies to joinder of claims and remedies and not to counterclaims, which are controlled by G.S. 1A-1, Rule 13. Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974).

Combination of Remedies by Holder of Note. — The holder of a note secured by a deed of trust may sue the makers in personam for the debt and may sue in rem to subject the mortgaged property to the payment of the note, and may combine the two remedies in one civil action. Watson v. Carr, 4 N.C. App. 287, 166 S.E.2d 503 (1969), decided under former § 1-123.

Plaintiff Could Not Proceed in One Action with Petition for Certiorari and Complaint. — Plaintiff's petition for writ of certiorari to review town's decision denying plaintiff's subdivision permit application was improperly joined with her complaint against the town in which she alleged constitutional violations and sought damages, costs, and attorneys' fees pursuant to this section. 326 N.C. 1, 387 S.E.2d 655, cert. denied, 496 U.S. 931, 110 S. Ct. 2631, 110 L. Ed. 2d 651 (1990).

Applied in Wickes Corp. v. Hodge, 7 N.C. App. 529, 172 S.E.2d 890 (1970); Board of Transp. v. Royster, 40 N.C. App. 1, 251 S.E.2d 921 (1979).

Cited in Corum v. University of N.C. ex rel. Bd. of Governors, 330 N.C. 761, 413 S.E.2d 276; Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968); Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993).

Rule 19. Necessary joinder of parties.

(a) *Necessary joinder.* — Subject to the provisions of Rule 23, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of anyone who should have been joined as plaintiff cannot be obtained he may be made a defendant, the reason therefor being stated in the complaint; provided, however, in all cases of joint contracts, a claim may be asserted against all or any number of the persons making such contracts.

(b) *Joinder of parties not united in interest.* — The court may determine any claim before it when it can do so without prejudice to the rights of any party or to the rights of others not before the court; but when a complete determination of such claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action.

(c) *Joinder of parties not united in interest — Names of omitted persons and reasons for nonjoinder to be pleaded.* — In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted. (1967, c. 954, s. 1.)

COMMENT

This rule deals with the problem of the minimum allowable size of a lawsuit, from the standpoint of parties required to be joined in order to proceed to trial. There is no compulsory joinder of causes of action, separately conceived, as noted in the General Comments to this bloc of joinder rules.

As framed, this rule is essentially a recodification of existing and former North Carolina statutes. Specifically, section (a), down to the proviso, is substantially a rewrite of the first sentence of former § 1-70. The introductory phrase, "subject to the provisions of Rule 23," makes the compulsory joinder directive subject to the class-action exception, which is now separately treated in Rule 23. The proviso is substantially a recodification of § 1-72 to carry forward the option to join or not join joint contract obligors plainly stated therein. Section (b) is substantially a tracking of the first sentence of former § 1-73, to express the general notion of "necessary party" based not on substantive jointness of claim but on the more general consideration of fairness and judicial economy of effort developed in the General Comments to this bloc of joinder rules. Adoption of this language involves rejection of the more sophisticated federal rules approach which posits the more refined categories of "indispensable" and "conditionally necessary parties." The code language is retained in the belief that roughly the same functional results are reached under its directive and the case law evolution under it of "proper" and "necessary" parties, and that no sufficiently good purpose would be served by introducing the new and more refined concepts and terminology to justify the risk of confusion from their introduction.

Section (c) is a direct counterpart of federal Rule 19(c). It is adopted because it forces explanation in the first instance of that which may be otherwise extracted by separate and time consuming later motion to require joinder. As such it should save wasted motion and time, if there is an adequate reason, such as unavailability of a party, to explain his nonjoinder in the first place.

Cross References. — For statutory provision similar to the proviso in section (a) of this rule, see G.S. 1-72. As to real parties in interest, see G.S. 1A-1, Rule 17.

Legal Periodicals. — For case law survey as to alternative joinder of parties, see 45 N.C.L. Rev. 838 (1967).

For note, "Civil Procedure — A Definition of 'Class' Under North Carolina Rule 23 — Crow v. Citicorp Acceptance Co.," see 23 Wake Forest L. Rev. 491 (1988).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

This Rule Adopts Prior Case Law Rather Than Federal Rule. — This rule has specifically adopted the prior case law of this jurisdiction concerning proper and necessary parties, rather than the federal rule classifications of "indispensable" and "conditionally necessary" parties. Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279, cert. denied and appeal dismissed, 296 N.C. 740, 254 S.E.2d 181, 254 S.E.2d 182, 254 S.E.2d 183 (1978).

The heart of this rule lies in the proposition that all parties should be joined whose presence is necessary to a complete determination of the controversy. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Sections (a) and (b) of this rule make no substantive change in the rules relating to joinder of parties as they formerly existed. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

This rule makes no change in the categorizing of parties as necessary, proper and formal or in the underlying principles upon which the categories have been based. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

Former G.S. 1-73 Compared. — The enactment of this rule has not changed the essence of law, as found by the courts of this State in cases decided under the former G.S. 1-73. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

A person is "united in interest" with another party when that person's presence is necessary in order for the court to determine a claim without prejudicing the rights of a party before it or the rights of others not before the court. Ludwig v. Hart, 40 N.C. App. 188, 252 S.E.2d 270, cert. denied, 297 N.C. 454, 256 S.E.2d 807 (1979).

Judgment Void for Nonjoinder of Party "United in Interest." — A judgment which is determinative of a claim arising in an action to which one who is "united in interest" with one of the parties has not been joined is void. Ludwig v. Hart, 40 N.C. App. 188, 252 S.E.2d 270, cert. denied, 297 N.C. 454, 256 S.E.2d 807 (1979).

Joinder Required Where Complete Determination Cannot Otherwise Be Had. — When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in. MacPherson v. City of Asheville, 283 N.C. 299, 196 S.E.2d 200 (1973); Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

In a condemnation action brought against a homeowner's association relating to common area property owned by the homeowner's association, the trial court did not err in ordering joinder of each individual record owner of a lot in the townhouse development since those individual owners had an easement of enjoyment in and to the common area at issue. N.C. DOT v. Stagecoach Vill., 174 N.C. App. 825, 622 S.E.2d 142, 2005 N.C. App. LEXIS 2594 (2005), cert. denied, — N.C. —, 630 S.E.2d 929 (2006).

Mandatory Duty of Court. — While the real party in interest provisions of G.S. 1A-1, Rule 17 are for the parties' benefit and may be waived if no objection is raised, the necessary joinder rules of this rule place a mandatory duty on the court to protect its own jurisdiction to enter valid and binding judgments. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

While a party may waive its right to be sued by a real party in interest, this rule requires the court to join as a necessary party any persons "united in interest" and/or any persons without whom a complete determination of the claim cannot be made. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

A sound criterion for deciding whether particular persons must be joined in litigation between others appears in the definition of necessary parties as those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined. Wall v. Sneed, 13 N.C. App. 719, 187 S.E.2d 454 (1972).

Necessary parties must be joined in an action. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971); Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978); Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

Effect of Failure to Join Necessary Parties. — A judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void.

Rice v. Randolph, 96 N.C. App. 112, 384 S.E.2d 295 (1989).

Who Are Necessary Parties. — A necessary party is one who is so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971); Wall v. Sneed, 13 N.C. App. 719, 187 S.E.2d 454 (1972); Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

A person is a necessary party to an action if his interest is such that no decree can be rendered which will not affect him. Wall v. Sneed, 13 N.C. App. 719, 187 S.E.2d 454 (1972).

The term "necessary parties" embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy. Wall v. Sneed, 13 N.C. App. 719, 187 S.E.2d 454 (1972); Rice v. Randolph, 96 N.C. App. 112, 384 S.E.2d 295 (1989).

A necessary party is one whose presence is required for a complete determination of the claim, and whose interest will be directly affected by the outcome of the litigation. Begley v. Employment Sec. Comm'n, 50 N.C. App. 432, 274 S.E.2d 370 (1981); Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983), cert. denied and appeal dismissed, 310 N.C. 476, 312 S.E.2d 882 (1984).

An insurance company is only a necessary party plaintiff when it has compensated the insured for the insured's entire loss. Howard v. Smoky Mt. Enters., Inc., 76 N.C. App. 123, 332 S.E.2d 200 (1985).

When a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property. Upchurch v. Upchurch, 122 N.C. App. 172, 468 S.E.2d 61 (1996), review denied, 343 N.C. 517, 472 S.E.2d 26 (1996).

Corporate owners were not necessary parties to a prior suit against their corporation under G.S. 1A-1-19(a), which certain prospective buyers of a manufactured home had filed against the corporation to recover a deposit that they had paid; thus, res judicata did not bar the buyers' second action against the corporation and the owners, in which the buyers sought to pierce the corporate veil and hold the owners personally liable on the prior judgment. Blair v. Robinson, 178 N.C. App. 357, 631 S.E.2d 217, 2006 N.C. App. LEXIS 1394 (2006).

Lien holders were not necessary parties under G.S. 1A-1, N.C. R. Civ. P. 19 in a county's suit seeking injunctive relief under G.S. § 113A-64.1, as even during a foreclosure suit, lien holders were not necessary parties. Durham County v. Graham, 191 N.C. App. 600, 663 S.E.2d 467, 2008 N.C. App. LEXIS 1505 (2008).

Although under G.S. 113A-64.1, a county had independent statutory authority to require the operators of a landfill to fix any excess disturbances they might have caused, and under G.S. 113A-64.1, the county's suit seeking injunctive relief did not require the inclusion of any other party besides the operators, a lender that currently owned the property was a necessary party under G.S. 1A-1, N.C. R. Civ. P. 19 as if the lender was not joined as a party, its right to determine the legal use of its property might be abrogated. Durham County v. Graham, 191 N.C. App. 600, 663 S.E.2d 467, 2008 N.C. App. LEXIS 1505 (2008).

City was not a necessary party under G.S. 1A-1, N.C. R. Civ. P. 19 in a county's suit seeking injunctive relief under G.S. § 113A-64.1, even though the operators of a landfill would have to petition the City for a zoning grant to comply with an injunction, as if the City denied such a petition, the operators could then argue before the trial court that they were unable to comply; the City had no interest in the property, although it might later become an interested party. Durham County v. Graham, 191 N.C. App. 600, 663 S.E.2d 467, 2008 N.C. App. LEXIS 1505 (2008).

Husband of the mother of a child born during the parties' marriage is presumed to be the father of that child and, thus, enjoys all the parental rights and privileges, as well as obligations, to that child. A determination that a petitioner in a legitimation action, and not the husband, is the biological father of the child terminates the husband's rights to the child, conferring them onto petitioner pursuant to G.S. 49-11; thus, unless the husband has previously been determined not to be the child's father, he is a necessary party to the proceeding pursuant to G.S. 1A-1, N.C. R. Civ. P. 19(b). In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

Who Are Proper Parties. — A proper party is one whose interest may be affected by a decree, but whose presence is not essential in order for the court to adjudicate the rights of others. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

Proper Parties May Be Joined. — However, whether proper parties will be ordered joined rests within the sound discretion of the trial court. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971); Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978); Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

Sisters, although united in interest with their brother in trust estate, were proper, not necessary, parties and did not have to be joined in his claim against decedent's estate for his alleged breach of his fiduciary duty as trustee. Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326, cert. denied, 340 N.C. 261, 456 S.E.2d 833 (1995).

Court Should Correct Defect of Parties by Own Motion. — In the absence of a proper motion by a competent person, a defect of the parties should be corrected by ruling of the court ex mero motu. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action. Any such defect should be corrected by the trial court ex mero motu in the absence of a proper motion by a competent person. White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983).

Since a judgment without necessary joinder is void, a trial court should, on its own motion, order a continuance to provide a reasonable time for necessary parties to be joined. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Discretion of Court in Making Parties. — When not regulated by statute, the procedural processes which will best promote the administration of justice are left to the judicial discretion of the trial judge. He has plenary power with respect to those who ought to be made parties to facilitate the administration of justice. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

Absence of the real party in interest did not constitute a "fatal defect" where the opposing party failed to show real prejudice in not having had the real party joined at the original trial. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

Absence of necessary parties does not merit a nonsuit. Instead, the court should order a continuance so as to provide a reasonable time for them to be brought in and plead. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

Absence of necessary party does not merit dismissal. The absence of a necessary party under this rule does not merit dismissal of the action. City of Albemarle v. Security Bank and Trust Co., 106 N.C. App. 75, 415 S.E.2d 96 (1992).

But Proceedings Should Cease Until Necessary Parties Are Present. — Where a fatal defect of the parties is disclosed, the court should refuse to deal with the merits of the case until the absent parties are brought into the action. Booker v. Everhart, 294 N.C. 146, 240 S.E.2d 360 (1978).

Procedure upon Motion to Dismiss Under G.S. 1A-1, Rule 12(b)(7). — When faced with a motion to dismiss under G.S. 1A-1, Rule 12(b)(7) for failure to join a necessary party, the court will decide if the absent party should be joined as a party. If it decides in the affirmative, the court will order him brought into the action. However, if the absentee cannot be joined, the court must then determine, by balancing the guiding factors set forth in section (b) of this rule, whether to proceed without him or to dismiss the action. A dismissal under G.S. 1A-1, Rule 12(b)(7) is not considered to be on the merits and is without prejudice. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

Necessary Parties in Divorce Action. — There are but two necessary parties to an action for divorce: husband and wife. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Children Are Not Proper Parties in Divorce Action. — Where there are children born to a marriage, it is neither proper nor necessary for them to be made parties to an action for divorce between their parents. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Necessary Parties in Action to Set Aside Divorce Decree After Spouse's Death. — The only necessary parties in an action to set aside an absolute divorce decree after the husband's death are the surviving spouse and the personal representative of the deceased spouse. Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Father and brother of decedent's ex-wife were not necessary parties in a dispute between decedent's new wife and his ex-wife involving a settlement agreement clause which allowed the ex-wife, her father and her brother the option of purchasing certain property if the ex-husband failed to bequeath it to his wife or children; while they certainly had interests in the outcome, their interests were "not of such a nature as to render it impossible for the court to finally adjudicate the question [presented]." Williamson v. Bullington, 139 N.C. App. 571, 534 S.E.2d 254, 2000 N.C. App. LEXIS 987 (2000), aff'd, 353 N.C. 363, 544 S.E.2d 221 (2001).

Husband of plaintiff in paternity suit was not a necessary party where a court had previously determined that he was not the father. Only the interests of the defendant, the alleged father, would be directly affected by the outcome of the litigation. Lombroia v. Peek, 107 N.C. App. 745, 421 S.E.2d 784 (1992).

Presumed Father in Paternity Action. — When a putative father sought custody of the child he believed he had fathered, he was required, under G.S. 1A-1, N.C. R. Civ. P. 19(b), to give notice to the husband of the child's mother, who was the child's presumed father, and, therefore, a necessary party. Smith v. Barbour, 154 N.C. App. 402, 571 S.E.2d 872, 2002 N.C. App. LEXIS 1450 (2002), cert. denied, — N.C. —, 599 S.E.2d 408 (2004).

In an action to recover for breach of trust by defendants as directors of a corporation, the corporation was not a necessary party plaintiff, since plaintiff, in claiming that a portion of proceeds from sale of stock had been earmarked to repay her for a loan to the corporation, claimed an injury peculiar or personal to herself and did not claim injury to the corporation. Snyder v. Freeman, 300 N.C. 204, 266 S.E.2d 593 (1980).

Suit by Beneficiary of Contract. — A party to a contract is ordinarily not a necessary party in a suit brought against the other contracting party by a beneficiary who claims the contract has been breached. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

Trustee and Note Holder Necessary Parties in Inverse Condemnation Action. — In an inverse condemnation action, alleged diminution in market value of the property made trustee and holder of the note secured by the deed of trust on that property persons united in interest with the owners, whose presence was necessary for a determination of the claim without prejudice to their rights. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

Necessary Parties in Adjacent Landowners' Action. — In a private nuisance action alleging that the separate development of the lands owned by adjacent landowners together caused flooding damages, this claim could not be fully adjudicated without the addition of one of these landowners; thus, it was a necessary party. Bjornsson v. Mize, 75 N.C. App. 289, 330 S.E.2d 520, cert. denied, 314 N.C. 537, 335 S.E.2d 13 (1985).

Action to Enjoin Demolition of Adjacent Structures. — Pursuant to this rule, nonparty property owners were required to be joined in an action, brought by others in their subdivision, to enjoin defendants from demolishing three residential and historic structures adjacent to plaintiffs' properties; defendants' change-of-circumstances affirmative defense had the potential to result in the invalidation of restrictive covenant requiring residential use of property in the subdivision. Karner v. Roy White Flowers, Inc., 351 N.C. 433, 527 S.E.2d 40, 2000 N.C. LEXIS 232 (2000).

A dispute as to the extinguishment of a subdivision easement by abandonment or adverse possession could not be resolved without the joinder of the grantor or his heirs, who retained fee title to the soil, and the record owners of lots in the subdivision, who had user rights in the easement. Rice v. Randolph, 96 N.C. App. 112, 384 S.E.2d 295 (1989).

Dispute As To Restrictive Covenants In A Development. — In a recreational amenity owner's action to collect amenity fees from homeowners' associations in a development, all property owners in the development were not necessary parties within the meaning of N.C. R. Civ. P. 19(a) because only the owner could enforce the covenant to pay an amenity fee, and the extinguishment of the restrictive covenant would not deprive the other property owners of any property right. Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, 187 N.C. App. 22, 652 S.E.2d 378, 2007 N.C. App. LEXIS 2269 (2007).

Insurer as Necessary Party. — Where whether or not insurer's legal title to plaintiff's claims was partial or complete, insurer clearly acquired some enforceable legal interest in the subject matter of the action by virtue of assignment provided by subrogation receipt, given insurer's interest in all of plaintiff's claims, a determination of such claims would necessarily prejudice insurer's interests in them, and insurer was therefore a necessary party under this rule. J & B Slurry Seal Co. v. Mid-South Aviation, Inc., 88 N.C. App. 1, 362 S.E.2d 812 (1987).

Insured as Necessary Party Where Certain Claims Not Reimbursed by Insurer. — In action for breach of warranty against encumbrances arising out of the mislocation of a septic tank, initially brought by grantee of residential property who was insured under a title insurance policy issued by company, in which insured-grantee sought funds which he forfeited when his loan could not be refinanced, the extra interest paid and to be paid on his current loan, incident to breach, as well as the expense to relocate the septic tank on his property, substitution of insurance company for insured-grantee as party-plaintiff was error necessitating remand to the trial court for joinder of necessary parties, where insured-grantee had been reimbursed by company only for expenses incurred to relocate the septic tank, as since the record did not reveal that insured-grantee released or otherwise dismissed his claims for forfeited funds and extra interest, insured-grantee was a necessary party to the action. Commonwealth Land Title Ins. Co. v. Stephenson, 97 N.C. App. 123, 387 S.E.2d 77 (1990), aff'd, 101 N.C. 379, 399 S.E.2d 380 (1990).

Since plaintiff's claim for loss of consortium derived from his wife's cause of action for her personal injuries, plaintiff was united in interest with his spouse and thus a necessary party to her action. The court, therefore, erred in denying plaintiff's motion to join his loss of consortium claim with his wife's action and in dismissing his claim for loss of consortium on the ground that it was not joined with his wife's action. Mrosla v. Feldman, 90 N.C. App. 261, 368 S.E.2d 39 (1988).

Lessor, Rather Than Assignee of Lease, Held to Be Real Party in Interest in Action

Against Lessees. — Language of an assignment of a lease clearly established that lessor assigned only the right to rent payments, and plaintiff retained all other rights under the lease, including right to enforce lessees' tax obligation under lease; thus, the lessor was a real party in interest in action against lessees who defaulted under lease. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Since assignee of lease received no right in the assignment to collect taxes from lessees, assignee's presence in the case brought by assignor/lessor against lessee for failure to pay taxes under lease was not necessary for a complete determination, and any judgment entered could not prejudice either assignees or the lessees. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Applied in N.C. Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971); Munchak Corp. v. Caldwell, 25 N.C. App. 652, 214 S.E.2d 194 (1975); Meachem v. Boyce, 35 N.C. App. 506, 241 S.E.2d 880 (1978); Behr v. Behr, 46 N.C. App. 694, 266 S.E.2d 393 (1980); Board of Light & Water Comm'rs v. Parkwood San. Dist., 49 N.C. App. 421, 271 S.E.2d 402 (1980); Begley v. Employment Sec. Comm'n, 50 N.C. App. 432, 274 S.E.2d 370 (1981); G & S Bus. Servs., Inc. v. Fast Fare, Inc., 94 N.C. App. 483, 380 S.E.2d 792 (1989); Booher v. Frue, 98 N.C. App. 585, 392 S.E.2d 105 (1990); Stokes v. Southeast Hotel Properties, Ltd., 877 F. Supp. 986 (W.D.N.C. 1994).

Cited in Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968); T.A. Loving Co. v. Latham, 15 N.C. App. 441, 190 S.E.2d 248 (1972); Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972); State v. Hines, 19 N.C. App. 87, 197 S.E.2d 893 (1973); Presnell v. Trollinger Inv. Co., 20 N.C. App. 722, 202 S.E.2d 493 (1974); Bowman v. Town of Granite Falls, 21 N.C. App. 333, 204 S.E.2d 239 (1974); Drury v. Drury, 24 N.C. App. 246, 210 S.E.2d 282 (1974); Riggs v. R.G. Foster & Co., 24 N.C. App. 377, 210 S.E.2d 525 (1975); Northwestern Bank v. Robertson, 25 N.C. App. 424, 213 S.E.2d 363 (1975); Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977); Cox v. Haworth, 304 N.C. 571, 284 S.E.2d 322 (1981); State ex rel. Utils. Comm'n v. Nantahala Power & Light Co., 314 N.C. 246, 333 S.E.2d 217 (1985); Britt v. Britt, 82 N.C. App. 303, 346 S.E.2d 259 (1986); City of Raleigh v. College Campus Apts., Inc., 94 N.C. App. 280, 380 S.E.2d 163 (1989); Booher v. Frue, 98 N.C. App. 570, 394 S.E.2d 816 (1990); Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993); West ex rel. Farris v. Tilley, 120 N.C. App. 145, 461 S.E.2d 1 (1995); Anderson ex rel. Jerome v. Town of Andrews, 133 N.C. App. 185, 515 S.E.2d 55 (1999); Energy Investors Fund, L.P. v. Metric Constructors, Inc., 351 N.C. 331, 525 S.E.2d 441, 2000 N.C. LEXIS 129 (2000); Pierce v. Johnson, 154 N.C. App. 34, 571 S.E.2d 661, 2002 N.C. App. LEXIS 1406 (2002); Moquin v. Hedrick, 163 N.C. App. 345, 593 S.E.2d 435, 2004 N.C. App. LEXIS 372 (2004); Bridges v. Oates, 167 N.C. App. 459, 605 S.E.2d 685, 2004 N.C. App. LEXIS 2335 (2004); Page v. Bald Head Ass'n, 170 N.C. App. 151, 611 S.E.2d 463, 2005 N.C. App. LEXIS 890 (2005).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — *The cases cited below were decided under former G.S. 1-70, 1-73 and 1-123.*

Intent of Former G.S. 1-73. — Former G.S. 1-73 contemplated that all persons necessary to a complete determination of the controversy, the matter in litigation, and affected by the same in some way, as between the original parties to the action, could in some instances be made parties plaintiff or defendant and in others had to be made parties. But it did not imply that any person who might have a cause of action against the plaintiff alone, or a cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, could or had to be made a party. It did not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party, or the defendant and a third party, in the same action. It was only when, as between the original parties litigant, other parties were material or interested, that it was proper to make them parties. McDonald v. Morris, 89 N.C. 99 (1883); Moore v. Massengill, 227 N.C. 244, 41 S.E.2d 655 (1947).

Who Are Necessary Parties. — Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. Pickelsimer v. Pickelsimer, 255 N.C. 408, 121 S.E.2d 586 (1961).

A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. Garrett v. Rose, 236 N.C. 299, 72 S.E.2d 843 (1952); Manning v. Hart, 255 N.C. 368, 121 S.E.2d 721 (1961); Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968); Maryland Cas. Co. v. Hall, 2 N.C. App. 198, 162 S.E.2d 691 (1968).

Persons in interest are necessary parties to a final adjudication. Meadows v. Marsh, 123 N.C. 189, 31 S.E. 476 (1898).

As to persons held necessary or unnecessary parties, see Browning v. Pratt, 17 N.C. 44 (1831); Harris v. Bryant, 83 N.C. 568 (1880); Peacock v. Harris, 85 N.C. 146 (1881); Dawkins

v. Dawkins, 93 N.C. 283 (1885).

Joinder of Necessary Parties Mandatory. — Provision of former G.S. 1-73 that the court must cause necessary parties to be brought in was mandatory, and contemplated only the making of necessary parties. Simon v. Raleigh City Bd. of Educ., 258 N.C. 381, 128 S.E.2d 785 (1963).

Former G.S. 1-73 made it mandatory when a complete determination of the controversy could not be made without the presence of other parties for these others to be made parties to the action. They were necessary parties. Overton v. Tarkington, 249 N.C. 340, 106 S.E.2d 717 (1959); Maryland Cas. Co. v. Hall, 2 N.C. App. 198, 162 S.E.2d 691 (1968).

When Additional Parties Must Be Brought in. — When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in. W.F. Kornegay & Co. v. Farmers & Merchants' Steamboat Co., 107 N.C. 115, 12 S.E. 123 (1890); Maxwell v. Barringer, 110 N.C. 76, 14 S.E. 516 (1892); Parton v. Allison, 111 N.C. 429, 16 S.E. 415 (1892); Burnett v. Lyman, 141 N.C. 500, 54 S.E. 412 (1906), appeal dismissed, 146 N.C. 597, 59 S.E. 877 (1907); McKeel v. Holloman, 163 N.C. 132, 79 S.E. 445 (1913); Barbee v. Cannady, 191 N.C. 529, 132 S.E. 572 (1926); Fry v. Pomona Mills, 206 N.C. 768, 175 S.E. 156 (1934).

When a complete determination of a controversy cannot be made without the presence of a party, the court must cause such party to be brought in, because such party is a necessary party and has an absolute right to intervene in a pending action. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

It is the duty of the court to bring in all parties necessary to a complete determination of the controversy. State ex rel. Jones v. Griggs, 219 N.C. 700, 14 S.E.2d 836 (1941).

Necessity of Bringing in Additional Parties Must Clearly Appear. — An order to bring additional parties into an action will not be granted until the necessity for making them parties clearly appears. Lee v. Eure, 92 N.C. 283 (1885).

Consent of the Parties. — Unless by consent of the parties, only such new parties may regularly be admitted, by amendment, to the action as are necessary to its proper determination; but where defendants do not object to such amendment introducing new plaintiffs, their assent is to be taken as implied. Richards v. Smith, 98 N.C. 509, 4 S.E. 625 (1887).

Requisite Interest of New Party. — To entitle one to the benefits of provision allowing new parties to be brought in, such additional party must have a legal interest in the subject matter of the litigation, and the interest of a new party must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment. Griffin & Vose, Inc. v. Non-Metallic Minerals Corp., 225 N.C. 434, 35 S.E.2d 247 (1945).

Discretionary Power of Court. — As a general rule the trial court has the discretionary power to make new parties, especially when necessary in order that there may be a full and final determination and adjudication of all matters involved in controversy. Service Fire Ins. Co. v. Horton Motor Lines, 225 N.C. 588, 35 S.E.2d 879 (1945).

The fact that plaintiff alone, without joinder of the owner, could not maintain his action did not limit the discretionary power of the judge. Service Fire Ins. Co. v. Horton Motor Lines, 225 N.C. 588, 35 S.E.2d 879 (1945).

As to review of decision, see Merrill v. Merrill, 92 N.C. 657 (1885).

Person Refusing to Join as Plaintiff May Be Made Defendant. Hardy v. Miles, 91 N.C. 131 (1884); Wilson v. Pearson, 102 N.C. 290, 9 S.E. 707 (1889); Elliott v. Brady, 172 N.C. 828, 90 S.E. 951 (1916).

But Must Be Served with Summons. Plemmons v. Southern Imp. Co., 108 N.C. 614, 13 S.E. 188 (1891).

A judgment that determines points of law adverse to a person is not sufficient grounds for making him defendant. Clark v. W.R. Bonsal & Co., 157 N.C. 270, 72 S.E. 954 (1911).

The term "proper party" means a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be affected by a decree or judgment which does complete justice between the other parties. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

Defect of Parties. — A defect of parties occurs when there has been a failure to join either a plaintiff or a defendant whose presence in the suit is necessary to give the court jurisdiction and authority to decide the controversy. When such a defect appears from the complaint itself, it is a ground for demurrer and a fatal defect unless the necessary party is brought in. Miller v. Jones, 268 N.C. 568, 151 S.E.2d 23 (1966).

Continuance for Bringing in Necessary Parties. — If other parties are necessary to a final determination of the cause, the court should order a continuance to provide a reasonable time for them to be brought in and to plead. Plemmons v. Cutshall, 230 N.C. 595, 55 S.E.2d 74 (1949).

Right of Tenant in Common to Sue Alone. — One tenant in common may sue without joining his cotenants for the recovery of possession of common property. Thames v. Jones, 97 N.C. 121, 1 S.E. 692 (1887). See also, Wilson v. Arentz, 70 N.C. 670 (1874).

Unconnected Parties Defendant with

Common Interest. — Several persons, although unconnected with each other, may be made defendants if they have a common interest centering in the point in issue in the cause. Virginia-Carolina Chem. Co. v. Floyd, 158 N.C. 455, 74 S.E. 465 (1912).

Party Unheard of for Years. — Where a person concerned in interest is stated in the bill to have moved away and to have not been heard of for many years, so that he cannot be served with process, that is a good reason as between third parties for not making him a party; and the court will proceed to a hearing notwithstanding. Ingram v. Lanier, 2 N.C. 221 (1795).

Insolvency of Defendant. — Mere insolvency of a defendant cannot alone determine the right of a plaintiff to join him with others in a tort action if he is liable, since the test is in the validity of the cause of action and the good faith of the plaintiff in making the joinder, and insolvency does not destroy the remedy, but merely affects the prospects of collection. Hough v. Southern Ry., 144 N.C. 692, 57 S.E. 469 (1907).

Where there was an allegation of mutual mistake of the common grantor of plaintiff and defendant, and of plaintiff and defendant as grantees in deeds simultaneously executed and delivered to them by said grantor, it was held proper for the court to make the grantor a party defendant. Smith v. Johnson, 209 N.C. 729, 184 S.E. 486 (1936).

In action by purchaser against real estate brokers to recover earnest money paid, wherein the seller was a necessary party to a complete determination of the controversy, denial of motion for his joinder as additional party defendant was held reversible error. Lampros v. Chipley, 228 N.C. 236, 45 S.E.2d 126 (1947).

Real Owners as Parties in Action Between Lessor and Lessee. — Where lessors sued lessees for rent, and the latter showed, as a counterclaim, that the lessors had no right to make the lease, and that the real owners thereof had brought suit against one of the lessees, and would recover damages for its use during such lease, the persons claiming as real owners should have been made parties to the action. McKesson v. Mendenhall, 64 N.C. 286 (1870).

Action to Set Aside Deed to Purchaser of Tax Sale Certificate. — In an action to set aside a deed to a purchaser at a foreclosure of a tax sale certificate, the purchaser at the sale, the owners of the property and all persons having any interest in the property should be made parties for a complete determination of the controversy. County of Buncombe v. Penland, 206 N.C. 299, 173 S.E. 609 (1934).

Where plaintiff claims under a voluntary conveyance made by cestui que trust, he cannot, in any form of action, obtain legal title and possession until the trustee is made a party. Matthews v. McPherson, 65 N.C. 189 (1871).

Several parties may have a cause of action which arises out of the same motor vehicle collision, but that does not mean necessarily that all of them are required to litigate their respective rights or causes of action in one and the same action. Manning v. Hart, 255 N.C. 368, 121 S.E.2d 721 (1961); Maryland Cas. Co. v. Hall, 2 N.C. App. 198, 162 S.E.2d 691 (1968).

Claim for unpaid wages due an employee can be joined in one action with similar claims assigned to him, and if the claims are assigned to joint assignees, all assignees must be parties and recover in their joint right. Morton v. Thornton, 257 N.C. 259, 125 S.E.2d 464 (1962).

Personal Representatives as Necessary Parties in Ejectment Action. — Where in an action of ejectment the controversy involved was whether the plaintiff owned the land in fee simple absolute, or whether the defendant owned the land in fee simple, subject to a charge payable in equal shares to the plaintiff and personal representatives of six decedents, the personal representatives of these six decedents were so vitally interested in this controversy that a valid judgment could not be rendered in the action completely and finally determining the controversy without their presence as parties. This being true, they were necessary parties to the action. Garrett v. Rose, 236 N.C. 299, 72 S.E.2d 843 (1952).

Trustee as Necessary Party in Foreclosure Action. — In an action for foreclosure, the trustee in the deed of trust is a necessary and indispensable party. Watson v. Carr, 4 N.C. App. 287, 166 S.E.2d 503 (1969).

Where a note secured by a deed of trust is payable to joint payees, they must join as parties in an action to foreclose the deed of trust, and when one of them refuses to join as a plaintiff, such payee is properly joined as a defendant. Underwood v. Otwell, 269 N.C. 571, 153 S.E.2d 40 (1967).

Suit by Joint Holders of Bill or Note. — Where a bill or note is made payable to several persons, or is endorsed or assigned to several, they are joint holders and must sue jointly as such. Underwood v. Otwell, 269 N.C. 571, 153 S.E.2d 40 (1967).

Where owner sued contractor for breach of contract and contractor sought to have subcontractor joined as a party defendant, former G.S. 1-73, permitting joint tortfeasors to be brought in for enforcing contribution, was inapplicable. Gaither Corp. v. Skinner, 238 N.C. 254, 77 S.E.2d 659 (1953).

If, prior to institution of plaintiff's action, defendant could have sued either the plaintiff, the other party, or both, there is no reason why the defendant would be required to join the other party as a codefendant to its cause of action on a counterclaim against plaintiff. Bullard v. Berry Coal & Oil Co., 254 N.C. 756, 119 S.E.2d 910 (1961).

Rule 20. Permissive joinder of parties.

(a) *Permissive joinder.* — All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) *Separate trial.* — The court shall make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and shall order separate trials or make other orders to prevent delay or prejudice. (1967, c. 954, s. 1; 1973, c. 75.)

COMMENT

This is an exact counterpart of federal Rule 20, and was proposed because it was felt, as developed in the General Comment to this bloc of rules, that the federal approach to permissive joinder is a much more serviceable one than was the code approach.

As pointed out in that Comment, the only limitations in respect of joinder in the federal approach are those related literally to party joinder. These limitations contemplate both single claim actions and multiple claim actions. In the multiple party-multiple claim action they are related by reference as limitations on claim joinder, as indicated in the Comment to Rule 18.

The rule is designed generally to express the notion that the limiting factors which control maximum lawsuit size in either single claim or multiple claim (by referring party joinder limitations to the claim joinder rule) litigation are (1) that the right to relief asserted by or against each party joined in the action should arise generally out of the same general aggregation of historical facts, and (2) furthermore, that in respect of all parties joined there must be involved for necessary determination in the lawsuit as structured a common question of law or fact. Beyond these limitations designed to keep the issues within bounds of fairness to parties and orderliness of handling, there is no requirement that every party must be affected by, or interested in, all the relief sought in the total action. And it is made plain, in furtherance of this notion, that the judgment entered in lawsuits involving multiple similarly aligned parties may be conformed to the possibility that not all parties are interested in all the relief to be given.

Section (b) provides the final safeguard against dangerous oversize and complexity through joinder by laying down a specific mandate for severance or such other orders as will protect parties in multiple party cases from unfairness resulting from their lack of interest or involvement in every facet of the case as permitted to be structured by the joinder rules.

Legal Periodicals. — For article on permissive joinder of parties and causes, see 34 N.C.L. Rev. 405 (1956).

For note on alternative joinder of defendants, see 42 N.C.L. Rev. 242 (1963).

For case law survey as to alternative joinder of parties, see 45 N.C.L. Rev. 838 (1967).

For survey of 1979 law on evidence, see 58 N.C.L. Rev. 1456 (1980).

CASE NOTES

I. In General.
II. Permissive Joinder.
III. Separate Trials.
IV. Decisions under Prior Law.

I. IN GENERAL.

Fed. R. Civ. P. 20(a) has a close counterpart in N.C. R. Civ. P. 20(a). — Under Fed. R. Civ. P. 20(a), which has a close counterpart in N.C. R. Civ. P. 20(a), the issue of proper joinder is examined on a case-by-case basis, keeping in mind the rule's purpose, which is to promote trial convenience, to expedite the final determination of disputes, and to prevent multiple lawsuits; even if a non-diverse defendant is not absolutely essential to the resolution of a plaintiff's claim, the other defendants do not have the right to demand his dismissal. Guider v. Hertz Corp., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 12364 (M.D.N.C. June 28, 2004).

Power of Judge to Refuse to Allocate Damages. — The trial court did not abuse its discretion in refusing to allow the defendants to amend the judgment, allocating the damages among defendants, where the evidence at trial tended to show: (1) that plaintiff worked for all three defendants at some point over the course of the year in question; (2) that the sole or major owner of all three entities was the same person; and (3) that all three entities, therefore, owed the plaintiff some portion of the disputed commissions. Fulk v. Piedmont Music Ctr., 138 N.C. App. 425, 531 S.E.2d 476 (2000).

Applied in Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972); Coffey v. Coffey, 94 N.C. App. 717, 381 S.E.2d 467 (1989); Oxendine v. Bowers, 100 N.C. App. 712, 398 S.E.2d 57 (1990); Triangle Park Chiropractic v. Battaglia, 139 N.C. App. 201, 532 S.E.2d 833, 2000 N.C. App. LEXIS 814 (2000); Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

Cited in Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968); First-Citizens Bank & Trust Co. v. Carr, 10 N.C. App. 610, 179 S.E.2d 838 (1971); Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972); Presnell v. Trollinger Inv. Co., 20 N.C. App. 722, 202 S.E.2d 493 (1974); Cox v. Haworth, 304 N.C. 571, 284 S.E.2d 322 (1981); Whichard v. Oliver, 56 N.C. App. 219, 287 S.E.2d 461 (1982); Akzona, Inc. v. American Credit Indem. Co., 71 N.C. App. 498, 322 S.E.2d 623 (1984); Mrosla v. Feldman, 90 N.C. App. 261, 368 S.E.2d 39 (1988); Swain v. Leahy, 111 N.C. App. 884, 433 S.E.2d 460 (1993); Moquin v. Hedrick, 163 N.C. App. 345, 593 S.E.2d 435, 2004 N.C. App. LEXIS 372 (2004).

II. PERMISSIVE JOINDER.

Purpose of Alternative Joinder Provisions. — The alternative joinder provisions of this rule were drafted for the express purpose of allowing a plaintiff who is faced with uncertainty as to the cause of her injuries to present her alternative theories to a jury, which must then decide from the evidence whether liability exists and if so which of the two or more defendants joined is liable to the plaintiff. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Alternative claims may be joined under section (a) of this rule if two tests are met. First, each claim must arise out of the same transaction, the same occurrence, or a series of either. The second test is that each claim must contain a question of law or fact, which will arise, common to all parties. Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

The practical occasion for alternative joinder is that created by uncertainty as to which of several parties is entitled to recover or is liable. Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

When Need for Joinder of Defendants in Alternative Arises. — The need for joinder of defendants in the alternative most often arises when the substance of plaintiff's claim indicates that he is entitled to relief from someone, but he does not know which of two or more defendants is liable under the circumstances set forth in the complaint. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Alternative Fact Allegations Not Admissions. — Alternative fact allegations made in good faith and based on genuine doubt are not admissions against interest so as to be admissible in evidence against the pleader. The pleader states the facts in the alternative because he is uncertain as to the true facts, and he is not "admitting" anything other than his uncertainty. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Right to Present Evidence and Submit Alternative Claims to Jury. — A plaintiff who pleads claims in the alternative against two or more defendants when she is uncertain as to the true facts but believes she is entitled to recover from at least one of the defendants is entitled to present evidence at trial to support both claims, and if she does, to submit both claims to the jury for decision. Woods v. Smith,

297 N.C. 363, 255 S.E.2d 174 (1979).

As to effect of one defendant's admission where negligence of other defendant is imputed to plaintiff, see Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Joining Insurance Company Which Has Partially Paid Loss. — It is not error to join, as a proper party plaintiff to the action, an insurance company which has partially paid the insured for the insured's loss, but the insurance company's presence in the action is not required. Howard v. Smoky Mt. Enters., Inc., 76 N.C. App. 123, 332 S.E.2d 200 (1985).

Slander. — In general, slander is an individual tort, and two or more persons each uttering slander against the same individual may not be held jointly liable in the absence of a conspiracy between or among them. However, although defendants, who were not alleged to have conspired, could not be held jointly liable, plaintiff was not precluded from pursuing his claims against both defendants in the same civil action. Shuping v. Barber, 89 N.C. App. 242, 365 S.E.2d 712 (1988).

Corporate employee was not misjoined in an action brought against his corporate employer. — Corporate employee, who was sued for slander per se, was not misjoined in an action brought against his corporate employer because the resolution of a breach of contract claim against the employer might involve the factual issues upon which the slander claim was based and the employer might be held vicariously liable if the employee's statements were determined to be defamatory, not privileged, and made within the scope of his employment. Guider v. Hertz Corp., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 12364 (M.D.N.C. June 28, 2004).

III. SEPARATE TRIALS.

Power of Judge to Order Separate Trials. — Section (b) of this rule authorizes the judge to order separate trials or make other orders to prevent a party from being embarrassed, delayed, or put to expense by the joinder of a party. This may be done on motion of either party, and the decision whether to do so rests in the discretion of the trial judge. Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

Although the basic philosophy of the party joinder provisions is to allow relatively unrestricted initial joinder, there are provisions in section (b) of this rule and in G.S. 1A-1, Rule 42(b) for the trial judge to sever and order separate trials. Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972); Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646, cert. denied, 300 N.C. 379, 267 S.E.2d 685 (1980), overruled on other grounds, 302 N.C. 539, 276 S.E.2d 397 (1981).

G.S. 1A-1, Rule 42(b) Confers Same Power Contemplated by Section (b). — G.S. 1A-1, Rule 42(b), which gives to the trial judge general power to sever, confers the same power contemplated by section (b) of this rule. Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

Whether or not there should be severance rests in the sound discretion of the trial judge. Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

IV. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-68, 1-69, 1-70 and 1-73.*

Basic Joinder Concept. — The code of civil procedure was bottomed on the basic concept that a court ought to bring before it as parties in a particular action all persons who might have interests either by way of rights or by way of liabilities in the subject matter of the action, so that a single judgment might be rendered effectually determining all such rights and liabilities for the protection of all concerned. Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952).

Object of former G.S. 1-68 was to permit all persons who came within its terms to unite as parties plaintiff, so that a single judgment might be rendered completely determining the controversy for the protection of all concerned. Hall v. DeWeld Mica Corp., 244 N.C. 182, 93 S.E.2d 56 (1956); Whitehead v. Margel, 220 F. Supp. 933 (W.D.N.C. 1963).

Plaintiffs' Interests Need Not Be Identical. — The fact that the interests of plaintiffs are legally severable, or not common or identical, is no bar to their joinder where they have a common interest in the subject of the action and the relief sought. Wilson v. Horton Motor Lines, 207 N.C. 263, 176 S.E. 750 (1934); Peed v. Burleson's, Inc., 242 N.C. 628, 89 S.E.2d 256 (1955).

But Their Interests Must Be Consistent. — While it is not necessary that all parties plaintiff have the identity of interest required by the common law, it is necessary that their interests be consistent. Burton v. City of Reidsville, 240 N.C. 577, 83 S.E.2d 651 (1954).

Two or more plaintiffs representing opposing interests with reference to the main purpose of the action may not be joined. Burton v. City of Reidsville, 240 N.C. 577, 83 S.E.2d 651 (1954).

Joinder of Proper Parties Within Discretion of Court. — Proper parties are those whose interest might be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the court. Pickelsimer v. Pickelsimer, 255 N.C. 408, 121 S.E.2d 586 (1961).

Joinder of Parties in Alternative. — Where defendant is liable to one or two parties in the alternative, so that if he is liable to one he is not liable to the other, and defendant is not sure to which of the parties liability obtains, he is entitled to join both as plaintiffs. American Air Filter Co. v. Robb, 267 N.C. 583, 148 S.E.2d 580 (1966).

Joinder of defendants in the alternative is permitted where there is but one cause of action. For instance, if A wishes to sue B, the driver of a motor vehicle, and his employer for B's negligence, but is uncertain whether C or D was the principal, he may join them both as defendants in the alternative. Conger v. Travelers Ins. Co., 260 N.C. 112, 131 S.E.2d 889 (1963).

Where the wrongful acts of two or more persons concur in producing a single injury, with or without concert between them, they may be treated as joint tort-feasors and, as a rule, sued separately or together at the election of plaintiffs. Chumley v. Great Atl. & Pac. Tea Co., 191 F. Supp. 254 (M.D.N.C. 1961), citing Raulf v. Elizabeth City Light & Power Co., 176 N.C. 691, 97 S.E. 236 (1918).

In an action by a partner for the dissolution of the partnership and for proper application of the partnership assets, plaintiff partner may join as a defendant the transferee of the defendant partner, upon allegation that the transfer was wrongful, in order to have the entire controversy settled in one action, and plaintiff is not compelled first to bring an action to establish the fact of the existence of the partnership and then another action for an accounting. Bright v. Williams, 245 N.C. 648, 97 S.E.2d 247 (1957).

Attack on Note Payable to Bearer. — Where trustee in deed of trust which purported to secure payment of note payable to bearer was a party to action brought by plaintiff to set aside deed of trust on the grounds that the note was false and fictitious and participated actively in its defense, the holder of the alleged note, who was unknown to plaintiff, could not be deemed a necessary party to the action. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

As to joinder of insured in insurer's action to enforce subrogation, see Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952), commented on in 31 N.C.L. Rev. 224 (1953).

Insurance company which pays insured for part of the loss is a proper party to an action brought by the insured against a tort-feasor to recover the total amount of the loss, and may be brought into the action at the insistance of the insured or the tort-feasor, either in the capacity of an additional plaintiff or in the capacity of an additional defendant. Commented on in 31 N.C.L. Rev. 224 (1953). See also Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952); Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978).

Husband and Wife as Plaintiffs. — Where plaintiffs, husband and wife, alleged that they owned home in which they lived and that defendant's mining operations resulted in damage to it, the allegation that they owned their home was sufficient to show that both had an interest in the property, and therefore both were properly joined as plaintiffs. Hall v. DeWeld Mica Corp., 244 N.C. 182, 93 S.E.2d 56 (1956).

Suit of Husbands on Trade Acceptances and Wives as Guarantors. — There was no misjoinder of parties and causes of action where the plaintiff in the same proceeding sued husbands on trade acceptances and sued their wives on guaranties executed to secure such trade acceptances. Arcady Farms Milling Co. v. Wallace, 242 N.C. 686, 89 S.E.2d 413 (1955).

Joinder of Husband and Wife in Action for Negligent Use of Property Held as Tenants by Entirety. — A husband and wife, holding property as tenants by the entirety, may properly be named defendants and held jointly liable for injuries resulting from the negligent use of the property, unless there is evidence shown at the trial that the husband exercised such exclusive control of the property as to exonerate the wife from liability. Whitehead v. Margel, 220 F. Supp. 933 (W.D.N.C. 1963).

Rule 21. Procedure upon misjoinder and nonjoinder.

Neither misjoinder of parties nor misjoinder of parties and claims is ground for dismissal of an action; but on such terms as are just parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action. Any claim against a party may be severed and proceeded with separately. (1967, c. 954, s. 1.)

COMMENT

This is an exact counterpart to federal Rule 21, with the addition of the phrase "nor misjoinder of parties and claims" appearing in the first sentence. The general purpose of the rule is clearly to solidify the basic notion under the federal approach that faulty structuring of a case in terms of joinder of improper parties should not give rise to any drastic interruption of its normal progress to trial. Rather, the safeguard of restructuring without interruption, through severance or dropping of parties, without dismissal, is provided as an adequate protection against the evils of proceeding to trial in an overly-complex structure. The phrase referring to misjoinder of parties and causes, while probably not strictly necessary from the logical standpoint, is inserted because of the developed North Carolina case law rule for dismissal rather than severance where there is "misjoinder of both parties and causes." See Brandis, *Permissive Joinder of Parties and Causes in North Carolina,* 25 N.C.L. Rev. 1, pp. 49-53 (1946).

CASE NOTES

Rule Is Counterpart of Federal Rule 21. — This rule is an exact counterpart of federal Rule 21, except for the addition of the phrase "nor misjoinder of parties and claims," which was inserted because of the prior procedure upon "dual misjoinder"; under the prior procedure there was a misjoinder of parties and causes if any plaintiff or defendant, though interested in one or more tracts, was not interested in all tracts. Presnell v. Trollinger Inv. Co., 20 N.C. App. 722, 202 S.E.2d 493 (1974).

One of the purposes of this rule is to ensure that parties properly before the court may litigate their differences without being penalized by delay due to those who are not properly before the court. Presnell v. Trollinger Inv. Co., 20 N.C. App. 722, 202 S.E.2d 493 (1974).

Existing parties to a lawsuit are entitled to notice of a motion to bring in additional parties. Pask v. Corbitt, 28 N.C. App. 100, 220 S.E.2d 378 (1975).

Order Void for Lack of Notice Void for All Purposes. — If an order allowing amendment and adding a party defendant is void for lack of notice to the original defendant, it is void for all purposes. Pask v. Corbitt, 28 N.C. App. 100, 220 S.E.2d 378 (1975).

Misjoinder of parties is not ground for dismissal of the action, but the court, on motion of any party or on its own initiative, may order that a misjoined party be dropped. W & H Graphics, Inc. v. Hamby, 48 N.C. App. 82, 268 S.E.2d 567 (1980).

But Claims Against a Defendant May Be Dismissed if That Defendant is Misjoined in a Suit. — Claims against a defendant may be dismissed if that defendant is misjoined in a suit, but a misjoinder of parties is not a ground for dismissing the entire action; a corporate employee, who was sued for slander per se, was not misjoined in an action brought against his corporate employer because the resolution of a breach of contract claim against the employer might involve the factual issues upon which the slander claim was based and the employer might be held vicariously liable if the employee's statements were determined to be defamatory, not privileged, and made within the scope of his employment. Guider v. Hertz Corp., — F. Supp. 2d —, 2004 U.S. Dist. LEXIS 12364 (M.D.N.C. June 28, 2004).

Directed Verdict Not Required for Nonjoinder of Remaindermen in Action by Life Tenant. — Plaintiff, as holder of life estate, had a right to maintain an action to protect her interests in the property, and nonjoinder of the remaindermen did not entitle defendants to a directed verdict, but at most entitled them to have the remaindermen joined as parties upon their motion to do so. Schell v. Rice, 37 N.C. App. 377, 246 S.E.2d 61, cert. denied, 295 N.C. 648, 248 S.E.2d 253 (1978).

Summary judgment, like dismissal of the action, is not appropriate in cases of misjoinder of parties and claims. Shuping v. Barber, 89 N.C. App. 242, 365 S.E.2d 712 (1988).

Since plaintiff's claim for loss of consortium derived from his wife's cause of action for her personal injuries, plaintiff was united in interest with his spouse and thus a necessary party to her action. The court, therefore, erred in denying plaintiff's motion to join his loss of consortium claim with his wife's action and in dismissing his claim for loss of consortium on the ground that it was not joined with his wife's action. Mrosla v. Feldman, 90 N.C. App. 261, 368 S.E.2d 39 (1988).

Applied in Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972); Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978); Coffey v. Coffey, 94 N.C. App. 717, 381 S.E.2d 467 (1989).

Cited in Robertson v. Bankers & Tel. Employers Ins. Co., 1 N.C. App. 122, 160 S.E.2d 115 (1968); Cox v. Haworth, 304 N.C. 571, 284 S.E.2d 322 (1981); Alamance County Hosp. v. Neighbors, 68 N.C. App. 771, 315 S.E.2d 779 (1984); Beau Rivage Homeowners Ass'n v. Billy Earl, L.L.C., 163 N.C. App. 325, 593 S.E.2d 120, 2004 N.C. App. LEXIS 366 (2004).

Rule 22. Interpleader.

(a) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims expose or may expose the plaintiff to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of crossclaim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(b) Where funds are subject to competing claims by parties to the action, the court may order the party in possession of the funds either to deposit the funds in an interest bearing account in a bank, savings and loan, or trust company licensed to do business in this State or to deposit the funds with the clerk. If the funds are deposited in a bank, savings and loan, or trust company, the court shall specify the type of interest bearing account to be used. Funds deposited with the clerk shall be invested or deposited as provided in G.S. 7A-112 and G.S. 7A-112.1. Upon determination of the action, the judgment shall provide for disbursement of the principal and interest earned on the funds while so deposited. (1967, c. 954, s. 1; 1989, c. 668, s. 1.)

COMMENT

This rule makes clear that a liberalized use of interpleader is to be permitted. In particular, Pomeroy's four limitations on the use of interpleader are specifically repudiated. While the North Carolina court has not yet turned its back on these limitations, it has indicated some impatience with them. See Simon v. Raleigh City Bd. of Educ., 258 N.C. 381, 128 S.E.2d 785 (1963).

CASE NOTES

Applied in Travelers Ins. Co. v. Keith, 283 N.C. 577, 196 S.E.2d 731 (1973).

Cited in Travelers Ins. Co. v. Keith, 15 N.C. App. 551, 190 S.E.2d 428 (1972).

Rule 23. Class actions.

(a) *Representation.* — If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

(b) *Secondary action by shareholders.* — In an action brought to enforce a secondary right on the part of one or more shareholders or members of a corporation or an unincorporated association because the corporation or association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath.

(c) *Dismissal or compromise.* — A class action shall not be dismissed or compromised without the approval of the judge. In an action under this rule, notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs.

(d) *Tax Class Actions.* — In addition to all of the requirements set out in this rule, a class action seeking the refund of a State tax paid due to an alleged unconstitutional statute may be brought and maintained only as provided in G.S. 105-241.18. (1967, c. 954, s. 1; 2008-107, s. 28.28(a).)

COMMENT

Section (a). — In respect to class actions, the Commission adheres rather closely to the statutory provisions in North Carolina. See former § 1-70. It will be seen that three requirements are present. First, there must be a "class." Second, there must be such numerosity as to make impracticable the joinder of all members of the class. Third, there must be an assurance of adequacy of representation. This last requirement, while not contained in the statute, is surely necessary if the class action is to have any binding effect on absentees. See Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741 (1940).

Section (b). — The Commission has not followed the federal rule in this section in its requirements that a shareholder must allege that he was a shareholder at the time of the transaction of which he complains. It was the Commission's thought that such a requirement may well deprive shareholders of any remedy when the corporation has suffered grievous injury. The Commission has also chosen not to follow the federal rule in its requirement of allegations in respect to the shareholder's efforts to persuade the managing directors to take remedial action. The Commission does not, however, take the positive approach of saying such allegations are unnecessary. Rule 8 governing what a complaint must contain is a sufficient guide in this matter.

Section (c). — This section seems obviously desirable in the protection that it affords absentees.

Editor's Note. — Session Laws 2008-107, s. 1.2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 2008'."

Session Laws 2008-107, s. 30.5, is a severability clause.

Effect of Amendments. — Session Laws 2008-107, s. 28.28(a), effective October 1, 2008, and applicable to actions filed on or after that date, added subsection (d).

Legal Periodicals. — For discussion of class actions, see 26 N.C.L. Rev. 223 (1948).

For note on capacity of unincorporated associations to sue and be sued, see 30 N.C.L. Rev 465 (1952).

For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983), see 63 N.C.L. Rev. 222 (1984).

For note, "Civil Procedure—A Definition of 'Class' Under North Carolina Rule 23—Crow v. Citicorp Acceptance Co.," see 23 Wake Forest L. Rev. 491 (1988).

For note, "Shareholder Derivative Suits Under the New North Carolina Business Corporations Act," see 68 N.C. L. Rev. 1091 (1990).

For recent development, "In re Wachovia Shareholders Litigation: The Case for the Common Benefit Doctrine," see 84 N.C. L. Rev. 2066 (2006).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Federal Rules and Cases. — Both the North Carolina Rules of Civil Procedure and the Federal Rules of Civil Procedure contain a requirement that the complaint initiating a shareholder derivative action be verified under oath. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Because the present federal rule and its predecessors (which also contained a verification requirement) have been interpreted and discussed widely, the Supreme Court will turn to federal cases to elucidate the purpose behind this requirement. Certain aspects of this rule and the procedures in North Carolina governing derivative suits may differ from the federal approach; however, insofar as the purposes of certain of the federal and State rules are congruent, cases explaining federal rules are helpful. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

While federal class action cases are not binding on North Carolina courts, the reasoning in such cases can be instructive, even though North Carolina's Rule 23 is quite different from the present Fed. R. Civ. P., Rule 23. Scarvey v. First Fed. Sav. & Loan Ass'n., 146 N.C. App. 33, 552 S.E.2d 655, 2001 N.C. App. LEXIS 790 (2001).

Origins of Section (a). — Section (a) of this rule is closely patterned after Rule 23 of the Federal Rules of Civil Procedure as it existed prior to 1966 (the year of the Federal Rule revision) and former G.S. 1-70. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254

S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Objectives of Rule. — This rule has as its objectives the efficient resolution of the claims or liabilities of many individuals in a single action and the elimination of repetitious litigation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Purpose of section (a) of this rule is to assure adequacy of representation afforded class. Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981).

This rule should receive a liberal construction, and it should not be loaded down with arbitrary and technical restrictions. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979); Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420 (1993), aff'd, 335 N.C. 158, 436 S.E.2d 821 (1993); Scarvey v. First Fed. Sav. & Loan Ass'n., 146 N.C. App. 33, 552 S.E.2d 655, 2001 N.C. App. LEXIS 790 (2001).

Permissible Application of Rule. — In general, courts focusing on this rule have given it a permissive application, so that common questions have been found to exist in a wide range of contexts. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979).

Requirements of G.S. 1A-1, N.C. R. Civ. P. 23(c) do not apply to pre-certification class-action complaints. A trial court errs in concluding that a named plaintiff in an action that had not yet been certified as a class action was required to obtain judicial approval under Rule 23(c) before obtaining a voluntary dismissal of his class-action complaint. Moody v. Sears Roebuck & Co., 191 N.C. App. 256, 664 S.E.2d 569, 2008 N.C. App. LEXIS 1324 (2008).

The requirements for a class action are: (1) The existence of a class; (2) the class members within the jurisdiction of the court must adequately represent any class members outside the jurisdiction of the court; (3) the class must be so numerous as to make it impracticable to bring each member before the court; (4) more than one issue of law or fact common to the class should be present; (5) the party representing the class must fairly insure the representation of all class members; and (6) adequate notice must be given to the class members. Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437, rev'd on other grounds, 319 N.C. 274, 354 S.E.2d 459 (1987); Perry v. Union Camp Corp., 100 N.C. App. 168, 394 S.E.2d 681 (1990).

Existence of a Class Prerequisite to Action Under Rule. — Although not specifically mentioned in this rule, an essential prerequisite of an action under the rule is that there must be a "class." English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

What Constitutes a "Class". — A "class," for purposes of representation, is a group of persons whose interests are so closely similar that an adequate representation of the legal position of one of them will accomplish the same purpose as would be achieved were all of them present and participating in the proceeding. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

"Class" Defined More Expansively Than Under Former Law. — The repeal of former G.S. 1-70 and adoption of the less restrictive language of only the first sentence of the 1938 version of Federal Rule 23 reveals a legislative intent that the term "class" under this rule be defined more expansively than under former law. Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

"Community of Interest" Not Required. — A "class" exists under this rule when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. It is unnecessary for any member of the class to share a jural relationship or "community of interest" with any other member of the class. Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Statements in cases holding or implying that the former "community of interest" standard applies under G.S. 1A-1, Section (a) of this rule, e.g., Maffei v. Alert Cable Television of N.C., Inc., 75 N.C. App. 473, 331 S.E.2d 188 (1985), rev'd on other grounds, 316 N.C. 615, 342 S.E.2d 867 (1986); English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979); and Mosley v. National Fin. Co., 36 N.C. App. 109, 243 S.E.2d 145, cert. denied, 295 N.C. 467, 246 S.E.2d 9 (1978), are disapproved by the Supreme Court. Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Whether a class exists is a question of fact that will be determined on the basis of the circumstances of each case. English v. Holden

Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Whether a class exists is a question of fact to be determined by the court on a case-by-case basis. Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437 (1986), rev'd on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Court Must Make Findings of Fact Regarding Class Certification. — Findings of fact are required by the trial court when rendering a judgment granting or denying class certification in order for the appellate courts to afford meaningful review under the abuse of discretion standard. Such findings must be made with sufficient specificity to allow effective appellate review. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

Action Not Precluded Where Some Class Members Outside Court's Jurisdiction. — The fact that some members of the class are located outside the court's jurisdiction does not prevent the institution of a class action, so long as there are class members within the jurisdiction who adequately represent those outside. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Class must be so numerous as to make it impracticable to bring all members before the court. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

In order to bring a proceeding under this rule, it is necessary to make an allegation in the complaint that the defendants constitute a class so numerous as to make it impracticable to bring them all before the court. Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622, cert. denied, 281 N.C. 621, 190 S.E.2d 465 (1972).

Parties seeking to utilize this rule must establish that the class members are so numerous that it is impractical to bring them all before the court. It is not necessary that they demonstrate the impossibility of joining class members, but they must demonstrate substantial difficulty or inconvenience in joining all members of the class. Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

There is no hard and fast formula for determining what is a "numerous" class. The number is not dependent upon any arbitrary limit, but rather upon the circumstances of each case. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987); Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Test for "Impracticability". — The legal test for "impracticability" of joining all members of a class, thus warranting a representative or class suit by or against some of the members, is not impossibility of joinder, but only difficulty or inconvenience in joining all members of the class. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

The pleadings should disclose the number and make-up of the class, the impracticability of bringing them all before the court and the personal interest in the action of the parties representing the class. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Affirmative Averment Under G.S. 1A-1, Rule 9(a). — Allegations that a party is a member of and properly represents a class under this rule suffice as the "affirmative averment" of "capacity and authority to sue" required by G.S. 1A-1, Rule 9(a). Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Plaintiffs were entitled to proceed as a class against corporate purchaser on the claims contained in the original complaint because the transfer occurred after the court certified the action as a class action, they had knowledge of the claims being asserted against seller at the time the transfer was made, and as transferee of all the assets, purchased the contracts which were the subject matter of the plaintiffs' original complaint. Dublin v. UCR, Inc., 115 N.C. App. 209, 444 S.E.2d 455, 1994 N.C. App. LEXIS 609 (1994), cert. denied, 449 S.E.2d 569 (1994).

Who May Bring Class Action. — As is obvious from the wording of section (a) of this rule, one who is not a member of the represented class may not bring a class action representing that class. Carnahan v. Reed, 53 N.C. App. 589, 281 S.E.2d 408 (1981).

Suit Seeking Tax Refund. — When taxpayers contested a tax imposed on income from out-of-state municipal bonds, and a class of such taxpayers was certified, under G.S. 1A-1-23, the requirement of G.S. 105-267 [repealed] that a taxpayer seeking a refund individually demand such relief was satisfied on behalf on all class members, despite the lack of such a demand by each member, because the demands made by the named class representatives satisfied the requirement of G.S. 105-267 [repealed] that the state be placed on notice of its potential liability, as the state possessed the information from which this liability could be determined, once it had notice of the class representatives' claims. Dunn v. State, — N.C. App. —, 635 S.E.2d 604, 2006 N.C. App. LEXIS 2163 (2006).

Representatives Must Have Personal Interest. — Those purporting to represent the class must show that they have a personal, and not just a technical or official, interest in the action. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

When individual taxpayers sued the state for a tax refund on behalf of themselves and others similarly situated, they could represent corporations and estates and trusts subjected to the same tax to which they objected, despite the fact that corporations and estates and trusts were taxed under different provisions, because they all alleged the unconstitutionality of G.S. 105-134.6(b)(1)b and (c)(1), so the individual taxpayers had more than a technical or official interest in the subject matter of the suit affecting the corporations or estates and trusts, and their interest was personal; thus, once they had standing, they could under G.S. 1A-1-23 represent both themselves and estates and trusts and corporations. Dunn v. State, — N.C. App. —, 635 S.E.2d 604, 2006 N.C. App. LEXIS 2163 (2006).

And it must not appear that there is a conflict of interest between members of the class who are not parties and those members who are representing the class as parties. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

The named representatives must show that there is no conflict of interest between them and the members of the class who are not named parties, so that the interest of the unnamed class members will be adequately and fairly protected. Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Party or parties representing the class must be such as will fairly ensure adequate representation of all. This requirement is also one of due process. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

The class representatives within this jurisdiction must establish that they will adequately represent those outside the jurisdiction. Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Property owners could not represent a potential class of landowners who owned land on a line between two counties in 1992 when the line was redrawn because they did not own such property in 1992, and they could not adequately represent the class for purposes of G.S. 1A-1, N.C. R. Civ. P. 23(a). Meadows v. Iredell County, 187 N.C. App. 785, 653 S.E.2d 925, 2007 N.C. App. LEXIS 2564 (2007).

More than one issue of law or fact common to the class should be present in order to maintain a class action. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Burden on Party Invoking Rule. — The party who is invoking this rule has the burden of showing that all of the prerequisites of utilizing the class action procedure have been satisfied. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987); Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437 (1986), rev'd on other grounds, 319 N.C. 274, 354 S.E.2d 459 (1987).

Plaintiff has the burden of showing that the alleged representatives are members of the class and that the interests of absent class members will be adequately protected. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Discretion of Trial Court. — In deciding whether an action may be maintained as a class action, the trial court is accorded a degree of discretion. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

It was within the court's discretion to direct the defendant to assume the onus and costs of notifying putative members of the plaintiff class. Frost v. Mazda Motor of Am., 353 N.C. 188, 540 S.E.2d 324, 2000 N.C. LEXIS 903 (2000).

Withdrawal of Motion to Certify a Class. — Car purchasers' appeal from a trial court's order that, in part, required court approval for the withdrawal of a request for class certification, was dismissed because the trial court granted the motion to withdraw the request and therefore the purchasers were not parties aggrieved. Alexander v. DaimlerChrysler Corp., 158 N.C. App. 637, 582 S.E.2d 57, 2003 N.C. App. LEXIS 1220 (2003).

Court Supervision of Communications With Potential Class Members Not Abuse of Discretion. — In a class action challenging interest rates that were charged in financing the purchase of mobile homes, trial court did not abuse its discretion in supervising communications with potential class members, as the trial court did not allow unlimited unsupervised communications with potential class members and restricted contact to the level it deemed appropriate at that stage of litigation. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104, cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991), cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991).

Although this rule should receive a liberal construction and be kept free from technical restrictions, a court has broad discretion in deciding whether to allow a class action. Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437 (1986), rev'd on other grounds, 319 N.C. 274, 354 S.E.2d 459 (1987).

In deciding whether to certify a class, a trial judge has broad discretion and may consider factors not expressly mentioned in this rule. Maffei v. Alert Cable TV of N.C., Inc., 316 N.C. 615, 342 S.E.2d 867 (1986).

Court May Take into Account Considerations Not Dealt with in Rule. — A court has broad discretion in deciding whether to allow the maintenance of a class action, and may take account of considerations not expressly dealt with in this rule in reaching a decision. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Statutes of Limitation. — Statutes of limitations on claims raised in a class action complaint are tolled as to all putative members of the class from the filing of the complaint until a denial of class action certification by the trial court; if an interlocutory appeal is taken from the denial of certification, tolling continues during the pendency of the appeal. Scarvey v. First Fed. Sav. & Loan Ass'n., 146 N.C. App. 33, 552 S.E.2d 655, 2001 N.C. App. LEXIS 790 (2001).

Notice to Members of Class Required. — While section (a) of this rule does not require it, fundamental fairness and due process dictate that adequate notice, determined in the discretion of the trial court, be given to members of the class. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987); Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

The North Carolina Supreme Court has held that fundamental fairness and due process require that adequate notice be given to the members of a class. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

The trial court should require that the best notice practical under the circumstances be given to class members. Such notice should include individual notice to all members who can be identified through reasonable efforts, but it need not comply with the formalities of service of process. Notice of the action should be given as soon as possible after the action is commenced. Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Because plaintiffs' case was certified as a class action, the plaintiffs did not have the power to voluntarily dismiss any of the plaintiffs' claims under G.S. 1A-1, N.C. R. Civ. P. 41 without notice to class members as required by G.S. 1A-1, N.C. R. Civ. P. 23(c). Kitchin v. Halifax County, — N.C. App. —, 665 S.E.2d 760, 2008 N.C. App. LEXIS 1624 (2008).

Opportunity to Request Exclusion from Class. — As part of notification, the trial court may require that potential class members be given an opportunity to request exclusion from the class within a specified time in a manner similar to the current federal practice. Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Refusal to Certify on Cost and Benefits Analysis. — Although one of the basic purposes of class actions is to provide a forum whereby claims which might not be economically pursued individually can be aggregated in an efficient and economically reasonable manner, there is a level at which the costs in pursuing the class action far outweigh any economic good sense and fair use of judicial resources. Maffei v. Alert Cable TV of N.C., Inc., 316 N.C. 615, 342 S.E.2d 867 (1986), upholding trial court's refusal to certify a class where the recovery which each member stood to gain was a mere 29 cents.

Unintentional illegality in the language of standard or uniform contracts cannot be raised as a shield to prevent plaintiffs from prosecuting a suit as a class action. Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

Plaintiff had no standing to bring suit challenging action of corporation where he failed to maintain his status as a holder of a beneficial interest in the stock of that corporation throughout the pendency of the litigation. Ashburn v. Wicker, 95 N.C. App. 162, 381 S.E.2d 876 (1989).

Plaintiff had no standing to challenge a loan made by defendant corporation to other defendant when plaintiff's beneficial interest, if any, in the defendant corporation consisted of a pledge of stock which secured a debt that was paid by another pledgee of the stock before plaintiff filed suit. Ashburn v. Wicker, 95 N.C. App. 162, 381 S.E.2d 876 (1989).

Possibility that some class members would later be removed did not automatically defeat class certification under G.S. 1A-1, N.C. R. Civ. P. 23 in a suit alleging a violation of the Telephone Consumer Protection Act, 47 U.S.C.S. § 277, of a proposed class that excluded persons with an established business relationship with a restaurant that sent unsolicited fax advertisements. Blitz v. AGEAN, Inc., — N.C. App. —, 677 S.E.2d 1, 2009 N.C. App. LEXIS 675 (2009).

Appeal of Order Dismissing Class Action. — Although order dismissing class action without prejudice did not determine the controversy and was interlocutory, the order affected a substantial right of the unnamed plaintiffs and was immediately appealable. Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437 (1986), rev'd on other grounds, 319 N.C. 274, 354 S.E.2d 459 (1987).

An order denying certification of a class action is appealable. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

While an order denying a class certification is interlocutory, it is nonetheless immediately appealable as it affects a substantial right of the unnamed plaintiffs. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curiam, 335 N.C. 158, 436 S.E.2d 821 (1993).

Review of Order Denying Class Certification. — The decision to grant or deny class certification rests within the sound discretion of the trial court; therefore, the appropriate standard for appellate review is whether the trial court's decision manifests an abuse of discretion. In this regard, an appellate court is bound by the court's findings of fact if they are supported by competent evidence. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

Trial court properly denied certification of class for employees of a retailer in regard to their contract and wage claims as the proposed class was overbroad and infeasible, individual issues would have predominated over common issues, and conflicts of interest existed amongst the members of the proposed class. Harrison v. Wal-Mart Stores, Inc., 170 N.C. App. 545, 613 S.E.2d 322, 2005 N.C. App. LEXIS 1082 (2005).

Class Certification Improperly Denied. — The trial court improperly denied class certification in an action arising out of a collateral protection insurance program, which insurance was required to be maintained by the plaintiff following the purchase of a motor vehicle, since (1) the trial court erred when ruling on the existence of this class when it considered possible defenses to the claims alleged by the plaintiff and found a class necessarily does not exist in cases involving actions for fraud, (2) the trial court improperly considered several matters when ruling on the plaintiff's adequacy as class representative, and the plaintiff's criminal record did not render her inadequate, and (3) the plaintiff's allegations were sufficient to establish numerosity and that a class action was the superior method to determine the claims at issue. Pitts v. American Sec. Ins. Co., 144 N.C. App. 1, 550 S.E.2d 179, 2001 N.C. App. LEXIS 330 (2001), cert. granted, 355 N.C. 214, 560 S.E.2d 133 (2002).

Certification of Class Held Proper. — The trial court properly certified suit as a class action where the class was divided into six subclasses, three of these consisting of living persons who retired as vested members of the Retirement System, and three of these subclasses consisting of living beneficiaries, heirs, or personal representatives of persons comprising the first three subclasses in an action regarding calculation of disability payments. Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, cert. denied, 334 N.C. 162, 432 S.E.2d 358, aff'd per curiam, 335 N.C. 158, 436 S.E.2d 821 (1993).

Procedure and Discovery in Shareholders' Derivative Actions. — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholders' derivative action, particularly with respect to former G.S. 55-55(c) (see now G.S. 55-7-40), this rule, and G.S. 1A-1, Rules 12 and 56, see Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Verification Requirement Not Jurisdictional. — Although complaint in shareholders' derivative suit was not properly verified, because G.S. 1A-1, Rule 23(b) addresses the procedure to be followed in, and not the substantive elements of, a shareholder's derivative suit, plaintiffs' failure to comply with the verification requirement at the time the complaint was filed was not a jurisdictional defect. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Where Purposes of Verification Requirement Have Been Met. — Because this rule's verification requirement is not jurisdictional in nature, where the purposes behind the rule have been fulfilled by the time the objection to a defective or absent verification is lodged, dismissal or summary judgment in favor of defendants is not appropriate. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Defendants waived their objection to lack of proper verification in shareholders' derivative suit by failing to raise the issue of verification until the fourth time the case was heard in the appellate division. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Because defendants raised the verification issue for the first time in appellate briefs before the Supreme Court, over seven years after the complaint was filed, and after many years of active litigation of the suit, defendants waived their right to complain about verification. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Class Based on Underpayment of Benefits. — A class was established where each of the parties had a claim based on contentions of underpayment of retirement benefits, and this claim predominated over issues affecting only individual class members. Faulkenbury v. Teachers' & State Emps. Retirement Sys., 345 N.C. 683, 483 S.E.2d 422 (1997).

Rule Does Not Bar Class Actions Against State or Counties. — Fact that rule does not specifically mention the State of North Carolina or counties does not mean that all class actions against the State or its counties are barred by sovereign immunity; indeed, class action declaratory judgment suits that seek injunctive and payment relief against the State have been allowed. Thus, the rule did not mean that a county did not have to refund "school impact fees" improperly imposed upon developers and home builders. Durham Land Owners Ass'n v. County of Durham, 177 N.C. App. 629, 630 S.E.2d 200, 2006 N.C. App. LEXIS 1187 (2006).

Collateral Review. — After a foreign court had fully addressed a domestic court's due process notice concerns and the matter had been fully and fairly litigated and finally decided, review of the issues on their merits is foreclosed. However, in a class action consumer's motion for voluntary dismissal, the trial court erred when the court failed to conduct a broad collateral review of a foreign court's settlement of a class action suit that encompassed the matter before the trial court. Moody v. Sears Roebuck & Co., 191 N.C. App. 256, 664 S.E.2d 569, 2008 N.C. App. LEXIS 1324 (2008).

Voluntary Dismissal of Class Action. — When a plaintiff seeks voluntary dismissal of a pre-certification class-action complaint, a trial court should engage in a limited inquiry to determine: (a) whether the parties have abused the class-action mechanism for personal gain; and (b) whether dismissal will prejudice absent putative class members; if the trial court finds that neither of these concerns is present, the plaintiff is entitled to a voluntary dismissal. If the trial court finds that one or both of these concerns are present, the court retains discretion to hold a certification hearing, certify the class if appropriate, and order that notice be given to class members; the parties may then again seek dismissal subject to the trial court's approval under G.S. 1A-1, N.C. R. Civ. P. 23(c). Moody v. Sears Roebuck & Co., 191 N.C. App. 256, 664 S.E.2d 569, 2008 N.C. App. LEXIS 1324 (2008).

Applied in State, Child Day-Care Licensing Comm'n ex rel. Edmisten v. Fayetteville St. Christian School, 42 N.C. App. 665, 258 S.E.2d 459 (1979); Susan B. v. Planavsky, 60 N.C. App. 77, 298 S.E.2d 397 (1982); Perry v. Cullipher, 69 N.C. App. 761, 318 S.E.2d 354 (1984).

Cited in Stegall v. Housing Auth., 278 N.C. 95, 178 S.E.2d 824 (1971); Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971); State ex rel. Moore v. Doe, 19 N.C. App. 131, 198 S.E.2d 236 (1973); North Carolina Consumers Power, Inc. v. Duke Power Co., 21 N.C. App. 237, 204 S.E.2d 399 (1974); Big Bear of N.C., Inc. v. City of High Point, 33 N.C. App. 563, 235 S.E.2d 911 (1977); Wood v. City of Fayetteville, 35 N.C. App. 738, 242 S.E.2d 640 (1978); Mosley v. National Fin. Co., 36 N.C. App. 109, 243 S.E.2d 145 (1978); Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978); Lowe v. Bryant, 55 N.C. App. 608, 286 S.E.2d 652 (1982); Whichard v. Oliver, 56 N.C. App. 219, 287 S.E.2d 461 (1982); Crowell v. Chapman, 306 N.C. 540, 293 S.E.2d 767 (1982); Barnhill San. Serv., Inc. v. Gaston County, 87 N.C. App. 532, 362 S.E.2d 161 (1987); Granville County Bd. of Comm'rs v. North Carolina Hazardous Waste Mgt. Comm'n, 329 N.C. 615, 407 S.E.2d 785 (1991); In re Triscari Children, 109 N.C. App. 285, 426 S.E.2d 435 (1993); Hyde v. Abbott Labs., Inc., 123 N.C. App. 572, 473 S.E.2d 680 (1996); Gilliam v. First Union Nat'l Bank, 125 N.C. App. 416, 481 S.E.2d 334 (1997); Karner v. Roy White Flowers, Inc., 351 N.C. 433, 527 S.E.2d 40, 2000 N.C. LEXIS 232 (2000); Bridges v. Oates, 167 N.C. App. 459, 605 S.E.2d 685, 2004 N.C. App. LEXIS 2335 (2004); Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005); Rowlette v. State, 188 N.C. App. 712, 656 S.E.2d 619, 2008 N.C. App. LEXIS 284 (2008); Sanders v. State Personnel Comm'n, — N.C. App. —, 677 S.E.2d 182, 2009 N.C. App. LEXIS 687 (2009).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-70.*

Federal Counterpart. — Former G.S. 1-70 had its counterpart in Rule 23a of the Federal Civil Rules of Procedure. Cocke v. Duke Univ., 260 N.C. 1, 131 S.E.2d 909 (1963).

Provisions merely provide a ready means for dispatch of business. Cocke v. Duke Univ., 260 N.C. 1, 131 S.E.2d 909 (1963).

Exception to the general rule that all persons interested in and to be affected by suit must be made parties on one or the other side obtains when they "may be very numerous and it may be impractical to bring them all before the court," a rule prevailing in the former equity practice. Glenn v. Farmers' Bank, 72 N.C. 626 (1875); Bronson v. Wilmington N.C. Life Ins. Co., 85 N.C. 411 (1881); Foster v. Hackett, 112 N.C. 546, 17 S.E. 426 (1893). See also, Thames v. Jones, 97 N.C. 121, 1 S.E. 692 (1887); McMillan v. Reeves, 102 N.C. 550, 9 S.E. 449 (1889).

Showing of Authority to Join Causes of Action in Favor of Other Parties Similarly Situated. — A party plaintiff may not join with his own cause of action against a defendant causes of action against the same defendant in favor of other parties similarly situated, in the absence of a showing of authority to bring such actions in their behalf. Nodine v. Goodyear Mtg. Corp., 260 N.C. 302, 132 S.E.2d 631 (1963).

Where potential beneficiaries of a trust were so numerous that it was practically impossible to bring them all before the court in an action seeking modification of the trust, a beneficiary of each class could be made a party and represent the class. The court's jurisdiction over the trust was not dependent on acquiring personal jurisdiction over every potential beneficiary. Cocke v. Duke Univ., 260 N.C. 1, 131 S.E.2d 909 (1963).

Community of Interest of Cemetery Lot Owners. — Plaintiff was authorized to bring an action on behalf of himself and other owners of lots in a cemetery who by reason of similar representations were induced to buy lots, as such lot owners had a community of interest. Mills v. Carolina Cem. Park Corp., 242 N.C. 20, 86 S.E.2d 893 (1955).

Where property was conveyed to trustees for use as a community house or playground for the benefit of the residents of the community, and an action was instituted involving title to the property in which representative members of the community were made parties, the judgment in the action was binding upon the minors and all members of the community not made parties under provision for class representative. Carswell v. Creswell, 217 N.C. 40, 7 S.E.2d 58 (1940).

Rule 24. Intervention.

(a) *Intervention of right.* — Upon `timely application anyone shall be permitted to intervene in an action:

(1) When a statute confers an unconditional right to intervene; or

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive intervention.* — Upon timely application anyone may be permitted to intervene in an action.

(1) When a statute confers a conditional right to intervene; or

(2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) *Procedure.* — A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene, except when the statute prescribes a different procedure. (1967, c. 954, s. 1.)

COMMENT

Section (a). — This section, providing for intervention as of right, while closely following the federal rule, spells out a practice much like that already achieved in North Carolina. Intervention now is of right in claim and delivery and in attachment by virtue of § 1-440.43 and § 1-482. In respect to subsection (2), it will be noted that the harm to the intervenor's interest is to be considered from a "practical" standpoint, rather than technically. In other words, the intervenor need not be threatened with being bound in a strict res judicata sense. Further, it should be noted that adequate representation for the proposed intervenor is not limited to purely formal representation. But a present party may, in appropriate circumstances, be relied on to protect the intervenor's interest even though there is no formal relationship. See Annot., 84 ALR 2d 1412 (1962).

It will be observed that in any case, the application to intervene must be "timely." What will be "timely" will depend on the circumstances of the case.

Section (b). — This section perhaps establishes a broader base for permissive intervention than North Carolina now has but the Commission believes that the flexibility it makes possible to be highly desirable and the Commission is confident that the stated guide to the court as to what it shall consider in deciding whether or not to permit intervention will insure adequate protection for the original parties.

Section (c). — This section with its simple statement of the required procedure should be useful.

Legal Periodicals. — For comment, "The Problem of Procedural Delay in Contested Case Hearings ..." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1049 (1981).

For a survey of 1996 developments in constitutional law, see 75 N.C.L. Rev. 2252 (1997).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Federal Rule Substantially Similar. — With only minor exceptions, Federal Rule 24 and this rule are substantially the same. Where the phrase "Statute of the United States" appears in the federal rule, the word "statute" is used in this rule. Ellis v. Ellis, 38 N.C. App. 81, 247 S.E.2d 274 (1978).

Federal Court Holdings Instructive. — With only minor exceptions, this Rule and Rule 24 of the Federal Rules of Civil Procedure are substantially the same; thus, the holdings of the federal circuit courts are instructive. Virmani v. Presbyterian Health Servs. Corp., 127 N.C. App. 629, 493 S.E.2d 310 (1997), aff'd in part and rev'd in part on other grounds, 350 N.C. 449, 515 S.E.2d 675 (1999).

Former G.S. 150A-23(d) (now G.S. 150A-23(d)) Compared. — While this rule contains specific requirements which control and limit intervention, former G.S. 150A-23(d) (now G.S. 150B-23(d)) clearly provided discretionary intervention in the Commissioner of Insurance by providing that the agency may permit any interested person to intervene and participate in the proceeding to the extent deemed appropriate. This language has been construed to provide intervention broader than the permissive intervention under this rule. State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 460, 269 S.E.2d 538 (1980).

No Substantive Change from Former Statute. — The rules of intervention as set out in the Rules of Civil Procedure make no substantive change in the rules as previously set out in former G.S. 1-73. River Birch Assocs. v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990).

Intervention pursuant to section (b) of this rule is permissive and within the discretion of the trial court. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

An intervenor by permission need not show a direct personal or pecuniary interest in the subject of the litigation. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Prerequisites to Nonstatutory Intervention. — Subsection (a)(2) of this rule sets forth three prerequisites to nonstatutory intervention as a matter of right: (1) an interest relating to the property or transaction; (2) practical impairment of the protection of that interest; and (3) inadequate representation of that interest by existing parties. Ellis v. Ellis, 38 N.C. App. 81, 247 S.E.2d 274 (1978); Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988); Procter v. City of Raleigh Bd. of Adjustment, 133 N.C. App. 181, 514 S.E.2d 745 (1999); Councill v. Town of Boone, 146 N.C. App. 103, 551 S.E.2d 907, 2001 N.C. App. LEXIS 795 (2001), cert. denied, 354 N.C. 360, 560 S.E.2d 130 (2001).

Burden on Intervenor. — Intervenors did not satisfy the element of Rule 24(a)(2) requiring them to show their interests as they never asserted in their motion that their interests were inadequately represented; the intervenors' main argument was that they did not have to make such a showing, and they erroneously contended it was the gas company's burden to show that representation was adequate. Harvey Fertilizer & Gas Co. v. Pitt County, 153 N.C. App. 81, 568 S.E.2d 923, 2002 N.C. App. LEXIS 1084 (2002).

Intervention Timely. — Trial court did not abuse its discretion in granting a prisoner's motion to intervene in a proceeding brought by other prisoners, since the motion was timely filed two months after class certification was denied in the other prisoners' suit, and the motion to intervene was filed before any hearing on the merits of the action. Hamilton v. Freeman, 147 N.C. App. 195, 554 S.E.2d 856, 2001 N.C. App. LEXIS 1147 (2001), cert. denied, 355 N.C. 285, 560 S.E.2d 802 (2002).

In determining whether motion to intervene is timely, trial court will give consideration to: (1) the status of the case; (2) the unfairness or prejudice to the existing parties; (3) the reason for any delay in moving for intervention; (4) the resulting prejudice to the applicant if the motion is denied; and (5) any unusual circumstances. State Employees' Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985); Procter v. City of Raleigh Bd. of Adjustment, 133 N.C. App. 181, 514 S.E.2d 745 (1999).

Motion Prior to Trial and After Judgment. — As a general rule, motions to intervene made prior to trial are seldom denied. Conversely, motions to intervene made after judgment has been rendered are disfavored and are granted only after a finding of extraordinary and unusual circumstances and upon a strong showing of entitlement and justification. State Employees' Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

In situations where a judgment has been entered, motions to intervene are granted only upon a finding of extraordinary and unusual circumstances or a strong showing of entitlement and justification. Procter v. City of Raleigh Bd. of Adjustment, 133 N.C. App. 181, 514 S.E.2d 745 (1999).

Appellants' motion to intervene in another party's petition for review of an annexation ordinance was properly denied because, even assuming G.S. 1A-1-24(a) applied to appeals of annexation ordinances under G.S. 160A-50(a), judgment had already entered, intervention would have prejudiced the city and the other party, and appellants did not offer a legitimate reason for the delay. Home Builders Ass'n of Fayetteville N.C., Inc. v. City of Fayetteville, 170 N.C. App. 625, 613 S.E.2d 521, 2005 N.C. App. LEXIS 1072 (2005).

Untimely Motion to Intervene Properly Denied. — Denial of a humane society's G.S. 1A-1, N.C. R. Civ. P. 24 motions to intervene in a case enjoining the prosecution of a gun club owner under G.S. 14-360 was proper because the motions were not filed until more than three years after an amendment to 15A N.C. Admin. Code 10B.0121, which amendment formed the basis of the humane society's claim that the injunction should have been dissolved. Malloy v. Cooper, — N.C. App. —, 673 S.E.2d 783, 2009 N.C. App. LEXIS 246 (2009).

A motion to intervene after the entry of default against the defendant, his liability to the plaintiff being conclusively established, the extent of liability never being in issue, was untimely. State Employees' Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Intervention Improper Where Filed After Settlement Was Approved. — Denial of a corporation's motion to intervene in a case seeking review of an annexation ordinance was proper, since the corporation failed to comply with G.S. 160A-50 procedures by moving to intervene six months after the ordinance was adopted; intervention was also improper under G.S. 1A-1-24, due to the facts that the motion was filed after judgment approving a settlement was entered and that the proposed intervention would have prejudiced the original parties by destroying their settlement. Gates Four Homeowners Ass'n v. City of Fayetteville, 170 N.C. App. 688, 613 S.E.2d 55, 2005 N.C. App. LEXIS 1088 (2005).

An intervenor is as much a party to the action as the original parties are and has rights equally as broad. Leonard E. Warner, Inc. v. Nissan Motor Corp., 66 N.C. App. 73, 311 S.E.2d 1 (1984).

Rule is silent as to the extent an intervenor may participate in the action once the court allows him in as a party. In view of the liberal philosophy of the rules as regards joinder and enlargement, anything less than full right of participation seems unduly restrictive and tends to defeat the important rules policy of avoiding multiplicity of actions. Once the intervenor becomes a party, he should be a party for all purposes. Harrington v. Overcash, 61 N.C. App. 742, 301 S.E.2d 528 (1983).

The granting of a motion to intervene pursuant to this rule is not ordinarily appealable. Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345, cert. denied, 300 N.C. 374, 267 S.E.2d 675 (1980), overruled on other grounds, Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

Although the rule is not absolute, ordinarily no appeal will lie from an order permitting intervention of parties unless the order adversely affects a substantial right which the appellant may lose if not granted an appeal before final judgment. The rule applies with equal vigor without regard to whether the trial court grants a motion to intervene as a matter of right pursuant to section (a) of this rule or as permissive intervention pursuant to section (b) of this rule. Wood v. City of Fayetteville, 35 N.C. App. 738, 242 S.E.2d 640, cert. denied, 295 N.C. 264, 245 S.E.2d 781 (1978).

But May Be Reviewed on Appeal from Final Judgment. — An order granting intervention may be reviewed upon appeal from the final judgment in the cause. Wood v. City of Fayetteville, 35 N.C. App. 738, 242 S.E.2d 640, cert. denied, 295 N.C. 264, 245 S.E.2d 781 (1978).

The de novo standard is expressly adopted when reviewing Rule 24(a)(2) decisions. Harvey Fertilizer & Gas Co. v. Pitt County, 153 N.C. App. 81, 568 S.E.2d 923, 2002 N.C. App. LEXIS 1084 (2002).

Court's Discretion Not Reviewable Absent Abuse. — The court's discretion in regard to permissive intervention under subsection (b)(2) of this rule is not reviewable in the absence of a showing of abuse. Ellis v. Ellis, 38 N.C. App. 81, 247 S.E.2d 274 (1978).

Service by Intervenor. — An intervenor party who is granted permission to intervene pursuant to subsection (b)(2) of this rule is not required to then issue a summons and complaint pursuant to Rule 4. The service pursuant to G.S. 1A-1, Rule 5 of the motion to intervene, accompanied with the complaint, is sufficient service upon the party against whom relief is sought or denied in the intervenor's pleading and is sufficient process to acquire jurisdiction over the party if all other requisites for jurisdiction over the party are met. Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345, cert. denied, 300 N.C. 374, 267 S.E.2d 675 (1980), overruled on other grounds, Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982).

A party who intervenes pursuant to this rule is not required to issue a summons and complaint pursuant to G.S. 1A-1, Rule 4. In re Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986), cert. denied, 318 N.C. 695, 351 S.E.2d 750 (1987).

Service, pursuant to G.S. 1A-1, Rule 5, of the motion accompanied with the pleading is sufficient service upon the party against whom relief is sought or denied in the intervenor's pleading and is sufficient process to acquire jurisdiction over the party if all other requisites for jurisdiction are met. In re Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986), cert. denied, 318 N.C. 695, 351 S.E.2d 750 (1987).

Intervention by Foster Parents. — In proceeding brought by Department of Social Services in which custody was put in issue by guardian ad litem and natural father, trial court did not err in permitting child's foster parents to intervene. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986), distinguishing Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Intervention by Grandmother. — As grandmother's interest in obtaining compensation from defendant for amounts expended for child support would be impaired by any judgment involving defendant's child support obligation which failed to take her claim for reimbursement into account, regardless of whether she would be bound by that judgment, and she would, as a practical matter, suffer the expense and inconvenience of bringing a separate suit against defendant, and would also be impeded by defendant's ability to force litigation of the additional issue of res judicata, her intervention would be allowed. State ex rel. Pender County Child Support Enforcement Agency v. Parker, 319 N.C. 354, 354 S.E.2d 501 (1987).

Intervention by Heir. — Trial court properly permitted nephew of decedent, who was claiming to be the sole heir of the decedent under a holographic will, to intervene at trial in a suit by the brother of the decedent, who sought specific performance of a contract by the decedent to make a will, after the brother of the decedent dismissed his claim against the nephew from the case and rested his case at trial. Taylor v. Abernethy, 149 N.C. App. 263, 560 S.E.2d 233, 2002 N.C. App. LEXIS 182 (2002), cert. denied, 356 N.C. 695, 579 S.E.2d 102 (2003).

Intervention in Zoning Matter. — A motion to intervene in a setback zoning case was timely, even though it was made after the trial court entered judgment adverse to intervenors, where the intervenors' interest previously had been adequately represented by the Board of Adjustment, and they sought to intervene only when the Board decided not to appeal. Procter v. City of Raleigh Bd. of Adjustment, 133 N.C. App. 181, 514 S.E.2d 745 (1999).

Neighbors were entitled to intervene in a zoning setback case in which the trial court allowed builders a special use permit, where the neighbors had an interest in preserving the character of their neighborhood, the protection of that interest was impaired by the Board of Adjustment's decision not to appeal from the trial court's judgment, and the neighbors' interests were no longer adequately represented. Procter v. City of Raleigh Bd. of Adjustment, 133 N.C. App. 181, 514 S.E.2d 745 (1999).

Permissive Intervenor. — G.S. 1A-1-24(b)(2) did not require a permissive intervenor to show a direct personal or pecuniary interest in the subject of the litigation, and therefore an order ruling that intervenors did not have standing to bring their claims seeking to establish an easement was independent of an earlier ruling permitting the intervention, and so was not a modification, change, or overruling of a prior order of another superior court judge. Koenig v. Town of Kure Beach, 178 N.C. App. 500, 631 S.E.2d 884, 2006 N.C. App. LEXIS 1569 (2006).

Because the time and expense involved in a second, unanticipated round of discovery in an environmental civil penalty matter was prejudicial to the property owner, as was the requirement that the property owner meet its burden of proof against both intervenors and the state agency authorized to impose the civil penalty, the ALJ abused his discretion in allowing permissive intervention. Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 361 N.C. 531, 648 S.E.2d 830, 2007 N.C. LEXIS 811 (2007).

Appeals of Annexation Ordinances. — Petitioners' motion under G.S. 1A-1-24(a) to intervene in another party's petition for review of an annexation ordinance was properly denied, because G.S. 1A-1-24(a) does not apply to appeals of annexation ordinances under G.S. 160A-50(a). Home Builders Ass'n of Fayetteville N.C., Inc. v. City of Fayetteville, 170 N.C. App. 625, 613 S.E.2d 521, 2005 N.C. App. LEXIS 1072 (2005).

Class Actions. — Appellate court affirmed a trial court's judgment denying a motion filed by a person who represented a class of consumers to intervene in a class action filed under G.S. 75-1 et seq., where the class representative had already objected to a proposed settlement in a timely manner at a fairness hearing and had the right to appeal the trial court's judgment approving settlement without intervening. Nicholson v. F. Hoffmann-Laroche, Ltd., 156 N.C. App. 206, 576 S.E.2d 363, 2003 N.C. App. LEXIS 71 (2003).

Successful bidder at an auction sale may intervene to contest a motion to enjoin conveyance of the property which was the subject of the auction sale. Northwestern Bank v. Robertson, 25 N.C. App. 424, 213 S.E.2d 363 (1975).

In an action to quiet title brought by a mother against those of her children and their spouses who would not execute a quitclaim deed to her for her homeplace, trial judge properly denied motion to intervene brought by some of her other children who had executed a quitclaim deed and who sought to have their deed set aside, since the deed related to a different transaction, even though it involved the same property. Ellis v. Ellis, 38 N.C. App. 81, 247 S.E.2d 274 (1978).

Intervention as Matter of Right in Matter Involving Environmental Civil Penalty. — While the intervenors had a general interest in an underlying issue, whether the property owner was exempt from the Sedimentation Pollution Control Act of 1973, they did not have a direct interest in the civil penalty imposed by the North Carolina department of environment and natural resources, which was the property or transaction at issue pursuant to G.S. 113A-64(a)(5); accordingly, the ALJ erred by granting intervention as of right. Holly Ridge Assocs., LLC v. N.C. Dep't of Env't & Natural Res., 361 N.C. 531, 648 S.E.2d 830, 2007 N.C. LEXIS 811 (2007).

The refusal to grant permissive intervention is an interlocutory order. Howell v. Howell, 89 N.C. App. 115, 365 S.E.2d 181 (1988).

Owner of garage and wrecker service, with whom sheriff contracted to store certain cars levied on pursuant to court order, was a legal possessor, and under G.S. 44A-2(d) had a lien on the cars from the time he began towing them away; such lien was enforceable under the explicit language of G.S. 1-440.43 and this rule, by intervention. Case v. Miller, 68 N.C. App. 729, 315 S.E.2d 737 (1984).

Law Firm As Interested Party. — Law firm which had no contact with defendant/phony psychiatric resident accused of sexual misconduct with client and which had not been authorized by him to undertake his representation lacked the authority under Rule 1.2(a) of the Rules of Professional Conduct to represent him on a limited basis but could intervene under Rule 24(a)(2) as an interested party to protect its interests. Dunkley v. Shoemate, 350 N.C. 573, 515 S.E.2d 442 (1999).

Newspaper/appellant had alternative means of obtaining a full and timely review of the issue it sought to raise without being allowed to intervene as a party and unduly delay the adjudication of the rights of the original parties; hence, trial court did not err in denying its motion to intervene under this section. Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 515 S.E.2d 675, 1999 N.C. App. LEXIS 432 (1999), cert. denied, 529 U.S. 1033, 120 S. Ct. 1452, 146 L. Ed. 2d 337 (2000).

Motion for Intervention Denied. — Where claimants to client security fund did not have an interest in the funds held by the trustee/conservator, the trial properly denied motion for intervention. In re Gertzman, 115 N.C. App. 634, 446 S.E.2d 130, cert. denied, 337 N.C. 801, 449 S.E.2d 571 (1994).

Declaratory Judgment Actions. — The trial court erred by denying a motion to intervene in a declaratory judgment insurance coverage action which was filed by the plaintiff in an underlying tort action. United Servs. Auto. Ass'n v. Simpson, 126 N.C. App. 393, 485 S.E.2d 337 (1997).

A physician and his employer did not have a right under this rule to intervene in a declaratory judgment action brought by an infant patient's estate to determine which heirs would share in the proceeds, if any, of a wrongful death action against the physician and employer, as the physician and employer had no significantly protectable interest in the declaratory judgment action. Alford v. Davis, 131 N.C. App. 214, 505 S.E.2d 917 (1998).

The Attorney General could not, pursuant to this section, either as a party or a non-party to challenge class action attorneys' fees as "excessive." Bailey v. North Carolina Dep't of Revenue, 353 N.C. 142, 540 S.E.2d 313, 2000 N.C. LEXIS 896 (2000).

Applied in Allgood v. Town of Tarboro, 281 N.C. 430, 189 S.E.2d 255 (1972); Berta v. North Carolina State Hwy. Comm'n, 36 N.C. App. 749, 245 S.E.2d 409 (1978); Raintree Corp. v. Rowe, 38 N.C. App. 664, 248 S.E.2d 904 (1978); Wood v. City of Fayetteville, 43 N.C. App. 410, 259 S.E.2d 581 (1979); Thompson v. Thompson, 70 N.C. App. 147, 319 S.E.2d 315 (1984); Thompson v. Thompson, 313 N.C. 313, 328 S.E.2d 288 (1985); Gummels v. North Carolina Dep't of Human Resources, 97 N.C. App. 245, 388 S.E.2d 223 (1990); State ex rel. Long v. Interstate Cas. Ins. Co., 106 N.C. App. 470, 417 S.E.2d 296 (1992); Surles v. Surles, 113 N.C. App. 32, 437 S.E.2d 661 (1993); Pryor v. Merten, 127 N.C. App. 483, 490 S.E.2d 590 (1997).

Cited in Lloyd v. Babb, 296 N.C. 416, 251 S.E.2d 843 (1979); Colon v. Bailey, 76 N.C. App. 491, 333 S.E.2d 505 (1985); Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985); State ex rel. Pender County Child Support Enforcement Agency v. Parker, 82 N.C. App. 419, 346 S.E.2d 270 (1986); Sparks v. Nationwide Mut. Ins. Co., 99 N.C. App. 148, 392 S.E.2d 415 (1990); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); State ex rel. Long v. Interstate Cas. Ins. Co., 106 N.C. App. 470, 417 S.E.2d 296 (1992); Maready v. City of Winston-Salem, 342 N.C. 708, 467 S.E.2d 615 (1996); Karner v. Roy White Flowers, Inc., 351 N.C. 433, 527 S.E.2d 40, 2000 N.C. LEXIS 232 (2000); Barton v. Sutton, 152 N.C. App. 706, 568 S.E.2d 264, 2002 N.C. App. LEXIS 976 (2002); Bruggeman v. Meditrust Co., L.L.C., 165 N.C. App. 790, 600 S.E.2d 507, 2004 N.C. App. LEXIS 1514 (2004); In re Summons Issued to Ernst & Young, LLP, 191 N.C. App. 668, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (2008).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-70 and 1-73.*

Ordinarily it is within the discretion of the court to permit proper parties to intervene. Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956); Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

But a person who is a necessary party has an absolute right to intervene in a pending action, and the court commits error when it refuses to permit him to exercise such right. Garrett v. Rose, 236 N.C. 299, 72 S.E.2d 843 (1952).

Refusal to permit a necessary party to intervene is error. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

Before a third party will be permitted to become a party defendant in a pending action, he must show that he has some legal interest in the subject matter of the litigation. His interest must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment, and it must be involved in the subject matter of the action. One whose interest in the matter in litigation is not a direct or substantial interest, but is indirect, inconsequential, or contingent cannot claim the right to defend. Strickland v. Hughes, 273 N.C. 481, 160 S.E.2d 313 (1968).

Intervention Where Defendant's Failure to Answer Shows Absence of Controversy Between Parties. — Where in an action to establish and enforce a lien for labor on defendants' land, the defendants filed no answer, persons who claimed to hold a mortgage on the land were not entitled to intervene, since there was no controversy between plaintiff and defendant. Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956).

Intervening Plaintiffs with Interests Adverse to Original Plaintiffs. — In an action filed by taxpayers to enjoin city from destroying low cost rental units belonging to city, intervenors were not entitled to come into case as parties plaintiff where their pleadings expressly denied all material allegations of the claims wholly antagonistic to those alleged by the plaintiffs. Burton v. City of Reidsville, 240 N.C. 577, 83 S.E.2d 651 (1954).

Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

(a) *Death.* — No action abates by reason of the death of a party if the cause of action survives. In such case, the court, on motion at any time within the time specified for the presentation of claims in G.S. 28A-19-3, may order the substitution of said party's personal representative or collector and allow the action to be continued by or against the substituted party.

(b) *Insanity or incompetency.* — No action abates by reason of the incompetency or insanity of a party. If such incompetency or insanity is adjudicated, the court, on motion at any time within one year after such adjudication, or afterwards on a supplemental complaint, may order that said party be represented by his general guardian or trustee or a guardian ad litem, and, allow the action to be continued. If there is no adjudication, any party may suggest such incompetency or insanity to the court and it shall enter such order in respect thereto as justice may require.

(c) *Abatement ordered unless action continued.* — At any time after the death, insanity or incompetency of a party, the court in which an action is pending, upon notice to such person as it directs and upon motion of any party aggrieved, may order that the action be abated, unless it is continued by the proper parties, within a time to be fixed by the court, not less than six nor more than 12 months from the granting of the order.

(d) *Transfer of interest.* — In case of any transfer of interest other than by death, the action shall be continued in the name of the original party; but, upon motion of any party, the court may allow the person to whom the transfer is made to be joined with the original party.

(e) *Death of receiver of corporation.* — No action against a receiver of a corporation abates by reason of his death, but, upon suggestion of the facts on the record, it continues against his successor or against the corporation in case a new receiver is not appointed and such successor or the corporation is automatically substituted as a party.

(f) *Public officers; death or separation from office.* —

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

(g) *No abatement after verdict.* — After a verdict is rendered in any action, the action does not abate by reason of the death of a party, whether or not the cause of action upon which it is based is a type which survives. (1967, c. 954, s. 1; 1977, c. 446, s. 3.)

COMMENT

Former § 1-74 and federal Rule 25 were generally comparable in providing for no automatic abatement of actions upon death, disability or transfer of interest of parties, but, instead, for a right to continue the action by or against substituted parties. The most important difference was in their respective ways of finally cutting off the right to continue. The federal rule allows two years within which parties may be substituted so as to continue the action, then for automatic dismissal if this has not been done within the period. Former § 1-74 allowed substitution and continuance on mere motion for one year after death or disability, and afterwards on supplemental complaint. No automatic dismissal was provided, but there was further provision that a party might be forced by the opposite party to either get substitution for continuation or suffer dismissal within a time specified by the court. Furthermore, former § 1-75 in a very awkward and questionable way imposed a duty on the adverse party to suggest to the court the death or disability of his opponent, and then a duty on the clerk to notify the proper representative to come in and file pleadings.

On balance, it was felt that the State procedure had served North Carolina well enough in this area and that accordingly the form of former § 1-74 should be followed. There has been an attempt, however, to dress the format up somewhat, using catchlines for separate sections and cleaning up some of the incomplete and ambiguous language.

Furthermore, there has been added section (f), tracking the language of federal Rule 25(d), relating to death and separation of public officers. There is no comparable provision in the current law.

Finally, former § 1-75 was omitted entirely, on the basis that it was ambiguous, and that in apparently requiring new pleadings by substituted parties, it was not desirable. Its requirements have in fact been overlooked by the North Carolina court which has allowed substitution and continuation of actions without compliance with its provisions. See Alexander v. Patton, 90 N.C. 557 (1884).

The only danger in this scheme is that a party may try to lie back until a successor in interest has lost all chance of proceeding successfully and then coming in with a supplemental complaint and trying to resurrect the successor to force a continuation within time specified under section (c). But the court has prevented plaintiffs from so acting. See Sawyer v. Cowell, 241 N.C. 681, 86 S.E.2d 431 (1955).

Cross References. — As to receivers for corporations, see G.S. 1-507.1 through 1-507.11 and G.S. 55-14-32.

Legal Periodicals. — For article, "Holding, Dictum ... Whatever," 25 N.C. Cent. L.J. 139 (2003).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Action to Collect Debt Survives Death of Plaintiff. — There was no merit to defendant's contention that action to collect a debt (a foreign judgment) abated because he had not been served with process at the time of the death of plaintiff, since a cause of action based upon the collection of a debt survives the death of a plaintiff. Mazzocone v. Drummond, 42 N.C. App. 493, 256 S.E.2d 843, cert. denied, 298 N.C. 298, 259 S.E.2d 300 (1979).

Supplemental Pleading. — In order for a supplemental pleading under section (a) of this rule to be procedurally proper, it must satisfy the requirements of G.S. 1A-1, Rule 15(d). Deutsch v. Fisher, 32 N.C. App. 688, 233 S.E.2d 646 (1977), decided under section (a) prior to 1977 amendment.

Effect of Section (c). — Section (c) of this rule does not provide for substitution, but provides a method by which a party may place a time limitation on the right to substitution. Silverthorne v. Coastal Land Co., 42 N.C. App. 134, 256 S.E.2d 397, cert. denied, 298 N.C. 300, 259 S.E.2d 302 (1979).

Order provided for in section (c) of this rule is intended to be used prior to any substitution of parties, since it provides for notice to "such person as [the court] directs," which has been correctly viewed as requiring notice to those who "would reasonably be expected to represent most closely the interest of the deceased." It is then up to the persons interested in the estate of the deceased to arrange for substitution of the appropriate party. Silverthorne v. Coastal Land Co., 42 N.C. App. 134, 256 S.E.2d 397, cert. denied, 298 N.C. 300, 259 S.E.2d 302 (1979).

There is no burden on a party seeking an order of abatement to make any showing that the plaintiff's failure to actively prosecute the lawsuit was without excuse. Silverthorne v. Coastal Land Co., 42 N.C. App. 134, 256 S.E.2d 397, cert. denied, 298 N.C. 300, 259 S.E.2d 302 (1979).

Section (d) of this rule is merely a procedural rule; substantive law governs its application. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

Failure to Make Substitution Directed by Court. — Where an incompetent plaintiff died after institution of action by her next friend, and the court authorized and directed substitution of her administrator as new plaintiff, failure so to substitute required dismissal of appeal by the court against the next friend. Ginn v. Smith, 20 N.C. App. 526, 201 S.E.2d 739 (1974).

Summary Judgment for Deceased Defendant Ineffective Where Motion to Substitute Personal Representative Had Never Been Ruled Upon. — After defendant doctor died, the medical malpractice action survived only against the personal representative or collector of the estate pursuant to G.S. 28A-18-1(a), and thus where the trial court never ruled upon the motion under G.S. 25(a) to substitute the executrix of the estate the trial court's summary judgment order with respect to the doctor had no effect. Purvis v. Moses H. Cone Mem'l Hosp. Serv. Corp., 175 N.C. App. 474, 624 S.E.2d 380, 2006 N.C. App. LEXIS 128 (2006).

Substitution Order Ineffective Where

Personal Representative Not Yet Appointed. — Where order directing the substitution of a yet-to-be-appointed personal representative for deceased defendant did not comply with G.S. 28A-18-1 or G.S. 1A-1, Rule 25, the order could not operate retroactively to substitute him as defendant once the personal representative was appointed, and the trial court erred in granting plaintiffs' summary judgment motion because the personal representative did not receive timely notice of the motion under G.S. 1A-1, Rule 56. Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005), cert. denied, — U.S. —, 126 S. Ct. 2972, 165 L. Ed. 2d 954 (2006).

Dismissal of Action for Divorce upon Husband's Death. — Trial court did not err in dismissing husband's action for divorce and wife's counterclaim for equitable distribution where husband died before decree of absolute divorce was granted. Caldwell v. Caldwell, 93 N.C. App. 740, 379 S.E.2d 271, cert. denied, 325 N.C. 270, 384 S.E.2d 513 (1989).

Annulment Action Survived Decedent's Death. — Where an executrix had filed a case on a decedent's behalf as his guardian ad litem, seeking an annulment of the decedent's marriage while the decedent was alive, and where substantial property rights hinged on the validity of the marriage, the action did not abate on the decedent's death and the executrix was entitled to pursue it. Clark v. Foust-Graham, 171 N.C. App. 707, 615 S.E.2d 398, 2005 N.C. App. LEXIS 1365 (2005).

Effect of Chapter 35A on Continuation for Incompetency. — Chapter 35A has had significant impact on section (b) of this rule, which discusses the continuation of an action when one party becomes incompetent. In a situation in which no incompetency adjudication has yet occurred, the action contemplated in the last clause would be referral of the competency issue to the clerk of superior court for action under Chapter 35A. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), reversed on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990) (holding that plaintiff lacked standing to challenge on appeal the district court's appointment of guardian ad litem for defendant).

Applied in MacPherson v. City of Asheville, 283 N.C. 299, 196 S.E.2d 200 (1973); In re Estate of Etheridge, 33 N.C. App. 585, 235 S.E.2d 924 (1977); Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979); Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880 (1982).

Cited in Deutsch v. Fisher, 39 N.C. App. 304, 250 S.E.2d 304 (1979); Cox v. Cox, 44 N.C. App. 339, 260 S.E.2d 812 (1979); Elmore v. Elmore, 67 N.C. App. 661, 313 S.E.2d 904 (1984); Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291 (1987); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992); Buie v. High Point Assocs. Ltd. Partnership, 119 N.C. App. 155, 458 S.E.2d 212 (1995); Farm Credit Bank v. Edwards, 121 N.C. App. 72, 464 S.E.2d 305 (1995); Price v. Beck, 153 N.C. App. 763, 571 S.E.2d 247, 2002 N.C. App. LEXIS 1253; Pierce v. Johnson, 154 N.C. App. 34, 571 S.E.2d 661, 2002 N.C. App. LEXIS 1406 (2002).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — *The cases cited below were decided under former G.S. 1-74.*

Common-Law Rule Changed. — The rule of the common law that a personal right of action dies with the person was changed by former G.S. 1-74 and former G.S. 28-172 and, except in the instances specified in former G.S. 28-175, an action originally maintainable by or against a deceased person was maintainable by or against his personal representative. Suskin v. Maryland Trust Co., 214 N.C. 347, 199 S.E. 276 (1938).

The rule of the common law that a personal right of action dies with the person has been changed. Paschal v. Autry, 256 N.C. 166, 123 S.E.2d 569 (1962).

No action abates with death except as provided. Baggarly v. Calvert, 70 N.C. 688 (1874); Sledge v. Reid, 73 N.C. 440 (1875); Wood v. Watson, 107 N.C. 52, 12 S.E. 49 (1890). See also, Shields v. Lawrence, 72 N.C. 43 (1875); Latham v. Latham, 178 N.C. 12, 100 S.E. 131 (1919).

Except by Order of Court. — Under former G.S. 1-74, where the right survives, an action does not abate by the death of a party, except by order of the court. Burnett v. Lyman, 141 N.C. 500, 54 S.E. 412, 115 Am. St. R. 691 (1906), appeal dismissed, 146 N.C. 597, 59 S.E. 877 (1907); Moore v. Moore, 151 N.C. 555, 66 S.E. 598 (1909).

A judgment is necessary to abate an action, for the court may, ex mero motu, enter judgment when it appears that plaintiff failed for a year to prosecute his action against the representatives or successors in interest of the original defendant, whose death has been suggested, though the records show no discontinuance of the action. Rogerson v. Leggett, 145 N.C. 7, 58 S.E. 596 (1907).

An action which survives disability or death does not abate until a judgment of the court is entered to that effect. Sawyer v. Cowell, 241 N.C. 681, 86 S.E.2d 431 (1955).

Where a cause of action survives, the action does not abate by the death of the plaintiff ipso facto, but only upon application of the party aggrieved, and then only in the discretion of the court, and in a time to be fixed, not less than six months nor more than one year from the granting of the order. Moore v. North Carolina R.R., 74 N.C. 528 (1876).

Continuance of Action by Personal Rep-

resentative or Successor. — In case of the death of a party, the court, at any time within one year thereafter or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. Pennington v. Pennington, 75 N.C. 356 (1876).

A decedent's cause or right of action surviving his death can be continued and prosecuted only by his personal representative. Neal v. Associates Disct. Corp., 260 N.C. 771, 133 S.E.2d 699 (1963).

Limit on Power to Continue Action Against Defendant's Representative Successor. — Power of the court to allow an action which survives the death of defendant to be continued against defendant's personal representative or successor in interest may not be invoked by a plaintiff who has kept his action in a semidormant condition for a number of years and then calls defendant's heir into court after the heir, by lapse of time, is unable to make good his defense or that defense which the ancestor might have made. Sawyer v. Cowell, 241 N.C. 681, 86 S.E.2d 431 (1955).

Wrongful Death Action Does Not Abate by Death, Resignation or Removal of Representative. — Once the personal representative of an estate is duly appointed, if such representative dies, resigns, or is removed, the law contemplates a continuity of succession until the estate has been fully administered; hence, upon the death, resignation, or removal of a representative who has properly brought an action for wrongful death, the action does not abate. Harrison v. Carter, 226 N.C. 36, 36 S.E.2d 700, 164 A.L.R. 697 (1946).

Death, etc., of Relator in State's Action upon Official Bonds. — In an action brought by the State upon official bonds, the relator is but an agent of the State in seeking to recover the moneys due, and if he dies or goes out of office the action does not abate. Davenport v. McKee, 98 N.C. 500, 4 S.E. 545 (1887).

As to binding effect of judgment against first administrator or administrator de bonis non in an action to renew it, see Thompson v. Badham, 70 N.C. 141 (1874).

Where two of several plaintiffs died and as they had no personal representative within a year thereafter, no motion was made to continue the action as to them, but the cause remained upon the docket and was proceeded with by the remaining plaintiffs, whose rights were finally determined, and the defendants did not apply to have the action abated as to the deceased plaintiffs, it was within the discretion of the presiding judge to allow the personal representative of such deceased parties to file a supplementary complaint and prosecute the action, his motion to be allowed to do so having been made before the final judgment was rendered in the cause. State ex rel. Coggins v. Flythe, 114 N.C. 274, 19 S.E. 701 (1894).

Action for Wrongful Cutting and Removal of Timber. — If a cause of action for damages for the wrongful cutting and removal of timber from realty belonging to the deceased accrued, in whole or in part, during his lifetime, the action for damages would survive to his executors. However, if such an injury to the realty was committed after his death, the right of action would belong to his heirs or devisees. Paschal v. Autry, 256 N.C. 166, 123 S.E.2d 569 (1962).

ARTICLE 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

(a) *Discovery methods.* — Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) *Discovery scope and limits.* — Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. — Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will

be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(2) Insurance Agreements. — A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation; Materials. — Subject to the provisions of subsection (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (i) a written statement signed or otherwise adopted or approved by the person making it, or (ii) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation; Experts. — Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

a. 1. A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

2. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)c [(b)(4)b] of this rule, concerning fees and expenses as the court may deem appropriate.

b. Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivision (b)(4)a2 of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)a2 of this rule the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) *Protective orders.* — Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the judge of the court in which the action is pending may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (i) that the discovery not be had; (ii) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (iii) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (iv) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (v) that discovery be conducted with no one present except persons designated by the court; (vi) that a deposition after being sealed be opened only by order of the court; (vii) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (viii) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) *Sequence and timing of discovery.* — Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. Any order or rule of court setting the time within which discovery must be completed shall be construed to fix the date after which the pendency of discovery will not be allowed to delay trial or any other proceeding before the court, but shall not be construed to prevent any party from utilizing any procedures afforded under Rules 26 through 36, so long as trial or any hearing before the court is not thereby delayed.

(e) *Supplementation of responses.* — A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and

location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) *Discovery conference.* — At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court may do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;
(2) A proposed plan and schedule of discovery;
(3) Any limitations proposed to be placed on discovery;
(4) Any other proposed orders with respect to discovery; and
(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(f1) *Medical malpractice discovery conference.* — In a medical malpractice action as defined in G.S. 90-21.11, upon the case coming at issue or the filing of a responsive pleading or motion requiring a determination by the court, the judge shall, within 30 days, direct the attorneys for the parties to appear for a discovery conference. At the conference the court may consider the matters set out in Rule 16, and shall:

(1) Rule on all motions;
(2) Establish an appropriate schedule for designating expert witnesses, consistent with a discovery schedule pursuant to subdivision (3), to be complied with by all parties to the action such that there is a deadline for designating all expert witnesses within an appropriate time for all parties to implement discovery mechanisms with regard to the designated expert witnesses;
(3) Establish by order an appropriate discovery schedule designated so that, unless good cause is shown at the conference for a longer time, and subject to further orders of the court, discovery shall be completed within 150 days after the order is issued; nothing herein shall be construed to prevent any party from utilizing any procedures afforded

under Rules 26 through 36, so long as trial or any hearing before the court is not thereby delayed; and

(4) Approve any consent order which may be presented by counsel for the parties relating to parts (2) and (3) of this subsection, unless the court finds that the terms of the consent order are unreasonable.

If a party fails to identify an expert witness as ordered, the court shall, upon motion by the moving party, impose an appropriate sanction, which may include dismissal of the action, entry of default against the defendant, or exclusion of the testimony of the expert witness at trial.

(g) *Signing of discovery requests, responses, and objections.* — Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with the rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee. (1967, c. 954, s. 1; 1971, c. 750; 1975, c. 762, s. 2; 1985, c. 603, ss. 1-4; 1987, c. 859, s. 3.)

COMMENT

Comment to this Rule as Originally Enacted. — *Section (a).* — This section gives a broad right of discovery to any party to take the testimony of any person, including a party, by oral deposition, pursuant to Rule 30, or by written interrogatories, pursuant to Rule 31, for the purpose of discovery or for use as evidence or for both purposes. Under prior practice the depositions of persons might be taken and perpetuated by deposition, and under former § 1-568.1 et seq. the deposition of a party might be taken for the purpose of discovery or for use as evidence or for both purposes.

Under this rule the necessity of obtaining court authorization is avoided, except leave of court must be obtained when plaintiff seeks to take a deposition within 30 days after the commencement of the action. Under prior practice a deposition of a proposed witness might be taken without order of court (former § 8-71). Under former §§ 1-568.10 and 1-568.11, a court order was necessary for examination of an adverse party.

Attendance of witnesses may be compelled by subpoena; attendance of a party by notice. Sanctions are provided in Rule 37(d) in the event a party fails to respond to the notice.

The last sentence of section (a) is much broader than the federal rule, which refers only to "a person confined in prison."

Section (b). — This section indicates the broad scope of examination and that it may cover not only evidence for use at the trial, but also inquiry into matters in themselves inadmissible at trial but which will lead to the discovery of evidence unless the court otherwise directs under Rule 30 (b) or (d).

Aside from the limitations of Rule 30(b) and (d), section (b) contains three limitations: (1) The deponent may be examined regarding any matter which is relevant to the subject matter in the pending action. (2) The deponent may not be examined regarding a matter which is privileged. (3) The deponent shall not be required to produce or submit for inspection any writing or data prescribed in the last sentence of section (b). This limitation (3) is based upon the proposed 1946 amendment to Rule 30(b).

Section (c). — This section is the same as the federal rule.

Section (d). — The use of a deposition at the trial stage is sharply limited by section (d). To be used, a deposition must not only satisfy one of the conditions of section (d), but also the limiting phrase in the first sentence of the section, "so far as admissible under the rules of evidence."

Section (e). — This section is added out of an abundance of caution.

Comment to the 1975 Amendment. — A limited rearrangement of the discovery rules is made, whereby certain rule provisions are transferred, as follows: Existing Rule 26(a) is transferred to Rules 30(a) and 31(a). Existing Rule 26(c) is transferred to Rule 30(c). Existing Rules 26(d) and (e) are transferred to Rule 32. Revisions of the transferred provisions, if any, are discussed in the notes appended to Rules 30, 31, and 32. In addition, Rule 30(b) is transferred to Rule 26(c). The purpose of this rearrangement is to establish Rule 26 as a rule governing discovery in general.

Section (a) — Discovery Devices. — This is a new section listing all of the discovery devices provided in the discovery rules and establishing the relationship between the general provision of Rule 26 and the specific rules for particular discovery devices. The provision that the frequency of use of these methods is not limited confirms existing law. It incorporates in general form a provision now found in Rule 33.

Section (b) — Scope of Discovery. — This section is recast to cover the scope of discovery generally. It regulates the discovery obtainable through any of the discovery devices listed in Rule 26(a).

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26(c) (transferred from 30(b)) confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of 26(b), and these powers have always been freely exercised. The new subsections in Rule 26(b) do not change existing law with respect to such situations.

Subsection (b)(1) — In General. — The language is changed to provide for the scope of discovery in general terms, rather than being limited to the scope of depositions. The subsection, although in terms applicable only to depositions, was incorporated by reference in existing Rules 33 and 34. Since decisions as to relevance to the subject matter of the action are made for discovery purposes well in advance of trial, a flexible treatment of relevance is required and the making of discovery, whether voluntary or under court order, is not a concession or a determination of relevance for purposes of trial. The substance of the subdivision represents no substantial change from the corresponding former provision. The provision of this subsection relating to matters within the knowledge of the party conducting discovery is taken from the existing North Carolina provision. It does not appear in the federal rule.

Subsection (b)(2) — Insurance Agreements. — This represents no change from the existing North Carolina provision.

Subsection (b)(3) — Work Product. — North Carolina had adopted a version of this rule in advance of the 1970 amendments to the federal rules. The present amendment would alter the test for compelling production from "injustice or undue hardship" to "substantial need" that cannot be satisfied without "undue hardship." It would also expand the scope of the protection of mental impressions, conclusions, opinions or legal theories to those of an "other representative of a party," e.g., an insurer. The wording of this subsection varies slightly from the federal rule; the basic substance of the subsection, however, remains unchanged.

Party's Right to Own Statement. — An exception to the requirement of this subsection enables a party to secure production of his own statement without any special showing. Ordinarily, a party gives a statement without insisting on a copy because he does not yet have a lawyer and does not understand the legal consequences of his actions. Thus, the statement is given at a time when he functions at a disadvantage. Discrepancies between his trial testimony and earlier statement may result from lapse of memory or ordinary inaccuracy; a written statement produced for the first time at trial may give such discrepancies a prominence which they do not deserve. In appropriate cases the court may order a party to be deposed before his statement is produced. E.g., McCoy v. GMC, 33 F.R.D. 354 (W.D. Pa. 1963); Smith v. Central Linen Serv. Co., 39 F.R.D. 15 (D. Md. 1966); Fernandes v. United Fruit Co., 50 F.R.D. 82 (D. Md. 1970).

In order to clarify and tighten the provision on statements by a party, the term "statement" is defined. The definition is adapted from 18 U.S.C. § 3500(e) (Jencks Act). The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization.

Section 8-89.1, which contains a similar provision whose application is restricted to personal injury plaintiffs, is repealed in connection with the enactment of this section.

Witness' Right to Own Statement. — A second exception to the requirement of this subsection permits a nonparty witness to obtain a copy of his own statement without any special showing. Many, though not all, of the considerations supporting a party's right to obtain his statement apply also to the nonparty witness.

Subsection (b)(4) — Trial Preparation; Experts. — This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party in relation to litigation or obtained by the expert and not yet transmitted to the party. The subsection deals with those experts whom the party expects to call as trial witnesses. It should be noted that the subsection does not address itself to the expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness.

Subdivision (b)(4)a deals with discovery of information obtained by or through experts who will be called as witnesses at trial. The provision is responsive to problems suggested by a relatively recent line of authorities. Many of these cases present intricate and difficult issues as to which expert testimony is likely to be determinative. Prominent among them are food and drug, patent, and condemnation cases.

In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand. Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.

Although the trial problems flowing from lack of discovery of expert witnesses are most acute and noteworthy when the case turns largely on experts, the same problems are encountered when a single expert testifies. Thus, subdivision (b)(4)a draws no line between complex and simple cases, or between cases with many experts and those with but one. The rule established by this subdivision is patterned substantially after the result reached by a number of courts in the former absence of such a provision in the federal rules.

Past judicial restrictions on discovery of an adversary's expert, particularly as to his opinions, reflect the fear that one side will benefit unduly from the other's better preparation. The procedure established in subdivision (b)(4)a holds the risk to a minimum. Discovery is limited to trial witnesses, and may be obtained only at a time when the parties know who their expert witnesses will be. A party must as a practical matter prepare his own case in advance of that time, for he can hardly hope to build his case out of his opponent's experts.

Subdivision (b)(4)a provides for discovery of an expert who is to testify at the trial. A party can require one who intends to use the expert to state the substance of the testimony that the expert is expected to give. The court may order further discovery, and it has ample power to regulate its timing and scope and to prevent abuse. Ordinarily, the order for further discovery shall compensate the expert for his time, and may compensate the party who intends to use the expert for past expenses reasonably incurred in obtaining facts or opinions from the expert. Those provisions are likely to discourage abusive practices.

Under subdivision (b)(4)b, the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum.

In ordering discovery under (b)(4)a2, the court has discretion whether to award fees and expenses to the other party; its decision should depend upon whether the discovering party is simply learning about the other party's case or is going beyond this to develop his own case.

Note: The General Assembly deleted from the drafting committee's text a proposed provision identical to Federal Rule 26(b)(4)(B) expressly providing for discovery in very limited circumstances of experts retained in anticipation of litigation or in preparation for trial, but who are not expected to be called as witnesses. Failure to adopt this provision would not appear to foreclose such discovery on a proper showing under Rule 26(b)(3) or Rule 34.

Section (c) — Protective Orders. — The provisions of existing [former] Rule 30(b) are transferred to this section (c), as part of the rearrangement of Rule 26. The language has been changed to give it application to discovery generally.

In addition, drafting changes are made to carry out and clarify the sense of the rule. Insertions are made to avoid any possible implication that a protective order does not extend to "time" as well as to "place" or may not safeguard against "undue burden or expense."

The new reference to trade secrets and other confidential commercial information reflects existing law. The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection.

The section contains new matter relating to sanctions. When a motion for a protective order is made and the court is disposed to deny it, the court may go a step further and issue an order to provide or permit discovery. This will bring the sanctions of Rule 37(b) directly into play. Since the court has heard the contentions of all interested persons, an affirmative order is justified. In addition, the court may require the payment of expenses incurred in relation to the motion.

Section (d) — Sequence and Priority. — This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court's power to establish priority by an order issued in a particular case. North Carolina has not suffered from the problems presented by rules of priority of discovery existing in some other jurisdictions under the original federal rules. This rule will insure that we do not develop any such problems. The last sentence allows discovery to continue to the time of trial so long as it does not result in a delay of trial or of any other proceeding before the court.

Section (e) — Supplementation of Responses. — The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a "continuing burden" on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question. The parties can adjust to a rule either way, once they know what it is.

Arguments can be made both ways. Imposition of a continuing burden reduces the proliferation of additional sets of interrogatories. Some courts have adopted local rules establishing such a burden. Others have imposed the burden by decision. On the other hand, there are serious objections to the burden, especially in protracted cases. Although the party signs the answers, it is his lawyer who understands their significance and bears the responsibility to bring answers up to date. In a complex case all sorts of information reaches the party, who little understands its bearing on answers previously given to interrogatories. In practice, therefore, the lawyer under a continuing burden must periodically recheck all interrogatories and canvass all new information. But a full set of new answers may no longer be needed by the interrogating party. Some issues will have been dropped from the case, some questions are now seen as unimportant, and other questions must in any event be reformulated.

Section (e) provides that a party is not under a continuing burden except as expressly provided. An exception is made as to the identity of persons having knowledge of discoverable matters, because of the obvious importance to each side of knowing all witnesses and because information about witnesses routinely comes to each lawyer's attention. Many of the decisions on the issue of a continuing burden have in fact concerned the identity of witnesses. An exception is also made as to expert trial witnesses in order to carry out the provisions of Rule 26(b)(4).

Another exception is made for the situation in which a party, or more frequently his lawyer, obtains actual knowledge that a prior response is incorrect. This exception does not impose a duty to check the accuracy of prior responses, but it prevents knowing concealment by a party or attorney. Finally, a duty to supplement may be imposed by order of the court in a particular case (including an order resulting from a pretrial conference) or by agreement of the parties. A party may of course make a new discovery request which requires supplementation of prior responses.

The duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the court may deem appropriate.

Cross References. — As to time for beginning and completing discovery, see General Rules of Practice, Rule 8, in the Annotated Rules of North Carolina.

Editor's Note. — The reference to subdivision (b)(4)c contained in subdivision (b)(4)a.2 of this section is in error. Review of the subject matter and comparison with federal Rule 26(b)(4)(C) makes it apparent that the subdivision intended is subdivision (b)(4)b.

Legal Periodicals. — For case law survey on evidence, see 43 N.C.L. Rev. 900 (1965).

For note on discovery of expert information, see 47 N.C.L. Rev. 401 (1969).

For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969).

For article on pre-trial and discovery, see 5 Wake Forest Intra. L. Rev. 95 (1969).

For comment, "Discoverability of Liability Insurance Policy Limits in North Carolina," see 7 Wake Forest L. Rev. 575 (1971).

For note on the scope of discovery under the 1975 amendment to this rule, see 13 Wake Forest L. Rev. 640 (1977).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For note, "Discovery and Testimony of Unretained Experts: Creating a Clear and Equitable Standard to Govern Compliance with Subpoenas," see 1987 Duke L.J. 140 (1987).

For article, "Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking," see 69 N.C.L. Rev. 795 (1991).

For article, "Taking a Deposition Under North Carolina Law," see 21 N.C. Cent. L.J. 215 (1995).

CASE NOTES

I. In General.
II. Scope of Discovery Generally.
III. Insurance Agreements.
IV. Trial Preparation.
V. Protective Orders.
VI. Decisions under Prior Law.

I. IN GENERAL.

Editor's Note. *— Some of the cases cited below were decided under section (b) of this rule and G.S. 1A-1, Rule 30 as they stood before the 1975 amendment.*

The purpose and intent of this rule is to prevent a party who has discoverable information from making evasive, incomplete, or untimely responses to requests for discovery. Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

The purpose behind section (e) of this rule is to prevent a party with discoverable information from making untimely, evasive, or incomplete responses to requests for discovery. Bumgarner v. Reneau, 332 N.C. 624, 422 S.E.2d 686 (1992).

Existence of Privilege Is Determined by Court, Not Parties. — Unilateral determination by a party that documents are privileged, and on that account may be withheld from discovery in defiance of a court order to produce them, rests the matter upon the ipse dixit of each defendant and not upon the judgment of the court. Determination of whether a privilege applies must be by the court, not the individual claiming the privilege, and the court may conduct a preliminary inquiry into its propriety. Midgett v. Crystal Dawn Corp., 58 N.C. App. 734, 294 S.E.2d 386 (1982).

Relationship to discovery in criminal cases. — Writing or recording evidencing a witness's assertions to a state prosecutor can qualify as a "witness statement" under G.S. 15A-903(a)(1); given the high stakes of criminal prosecutions and the special protections traditionally afforded criminal defendants, it is not untenable that the general assembly intended that "witness statement" in the criminal context would not mean the same thing as it does under G.S. 1A-1-26(b)(3). State v. Shannon, 182 N.C. App. 350, 642 S.E.2d 516, 2007 N.C. App. LEXIS 687 (2007).

Remedy for Error in Discovery Orders Is Not Open Defiance. — When a party willfully disobeys an order entered with personal and subject matter jurisdiction, a judgment of contempt (a permissible G.S. 1A-1, Rule 37 sanction) is appropriate even if the order was erroneously issued. Such an order is not void and is entitled to respect. The proper remedy for any error therein is not by open defiance, but by appeal. Midgett v. Crystal Dawn Corp., 58 N.C. App. 734, 294 S.E.2d 386 (1982).

In Camera Inspection in Discretion of Court. — Whether to conduct an in camera inspection of documents appears, as a general rule, to rest in the sound discretion of the trial court. Midgett v. Crystal Dawn Corp., 58 N.C. App. 734, 294 S.E.2d 386 (1982).

Remand for In Camera Inspection Required. — Remand was necessary for a trial court to review documents in camera and determine whether some of the documents were in fact privileged because, from the record, the appellate court was unable to determine whether the withheld materials were created in anticipation of litigation. In re Summons Issued to Ernst & Young, LLP, 191 N.C. App. 668, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (2008).

The trial court has express authority under § 1A-1, Rule 37 to impose sanctions on a party who balks at discovery requests. Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

The imposition of sanctions under § 1A-1, Rule 37 for failure to comply with section (e) of this rule is within the sound discretion of the trial judge. Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983), cert. denied, 310 N.C. 631, 315 S.E.2d 697, 315 S.E.2d 698 (1984); Bumgarner v. Reneau, 332 N.C. 624, 422 S.E.2d 686 (1992).

Seasonable Supplemental Responses. — Defendant's supplemental response to interrogatories was not rendered "seasonable" within the meaning and intent of subsection (e)(1) of this rule by the mere fact that there was no occasion for imposition of sanctions for failing to respond to discovery request with due diligence and good faith. Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Supplemental answers to interrogatories are not seasonable when the answers are made so close to the time of trial that the party seeking discovery thereby is prevented from preparing adequately for trial, even with the exercise of due diligence. Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983), cert. denied, 310 N.C. 631, 315 S.E.2d 697, 315 S.E.2d 698 (1984); Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Supplementation of Admission. — Under circumstances in which it was clear that an owner's admission that his house had been condemned prior to a fire that destroyed the house was incorrect, and the owner attempted to supplement his response, the trial judge's allowance of the testimony was not error; moreover, a guaranty association was not prejudiced by the allowance given its concession that it received the correction a mere 15 minutes after the admission was made. Papdopoulos v. State Capital Ins. Co., 183 N.C. App. 258, 644 S.E.2d 256, 2007 N.C. App. LEXIS 1036 (2007).

As to pretrial discovery at common law for criminal or civil litigants, see News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

No right of inspection of public documents existed at common law when inspection was sought merely to satisfy curiosity. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

Statutes have now replaced former equitable rights of discovery and bills of discovery in equity have been abolished. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

Civil discovery is now governed by statute. The Supreme Court of the United States has indicated that rules governing discovery in civil cases are a matter of legislative grace. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

Civil litigants enjoy no absolute right to discovery of documents in the hands of others. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

Court Permitted Further Discovery. — Where in response to plaintiffs' interrogatories concerning the facts and opinions to which each of defendant's experts would testify, and the grounds therefor, defendant responded with the same standardized statement for each of his expert witnesses which was largely a disclaimer of defendant's negligence, the court acted within its discretion in permitting further discovery. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Order Compelling Production of Documents Held Proper. — Because, despite the fact that insurers claimed that requested documents were privileged, the insurers failed to produce the 450 documents at issue for an in camera inspection, they failed to carry their burden of establishing that those documents were privileged, and an order compelling production of those 450 documents was proper. Wachovia Bank, N.A. v. Clean River Corp., 178 N.C. App. 528, 631 S.E.2d 879, 2006 N.C. App. LEXIS 1567 (2006).

Ample Opportunity for Discovery. — Trial court did not abuse its discretion in denying customer's request for discovery and motion to compel discovery because it was customer's fourth request for discovery and was filed one month before trial and 20 months after commencement of the case against the restaurant; the court found per G.S. 1A-1, Rule 26(b)(1)(a)(ii) that the customer had ample opportunity by discovery in the action to obtain the information sought. Lindsey v. Boddie-Noell Enters., Inc., 147 N.C. App. 166, 555 S.E.2d 369, 2001 N.C. App. LEXIS 1145 (2001), cert. denied, 355 N.C. 213, 559 S.E.2d 803 (2002).

Amendment of Discovery Schedule. — A medical malpractice plaintiff was not entitled to an amendment of a discovery scheduling order so that plaintiff could depose new experts, even if this were done within the deadline of the original discovery schedule, since it might not have been feasible for the defendants to depose such experts within the deadline. Alston v. Duke Univ., 133 N.C. App. 57, 514 S.E.2d 298 (1999).

Failure to Address Claims of Privilege. — Trial judge erred in releasing documents to the plaintiffs without addressing the defendant's Rule 26(b) claims of privilege. Hall v. Cumberland County Hosp. Sys., 121 N.C. App. 425, 466 S.E.2d 317, cert. denied, 343 N.C. 122, 468 S.E.2d 780 (1996).

Where an order was entered allowing plaintiff to examine defendants pursuant to former procedure for the purpose of securing information to file a complaint, plaintiff had a vested right to conduct such examination and did not need to move for an adverse examination under either this rule or G.S. 1A-1, Rule 27(b) upon enactment of the Rules of Civil Procedure. Williams v. Blount, 14 N.C. App. 139, 187 S.E.2d 464 (1972).

Sanction for Taking Deposition in Violation of Rules. — Striking of the notice of the taking of a deposition and prohibiting its further use was a reasonable sanction for a deposition procured in violation of deposition rules, even though it was defendant's counsel, and not defendant itself, who committed the acts giving rise to the sanction. Turner v. Duke Univ., 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

Sanctions for Improper Discovery. — A motion under the more specific rule governing sanctions in the context of discovery responses is the proper avenue for sanctioning improper conduct relative to discovery. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Sanctions Under Subsection (g). — The imposition of sanctions for discovery abuses under subsection (g) informs offending counsel of exactly what action is being sanctioned. This process alleviates any due process concerns an attorney might raise by claiming not to know which of his or her actions merit sanctions. Brooks v. Giesey, 334 N.C. 303, 432 S.E.2d 339 (1993).

Sanctions Under Subsection (f1). — Where an inmate did not designate his experts until almost four months after the ordered date, the trial court did not abuse its discretion by excluding the expert's testimony. Summey v. Barker, 154 N.C. App. 448, 573 S.E.2d 534, 2002 N.C. App. LEXIS 1449 (2002).

Sanctions for Failure to Designate Expert Witnesses by the Specified Date. — Inmate who sued a sheriff and various medical providers, alleging medical malpractice and negligence, did not show excusable neglect for failing to designate his expert witnesses by the date specified in the trial court's order, and because the trial court properly denied the inmate's motion for an extension of time to designate his expert witnesses, and his forecast of evidence could not include a designation of witnesses, the trial court's order granting summary judgment in favor of all defendants was upheld. Summey v. Barker, 357 N.C. 492, 586 S.E.2d 247, 2003 N.C. LEXIS 1105 (2003).

Appeal from Discovery Order Limiting Contact. — A discovery order which prohibited defendant hospital from contact with defendant doctor other than through "the statutorily recognized methods of discovery enumerated in" this rule was not immediately appealable, where the order in no way precluded the hospital from meeting with and discussing the case with the doctor in the context of the multivaried discovery methods detailed in this rule and, therefore, did not affect a substantial right. Norris v. Sattler, 139 N.C. App. 409, 533 S.E.2d 483, 2000 N.C. App. LEXIS 894 (2000).

Inadequate Record for Appeal. — Appeal had to be dismissed as appellate court was unable to review whether plaintiff consumer demonstrated a "substantial need" for requested discovery and whether an "undue hardship" existed in obtaining that material by other means, pursuant to G.S. 1A-1, Rule 26(b)(3), as the record on appeal was not sufficient to allow for such review. Velez v. Dick Keffer Pontiac-GMC Truck, Inc., 144 N.C. App. 465, 551 S.E.2d 858, 2001 N.C. App. LEXIS 532 (2001).

Denial of Motion to Compel Presumed to Be Supported by Sufficient Facts. — Where neither party asked the trial court to enter findings of fact or conclusions of law in its order denying the administrator's motion to compel, the appellate court presumed that the trial court found facts sufficient to support its orders and thus, that the administrator failed to meet the heavy burden of proving an abuse of discretion. Barringer v. Wake Forest Univ. Baptist Med. Ctr., — N.C. App. —, 677 S.E.2d 465, 2009 N.C. App. LEXIS 673 (2009).

Denial of Discovery Held Not Abuse of Discretion. In a broker's breach of contract action, a trial court's denial of the broker's motion under G.S. 1A-1, N.C. R. Civ. P. 26(b)(1), to compel production of a brokerage service's corporate bank statements and tax returns on the ground that the materials were not relevant was not an abuse of discretion because it was not shown that the trial court's determination was manifestly unreasonable. Maxwell v. Michael P. Doyle, Inc., 164 N.C. App. 319, 595 S.E.2d 759, 2004 N.C. App. LEXIS 822 (2004).

Substantial Need Shown for Document Prepared for Trial. — Declaration prepared for use in a federal lawsuit between a bank and a vendor was protected by the work-product doctrine, but the bank was compelled to disclose it to a former bank employee who demonstrated a substantial need for the document and an inability to obtain it elsewhere; her wrongful termination action was based on the theory that she was fired because she refused to sign the allegedly inaccurate or untruthful document. Isom v. Bank of Am., N.A., 177 N.C. App. 406, 628 S.E.2d 458, 2006 N.C. App. LEXIS 970 (2006).

Applied in Continental Ins. Co. v. Foard, 9 N.C. App. 630, 177 S.E.2d 431 (1970); Harris v. Parker, 17 N.C. App. 606, 195 S.E.2d 121 (1973); Hardison v. Williams, 21 N.C. App. 670, 205 S.E.2d 551 (1974); Peterson v. Johnson, 28 N.C. App. 527, 221 S.E.2d 920 (1976); Tennessee-Carolina Transp., Inc. v. Strick Corp., 291 N.C. 618, 231 S.E.2d 597 (1977); Craig v. Kessing, 36 N.C. App. 389, 244 S.E.2d 721 (1978); Bullock v. Insurance Co. of N. Am., 39 N.C. App. 386, 250 S.E.2d 732 (1979); Dworsky v. Travelers Ins. Co., 49 N.C. App. 446, 271 S.E.2d 522 (1980); Four Seasons Homeowners Ass'n v. Sellers, 62 N.C. App. 205, 302 S.E.2d 848 (1983); Industrotech Constructors, Inc. v. Duke Univ., 67 N.C. App. 741, 314 S.E.2d 272 (1984); Alford v. Shaw, 72 N.C. App. 537, 324 S.E.2d 878 (1985); Jennings v. Jessen, 103 N.C. App. 739, 407 S.E.2d 264 (1991); Powers v. Parisher, 104 N.C. App. 400, 409 S.E.2d 725 (1991); Williams v. North Carolina Dep't of Correction, 120 N.C. App. 356, 462 S.E.2d 545 (1995); Romig v. Jefferson-Pilot Life Ins. Co., 132 N.C. App. 682, 513 S.E.2d 598, 1999 N.C. App. LEXIS 285 (1999); Jones v. Asheville Radiological Group, P.A., 134 N.C. App. 520, 518 S.E.2d 528 (1999); Swink v. Weintraub, — N.C. App. —, 672 S.E.2d 53, 2009 N.C. App. LEXIS 111 (2009).

Cited in Pearce v. Barham, 271 N.C. 285, 156 S.E.2d 290 (1967); In re Mark, 15 N.C. App. 574, 190 S.E.2d 381 (1972); Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973); Hammer v. Allison, 20 N.C. App. 623, 202 S.E.2d 307 (1974); Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975); In re Simon, 36 N.C. App. 51, 243 S.E.2d 163 (1978); AT & T Co. v. Griffin, 39 N.C. App. 721, 251 S.E.2d 885 (1979); Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500 (1979); Laing v. Liberty Loan Co., 46 N.C. App. 67, 264 S.E.2d 381 (1980); Shepherd v. Oliver, 57 N.C. App. 188, 290 S.E.2d 761 (1982); Wright v. Fiber Indus., Inc., 60 N.C. App. 486, 299 S.E.2d 284 (1983); In re City of Durham Annexation Ordinance No. 5791, 66 N.C. App. 472, 311 S.E.2d 898 (1984); Walker v. Liberty Mut. Ins. Co., 84 N.C. App. 552, 353 S.E.2d 425 (1987); Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988); Prince v. Duke Univ., 326 N.C. 787, 392 S.E.2d 388 (1990); Cantwell v. Cantwell, 109 N.C. App. 395, 427 S.E.2d 129 (1993); Cantwell v. Cantwell, 109 N.C. App. 395, 427 S.E.2d 129 (1993); Pugh v. Pugh, 113 N.C. App. 375, 438 S.E.2d 214 (1994); Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994); Shaw v. Cameron, 125 N.C. App. 522, 481 S.E.2d 365 (1997); Williams v. Hinton, 127 N.C. App. 421, 490 S.E.2d 239 (1997); Russell v. Buchanan, 129 N.C. App. 519, 500 S.E.2d 728 (1998); Gbye v. Gbye, 130 N.C. App. 585, 503 S.E.2d 434 (1998); McKillop v. Onslow County, 139 N.C. App. 53, 532 S.E.2d 594, 2000 N.C. App. LEXIS 808 (2000); Edwards v. Wall, 142 N.C. App. 111, 542 S.E.2d 258 (2001); Hill v. Williams, 144 N.C. App. 45, 547 S.E.2d 472, 2001 N.C. App. LEXIS 331 (2001); Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573 S.E.2d 118, 2002 N.C. LEXIS 1252 (2002); Suarez v. Wotring, 155 N.C. App. 20, 573 S.E.2d 746, 2002 N.C. App. LEXIS 1594 (2002); Moose v. Versailles Condo. Ass'n, 171 N.C. App. 377, 614 S.E.2d 418, 2005 N.C. App. LEXIS 1199 (2005); Brown v. Am. Partners Fed. Credit Union, — N.C. App. —, 645 S.E.2d 117, 2007 N.C. App. LEXIS 1180 (2007); Yorke v. Novant Health, Inc., — N.C. App. —, 666 S.E.2d 127, 2008 N.C. App. LEXIS 1620 (2008); State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

II. SCOPE OF DISCOVERY GENERALLY.

Section (b) of this rule is not unconstitutional on the grounds that it deprives a party of property without due process of law, authorizes an unreasonable search and seizure, denies equal protection of the laws, or impairs the right to contract. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

Enforced discovery as authorized by the provisions of this rule is not an unwarranted invasion of defendant's privacy. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

Limited Discovery After Default Judgment Entered. — Trial court did not err in limiting discovery solely to the issues of whether the seller's conduct amounted to an unfair or deceptive trade practice where the trial court had earlier entered a default against the seller. Blankenship v. Town & Country Ford, Inc., 174 N.C. App. 764, 622 S.E.2d 638, 2005 N.C. App. LEXIS 2616 (2005).

Notice. — Investor's claim that the trial court erred in not providing the investor an opportunity to be heard in relation to an order which compelled the production of client/investor documents was rejected where no notice was required under G.S. 1A-1, Rule 26(b) for this type of discovery. Miles v. Martin, 147 N.C. App. 255, 555 S.E.2d 361, 2001 N.C. App. LEXIS 1135 (2001).

Safeguards to Protect Discovered Information. — Trial court did not abuse its discretion in ordering that defendant bank provide factual work product, pursuant to G.S. 1A-1, Rule 26(b)(3), to plaintiff consumer as such material was discoverable and the trial court put stringent safeguards in place to protect against abuse regarding discovery provided. Velez v. Dick Keffer Pontiac-GMC Truck, Inc., 144 N.C. App. 465, 551 S.E.2d 858, 2001 N.C. App. LEXIS 532 (2001).

Trial court's decision not to conduct an in camera review of all of the decedent's substance abuse treatment records was proper because the clear purpose of the trial court's order was to enable the health care providers to have access to information useful in developing their defense. Given that the records ordered to be disclosed were reasonably calculated to lead to the discovery of evidence relevant to the issues of emotional distress and damages and such records would only be disclosed under seal, the trial court complied with 42 C.F.R. § 2.64(e)(1). Spangler v. Olchowski, 187 N.C. App. 684, 654 S.E.2d 507, 2007 N.C. App. LEXIS 2575 (2007).

The goal of the discovery rules is to facilitate the disclosure, prior to trial, of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of basic issues and facts to go to trial. Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983), cert. denied, 310 N.C. 631, 315 S.E.2d 697, 315 S.E.2d 698 (1984).

Matters Relevant to Claims and Defenses Within Scope of Discovery. — The scope of discovery is not limited to matters relevant to claims for relief, but also includes matters relevant to defenses. Shellhorn v. Brad Ragan, Inc., 38 N.C. App. 310, 248 S.E.2d 103, cert. denied, 295 N.C. 735, 249 S.E.2d 804 (1978).

The provision of section (b) of this rule that "it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence" refers only to testimony that will or might be inadmissible at trial. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

The relevancy test for discovery is not the same as the relevancy test for admissibility into evidence. Shellhorn v. Brad Ragan, Inc., 38 N.C. App. 310, 248 S.E.2d 103, cert. denied, 295 N.C. 735, 249 S.E.2d 804 (1978).

The test of relevancy under this rule is not the stringent test required at trial. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

The test of relevancy under subsection (b) of this rule differs from the more stringent test of relevancy under G.S. 8C-1, Rule 401. Adams v. Lovette, 105 N.C. App. 23, 411 S.E.2d 620, aff'd, 332 N.C. 659, 422 S.E.2d 575 (1992).

And determination that information is relevant for discovery is not conclusive of its admissibility as relevant evidence at trial. Shellhorn v. Brad Ragan, Inc., 38 N.C. App. 310, 248 S.E.2d 103, cert. denied, 295 N.C. 735, 249 S.E.2d 804 (1978).

When Information Is Relevant for Discovery. — To be relevant for purposes of discovery, the information need only be "reasonably calculated" to lead to the discovery of admissible evidence. Shellhorn v. Brad Ragan, Inc., 38 N.C. App. 310, 248 S.E.2d 103, cert. denied, 295 N.C. 735, 249 S.E.2d 804 (1978).

Records Irrelevant for Discovery Purposes. — Whether or not plaintiff's replacement had a relationship with a high school student during his previous employment, the complete student records at high school and school personnel records were irrelevant to whether defendants intentionally inflicted emotional distress on plaintiff, constructively and wrongfully discharged her, or maliciously interfered with her contract; therefore, the trial court did not abuse its discretion in denying motion to compel discovery. Wagoner v. Elkin City Schs. Bd. of Educ., 113 N.C. App. 579, 440 S.E.2d 119, cert. denied, 336 N.C. 615, 447 S.E.2d 414 (1994).

The underlying claims for relief must be aligned with documents requested for discovery to determine if the documents are within the scope of discovery. Shellhorn v. Brad Ragan, Inc., 38 N.C. App. 310, 248 S.E.2d 103, cert. denied, 295 N.C. 735, 249 S.E.2d 804 (1978).

Filing of Answer Does Not Waive Right Against Self-Incrimination. — The mere filing of a verified answer does not operate to effectuate a waiver of the right to assert the privilege against self-incrimination. Gunn v. Hess, 90 N.C. App. 131, 367 S.E.2d 399 (1988).

The right of discovery must yield to the privilege against compulsory self-incrimination. Stone v. Martin, 56 N.C. App. 473, 289 S.E.2d 898, appeal dismissed and cert. denied, 306 N.C. 392, 294 S.E.2d 220 (1982).

Courts cannot compel disclosure of information which would tend to incriminate the person from whom it is sought and cannot impose sanctions on one who refuses to disclose privileged information. Stone v. Martin, 56 N.C. App. 473, 289 S.E.2d 898, appeal dismissed and cert. denied, 306 N.C. 392, 294 S.E.2d 220 (1982).

Discovery Order Held to Violate Right Against Self-Incrimination. — In an action for alienation of affections and criminal conversation with plaintiff's husband, trial court's order compelling defendant to answer interrogatories which asked in effect whether she had committed fornication or adultery violated defendant's right against self-incrimination. Gunn v. Hess, 90 N.C. App. 131, 367 S.E.2d 399 (1988).

Relevant Unprivileged Matter is Discoverable. — Any unprivileged matter that is relevant is discoverable; on the other hand, if the matter of which discovery is sought is privileged, it is not discoverable, even if relevant, unless the interests of justice outweigh the protected privilege. Mims v. Wright, 157 N.C. App. 339, 578 S.E.2d 606, 2003 N.C. App. LEXIS 646 (2003).

Relevant matter that is privileged is not discoverable unless interests of justice outweigh the protected privilege. Shellhorn v. Brad Ragan, Inc., 38 N.C. App.

310, 248 S.E.2d 103, cert. denied, 295 N.C. 735, 249 S.E.2d 804 (1978).

Attorney-Client Privilege. — Trial court did not err in ordering the production of client/investor documents where the investor failed to prove that an attorney-client privilege existed; he could not prove that he was compelled to produce the documents in violation of a privilege. Miles v. Martin, 147 N.C. App. 255, 555 S.E.2d 361, 2001 N.C. App. LEXIS 1135 (2001).

Rule Does Not Affect Privacy Surrounding Confidential Relationships. — The General Assembly, in enacting the Rules of Civil Procedure, did not contemplate that G.S. 1A-1, Rule 33 and section (b) of this rule would enable husband and wife, in actions between them, to require the other to answer interrogatories relating to acts of adultery or conduct from which adultery might be implied during the subsistence of their marriage; the General Assembly did not intend in such manner to remove the cloak of privacy surrounding the confidential relationships of husband and wife. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Protection of Confidential Commercial Information. — The courts under this rule should be careful in the interests of justice to prevent disclosure of confidential commercial information to avoid annoyance, embarrassment or oppression, particularly where the action is between competitors. Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379, cert. denied, 288 N.C. 242, 217 S.E.2d 679 (1975).

A customer list is not a trade secret. Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379, cert. denied, 288 N.C. 242, 217 S.E.2d 679 (1975).

Sections 8-56 and 50-10 are distinguishable from section (b) of this rule, in that they relate to the disqualification of husband or wife as a witness with reference to specific matters, not to the admissibility or inadmissibility of the testimony of a qualified witness. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion. Hudson v. Hudson, 34 N.C. App. 144, 237 S.E.2d 479, cert. denied, 293 N.C. 589, 239 S.E.2d 264 (1977); Ritter v. Kimball, 67 N.C. App. 333, 313 S.E.2d 1 (1984); Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

Because a construction company was allowed to review all discoverable documents, its G.S. 1A-1-26(b)(1) motion to compel discovery was properly denied; consequently, the trial court properly granted summary judgment to the developer and its agent. Phelps-Dickson Builders, L.L.C. v. Amerimann Partners, 172 N.C. App. 427, 617 S.E.2d 664, 2005 N.C. App. LEXIS 1791 (2005).

Summary Judgment Motion Heard Before Motion to Compel. — Where the plaintiff's failure to seek an extension under the local rules fixed the date after which pendency of discovery "would not be allowed to delay trial or any other proceeding before the court ...," the trial court did not abuse its discretion by hearing defendants' motion for summary judgment, even though discovery was still pending. Dobson v. Harris, 134 N.C. App. 573, 521 S.E.2d 710, 1999 N.C. App. LEXIS 894 (1999), cert. denied, 351 N.C. 187, 541 S.E.2d 728 (1999).

The determination of whether and when to convene a discovery conference is a matter left to the discretion of the trial judge. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104, cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991), cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991).

Discovery Plan Required for Discovery Conference. — While G.S. 1A-1, Rule 26(f) requires the court to impose a discovery plan if a discovery conference is held, court is not obligated to impose discovery plan if no discovery conference has been held. Gibbons v. CIT Group/Sales Fin., Inc., 101 N.C. App. 502, 400 S.E.2d 104, cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991), cert. denied, 329 N.C. 496, 407 S.E.2d 856 (1991).

Though discovery in annexation proceedings is not altogether forbidden, its scope is necessarily limited by the nature of the proceeding. Campbell v. City of Greensboro, 70 N.C. App. 252, 319 S.E.2d 323, cert. denied and appeal dismissed, 312 N.C. 492, 322 S.E.2d 553 (1984).

Information Regarding Expert Witnesses. — This rule permits a party to obtain by interrogatories from another party three things: (1) The identity of any expert witness the other party expects to call at trial; (2) the subject matter on which the expert is expected to testify; and (3) the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. Mack v. Moore, 91 N.C. App. 478, 372 S.E.2d 314 (1988), appeal dismissed and cert. denied, 323 N.C. 704, 377 S.E.2d 225 (1989).

When Identity of Expert Is Discoverable. — Neither this rule not its federal counterpart speaks specifically to the issue of whether a party is entitled to discover the identity of a nontestifying expert. Mack v. Moore, 91 N.C. App. 478, 372 S.E.2d 314 (1988), appeal dismissed and cert. denied, 323 N.C. 704, 377 S.E.2d 225 (1989).

Before it can be determined if the identity of an expert is discoverable, the party resisting discovery should set forth with some specificity the reasons he believes the expert's identity is not discoverable. The propounding party is then entitled to a determination of the expert's status based on an in camera review by the trial court. Mack v. Moore, 91 N.C. App. 478, 372 S.E.2d 314 (1988), appeal dismissed and cert. denied, 323 N.C. 704, 377 S.E.2d 225 (1989).

If an expert (1) has facts and opinions otherwise discoverable under Subsection (b)(1) of this rule, (2) acquired or developed such facts and opinions in anticipation of litigation or for trial, and (3) is expected to be called as an expert witness at trial, subsection (b)(4) of this rule is controlling and his identity is discoverable. If such an expert is not expected to testify, the identity of that expert is not discoverable. Mack v. Moore, 91 N.C. App. 478, 372 S.E.2d 314 (1988), appeal dismissed and cert. denied, 323 N.C. 704, 377 S.E.2d 225 (1989).

Testimony of Experts Not Listed on Pre-Trial Discovery. — Trial court properly admitted testimony of two doctors who acted as expert witnesses in a medical malpractice action; G.S. 1A-1, N.C. R. Civ. P. 26(f1) did not prohibit the testimony, even though the experts were not listed on pre-trial discovery, because the purpose of the discovery rules was achieved and defendants were not prejudiced by any actions of plaintiffs in failing to timely notify defendants of the experts, as all parties had the opportunity to depose both experts before trial, and defendants could not claim surprise by the expert testimony of either physician and failed to show that the trial court abused its discretion in allowing into evidence the expert testimony. Coffman v. Roberson, 153 N.C. App. 618, 571 S.E.2d 255 (2002), cert. denied, 356 N.C. 668, 577 S.E.2d 111 (2003).

Where witness was both a fact and expert (doctor) witness, he could be deposed without a court order, and his testimony could only be limited by objection during the deposition if he was questioned regarding his expert opinion. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Exclusion of Statement From Treating Physician. — Exclusion of written response from a treating physician, which was in response to a facsimile sent by defense counsel that detailed three questions regarding causation of an employee's alleged work-related injury and subsequent disability, was proper since the communication was ex parte and consisted of interrogatories to a non-party, which were not authorized by any caselaw precedent nor any rule of evidence. Mayfield v. Parker Hannifin, 174 N.C. App. 386, 621 S.E.2d 243, 2005 N.C. App. LEXIS 2472 (2005).

Other Witnesses and Exhibits. — With the exception of expert trial witnesses, whose identities are discoverable under the provisions of subdivision (b)(4) of this rule, a party is not entitled to find out, by discovery, which witnesses his opponent intends to call, or the documents and exhibits a party opponent intends to present at the trial; instead, the names of witnesses and lists of exhibits a party opponent intends to use at trial are obtainable through the pretrial conference. King v. Koucouliotes, 108 N.C. App. 751, 425 S.E.2d 462, cert. granted, 334 N.C. 163, 432 S.E.2d 361, discretionary review improvidently granted, 335 N.C. 164, 436 S.E.2d 132 (1993).

Denial to Interview Child in Parental Termination Proceeding Was Not Abuse of Discretion. — Trial court did not err by denying a mother's motion to interview her son for whom a proceeding was initiated against the mother for termination of her parental rights because, as evidenced by the multiple findings of fact contained within multiple court orders, any contact the mother had with the child was disruptive to his own therapeutic progress and it was clear from the record that the trial court was concerned with the mother's behavior in attempting to learn of the child's whereabouts, particularly since the mother abducted the child from his school bus stop while he was in foster care. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

Accident Reports. — Accident report was held to be discoverable. Cook v. Wake County Hosp. Sys., 125 N.C. App. 618, 482 S.E.2d 546 (1997).

Defendant hospital's accident reporting policy existed to serve a number of nonlitigation, business purposes which imposed a duty on employees to report any extraordinary occurrences within the hospital to risk management; thus, absent any salient facts, it could not be said that hospital employee prepared accident report because of the prospect of litigation. Cook v. Wake County Hosp. Sys., 125 N.C. App. 618, 482 S.E.2d 546 (1997).

Documents Furnished by Applicants for Hospital Privileges. — In a medical negligence suit, a doctor's application for hospital privileges was not exempt from discovery under G.S. 131E-95, which applied to information generated by a medical review committee, because the allegedly privileged information was not generated by a committee, but was provided by the doctor to the hospital in his application for privileges. Cunningham v. Cannon, 187 N.C. App. 732, 654 S.E.2d 24, 2007 N.C. App. LEXIS 2529 (2007).

Public Consent Order Issued by Board of Medical Examiners is Discoverable. — As a doctor entered into a consent order with a board of medical examiners knowing it would become a public record, the order was not protected by G.S. 90-21.22 and was discoverable in a medical negligence suit. Cunningham v. Cannon, 187 N.C. App. 732, 654 S.E.2d 24, 2007 N.C. App. LEXIS 2529 (2007).

In a medical malpractice case, because information contained in board of medical examiners' consent order and a doctor's application for hospital privileges provided information related to the doctor's history of drug and alcohol abuse, it was discoverable under N.C. R. Civ. P. 26. Cunningham v. Cannon, 187 N.C. App. 732, 654 S.E.2d 24, 2007 N.C. App. LEXIS 2529 (2007).

G.S. 1A-1, N.C. R. Civ. P. 7, 26, and G.S. 8C-1, N.C. R. Civ. P. 101 et seq., permitted a husband who had not yet been declared a child's father to file pleadings and motions, obtain discovery, and present evidence; accordingly, the husband could have introduced evidence of his paternity and/or rebutted or discredited evidence of paternity presented by a putative father. Although the husband could have accomplished neither, his presence was not obviously, utterly immaterial, as it afforded him an opportunity to defend the presumption that he was the child's father and discredit the putative father's evidence to the contrary. In re Papathanassiou, — N.C. App. —, 671 S.E.2d 572, 2009 N.C. App. LEXIS 108 (2009).

III. INSURANCE AGREEMENTS.

The 1971 amendment to section (b) of this rule, adding a paragraph relating to insurance agreements, was a valid exercise of legislative authority. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

Purpose of 1971 Amendment. — The promotion of settlements was not the primary purpose of the 1971 amendment to section (b) of this rule. Rather, its primary purpose was to enable both plaintiff and defendant to have equal information concerning all facts necessary to enable each to make a fair evaluation of his position incident to settlement negotiations. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

Effect of 1971 Amendment. — The 1971 amendment to section (b) of this rule conferred upon a party the legal right to obtain discovery of the existence and contents of insurance agreements referred to therein. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

Section (b) of this rule authorizes pretrial discovery of information concerning automobile liability insurance carried by a defendant where the only issues raised by the pleadings relate to negligence, contributory negligence and damage. Marks v. Thompson, 14 N.C. App. 272, 188 S.E.2d 22, aff'd, 282 N.C. 174, 192 S.E.2d 311 (1972).

Authority of Judge When Party Exercises Right to Obtain Discovery of Insurance Agreement. — When a party elects to exercise the legal right to obtain discovery of the existence and contents of insurance agreements under section (b) of this rule, the discretionary authority conferred upon the judge relates only to the time, place and circumstances of such discovery. Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

IV. TRIAL PREPARATION.

Materials Prepared in Anticipation of Litigation Protected. — Any materials prepared in anticipation of any litigation by the party from whom discovery is sought are protected under subsection (b)(3) of this rule. The protection is allowed not only materials prepared after the other party has secured an attorney, but also those prepared under circumstances in which a reasonable person might anticipate a possibility of litigation. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Trial court erred by ordering an attorney, his campaign committee, and committee employees to disclose to an opponent a copy of verbatim text their attorney copied into her laptop computer from the opponent's client files because the text was the attorney's opinion work product and was not discoverable, especially since the opponent already had the underlying, original documents in his possession; counsel did not copy entire documents or substantial parts of documents contained in the opponent's files but inputted very short, select pieces of documents that she considered relevant to her clients' litigation strategy; the trial court did not abuse its discretion in determining that the verbatim text did not contain confidential or privileged information. Boyce & Isley, PLLC v. Cooper, — N.C. App. —, 673 S.E.2d 694, 2009 N.C. App. LEXIS 255 (2009).

Trial court did not abuse his discretion by not requiring an attorney, his campaign committee, and committee employees to destroy the verbatim text their attorney copied into her laptop computer from an opponent's client files because the text at issue did not contain any privileged, sensitive, or confidential information. Boyce & Isley, PLLC v. Cooper, — N.C. App. —, 673 S.E.2d 694, 2009 N.C. App. LEXIS 255 (2009).

Scope of Attorney-Client Privilege. — Protection of the attorney-client privilege is absolute under this rule and the privilege under the rule is identical in scope to the traditional privilege. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Scope of "Work Product" Exception. — Although not a privilege, the "work product" or trial preparation exception is a "qualified immunity" and extends to all materials prepared "in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer or agent." Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Materials prepared in the ordinary course of business are not protected under subsection (b)(3) of this rule, nor does the protection extend to facts known by any party. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

In a medical malpractice case, it appeared that documents generated pursuant to a hospital policy "for the reporting of all unexpected events" would not be entitled to protection under G.S. 1A-1, N.C. R. Civ. P. 26(b)(3) because they would have been prepared in the ordinary course of business; remand was required, however, to determine whether the documents in question had been generated pursuant to that policy. Diggs v. Novant Health, Inc., 177 N.C. App. 290, 628 S.E.2d 851, 2006 N.C. App. LEXIS 983 (2006).

Notes and witness statements taken by the State Bar's investigator were not discoverable on attorney's appeal of disbarment until there was a showing by attorney that he had a substantial need of the materials in preparation of his case and that he was unable without undue hardship to obtain the substantial equivalent. North Carolina State Bar v. Harris, 137 N.C. App. 207, 527 S.E.2d 728, 2000 N.C. App. LEXIS 317 (2000).

Physician Not Retained for Purpose of Litigation. — In an action for negligence in treatment and diagnosis allegedly causing the death of a patient, taking the deposition of a physician after the date set by a court order for identifying and deposing expert witnesses was not a violation of subsection (b)(4) of this rule where, even though all doctors may be considered experts in that they possess a specialized knowledge of medicine, the physician was not retained for the purpose of litigation but had treated plaintiff's wife and his knowledge of her case arose before her death, and the purpose of the deposition was to elicit the doctor's observations as to her medical condition. Turner v. Duke Univ., 91 N.C. App. 446, 372 S.E.2d 320 (1988), rev'd on other grounds, 325 N.C. 152, 381 S.E.2d 706 (1989), aff'd, 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

Defense counsel may not interview medical malpractice plaintiff's nonparty treating physicians privately without plaintiff's express consent. Defendant instead must utilize the statutorily recognized methods of discovery enumerated in this rule. Crist v. Moffatt, 326 N.C. 326, 389 S.E.2d 41 (1990).

Doctor Not Always Expert Witness. — Although, by general definition, all doctors may be considered experts in that they possess a specialized knowledge of medicine beyond that of the layman, not every role of a doctor as a witness in a legal controversy is in the capacity of an "expert" witness. Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989), aff'd, 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

In a malpractice case, the Court of Appeals correctly concluded that in deposing doctor after July 17, 1987, university did not violate order requiring identification and deposition of expert witnesses prior to that date; university properly listed doctor as an ordinary witness since doctor was not questioned about the standard of patient's care at the university, the university did not retain doctor for the purpose of litigation, his knowledge of patient's case arose before her death and before the litigation, and the purpose of the doctor's depositions was to elicit his observations as to the patient's medical condition. Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989), aff'd, 101 N.C. App. 276, 399 S.E.2d 402, cert. denied, 329 N.C. 504, 407 S.E.2d 552 (1991).

Inadequate Time to Prepare Response as Grounds for Continuance. — In malpractice action defendant's supplemental response to plaintiffs' interrogatories and plaintiffs' deposing of the new expert defense witness disclosed thereby a little over one day before trial began came too close to trial time to allow plaintiffs adequate time to prepare a response to the newly disclosed information; thus trial court erred in refusing to grant plaintiffs' motion for continuance. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Work Product Immunity Granted in Error. — Defendant attorney's due process rights were violated by Disciplinary Hearing Committee's failure to compel production of State Bar investigator's witness interview notes and memoranda to defense counsel, insofar as they related to matters to which the investigator testified; by allowing its investigator to testify in defendant's disciplinary hearing, the State Bar waived any immunity under the attorney-work product doctrine as to matters testified to by the investigator that were contained in his notes. North Carolina State Bar v. Harris, 139 N.C. App. 822, 535 S.E.2d 74, 2000 N.C. App. LEXIS 1037 (2000).

V. PROTECTIVE ORDERS.

The trial judge's order under section (c) of this rule is discretionary and is reviewable only for abuse of that discretion. Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977), rev'd on other grounds, 294 N.C. 146, 240 S.E.2d 360 (1978).

The trial judge does not have unlimited authority to issue a protective order. An order under section (c) of this rule is, however, discretionary, and is reviewable only for abuse of discretion. Williams v. State Farm Mut. Auto.

Ins. Co., 67 N.C. App. 271, 312 S.E.2d 905 (1984); Ritter v. Kimball, 67 N.C. App. 333, 313 S.E.2d 1 (1984).

Protective orders pursuant to section (c) of this rule are within the trial court's discretion and will only be disturbed for an abuse of discretion. Hartman v. Hartman, 82 N.C. App. 167, 346 S.E.2d 196, cert. denied as to additional issues, 318 N.C. 506, 349 S.E.2d 860 (1986), aff'd, 319 N.C. 396, 354 S.E.2d 239 (1987).

The trial court did not abuse its discretion in denying "work product" protection to a large number of the defendants-insurers' claims diary entries, particularly ones prepared in the course of the investigatory process prior to the denial of plaintiffs's claim. Evans v. United Servs. Auto. Ass'n, 142 N.C. App. 18, 541 S.E.2d 782, 2001 N.C. App. LEXIS 48 (2001), cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001).

Sanctions. — The trial court properly denied the plaintiff's motion for relief from a judgment under this rule that struck her designation of an expert witness, where the plaintiff sought no extension of time to designate expert witnesses in a medical malpractice case, did not offer any excuse for the late designation, and acknowledged that the failure to designate was due to her attorney's negligence. Briley v. Farabow, 348 N.C. 537, 501 S.E.2d 649 (1998).

Sanctions Inappropriate for Alleged Violation of Protective Order No Longer In Place. — Because there was no binding protective order in effect under N.C. R. Civ. P. 26(f1) since the parties never stipulated to having such an order carrying over from a previous voluntarily dismissed medical malpractice action brought by a plaintiff, and the plaintiff did not violate Rule 26(e) with regard to supplementing its answers to interrogatories, no basis existed for a trial court's exclusion of an expert witness' testimony as a sanction imposed upon the plaintiff. Barham v. Hawk, 165 N.C. App. 708, 600 S.E.2d 1 (2004), aff'd, 360 N.C. 358, 625 S.E.2d 778 (2006).

Protective Order Upheld. — Order of trial court granting plaintiff's counsel's motion for a protective order, made pursuant to a notice filed by defendant's counsel of an intention to depose plaintiff's counsel and to videotape the proceeding, whereby an oral deposition would not be had, but defendant would be allowed to use interrogatories, did not constitute an abuse of discretion. Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706, cert. denied, 322 N.C. 330, 368 S.E.2d 875 (1988).

Protective order was appropriate in malpractice action where request was tardy and constituted an undue burden as it covered voluminous medical records replete with confidential information that would require exhaustive scrutiny and extensive redaction. Fallis v. Watauga Med. Ctr., Inc., 132 N.C. App. 43, 510 S.E.2d 199, 1999 N.C. App. LEXIS 37 (1999), cert. denied, 350 N.C. 308, 534 S.E.2d 589 (1999).

Modification to Protective Order Disallowed. — Where plaintiffs agreed to protective order and sealing provisions, arguments relating to constitutionality and presumption of access were not available to support their request for removal of protective order; wholesale declassification of the record was not, in any case, deemed appropriate. Longman v. Food Lion, Inc., 186 F.R.D. 331 (M.D.N.C. 1999).

Where plaintiffs sought to modify protective order that they had previously agreed to, on the grounds that (1) they wanted to submit the record on appeal without the administrative burden of filing it under seal, and (2) they wanted to provide material to class members and the public at large, they failed to show a change in circumstances sufficient to warrant a reconsideration of the seal. Longman v. Food Lion, Inc., 186 F.R.D. 331 (M.D.N.C. 1999).

Protective Order with Respect to MHOD Petition Affirmed. — Plaintiff seller of land whose petition for Manufactured Home Overlay District (MHOD) rezoning was denied was precluded from examining a city mayor about his actions, intentions or motives with respect to the city's denial and with respect to any other quasi-judicial or legislative matters before the council. Northfield Dev. Co. v. City of Burlington, 136 N.C. App. 272, 523 S.E.2d 743, 2000 N.C. App. LEXIS 2 (2000).

Award of expenses in malpractice case against defendant was justified under section (c) of this rule because defendant's motion to quash was denied and under G.S. 1A-1, Rule 37(a)(4) because plaintiffs' motion to compel was granted. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Nullified by Dismissal. — Where plaintiff entered a dismissal in her action for claim and delivery, her argument that trial court erred in entering protective order concerning possession was moot, as the protective order was nullified by plaintiff's dismissal. Doe v. Duke Univ., 118 N.C. App. 406, 455 S.E.2d 470 (1995).

Protective Order to Safeguard Fifth Amendment Privilege. — Where an employee physically appeared at a deposition and invoked his Fifth Amendment privilege, the imposition of sanctions for failure to appear was not appropriate as the better course of action would have been for the employee to apply for a protective order pursuant to subsection (c) of this rule. Bd. of Drainage Comm'rs Drainage Dist. No. 3 v. Dixon, 158 N.C. App. 509, 581 S.E.2d 469, 2003 N.C. App. LEXIS 1181 (2003), review denied, 357 N.C. 504, 587 S.E.2d 659 (2003), aff'd, review improvidently allowed, 358 N.C. 214, 593 S.E.2d 763 (2004).

Materials Covered by the Attorney-Client Privilege. — Twenty-one insurance diary entries which consisted of either requests to counsel for advice and opinions or counsel's reply to such requests were properly found by the trial court to be protected by the attorney-client privilege. Evans v. United Servs. Auto. Ass'n, 142 N.C. App. 18, 541 S.E.2d 782, 2001 N.C. App. LEXIS 48 (2001), cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001).

Materials Not Covered by the Attorney-Client Privilege. — The trial court properly ordered the production of an investigative report compiled by an independent claim adjusters for the defendants-insurers as well as some, but not all, of defendants' internal memoranda and a part of defendants' on-line procedures manual, in spite of the fact that the defendants claimed it was covered by the Attorney-Client privilege. Evans v. United Servs. Auto. Ass'n, 142 N.C. App. 18, 541 S.E.2d 782, 2001 N.C. App. LEXIS 48 (2001), cert. denied, 353 N.C. 371, 547 S.E.2d 810 (2001).

Protection of Social Security Number. — The trial court did not abuse its discretion because its order compelling discovery of an employee's social security number fell squarely within the exemption for court orders in both G.S. 132-1.10, and the original Federal Privacy Act of 1974. The trial court took measures to minimize the potential loss of privacy resulting from the disclosure of the social security number, requiring that all records be purged upon the completion of the lawsuit pursuant to G.S. 1A-1, N.C. R. Civ. P. 26(c). Fulmore v. Howell, 189 N.C. App. 93, 657 S.E.2d 437, 2008 N.C. App. LEXIS 429 (2008).

VI. DECISIONS UNDER PRIOR LAW.

***Editor's Note.** — The cases cited below were decided under former G.S. 8-71.*

The competency, in proper cases, of written depositions for the production of proof in civil actions is unquestioned. In such cases, it sufficiently complies with the constitutional mandate if the testimony was taken under oath in the manner prescribed by law, with opportunity to cross-examine. Chesson v. Kieckhefer Container Co., 223 N.C. 378, 26 S.E.2d 904 (1943).

Right of Cross-Examination. — Where a cause has been referred and regularly proceeded with before a commissioner to take a deposition therein, the party has a right to cross-examine the witnesses of the opposing party, which may not be denied him as a matter of law. Sugg v. St. Mary's Oil Engine Co., 193 N.C. 814, 138 S.E. 169 (1927).

Taking of Deposition Optional. — A party may take a deposition; he is not obliged to do so and it is optional with him whether he will or not. Sparrow v. Blount, 90 N.C. 514 (1884).

Former § 8-71 did not contemplate taking the deposition of a person disqualified to give evidence in a case. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954); Waldron Buick Co. v. GMC, 251 N.C. 201, 110 S.E.2d 870 (1959); Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

Defendants could not take the deposition of plaintiff's physician, because under G.S. 8-53 he was disqualified to testify as to information he acquired in attending plaintiff in a professional capacity. Waldron Buick Co. v. GMC, 251 N.C. 201, 110 S.E.2d 870 (1959).

Hence, it had to be considered in connection with § 8-53, relating to confidential communications between physician and patient. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954); Waldron Buick Co. v. GMC, 251 N.C. 201, 110 S.E.2d 870 (1959); Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

No Authority to Enter Order in Chambers for Pretrial Examination of Physician Regarding Confidential Communications. — The judge of the superior court has no authority to enter an order in chambers for the pretrial examination of a physician in regard to confidential communications of his patient. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

Leading Questions. — It is discretionary with the trial judge whether or not answers to leading questions shall be striken out of a deposition. Bank v. Carr, 130 N.C. 479, 41 S.E. 876 (1902).

Rule 27. Depositions before action or pending appeal.

(a) *Before action.* —

(1) Petition. — A person who desires to perpetuate his own testimony or that of another person regarding any matter may file a verified petition in the appropriate court in a county where any expected adverse party resides. The petition shall be entitled in the name of the petitioner and shall show: (i) that the petitioner expects that he, or his personal representative, heirs, legatees or devisees, will be a party to an action cognizable in any court, but that he is presently unable to bring it or cause it to be brought, (ii) the subject matter of the expected action and his reasons for desiring to perpetuate it, (iii) the facts

which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (iv) the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and (v) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. — The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing (or within such time as the court may direct) the notice shall be served in the manner provided in Rule 4(j)(1) or (2) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(j)(1) or (2), an attorney who shall represent them, in case they are not otherwise represented. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) Order and Examination. — If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. — If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the United States or the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a court of this State in accordance with the provisions of Rule 32(a), or in any other court under whose rules it is admissible.

(b) *Pending appeal.* — If an appeal has been taken from the determination of any court or if petition for review or certiorari has been served and filed, or before the taking of an appeal or the filing of a petition for review or certiorari if the time therefor has not expired, the court in which the determination was made may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the trial court. In such case the party who desires to perpetuate the testimony may make a motion in the trial court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the trial court. The motion shall show (i) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; (ii) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the trial court.

(c) *Perpetuation by action.* — This rule does not limit the power of a court to entertain an action to perpetuate testimony. (1967, c. 954, s. 1; 1975, c. 762, s. 2.)

COMMENT

Comment to this Rule as Originally Enacted. — The objectives here are to provide simple procedures for discovery when the purpose is preservation of testimony or the obtaining of information with which to prepare a complaint and further, in appropriate cases, to provide for discovery pending appeal.

Section (a). — Former §§ 8-85 to 8-88 provided for a special proceeding or a civil action to perpetuate testimony. Under section (a), the most significant change in respect to perpetuating testimony is that no summons is necessary. But there is a requirement of notice.

Section (b) [Now Deleted]. — This section deals with discovery for the purpose of obtaining information to prepare a complaint. It carries forward all of the protections to a prospective defendant incorporated in former § 1-121. But, again, no service of process is necessary. After the contemplated order is obtained, the procedure set forth in the other discovery rules will apply.

Section (c) [Now Section (b)]. — This section adds something new in providing for the situation where it may be desirable to take a deposition pending an appeal.

Comment to the 1975 Amendment. — This amendment deletes present Rule 27(b) which provided for depositions before action to obtain information to prepare a complaint. This provision and its predecessor generated about one half of all the appeals from orders relating to discovery in the North Carolina courts, most of them determined adversely to the party who initiated the procedure. Whatever may have been the justification for this procedure under the former code pleading practice in North Carolina, the adoption of the liberalized pleading requirements of Rule 8 would appear to have eliminated the necessity for retaining it.

The former sections (c) and (d) are redesignated as sections (b) and (c) respectively.

Legal Periodicals. — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

CASE NOTES

For cases construing former section (b) of this rule, which was eliminated by the 1975 amendment, see In re Lewis, 11 N.C. App. 541, 181 S.E.2d 806, cert. denied, 279 N.C. 394, 183 S.E.2d 242 (1971); Williams v. Blount, 14 N.C. App. 139, 187 S.E.2d 464 (1972).

Cited in In re Mark, 15 N.C. App. 574, 190 S.E.2d 381 (1972); State Farm Fire & Cas. Co. v. Taylor, 118 F.R.D. 426 (M.D.N.C. 1988).

Rule 28. Persons before whom depositions may be taken.

(a) *Within the United States.* — Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before a person authorized to administer oaths by the laws of this State, of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) *In foreign countries.* — Depositions may be taken in a foreign country:

(1) Pursuant to any applicable treaty or convention;

(2) Pursuant to a letter of request, whether or not captioned a letter rogatory;

(3) On notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States; or

(4) Before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer

any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in (here name the country)." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because the testimony was not taken under oath, or any similar departure from the requirements for depositions taken within the United States under these rules.

(c) *Disqualification for interest.* — Unless the parties agree otherwise by stipulation as provided in Rule 29, no deposition shall be taken before a person who is any of the following:

(1) A relative, employee, or attorney of any of the parties;
(2) A relative or employee of an attorney of the parties;
(3) Financially interested in the action; or
(4) An independent contractor if the contractor or the contractor's principal is under a blanket contract for the court reporting services with an attorney of the parties, party to the action, or party having a financial interest in the action. Notwithstanding the disqualification under this rule, the party desiring to take the deposition under a stipulation shall disclose the disqualification in writing in a Rule 30(b) notice of deposition and shall inform all parties to the litigation on the record of the existence of the disqualification under this rule and of the proposed stipulation waiving the disqualification. Any party opposing the proposed stipulation as provided in the notice of deposition shall give timely written notice of his or her opposition to all parties.

For the purposes of this rule, a blanket contract means a contract to perform court reporting services over a fixed period of time or an indefinite period of time, rather than on a case by case basis, or any other contractual arrangement which compels, guarantees, regulates, or controls the use of particular court reporting services in future cases.

Notwithstanding any other provision of law, a person is prohibited from taking a deposition under any contractual agreement that requires transmission of the original transcript without the transcript having been certified as provided in Rule 30(f) by the person before whom the deposition was taken.

Notwithstanding the provisions of this subsection, a person otherwise disqualified from taking a deposition under this subsection may take a deposition provided that the deposition is taken by videotape in compliance with Rule 30(b)(4) and Rule 30(f), and the notice for the taking of the deposition states the name of the person before whom the deposition will be taken and that person's relationship, if any, to a party or a party's attorney, provided that the deposition is also recorded by stenographic means by a nondisqualified person.

(d) *Depositions to be used outside this State.* —

(1) A person desiring to take depositions in this State to be used in proceedings pending in the courts of any other state or country may present to a judge of the superior or district court a commission, order, notice, consent, or other authority under which the deposition is to be taken, whereupon it shall be the duty of the judge to issue the

necessary subpoenas pursuant to Rule 45. Orders of the character provided in Rules 30(b), 30(d), and 45(b) may be made upon proper application therefor by the person to whom such subpoena is directed. Failure by any person without adequate excuse to obey a subpoena served upon him pursuant to this rule may be deemed a contempt of the court from which the subpoena issued.

(2) The commissioner herein provided for shall not proceed to act under and by virtue of his appointment until the party seeking to obtain such deposition has deposited with him a sufficient sum of money to cover all costs and charges incident to the taking of the deposition, including such witness fees as are allowed to witnesses in this State for attendance upon the superior court. From such deposit the commissioner shall retain whatever amount may be due him for services, pay the witness fees and other costs that may have been incurred by reason of taking such deposition, and if any balance remains in his hands, he shall pay the same to the party by whom it was advanced. (1967, c. 954, s. 1; 1975, c. 762, s. 2; 1995, c. 389, s. 4; 1999-264, s. 1; 2001-379, s. 4.)

COMMENT

Comment to this Rule as Originally Enacted. — This rule is the same as the federal rule except that "of this State" has been inserted in section (a), and section (d) has been added.

Under section (a) depositions for use in North Carolina need not be taken within the State. They may be taken wherever the party taking the deposition desires, subject to the protective provisions of Rule 30(b). However, a subpoena to require a witness to attend the deposition will not run outside the State. Many states have statutes comparable to present G.S. 8-84, making their subpoena power available to compel residents to appear for depositions to be used in foreign states.

Section (d) has no counterpart in the federal rules. It is designed to permit courts in this State to assist parties in proceedings in other states to take depositions in this State for use in such proceedings. North Carolina now has such a statute as indicated above. This rule also requires the party taking a deposition to make a deposit insuring the payment of all fees and costs incident to the taking of the deposition. This practice will be new.

Comment to the 1975 Amendment. — This section is amended slightly to conform to the federal rule, but its substance remains unchanged.

Legal Periodicals. — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For article, "Taking a Deposition Under North Carolina Law," see 21 N.C. Cent. L.J. 215 (1995).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Foreign Depositions. — In a contract case in which the buyers asserted that the venue in the forum selection clause of the contract was seriously inconvenient because some witnesses were located in North Carolina and Minnesota and those states had not passed the Uniform Foreign Depositions Act, the court granted the sellers' Fed. R. Civ. P. 12(b)(3) motion after determining that N. C. R. Civ. P. 28(d)(1) and Minn. R. Civ. P. 45.04 provided for similar enforcement mechanisms. Navickas v. Aircenter, Inc., — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 14061 (E.D. Tenn. May 23, 2003).

Applied in Brown v. Neal, 283 N.C. 604, 197 S.E.2d 505 (1973); Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880 (1982); State v. Isleib, 80 N.C. App. 599, 343 S.E.2d 234 (1986); State v. Morrison, 84 N.C. App. 41, 351 S.E.2d 810

(1987); Stokes County v. Pack, 91 N.C. App. 616, 372 S.E.2d 726 (1988); Iverson v. TM One, Inc., 92 N.C. App. 161, 374 S.E.2d 160 (1988); State v. Aytche, 98 N.C. App. 358, 391 S.E.2d 43 (1990); State v. Thompson, 110 N.C. App. 217, 429 S.E.2d 590 (1993).

Cited in Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404 (1986); Kearney v. County of Durham, 99 N.C. App. 349, 393 S.E.2d 129 (1990); Pugh v. Pugh, 111 N.C. App. 118, 431 S.E.2d 873 (1993); Metropolitan Property & Cas. Ins. Co. v. Lindquist, 120 N.C. App. 847, 463 S.E.2d 574 (1995); Tierney v. Garrard, 124 N.C. App. 415, 477 S.E.2d 73 (1996); Huff v. Autos Unlimited, Inc., 124 N.C. App. 410, 477 S.E.2d 86 (1996); State v. Green, 124 N.C. App. 269, 477 S.E.2d 182 (1996); State v. Fowler, 353 N.C. 599, 548 S.E.2d 684, 2001 N.C. LEXIS 674 (2001); Wilfong v. N.C. DOT, — N.C. App. —, 670 S.E.2d 331, 2009 N.C. App. LEXIS 31 (2009).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — *The cases cited below were decided under former G.S. 8-71.*

Qualification of Commissioner Presumed. — A commissioner appointed to take depositions will be presumed to be properly qualified until the contrary is shown. Gregg v. Mallet, 111 N.C. 74, 15 S.E. 936 (1892).

The commissioner should not be related to either of the parties, but the burden of proving this relationship rests upon the movant. Younce v. Broad River Lumber Co., 155 N.C. 239, 71 S.E. 329 (1911).

Mistake in Name. — Where notice to take depositions correctly stated the name of the commissioner appointed to take them and was otherwise regular, it was error for the trial judge to exclude the depositions as evidence on account of a slight error in the spelling of the commissioner's name. Hardy v. Phoenix Mut. Life Ins. Co., 167 N.C. 22, 83 S.E. 5 (1914).

Rule 29. Stipulations regarding discovery procedure.

Unless the court orders otherwise, the parties may by written stipulation (i) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (ii) modify the procedures provided by these rules for other methods of discovery. (1967, c. 954, s. 1; 1975, c. 762, s. 1.)

COMMENT

Comment to this Rule as Originally Enacted. — This rule is identical with federal Rule 29. In many cases, saving time and expense is just as important as strict formality. It should be noted that the stipulation relates only to the formalities of taking depositions, and not to their use at trial. Hence, parties may stipulate as to time, place, and manner of taking of a deposition without waiving objections to its admissibility under Rule 26(d).

Comment to the 1975 Amendment. — [Prior to the 1975 amendment] there is [was] no provision for stipulations varying the procedures by which methods of discovery other than depositions are [were] governed. It is common practice for parties to agree on such variations, and the amendment recognizes such agreements and provides a formal mechanism in the rules for giving them effect. Any stipulation varying the procedures may be superseded by court order.

Legal Periodicals. — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

Rule 30. Depositions upon oral examination.

(a) *When depositions may be taken.* — After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), except that leave is not required (i) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (ii) if special notice is given as provided in subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 45, provided that no subpoena need be served on a deponent who is a party or an officer, director or managing agent of a party, provided the party has been served with notice pursuant to subsection (b)(1) of this rule. The deposition of a person confined in prison or of a patient receiving in-patient care in or confined to an institution or hospital for the mentally ill or mentally handicapped may be taken only by leave of court on such terms as the court prescribes.

(b) *Notice of examination; general requirements; place of examination; special notice; nonstenographic recording; production of documents and things; deposition of organization.* —

(1) A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. The notice shall be served on all parties at least 15 days prior to the taking of the deposition when any party required to be served resides without the State and shall be served on all parties at least 10 days prior to the taking of the deposition when all of the parties required to be served reside within the State. Depositions of parties, officers, directors or managing agents of parties or of other persons designated pursuant to subsection (b)(6) hereof to testify on behalf of a party may be taken only at the following places:

A resident of the State may be required to attend for examination by deposition only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the State may be required to attend for such examination only in the county wherein he resides or within 50 miles of the place of service except that a judge, as defined by subdivision (h) of this rule, may, upon motion showing good cause, require that a party who selected the county where the action is pending as the forum for the action or an officer, director or managing agent of such a party, or a person designated pursuant to subsection (b)(6) hereof to testify on behalf of such a party present himself for the taking of his deposition in the county where the action is pending. The judge upon granting the motion may make any other orders allowed by Rule 26(c) with respect thereto, including orders with respect to the expenses of the deponent.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (i) states that the person to be examined is about to go out of the county where the action is pending and more than 100 miles from the place of trial, or is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (ii) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subsection (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4) Unless the court orders otherwise, testimony at a deposition may be recorded by sound recording, sound-and-visual, or stenographic means. If the testimony is to be taken by other means in addition to or in lieu of stenographic means, the notice shall state the methods by which it shall be taken and shall state whether a stenographer will be present at the deposition. In the case of a deposition taken by stenographic means, the party that provides for the stenographer shall provide for the transcribing of the testimony taken. If the deposition is by sound recording only, the party noticing the deposition shall provide for the transcribing of the testimony taken. If the deposition is by sound-and-visual means, the appearance or demeanor of deponents or attorneys shall not be distorted through camera techniques. Regardless of the method stated in the notice, any party or the deponent may have the testimony recorded by stenographic means.

(5) A party deponent, deponents who are officers, directors or managing agents of parties and other persons designated pursuant to subsection (b)(6) hereof to testify on behalf of a party may not be served with a subpoena duces tecum, but the notice to a party for the deposition of such a deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34, except as to time for response, shall apply to the request. When a notice to take such a deposition is accompanied by a request made in compliance with Rule 34 the notice and the request must be served at least 15 days earlier than would otherwise be required by Rule 30(b)(1), and any objections to such a request must be served at least seven days prior to the taking of the deposition.

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. It shall not be necessary to serve a subpoena on an organization which is a party, but the notice, served on a party without an accompanying subpoena shall clearly advise such of its duty to make the required designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1) and 45(d), a deposition taken by telephone is taken in the district and the place where the deponent is to answer questions propounded to him.

(c) *Examination and cross-examination; record of examination; oath; objections.* — Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43(b). The person before whom the deposition is to be taken shall put the deponent on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the deponent. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subsection (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the person before whom the deposition is taken, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the deposition by the person before whom the deposition is taken. Subject to any limitations imposed by orders entered pursuant to Rule 26(c) or 30(d), evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party who served the notice of taking the deposition, and he shall transmit them to the person before whom the deposition is to be taken who shall open them at the deposition, propound them to the witness and record the answers verbatim.

(d) *Motion to terminate or limit examination.* — At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, a judge of the court in which the action is pending or any judge in the county where the deposition is being taken may order before whom the examination is being taken to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of a judge of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) *Submission to deponent; changes; signing.* — The sound-and-visual recording, or the transcript of it, if any, the transcript of the sound recording, or the transcript of a deposition taken by stenographic means, shall be submitted to the deponent for examination and shall be reviewed by the deponent, unless such examination and review are waived by the deponent and by the parties. If there are changes in form or substance, the deponent shall sign a statement reciting such changes and the reasons given by the deponent for making them. The person administering the oath shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent. The certificate shall then be signed by the deponent, unless the parties by stipulation waive the signing or the deponent is ill or cannot be found or refuses to sign. If the certificate is not signed by the deponent within 30 days of its submission to him, the person before whom the deposition was taken shall sign the certificate and state on the certificate the fact of the waiver or of the illness or absence of the deponent or the fact of the refusal or failure to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though the certificate were signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) *Certification by person administering the oath; exhibits; copies.* —

(1) The person administering the oath shall certify that the deponent was duly sworn by him and that the deposition is a true record of the testimony given by the deponent. This certificate shall be in writing and accompany the sound-and-visual or sound recording or transcript of the deposition. He shall then place the deposition in an envelope or package endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall personally deliver it or mail it by first class mail to the party taking the deposition or his attorney who shall preserve it as the court's copy.

Documents and things produced for inspection during the examination of the deponent shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (i) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (ii) if the person producing the materials requests their return, the person before whom the deposition is taken shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the person administering the oath shall furnish a copy of the deposition to any party or to the deponent.

(3) Repealed by Session Laws 2005-138, s. 3, effective October 1, 2005.

(g) *Failure to attend or to serve subpoena; expenses.* —

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the judge may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the judge may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(h) *Judge; definition.* —

(1) In respect to actions in the superior court, a judge of the court in which the action is pending shall, for the purposes of this rule, and Rule 26, Rule 31, Rule 33, Rule 34, Rule 35, Rule 36 and Rule 37, be a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county.

(2) In respect to actions in the district court, a judge of the court in which the action is pending shall, for the purposes of this rule, Rule 26, Rule 31, Rule 33, Rule 34, Rule 35, Rule 36 and Rule 37, be the chief district judge or any judge designated by him pursuant to G.S. 7A-192.

(3) In respect to actions in either the superior court or the district court, a judge of the court in the county where the deposition is being taken shall, for the purposes of this rule, be a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in that county, or the chief judge of the district court or any judge designated by him pursuant to G.S. 7A-192. (1967, c. 954, s. 1; 1973, c. 828, s. 1; c. 1126, ss. 1, 2; 1975, c. 762, s. 2; 1977, c. 769; 1983, c. 201, s. 2; c. 801, ss. 1, 2; 1987 (Reg. Sess., 1988), c. 1037, s. 42; 1995, c. 353, ss. 1-3; 1995 (Reg. Sess., 1996), c. 742, s. 4; 2005-138, s. 3.)

COMMENT

Comment to this Rule as Originally Enacted. — This rule prescribes the procedure for taking depositions upon oral examination. Depositions upon written interrogatories are governed by Rule 31. The procedure fixed by Rule 30 governs depositions upon oral examination in all cases, whether a deposition with or without leave of court as provided in Rule 26(a), or under an order of court for the perpetuation of testimony before action under Rule 27 (a) or under order of court for the perpetuation of testimony pending appeal as provided in Rule 27(b) or under order of court as provided in Rule 27(c).

Section (a) differs from federal Rule 30 (a) in that a specific time for serving notice prior to the taking of the deposition is fixed, instead of "reasonable notice" as is found in the federal rule. Furthermore, section (a) does not authorize the court to extend or shorten the time fixed by the rule. Such a provision is contained in federal Rule 30(a).

Sections (b) and (d) provide for protection from the abuse of the discovery procedure to either the opposing party or the person to be examined. Before the taking of the deposition begins, either may apply for protection under section (b). During the taking of the deposition either may apply for protection under section (d). Under section (b) application is made to the judge of the court in which the action is pending upon motion seasonably made. "Seasonably" means as soon as the person making the motion learns that he will need the protective order. *Moore's Federal Practice,* § 30.05, (2nd Ed.). Such a motion must comply with Rule 7(b), be served and filed in compliance with Rule 5, and be served within the time provided in Rule 6(d).

A change has been made in federal Rule 30(c) in that a provision has been added with respect to the payment for transcribing when the transaction is requested by a party other than the party taking the deposition. In some cases the sole purpose of the deposition may be for discovery only, and not for use at the trial. Hence, the court should have this power.

The words "or by some method by which the testimony is written or typed as it is given" are inserted in section (c) for the purpose of indicating that, in the absence of agreement, testimony may be taken by any of the methods described.

As has been indicated, section (d) provides for protection during the taking of the deposition. Such a motion may be made before a judge of a court in which an action is pending or a judge of the court in which the deposition is being taken. Section (d) authorizes the judge to order either party or the deponent to pay such costs as may be deemed reasonable upon the granting or refusing of such a motion.

Section (e) changes former procedure to the extent that the deposition need not be signed by the deponent unless one of the parties or the deponent makes such a request.

Section (f) contains no provision for opening a deposition similar to former practice (repealed § 8-71). No good reason exists for continuing that practice, since in most cases all parties have copies of the deposition, and objections which have been entered at the taking of the deposition can be passed on at the time of trial.

Section (g) is identical with federal Rule 30(g). Apparently there is no provision under present statutes for the taxing of expenses under such circumstances.

Comment to the 1975 Amendment. — *Section (a).* — This section contains the provisions of existing [former] Rule 26(a), transferred here as part of the rearrangement relating to Rule 26. Existing [former] Rule 30(a) is transferred to 30(b). Changes in language have been made to conform to the new arrangement.

This section is further revised in regard to the requirement of leave of court for taking a deposition. The present procedure, requiring a plaintiff to obtain leave of court if he serves notice of taking a deposition within 30 days after commencement of the action, is changed in several respects. First, leave is required by reference to the time the deposition is to be taken rather than the date of serving notice of taking. Second, the 30-day period runs from the service of summons and complaint on any defendant, rather than the commencement of the action. Third, leave is not required beyond the time that defendant initiates discovery, thus showing that he has retained counsel. As under the present practice, a party not afforded a reasonable opportunity to appear at a deposition, because he has not yet been served with process, is protected against use of the deposition at trial against him. See Rule 32(a) transferred from [former] 26(d). Moreover, he can later redepose the witness if he so desires.

The purpose of requiring the plaintiff to obtain leave of court is to protect a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit. This protection, however, is relevant to the time of taking the deposition, not to the time that notice is served. Similarly, the protective period should run from the service of process rather than the filing of the complaint with the court. The new procedure is consistent in principle with the provisions of Rules 33, 34 and 36 as revised.

Plaintiff is excused from obtaining leave even during the initial 30-day period if he gives the special notice provided in subsection (b)(2). The required notice must state that the person to be examined is about to go out of the district where the action is pending and more than 100 miles from the place of trial, or out of the United States, or on a voyage to sea, and will be unavailable for examination unless deposed within the 30-day period. Defendant is protected by a provision that the deposition cannot be used against him if he was unable through exercise of diligence to obtain counsel to represent him.

The North Carolina modification of the

former federal rule, requiring leave of court to depose mental patients as well as prisoners, is retained in substance.

The provision obviating the necessity of serving a subpoena on a deponent who is a party or an officer, director or managing agent of a party where the party has been served with notice of the deposition incorporates by rule the result reached by decision in most federal courts.

Section (b). — Existing [former] Rule 30(b) on protective orders has been transferred to Rule 26(c), and existing former Rule 30(a) relating to the notice of taking deposition has been transferred to this section. Because new material has been added, subsection numbers have been inserted.

Subsection (b)(1). — If a subpoena duces tecum is to be served, a copy thereof or a designation of the materials to be produced must accompany the notice. Each party is thereby enabled to prepare for the deposition more effectively. The former North Carolina requirement, designating the length of notice required, is retained in preference to the standard of reasonable notice contained in the federal rules. The provision with respect to the place of deposition is removed in a modified form to this subsection from Rule 45(d)(2), where it referred only to deponents testifying under subpoena, and not to party deponents testifying pursuant to notice only.

Subsection (b)(2). — This subsection is discussed in the note to section (a), to which it relates.

Subsection (b)(3). — This provision is new, although the power of the Court to alter the time of a deposition has probably always existed.

Subsection (b)(4). — In order to facilitate less expensive procedures, provision is made for the recording of testimony by other than stenographic means — e.g., by mechanical, electronic, or photographic means. Because these methods give rise to problems of accuracy and trustworthiness, the party taking the deposition is required to apply for a court order. The order is to specify how the testimony is to be recorded, preserved, and filed, and it may contain whatever additional safeguards the court deems necessary.

Subsection (b)(5). — A provision is added to enable a party, through service of notice, to require another party to produce documents or things at the taking of his deposition. This may now be done as to a nonparty deponent through use of subpoena duces tecum as authorized by Rule 45, but some federal courts held under the former federal rule that documents could be secured from a party only under former Rule 34, which required notice, hearing and an order finding good cause for production. With the elimination of "good cause" from Rule 34, the reason for this restrictive doctrine has disappeared.

Whether production of documents or things should be obtained directly under Rule 34 or at the deposition under this rule will depend on the nature and volume of the documents or things. Both methods are made available. When the documents are few and simple, and closely related to the oral examination, ability to proceed via this rule will facilitate discovery. If the discovering party insists on examining many and complex documents at the taking of the deposition, thereby causing undue burdens on others, the latter may, under Rules 26(c) or 30(d), apply for a court order that the examining party proceed via Rule 34 alone. The provisions as to the timing of such request eliminates an ambiguity present in the new federal rule and insures that the party giving notice of the taking of a deposition will know in advance of the deposition what documents or things the deponent declines to produce. This will allow the deposing party an opportunity to seek an order to compel production under Rule 37(a) prior to the deposition if he is so advised and will serve to minimize the risk that a deposition will be adjourned because of the previously undisclosed refusal of the deponent to produce requested documents or things.

Subsection (b)(6). — A new provision is added, whereby a party may name a corporation, partnership, association or governmental agency as the deponent and designate the matters on which he requests examination, and the organization shall then name one or more of its officers, directors, or managing agents, or other persons consenting to appear and testify on its behalf with respect to matters known or reasonably available to the organization. The organization may designate persons other than officers, directors, and managing agents, but only with their consent. Thus, an employee or agent who has an independent or conflicting personal injury case — can refuse to testify on behalf of the organization.

This procedure supplements the existing practice whereby the examining party designates the corporate official to be deposed. Thus, if the examining party believes that certain officials who have not testified pursuant to this subsection have added information, he may depose them. On the other hand, a court's decision whether to issue a protective order may take account of the availability and use made of the procedures provided in this subsection.

The new procedure should be viewed as an added facility for discovery, one which may be advantageous to both sides as well as an improvement in the deposition process. It will reduce the difficulties now encountered in determining, prior to the taking of a deposition, whether a particular employee or agent is a "managing agent." It will curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it. The provision should also assist organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge. Some courts have held that under the existing rules a corporation should not be burdened with choosing which person is to appear for it. This burden is not essentially different from that of answering interrogatories under Rule 33, and is in any case lighter than that of an examining party ignorant of who in the corporation has knowledge.

This rule is so phrased that notice to parties, including a party deponent, and a subpoena to a nonparty organization are required to bring the rule into play.

The wording of this subsection is slightly altered from that of the federal rule to eliminate an ambiguity as to whether the subpoena must be issued to a party.

Section (c). — A new sentence is inserted at the beginning, representing the transfer of existing [former] Rule 26(c) to this section. Another addition conforms to the new provision in subsection (b)(4).

The present rule provides that transcription shall be carried out unless all parties waive it. In view of the many depositions taken from which nothing useful is discovered, the revised language provides that transcription is to be performed if any party requests it.

Parties choosing to serve written questions rather than participate personally in an oral deposition are directed to serve their questions on the party taking the deposition, since the officer is often not identified in advance. Confidentiality is preserved, since the questions may be served in a sealed envelope.

Section (d). — The assessment of expenses incurred in relation to motions made under this section (d) is made subject to the provisions of Rule 37(a). The standards for assessment of expenses are more fully set out in Rule 37(a), and these standards should apply to the essentially similar motions of this section.

Section (e). — The provision relating to the refusal of a deponent to sign his deposition is tightened through insertion of a 30-day time period and a provision allowing use of the deposition upon the refusal or failure of the deponent to sign and return it within the required time.

Subsection (f)(1). — A provision is added which codifies in a flexible way the procedure for handling exhibits related to the deposition and at the same time assures each party that he may inspect and copy documents and things produced at a nonparty witness in response to a subpoena duces tecum. As a general rule and in the absence of agreement to the contrary or order of the court, exhibits produced without objection are to be annexed to and returned with the deposition, but a deponent may substitute copies for purposes of marking and he may obtain return of the exhibits. The right of the parties to inspect exhibits for identification and to make copies is assured.

The former requirement of North Carolina Rule 26(f)(1) that the original and one copy be filed with the clerk is abandoned. In practice it proved to have little utility and was generally waived or ignored.

Subsection (f)(3). — This provision clarifies the conflict between former Rule 30(f)(3) which required the party to give the notice, and [former] 32(e) which required the clerk to do so. It also eliminates the former requirement that the party taking the deposition furnish a copy to all other parties. Whatever the reason for the former requirement may have been, in practice it has penalized the party with limited means who must utilize depositions to make out his claim or defense.

Section (g). — This provision contained only minor changes in phraseology not affecting the substance of the rule.

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1979 law on evidence, see 58 N.C.L. Rev. 1456 (1980).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Taking a Deposition Under North Carolina Law," see 21 N.C. Cent. L.J. 215 (1995).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Right to take deposition granted by section (a) of this rule is unqualified, except for provision of G.S. 1A-1, Rule 26(c) authorizing the trial court to issue "protective orders." Tennessee-Carolina Transp., Inc. v. Strick Corp., 291 N.C. 618, 231 S.E.2d 597 (1977).

Effect of Adverse Testimony in Deposition Generally. — When a party gives adverse testimony in a deposition or at trial, that testimony should not, in most instances, be conclusively binding on him to the extent that his opponent may obtain either summary judgment or a directed verdict. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Two exceptions to the general rule regarding the effect of adverse testimony in a deposition should be noted: (1) When a party gives deliberate, unequivocal and repeated testimony which is diametrically opposed to the essential allegations of the complaint, destroying the theory of the action, which testimony is intentionally given and unremedied by any further testimony, the testimony should be treated as binding judicial admissions rather than evidential admissions; (2) When a party gives adverse testimony, and there is insufficient evidence to the contrary presented to support the allegations of the complaint, summary judgment or a directed verdict would in most cases properly be granted. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Where witness was both a fact and an expert witness he could be deposed without a court order and his testimony could only be limited by objection during the deposition if he was questioned regarding his expert opinion. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Opposition to Discovery Was Correct Where Subpoena Not Issued Correctly. — In order to compel the deposition testimony of a nonparty, a subpoena must be issued from the county in which the deposition is to be taken, and a proper subpoena should have been issued from the Clerk of Superior Court of Wake County directing a nonparty in a divorce case to appear in Wake County; therefore, nonparty and her attorney were substantially justified in opposing the discovery sought pursuant to the subpoena issued from Mecklenburg County and the trial court's imposition of attorney fees under G.S. 1A-1, Rule 37(a)(4) was error. Cochran v. Cochran, 93 N.C. App. 574, 378 S.E.2d 580 (1989).

Jurisdiction of Court. — District Court was without jurisdiction, pending the appeal, to find deponent in contempt of the order appealed from; thus, its findings and order to that effect were void. Wilson v. Wilson, 124 N.C. App. 371, 477 S.E.2d 254 (1996).

Applied in Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975); Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176 (1981); Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190 (1983).

Cited in Cloer v. Smith, 132 N.C. App. 569, 512 S.E.2d 779 (1999); Sharpe v. Worland, 132 N.C. App. 223, 511 S.E.2d 35 (1999); Sharpe v. Worland, 351 N.C. 159, 522 S.E.2d 577 (1999); Kilgo v. Wal-Mart Stores, Inc., 138 N.C. App. 644, 531 S.E.2d 883, 2000 N.C. App. LEXIS 791 (2000); Patterson v. Sweatt, 146 N.C. App. 351, 553 S.E.2d 404, 2001 N.C. App. LEXIS 935 (2001); Bd. of Drainage Comm'rs Drainage Dist. No. 3 v. Dixon, 158 N.C. App. 509, 581 S.E.2d 469, 2003 N.C. App. LEXIS 1181 (2003); Home Sav. Bank v. Colonial Am. Cas. & Sur. Co., 165 N.C. App. 189, 598 S.E.2d 265, 2004 N.C. App. LEXIS 1147 (2004).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — *The cases cited below were decided under former G.S. 8-71 and G.S. 8-72.*

Presumption of Regularity. — The presumption is that a deposition has been properly taken when it appears thereon that it was taken by one named in the commission on the day named and at the designated place. Younce v. Broad River Lumber Co., 155 N.C. 239, 71 S.E. 329 (1911).

The object of the notice is to give the party an opportunity to attend and cross-examine; and, while on the one hand, a party will not be forced to attend on Sunday, or on a day when his presence is required at another place for the purpose of that very suit, so, on the other, it held that the principle is complied with substantially, if the notice describes the place with reasonable certainty. Owens v. Kinsey, 51 N.C. 38 (1858).

Notice to One of Several Joint Defendants. — Upon a bill against joint administrators relative to the acts of the intestate, of which the administrators put in a joint answer, a deposition taken by the plaintiff upon notice to only one of the defendants was excluded even though it was the deposition of the plaintiff's only witness, who had since died. Cox v. Smitherman, 37 N.C. 66 (1841).

Variance Between Notice and Certificate. Where a deposition certified to have been taken at the house of J.E. was objected to because the notice was to take it at the house of J.A.E., it was held that it would be presumed that the notice and certificate referred to the same person. Ellmore v. Mills, 2 N.C. 359 (1796).

A misdescription of a place, in one small particular, in a notice to take depositions will not be fatal, if other descriptive terms are used in the notice, less liable to mistake, by which such place may be identified. Pursell v. Long, 52 N.C. 102 (1859).

A notice to take a deposition on "the 5th or 6th" of a certain month was held sufficient. Kenedy v. Alexander, 2 N.C. 25 (1794).

Notice to take a deposition on a particular day of every week for three successive months is not good. Bedell v. President & Dirs. of State Bank, 12 N.C. 483 (1828).

Where notice is served that depositions will be taken at the same time in two different places, so that the party who is notified cannot be present at both, he may attend at either place designated and disregard the notice as to the other, and the deposition taken in his absence at the other place will, on motion, be quashed or suppressed, but where he elects to appear by counsel and cross-examines the witnesses without making any objection at the time, this is a waiver as to any defect in the notice. Ivey v. Bessemer City Cotton Mills, 143 N.C. 189, 55 S.E. 613 (1906).

Where notice was given to take the deposition of certain named parties "and others," and depositions of those particularly mentioned were not taken, it was held to be no ground for exception. McDugald v. Smith, 33 N.C. 576 (1850).

Where the notice directed the commissioner to take the depositions of persons named "and others," depositions taken of others than those named were admissible. In re Will of Rawlings, 170 N.C. 58, 86 S.E. 794 (1915).

Taking of Deposition in Party's Place of Business. — It is not error to take a deposition in the place of business of one of the parties if such place is named in the notice and there is no suggestion that the other party suffered any prejudice thereby. Bank v. Carr, 130 N.C. 479, 41 S.E. 876 (1902).

Duty of Witness to Answer. — The commissioner acts for the court, and it is the duty of the witness to answer proper questions propounded by him, just as if the examination was conducted before the judge or clerk. Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893).

Necessity of Sealing. — A deposition must be sealed up by the commissioners, so as to prevent inspection and alteration; it need not be certified under the seal of the commissioners. Ward v. Ely, 12 N.C. 372 (1828).

Where a deposition was found among papers, with a commission unattached, and an envelope which appeared to have been sealed up and afterwards broken open, it was held that this was sufficient evidence to justify the clerk in finding that the deposition had been taken under such commission, and had been returned to him sealed up by the commissioner, and therefore, that the clerk had done right in passing upon and allowing such deposition to be read. Hill v. Bell, 61 N.C. 122 (1867).

Mailing of Deposition to Clerk by Attorney. — Where the notary public taking a deposition in another state sealed the same in an envelope addressed to the clerk of the superior court, the fact that the attorney of the party offering the deposition in evidence brought the sealed envelope back with him to this state and dropped it in the mail, as requested by the notary, did not render the deposition incompetent. Randle v. Grady, 228 N.C. 159, 45 S.E.2d 35 (1947).

When Delay in Execution of Commission Insufficient for Continuance. — Commissions to take testimony are issued at the instance and for the benefit of one of the parties, and he will usually make them returnable at the earliest day consistent with convenience. But if through laches or from a wish to delay the trial, he should not do so, the nonexecution of the commission will be adjudged an insufficient reason for asking a continuance. Duncan v. Hill, 19 N.C. 291 (1837).

Rule 31. Depositions upon written questions.

(a) *Serving questions; notice.* — After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45 provided that no subpoena need be served on a deponent who is a party or an officer, director or managing agent of a party, provided the party has been served with notice pursuant to this rule. Such a deposition shall be taken in the county where the witness resides or is employed or transacts his business in person unless the witness agrees that it may be taken elsewhere. The deposition of a person confined in prison or of a patient receiving in-patient care in or confined to an institution or hospital for the mentally ill or mentally handicapped may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (i) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (ii) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) *Person to take responses and prepare record.* — A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the person designated in the notice to take the deposition, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the deponent in response to the questions and to prepare, certify, and mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) Repealed by Session Laws 2005-138, s. 4, effective October 1, 2005. (1967, c. 954, s. 1; 1975, c. 762, s. 2; 2005-138, s. 4.)

COMMENT

Comment to this Rule as Originally Enacted. — This rule provides an alternative method for taking depositions which a party may employ rather than taking the deposition on oral examination as provided for in Rule 30, and follows very closely federal Rule 31.

Under former § 8-71, when a deposition was returned to the court, the clerk was required to open and pass on it after giving parties or their attorney not less than one day's notice. Section (c) simply requires the party taking the deposition to give notice of the filing of the deposition.

"Rule 31(d) permits a party or a deponent to make a motion in the court in which the action is pending for any protective order specified in Rule 30. The motion, however, must be made prior to the taking of the testimony of the deponent. This time limitation upon the making of the motion is perfectly proper with respect to a party, but if applied also to a motion made by a deponent, it is inconsistent with the practice that the interrogatories are not to be shown to the deponent in advance of the taking of the deposition. While the time limitation imposed by Rule 30(d) upon the making of a motion for a protective order is in terms applicable to a motion by a deponent, it is believed that the proper practice should be that the interrogatories should not be shown to the deponent in advance of the taking of his deposition, except upon consent of the parties, and that the deponent should be allowed to make a motion for a protective order during the taking of the deposition as provided in Rule 30(d) for the making of a similar motion by a deponent upon an oral examination." 4 *Moore's Federal Practice,* § 31.06.

Comment to the 1975 Amendment. — Confusion is created by the use of the same terminology to describe both the taking of a deposition upon "written interrogatories" pursuant to this rule and the serving of "written interrogatories" upon parties pursuant to Rule 33. The distinction between these two modes of discovery will be more readily and clearly grasped through substitution of the word "questions" for "interrogatories" throughout this rule.

Section (a). — A new paragraph is inserted at the beginning of this section to conform to the rearrangement of provisions in Rules 26(a), 30(a), and 30(b).

The revised section permits designation of the deponent by general description or by class or group. This conforms to the practice for depositions on oral examination.

The new procedure provided in Rule 30(b)(6) for taking the deposition of a corporation or other organization through persons designated by the organizations is incorporated by reference.

The service of all questions, including cross, redirect, and recross, is to be made on all parties. This will inform the parties and enable them to participate fully in the procedure.

The time allowed for service of cross, redirect, and recross questions has been extended. Experience with the existing time limits under the former federal rule showed them to be unrealistically short. No special restriction is placed on the time for serving the notice of taking the deposition and the first set of questions. Since no party is required to serve cross questions less than 30 days after the notice and questions are served, the defendant has sufficient time to obtain counsel. The court may for cause shown enlarge or shorten the time.

The provision obviating the necessity of service of subpoena on a party or an officer, director or managing agent of a party conforms to revised Rule 30(a) and federal case law in the absence of a similar provision in the federal rules.

The North Carolina modification of the former federal rule, requiring leave of court to depose mental patients as well as prisoners, is retained in substance.

Section (c). — This section is amended to conform to the change in Rule 30(f)(3).

Former Section (d). — Since new Rule 26(c) provides for protective orders with respect to all discovery, and expressly provides that the court may order that one discovery device be used in place of another, section (d) is eliminated as unnecessary.

Legal Periodicals. — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

CASE NOTES

Use of Deposition at Trial Stage Limited. — Although the Rules of Civil Procedure provide extensive rights of discovery to any party, the use of a deposition in a civil case at the trial stage is sharply limited. Maness v. Bullins, 11 N.C. App. 567, 181 S.E.2d 750, cert. denied, 279 N.C. 395, 183 S.E.2d 242 (1971).

Admission of Interrogatories Held Error. — Where the record contained no indication by evidence or stipulation as to whereabouts of a deponent who was not a party at the time the case came on for trial, and there was no finding or inquiry by the trial judge as to the existence of any of the conditions which would have made the interrogatories competent and admissible in evidence, their admission constituted prejudicial error. Maness v. Bullins, 11 N.C. App. 567, 181 S.E.2d 750, cert. denied, 279 N.C. 395, 183 S.E.2d 242 (1971).

In order to compel the deposition testimony of a nonparty, a subpoena must be issued from the county in which the deposition is to be taken, and a proper subpoena should have been issued from the Clerk of Superior Court of Wake County directing a nonparty in a divorce case to appear in Wake County; therefore, nonparty and her attorney were substantially justified in opposing the discovery sought pursuant to the subpoena issued from Mecklenburg County and the trial court's imposition of attorney's fees under G.S. 1A-1, Rule 37(a)(4) was error. Cochran v. Cochran, 93 N.C. App. 574, 378 S.E.2d 580 (1989).

Applied in Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).

Cited in Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379 (1975); Kilgo v. Wal-Mart Stores, Inc., 138 N.C. App. 644, 531 S.E.2d 883, 2000 N.C. App. LEXIS 791 (2000).

Rule 32. Use of depositions in court proceedings.

(a) *Use of depositions.* — At the trial or upon the hearing of a motion or an interlocutory proceeding or upon a hearing before a referee, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a person called as a witness may also be used as substantive evidence by any party adverse to the party who called the deponent as a witness and it may be used by the party calling deponent as a witness as substantive evidence of such facts stated in

the deposition as are in conflict with or inconsistent with the testimony of deponent as a witness.

(3) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose, whether or not the deponent testifies at the trial or hearing.

(4) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: that the witness is dead; or that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting testimony of witnesses orally in open court, to allow the deposition to be used; or the witness is an expert witness whose testimony has been procured by videotape as provided for under Rule 30(b)(4).

(5) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which is relevant to the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the former action and duly prepared, certified, and delivered in accordance with Rule 30 may be used in the latter as if originally taken therefor.

(b) *Objections to admissibility.* — Subject to the provisions of Rules 28(b) and subsection (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) *Effect of taking or using depositions.* — A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subsection (a)(2) or (a)(3) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) *Effect of errors and irregularities in depositions.* —

(1) As to Notice. — All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Person before Whom Taken. — Objection to taking a deposition because of disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition. —

a. Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

b. Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

c. Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. — Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, or otherwise dealt with by the person taking the deposition under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defeat is, or with due diligence might have been, ascertained. (1967, c. 954, s. 1; 1975, c. 762, s. 2; 1977, c. 984; 1981, c. 599, s. 2; 2005-138, ss. 5, 6.)

COMMENT

Comment To This Rule as Originally Enacted. — The purpose of this rule is to require defects in the taking of depositions to be pointed out promptly in order that the erring party may have an opportunity to correct the errors and prevent waste of time and expense by a subsequent claim to suppress a deposition based upon some technical error.

Section (a) carries forward former § 1-568.23 (a).

Under former law objection based upon the disqualification of the person before whom the deposition is to be taken could be made at any time up to trial. Under section (b) such an objection would be unavailable at trial.

Sections (c)(1) and (2) follow verbatim federal Rule 32 (c)(1) and (3) and former § 1-568.23(b) and (d).

Federal Rule 32(c)(2), which is the same as former § 1-568.23(c), has been omitted.

Section (d). — This section follows federal Rule 32(d) verbatim and is quite similar to former §§ 1-568.22 and 1-568.23(e) except in this rule objection must be made with "reasonable promptness," whereas, under former statutes, a motion to suppress must have been made within ten days after the deposition was filed.

Comment to the 1975 Amendment. — As part of the rearrangement of the discovery rules, existing [former] sections (d) and (e) of Rule 26 are transferred to Rule 32 as new sections (a) and (c). The provisions of Rule 32 are retained as section (d) of Rule 32 with appropriate changes in the lettering and numbering of subheadings. The new rule is given a suitable new title. A beneficial by-product of the rearrangement is that provisions which are naturally related to one another are placed in one rule.

A change is made in new Rule 32(a), whereby it is made clear that the rules of evidence are to be applied to depositions offered at trial as though the deponent were then present and testifying at trial. This eliminates the possibility of certain technical hearsay objections which are based, not on the contents of deponent's testimony, but on his absence from court. The language of present [former] Rule 26(d) does not appear to authorize these technical objections, but it is not entirely clear.

The provisions of former Rule 26(d)(2)a and b, governing use of a deposition where the deponent testifies at trial, are preserved in Rule 32(a)(1) and (2) with the added provision that any party may use a deposition to contradict or impeach a witness who testifies at trial.

Note present [former] Rule 26(e), transferred to Rule 32(b).

An addition in Rule 32(a)(2) provides for use of a deposition of a person designated by a corporation or other organization, which is a party, to testify on its behalf. This complements the new procedure for taking the deposition of a corporation or other organization provided in Rules 30(b)(6) and 31(a). The addition is appropriate, since the deposition is in substance and effect that of the corporation or other organization which is a party.

References to other rules are changed to conform to the rearrangement, and minor verbal changes have been made for clarification. The time for objecting to written questions served under Rule 31 is slightly extended.

The somewhat unwieldy provisions of former Rule 32(e) relating to the mechanics of handling objections to all or part of a deposition are abandoned in favor of present Rule 32(b).

The absence of specific provisions relating to the time when objections of various kinds must be made has necessitated the entry of a stipulation on the subject in every carefully taken deposition. Rules 32(d)(3)a and b incorporate in the rules provisions that are almost universally stipulated by the parties in the absence of a rule.

Legal Periodicals. — For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Taking a Deposition Under North Carolina Law," see 21 N.C. Cent. L.J. 215 (1995).

CASE NOTES

Editor's Note. *— Some of the cases cited below were decided under former sections (d) and (e) of G.S. 1A-1, Rule 26 as it stood before the 1975 amendment.*

To the extent they are in conflict, this rule takes precedence over G.S. 8-83. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

But insofar as it does not conflict with this rule, § 8-83 remains in effect. Wright v. American Gen. Life Ins. Co., 59 N.C. App. 591, 297 S.E.2d 910 (1982), cert. denied, 307 N.C. 582, 299 S.E.2d 653 (1983).

Deposition of Non-Party Witness. — To be admissible at trial, the deposition of an unavailable non-party witness must meet the requirements of both this Rule and N.C.R. Evid. 804(b)(1). Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650, 464 S.E.2d 47 (1995).

Rules of evidence are to be applied to depositions offered at trial as though the deponent were then present and testifying at trial. Suarez v. Wotring, 155 N.C. App. 20, 573 S.E.2d 746, 2002 N.C. App. LEXIS 1594 (2002), cert. denied, 357 N.C. 66, 579 S.E.2d 107, cert. dismissed, 357 N.C. 66, 579 S.E.2d 107 (2003).

Deposition of an available witness is admissible under G.S. 1A-1, N.C. R. Civ. P. 32(a), so long as one of the enumerated purposes set forth in Rule 32(a) have been met. Suarez v. Wotring, 155 N.C. App. 20, 573 S.E.2d 746, 2002 N.C. App. LEXIS 1594 (2002), cert. denied, 357 N.C. 66, 579 S.E.2d 107, cert. dismissed, 357 N.C. 66, 579 S.E.2d 107 (2003).

Use After Release from Subpoena. — Where three expert medical witnesses for the plaintiff all testified at a medical negligence trial and were released from subpoena with the health care providers' consent, the use of their deposition testimony by the health care providers was admissible as substantive evidence. Suarez v. Wotring, 155 N.C. App. 20, 573 S.E.2d 746, 2002 N.C. App. LEXIS 1594 (2002), cert. denied, 357 N.C. 66, 579 S.E.2d 107, cert. dismissed, 357 N.C. 66, 579 S.E.2d 107 (2003).

Use of Depositions at Trial Stage Limited. — Although the Rules of Civil Procedure provide extensive rights of discovery to any party, the use of a deposition in a civil case at the trial stage is sharply limited. Maness v. Bullins, 11 N.C. App. 567, 181 S.E.2d 750, cert. denied, 279 N.C. 395, 183 S.E.2d 242 (1971); Warren v. City of Asheville, 74 N.C. App. 402, 328 S.E.2d 859, cert. denied, 314 N.C. 336, 333 S.E.2d 496 (1985).

Generally, testimony by deposition is less desirable than oral testimony, and it should ordinarily be used as a substitute only if the witness is not available to testify in person. Warren v. City of Asheville, 74 N.C. App. 402, 328 S.E.2d 859, cert. denied, 314 N.C. 336, 333 S.E.2d 496 (1985).

Oral testimony is more desirable, but a deposition may be used if a witness is unavailable. Investors Title Ins. Co. v. Herzig, 330 N.C. 681, 413 S.E.2d 268 (1992).

Objection Based On Dead Man's Statute Not Waived. — Pursuant to N.C. R. Civ. P. 32(d)(3)(a), administrator did not waive objection based on Dead Man's Statute by failing to make it at widow's deposition. Estate of Redden

v. Redden, 179 N.C. App. 113, 632 S.E.2d 794, 2006 N.C. App. LEXIS 1638 (2006).

As to nonadmissibility of depositions for purposes of corroboration, see Miller v. Kennedy, 22 N.C. App. 163, 205 S.E.2d 741, cert. denied, 285 N.C. 661, 207 S.E.2d 755 (1974).

Use of Party's Deposition Under Subsection (a)(3). — While under subdivisions (2) and (9) of G.S. 8-83 the presence of a witness in court is a proper basis for excluding the witness's deposition, it is no basis for excluding the deposition of a party, which subsection (a)(3) of this rule makes useable without restriction, if it is otherwise admissible under the rules of evidence. Stilwell v. Walden, 70 N.C. App. 543, 320 S.E.2d 329 (1984).

Whether a deposition may be used at trial pursuant to subsection (a)(4) of this rule will depend upon the circumstances at the time of the trial. Tennessee-Carolina Transp., Inc. v. Strick Corp., 291 N.C. 618, 231 S.E.2d 597 (1977).

There is no distinction between a discovery deposition and a trial deposition, under this rule. Robertson v. Nelson, 116 N.C. App. 324, 447 S.E.2d 488 (1994).

Admittance of Portion of Deposition Does Not Require Admittance of Entire Deposition. — Trial court did not err in allowing in evidence selected portions of each of the two plaintiffs' depositions and in overruling plaintiffs' motions that the entire depositions be admitted. Plaintiffs' reliance on this section was misplaced since plaintiffs alleged a right to have the entire depositions admitted once a portion had been offered into evidence; this section allows the admission of "any other part which is relevant to the part introduced." Lenins v. K-Mart Corp., 98 N.C. App. 590, 391 S.E.2d 843 (1990).

Continuous Search for Witness Unnecessary. — Nothing in the plain language of this rule indicates that an attorney must maintain a continuous search for a witness until either the witness is found or the deposition is used. Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979), cert. denied, 299 N.C. 544, 265 S.E.2d 404 (1980).

Incarcerated Parent in Parental Termination Proceeding. — When an incarcerated parent is denied transportation to the hearing in contested termination cases, the better practice is for the court, when so moved, to provide the funds necessary for the deposing of the incarcerated parent. The parent's deposition, combined with representation by counsel at the hearing, will ordinarily provide sufficient participation by the incarcerated parent so as to reduce the risk of error attributable to his absence to a level consistent with due process. In re Quevedo, 106 N.C. App. 574, 419 S.E.2d 158, appeal dismissed, 332 N.C. 483, 424 S.E.2d 397 (1992).

Admission of Interrogatories Held Error. — Where the record contained no indication by evidence or stipulation as to the whereabouts of a deponent who was not a party at the time the case came on for trial, and there was no finding or inquiry by the trial judge as to the existence of any of the conditions specified in former subsection (d)(3) of G.S. 1A-1, Rule 26 (similar to subsection (a)(4) of this rule) which would have made the interrogatories competent and admissible in evidence, their admission constituted prejudicial error. Maness v. Bullins, 11 N.C. App. 567, 181 S.E.2d 750, cert. denied, 279 N.C. 395, 183 S.E.2d 242 (1971).

Admissibility of Adverse Examination of Defendant's President in Workers' Compensation Hearing. — In a workers' compensation hearing, the admissibility of an adverse examination of defendant's president was governed by former subsection (d)(1) of G.S. 1A-1, Rule 26 (similar to subsection (a)(3) of this rule) and portions of the adverse examination offered by plaintiffs should have been received in evidence, notwithstanding defendant's president had testified in one of the hearings and resided within 75 miles of the hearing site. Gay v. Guaranteed Supply Co., 12 N.C. App. 149, 182 S.E.2d 664 (1971).

Rule applicable to the testimony at trial of an adverse party under § 1A-1, Rule 43(b) is equally applicable to the adverse party's testimony under adverse examination. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

In marking the distinction between the introduction and use of the testimony of an adverse party, whether obtained by adverse examination prior to trial or at trial, and the introduction and use of the testimony of a witness other than a party, whether obtained by deposition or at trial, both this rule and G.S. 1A-1, Rule 43(b) recognize that the self-interest of the adverse party bears upon the credibility of that portion of his testimony which tends to exculpate him and to place blame upon another. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Effect of Giving Adverse Testimony in Deposition Generally. — When a party gives adverse testimony in a deposition or at trial, that testimony should not, in most instances, be conclusively binding on him to the extent that his opponent may obtain either summary judgment or a directed verdict. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Two exceptions to the general rule regarding the effect of giving adverse testimony in a deposition should be noted: (1) When a party gives deliberate, unequivocal and repeated testimony which is diametrically opposed to the essential allegations of the complaint, destroying the theory of the action, which testimony is intentionally given and unremedied by any further testimony, the testimony should be treated as binding judicial admissions rather than evidential admissions; (2) When a party gives adverse testimony, and there is insufficient evidence to the contrary presented to support the allegations of the complaint, summary judgment or a directed verdict would in most cases properly be granted. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Effect of Introducing Adverse Examination of Defendant. — The introduction in evidence by a plaintiff of the adverse examination of the defendant no longer makes the defendant a witness for the plaintiff. Plaintiff does not thereby represent the defendant as being worthy of belief as to each and every aspect of his testimony, but may impeach him as well as contradict him. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Deposition of Party Not Separately Represented at Deposition Admitted at Trial. — Admission of the deposition of an individual at trial, where the individual was a party to the action but not separately represented during the deposition, was proper under G.S. 1A-1, N.C. R. Civ. P. 32(a), as the individual was present at the deposition and was being represented by counsel for two other parties with similar interests, including the individual's employer. Floyd v. McGill, 156 N.C. App. 29, 575 S.E.2d 789, 2003 N.C. App. LEXIS 35 (2003), cert. denied, 357 N.C. 163, 580 S.E.2d 364 (2003).

Cross-Examination Concerning Deposition Taken in Unrelated Case. — In a personal injury action, defense counsel could cross-examine plaintiff concerning his deposition taken in another pending, unrelated case. And as plaintiff's statements concerning his lack of prior medical problems contradicted plaintiff's testimony as to the extent of his injuries sustained as a result of the collision with defendant, his prior inconsistent statements could be used for purposes of impeachment and were admissible. Gillespie v. Draughn, 54 N.C. App. 413, 283 S.E.2d 548 (1981), cert. denied, 304 N.C. 726, 288 S.E.2d 805 (1982).

Where depositions were only offered for corroborative purposes, the trial court did not err in admitting them. Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631 (1985).

Insufficient Evidence of Witness's Illness. — Party's attorney failed to offer sufficient proof of a witness's alleged illness, and the trial court did not abuse its discretion in refusing to admit testimony under subdivision (a)(4), where the attorney orally stated that he had received the information that witness was ill from the witness's wife over the telephone, and offered no other form of proof concerning the alleged illness. Vandervoort v. McKenzie, 117 N.C. App. 152, 450 S.E.2d 491 (1994).

Judicial Notice of Distance Between Cities Not Required. — Where an attorney sought to have a deposition admitted pursuant to subdivision (a)(4) of the Rules of Civil Procedure by asserting that the witness was more than 100 miles from the place of trial, the trial court did not abuse its discretion by declining to take judicial notice of the distance between two cities. Vandervoort v. McKenzie, 117 N.C. App. 152, 450 S.E.2d 491 (1994).

Discretion of Trial Court. — Trial court did not err in allowing the employee to play the videotaped cross-examination of a doctor who was originally deposed by the railroad; it was within the trial court's discretion about whether to allow such testimony and no error occurred in that regard since the railroad had already shown the jury the direct examination of the doctor and, thus, could not well object to the employee playing the cross-examination of the doctor. Williams v. CSX Transp., Inc., 176 N.C. App. 330, 626 S.E.2d 716, 2006 N.C. App. LEXIS 532 (2006).

Reading Aloud Verbatim Transcript of Employee Deposition. — Grant of new trial was improper under G.S. 1A-1, N.C. R. Civ. P. 59(a)(8) and 61 since by having a former employee read aloud the verbatim transcript of the employee's deposition, a patron had the full benefit of the prior inconsistent statements that the patron sought to introduce by having the jury view a videotaped deposition; a conclusion that the videotaped deposition was admissible to contradict the employee's testimony as a witness and that excluding the videotape amounted to an error of law was erroneous. Harrell v. Sagebrush of N.C., LLC, 191 N.C. App. 381, 663 S.E.2d 444, 2008 N.C. App. LEXIS 1319 (2008).

Applied in Holbrooks v. Duke Univ., Inc., 63 N.C. App. 504, 305 S.E.2d 69 (1983); In re City of Durham Annexation Ordinance No. 5791, 66 N.C. App. 472, 311 S.E.2d 898 (1984).

Cited in Property Shop, Inc., v. Mountain City Inv. Co., 56 N.C. App. 644, 290 S.E.2d 222 (1982); Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987); Hassett v. Dixie Furn. Co., 104 N.C. App. 684, 411 S.E.2d 187 (1991); Teague v. Isenhower, 157 N.C. App. 333, 579 S.E.2d 600, 2003 N.C. App. LEXIS 546 (2003); O'Mara v. Wake Forest Univ. Health Scis., 184 N.C. App. 428, 646 S.E.2d 400, 2007 N.C. App. LEXIS 1478 (2007).

Rule 33. Interrogatories to parties.

(a) *Availability; procedures for use.* — Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

A party may direct no more than 50 interrogatories, in one or more sets, to any other party, except upon leave granted by the Court for good cause shown or by agreement of the other party. Interrogatory parts and subparts shall be counted as separate interrogatories for purposes of this rule.

There shall be sufficient space following each interrogatory in which the respondent may state the response. The respondent shall: (1) state the response in the space provided, using additional pages if necessary; or (2) restate the interrogatory to be followed by the response.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. An objection to an interrogatory shall be made by stating the objection and the reason therefor either in the space following the interrogatory or following the restated interrogatory. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon the defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) *Scope; use at trial.* — Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) *Option to produce business records.* — Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. (1967, c. 954, s. 1; 1971, c. 1156, s. 4.5; 1975, c. 99; c. 762, s. 2; 1987, c. 73; c. 613, s. 1.)

COMMENT

Comment to this Rule as Originally Enacted. — Under former § 1-568.17 a party might examine upon written interrogatories.

This rule provides that the scope of the interrogatories is the same as that for discovery generally, as set out in Rule 26(b). Hence, interrogatories may be used for purposes of discovery. Also, the use of answers to interrogatories is limited by Rule 26(d) as well as by ordinary rules of evidence.

The period in which plaintiff may not serve interrogatories without leave of court has been lengthened from 10 days, as in federal Rule 33, to 30 days. This corresponds to the time for filing answer or other pleading or motion and thus preserves the general scheme by which a defendant is given 30 days to take his first action unless the court otherwise orders.

It should be noted that this rule does not require notice to parties other than the one to be examined. Former § 1-568.17 required that a copy of the order for examination and a copy of the interrogatories be delivered to all other parties.

The problems which might be presented in cases where the interrogatories call for documents to be attached are covered in Rule 26(b), which governs the scope of the interrogatories.

Comment to the 1975 Amendment. *Section (a).* — The mechanics of the operation of Rule 33 are substantially revised by the proposed amendment, with a view to reducing court intervention. There is generally agreement that interrogatories have spawned a greater percentage of objections and motions than any other discovery device.

The procedures provided in former Rule 33 seemed calculated to encourage objections and court motions. The time period allowed for objecting to interrogatories, 10 days, was too short. The time pressures tended to encourage objections as a means of gaining time to answer. The time for objections was even shorter than for answers, and the party ran the risk that if he failed to object in time he may have waived his objections. It often seemed easier to object than to seek an extension of time. Unlike Rules 30(d) and 37(a), Rule 33 imposed no sanction of expenses on a party whose objections were clearly unjustified. Rule 33 assured that the objections led directly to court, through its requirement that they be served with a notice of hearing. Although this procedure did not preclude an out-of-court resolution of the dispute, the procedure tended to discourage informal negotiations. If answers were served and they were thought inadequate, the interrogating party could move under Rule 37(a) for an order compelling adequate answers. There was no assurance that the hearing on objections and that on inadequate answers would be heard together.

The amendment improves the procedure of Rule 33 in the following respects:

(1) The time allowed for response applies to both answers and objections, but a defendant need not respond in less than 45 days after service of the summons and complaint upon him. As is true under existing law, the responding party who believes that some parts or all of the interrogatories are objectionable may choose to seek a protective order under new Rule 26(c) or may serve objections under this rule. Unless he applies for a protective order, he is required to serve answers or objections in response to the interrogatories, subject to the sanctions provided in Rule 37(d). Answers and objections are served together, so that a response to each interrogatory is encouraged, and any failure to respond is easily noted.

(2) In view of the enlarged time permitted for response, it is no longer necessary to require leave of court for service of interrogatories. The purpose of this requirement — that defendant have time to obtain counsel before a response must be made — is adequately fulfilled by the requirement that interrogatories be served upon a party with or after service of the summons and complaint upon him.

(3) If objections are made, the burden is on the interrogating party to move under Rule 37(a) for a court order compelling answers, in the course of which the court will pass on the objections. The change in the burden of going forward does not alter the existing obligation of an objecting party to justify his objections. If the discovering party asserts that an answer is incomplete or evasive, again he may look to Rule 37(a) for relief, and he should add this assertion to his motion to overrule objections. There is no requirement that the parties consult informally concerning their differences, but the new procedure should encourage consultation.

A change is made in section (a) which is not related to the sequence of procedures. The restriction to "adverse" parties is eliminated. The courts have generally construed this restriction as precluding interrogatories unless an issue between the parties is disclosed by the pleadings — even though the parties may have conflicting interests. The resulting distinctions have often been highly technical. Eliminating the requirement of "adverse" parties from Rule 33 brings it into line with all other discovery rules.

A second change in section (a) is the addition of the term "governmental agency" to the listing of organizations whose answers are to be made by any officer or agent of the organization. This does not involve any change in existing law. Compare the similar listing in Rule 30(b)(6).

The duty of a party to supplement his answers to interrogatories is governed by a new provision in Rule 26(e).

Section (b). — There are numerous and conflicting federal decisions on the question whether and to what extent interrogatories are limited to matters "of fact," or may elicit opinions, contentions, and legal conclusions.

Rule 33 is amended to provide that an interrogatory is not objectionable merely because it calls for an opinion or contention that relates to fact or the application of law to fact. Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful, and the clear trend of the cases is to permit "factual" opinions. As to requests for opinions or contentions that call for the application of law to fact, they can be most useful in narrowing and sharpening the issues, which is a major purpose of discovery. On the other hand, under the new language interrogatories may not extend to issues of "pure law," i.e., legal issues unrelated to the facts of the case.

Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge.

The use of answers to interrogatories at trial is made subject to the rules of evidence. The provisions governing use of depositions, to which this rule presently refers, are not entirely apposite to answers to interrogatories, since deposition practice contemplates that all parties will ordinarily participate through cross-examination.

Certain provisions are deleted from section (b) because they are fully covered by new Rule 26(c) providing for protective orders and Rules 26(a) and 26(d). The language of the section is thus simplified without any change of substance.

Section (c). — This is a new section relating especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer. The section gives the party an option to make the records available and place the burden of research on the party who seeks the information. This provision, without undermining the liberal scope of interrogatory discovery, places the burden of discovery upon its potential benefitee, and alleviates a problem which in the past has troubled federal courts. The interrogating party is protected against abusive use of this provision through the requirement that the burden of ascertaining the answer be substantially the same for both sides. A respondent may not impose on an interrogating party a mass of records as to which research is feasible only for one familiar with the records. At the same time, the respondent unable to invoke this section does not on that account lose the protection available to him under new Rule 26(c) against oppressive or unduly burdensome or expensive interrogatories. And even when the respondent successfully invokes the section, the court is not deprived of its usual power, in appropriate cases, to require that the interrogating party reimburse the respondent for the expense of assembling his records and making them intelligible.

Disclosure of trial witnesses. — Prior to the 1970 revision the federal cases were in conflict as to whether a party could be required at a proper time, in response to an interrogatory or by other discovery devices, to state the names and addresses of witnesses then known, and whom he proposed to call at trial. Probably the weight of reported authority was that a party is not required so to do. But at least the judge at pretrial under Rule 16 may require disclosure in the exercise of a sound discretion in light of all the circumstances.

And the 1970 revision provides that "A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." Rule 26(b)(4) a 1, supra.

Obtaining copies of documents, etc., by requesting a party to attach them to his answers to interrogatories. — Formerly Rule 34 required a motion showing good cause as a prerequisite to obtaining discovery and production of documents and things for inspection, copying or photographing. Accordingly, most federal authorities held that interrogatories to a party requesting copies of documents were not proper and that copies of statements or witnesses and other documents could be obtained from a party only under Rule 34 (or Rules 26 and 45) upon a showing of good cause. The present revision eliminates the good-cause requirement in Rule 34; but section (b) of that rule sets out the procedure that should be followed in obtaining inspection, etc. Rule 34 does not, however, deal with discovery of trial preparation materials. That matter is now dealt with by Rule 26(b)(3), (4), supra. Those provisions allow a party or a witness to obtain a copy of his own written statement as of right. And a party is entitled, as of right, to obtain from any other party the names of expert witnesses whom he expects to call at trial, and a statement of the substance of the facts and opinions to which the expert is expected to testify. Rule 26(b)(4) a 1, supra. As to other trial preparation materials a party must make the showing spelled out in Rule 26(b)(3), supra. This requirement, accordingly, should not be circumvented by an improper use of Rule 33 or Rule 34.

Rule 30(b)(5) does, however, provide that "The notice to a party deponent may be accompanied by a request made in compliance with

Rule 34 for the production of documents and tangible things at the taking of the deposition."

Legal Periodicals. — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

Applicability of G.S. 8-56 and G.S. 50-10. — The provisions of G.S. 8-56 and G.S. 50-10 which render a husband or wife an incompetent witness apply to answers to interrogatories as well as to testimony at trial. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

The General Assembly, in enacting the Rules of Civil Procedure, did not contemplate that this rule and G.S. 1A-1, Rule 26(b) would enable husband and wife in actions between them to require the other to answer interrogatories relating to acts of adultery or conduct from which adultery might be implied during the subsistence of their marriage; the General Assembly did not intend in such manner to remove the cloak of privacy surrounding the confidential relationships of husband and wife. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Attestation by Defendant to Answers Not His Own. — Section 1A-1, Rule 37(d) does not come into operation if the responding party meets the requirements of this rule. However, by attesting to answers that were not his, defendant did not meet the requirements of this rule. Therefore, the imposition of sanctions of default against defendant was proper under G.S. 1A-1, Rule 37(d). Hunter v. Spaulding, 97 N.C. App. 372, 388 S.E.2d 630 (1990).

No Shield of Deniability. — Any requirement that a person supply answers that are "reasonably available" does not mean that a person may distend this rule to fashion a shield of so-called "deniability." Hunter v. Spaulding, 97 N.C. App. 372, 388 S.E.2d 630 (1990).

Failure to Object to Interrogatories as Waiver. — Ordinarily, in the absence of an extension of time, failure to object to interrogatories within the time fixed by the rule is a waiver of any objection. Golding v. Taylor, 19 N.C. App. 245, 198 S.E.2d 478, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

Where plaintiff was properly served with interrogatories but refused to answer them without good cause, and did not serve objections to any of the interrogatories on defendant or ask for an extension of time to answer, the trial court properly dismissed plaintiff's action. Hammer v. Allison, 20 N.C. App. 623, 202 S.E.2d 307, cert. denied, 285 N.C. 233, 204 S.E.2d 23 (1974).

Absent Some Overriding Constitutional Privilege. — When time has lapsed the defendant will be deemed to have waived its right to object to interrogatories, absent some overriding constitutional privilege such as self-incrimination. Harrington Mfg. Co. v. Powell Mfg. Co., 26 N.C. App. 414, 216 S.E.2d 379, cert. denied, 288 N.C. 242, 217 S.E.2d 679 (1975).

Principle that ordinarily failure to timely object to interrogatories waives objections thereto must yield to the privilege against self-incrimination guaranteed by U.S. Const., Amend. XIV. Golding v. Taylor, 19 N.C. App. 245, 198 S.E.2d 478, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

Trial court acts within its discretion in making and refusing discovery orders. George W. Shipp Travel Agency, Inc. v. Dunn, 20 N.C. App. 706, 202 S.E.2d 812, cert. denied, 285 N.C. 237, 204 S.E.2d 23 (1974).

Where plaintiff served answers to interrogatories after defendant had filed motion to dismiss and plaintiff's failure to comply with this rule clearly prejudiced the defendant's ability to prepare for trial, the court had authority to dismiss the action. Hayes v. Browne, 76 N.C. App. 98, 331 S.E.2d 763 (1985), cert. denied, 315 N.C. 587, 341 S.E.2d 25 (1986).

Proper Party to Answer Interrogatories. — The State Bar's counsel, as an agent of that governmental agency, was the proper party to answer the defendant's interrogatories. North Carolina State Bar v. Harris, 137 N.C. App. 207, 527 S.E.2d 728, 2000 N.C. App. LEXIS 317 (2000).

Interrogatories as Admissions of Party Opponent. — Defendant's answers to interrogatories, duly signed by defendant's attorney, were admissions of a party opponent, and as such should have been admitted into evidence. Karp v. University of N.C., 78 N.C. App. 214, 336 S.E.2d 640 (1985).

Party May Not Disavow Answers at Trial Which He Gave on Interrogatories. — This rule does not permit a party to swear to the truth of answers given on interrogatories and then, at trial, to disavow knowledge about those answers. Hunter v. Spaulding, 97 N.C. App. 372, 388 S.E.2d 630 (1990).

Dismissal Proper. — Dismissal of plaintiff's suit was affirmed as it could be inferred that the trial court considered lesser sanctions given that it stated that lesser sanctions were urged by plaintiff and that, given the severity of disobedience by plaintiff's counsel, lesser sanctions were inappropriate; plaintiff's misconduct was serious as plaintiff did not answer or object to any of an insurer's discovery requests, seek a protective order, or proffer any justification for the inaction. Badillo v. Cunningham, 177 N.C. App. 732, 629 S.E.2d 909, 2006 N.C. App. LEXIS 1226 (2006).

Applied in Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972); Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622 (1972); Harris v. Parker, 17 N.C. App. 606, 195 S.E.2d 121 (1973).

Cited in Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971); Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972); Riggins v. County of Mecklenburg, 14 N.C. App. 624, 188 S.E.2d 749 (1972); Jernigan v. State Farm Mut. Auto. Ins. Co., 16 N.C. App. 46, 190 S.E.2d 866 (1972); Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974); Austin v. Wilder, 26 N.C. App. 229, 215 S.E.2d 794 (1975); Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975); Stanback v. Stanback, 37 N.C. App. 324, 246 S.E.2d 74 (1978); Thelen v. Thelen, 53 N.C. App. 684, 281 S.E.2d 737 (1981); Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176 (1981); Beatty v. H.B. Owsley & Sons, 53 N.C. App. 178, 280 S.E.2d 484 (1981); Holcomb v. Hemric, 56 N.C. App. 688, 289 S.E.2d 620 (1982); Weaver v. Weaver, 88 N.C. App. 634, 364 S.E.2d 706 (1988); Segrest v. Gillette, 96 N.C. App. 435, 386 S.E.2d 88 (1989); Cheek v. Poole, 121 N.C. App. 370, 465 S.E.2d 561 (1996); Prior v. Pruett, 143 N.C. App. 612, 550 S.E.2d 166, 2001 N.C. App. LEXIS 335 (2001); Thompson v. First Citizens Bank & Trust Co., 151 N.C. App. 704, 567 S.E.2d 184, 2002 N.C. App. LEXIS 889 (2002).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

(a) *Scope.* — Any party may serve on any other party a request (i) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (ii) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) *Procedure.* — The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

There shall be sufficient space following each request in which the respondent may state the response. The respondent shall: (1) state the response in the space provided, using additional pages if necessary; or (2) restate the request to be followed by the response. An objection to a request shall be made by stating the objection and the reason therefor either in the space following the request or following the restated request.

(c) *Persons not parties.* — This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land. (1967, c. 954, s. 1; 1969, c. 895, s. 8; 1973, c. 923, s. 1; 1975, c. 762, s. 2; 1987, c. 613, s. 2.)

COMMENT

Comment to this Rule as Originally Enacted. — Former statutes in a pending action authorized the court to order an inspection of writings (§ 8-89) and the production of documents (§ 8-90).

The protective provisions of Rule 30(b) are incorporated in this rule by reference.

The provisions in this rule limiting the scope of the examination as permitted in Rule 26(b) and the specification in Rule 26(b) of documents which shall not be the subject of discovery would appear to provide explicit regulations on such matters and avoid complexities which have existed under the federal rules.

Comment to the 1969 Amendment. — The 1969 amendment deleted former subsection (b) which dealt with discovery of certain documents without order of court. Since this whole area is now undergoing intensive study, it was thought desirable to delay action until a later date.

Comment to the 1975 Amendment. — Rule 34 is revised to accomplish the following major changes in the existing rule: (1) To eliminate the requirement of good cause for production, which was formerly superimposed on the provisions regulating the permissible scope of discovery; (2) To have the rule operate without the necessity of the court's participation; (3) To include testing and sampling as well as inspecting or photographing tangible things; and (4) To make clear that the rule does not preclude an independent action for analogous discovery against persons not parties.

Section (a). — Good cause is eliminated because it has furnished an uncertain and erratic protection to the parties from whom production is sought and is now rendered unnecessary by virtue of the more specific provisions added to Rule 26(b) relating to materials assembled in preparation for trial and to experts retained or consulted by parties.

The good-cause requirement was originally inserted in federal Rule 34 as a general protective provision in the absence of experience with the specific problems that would arise thereunder. The overwhelming proportion of the cases in which the formula of good cause has been applied to require a specific showing are those involving trial preparation. In practice, the courts have not treated documents as having a special immunity to discovery simply because of their being documents. Protection may be afforded to claims of privacy or secrecy or of undue burden or expense under what is now Rule 26(c) (previously Rule 30(b)). To be sure, an appraisal of "undue" burden inevitably entails consideration of the needs of the party seeking discovery. With special provisions added to govern trial preparation materials and experts, there is no longer any occasion to retain the requirement of good cause.

The revision of Rule 34 to have it operate extrajudicially rather than by court order is to a large extent a reflection of existing practice.

The inclusion of testing and sampling of tangible things and objects or operations on land reflects a need frequently encountered by parties in preparation for trial. If the operation of a particular machine is the basis of a claim for negligent injury, it will often be necessary to test its operating parts or to sample and test the products it is producing.

The inclusive description of "documents" is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a printout of computer data. The burden thus placed on respondent will vary from case to case, and the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs. Similarly, if the discovering party needs to check the electronic source itself, the court may protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.

Section (b). — The procedure provided in Rule 34 is essentially the same as that in Rule 33, as amended, and the discussion in the note appended to that rule is relevant to Rule 34 as well. Problems peculiar to Rule 34 relate to the specific arrangements that must be worked out for inspection and related acts of copying, photographing, testing, or sampling. The rule provides that a request for inspection shall set forth the items to be inspected either by item or category, describing each with reasonable particularity, and shall specify a reasonable time, place, and manner of making the inspection.

Section (c). — Rule 34 as revised continues to apply only to parties. Comments from the bar to the drafters of the federal rule made clear that in the preparation of cases for trial it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party, and that some federal courts had dismissed independent actions in the nature of bills in equity for such discovery on the ground that Rule 34 is preemptive. While an ideal solution to this problem is to provide for discovery against persons not parties in Rule 34, both the jurisdictional and procedural problems are very complex. For the present, this section makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties.

Relation to other rules. — Rule 34 does not deal with trial preparation materials, since discovery as to those materials is specially dealt with by Rule 26(b)(3), (4). Accordingly, those provisions should not be circumvented by an improper use of Rule 33 or 34.

A request made in compliance with Rule 34 may accompany the notice to a party deponent to take his oral deposition. Rule 30(b)(5).

Legal Periodicals. — For article on legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

The purpose of this rule is to prevent litigants from engaging in mere fishing expeditions to discover evidence or using the rule for harassment purposes. Williams v. State Farm Mut. Auto. Ins. Co., 67 N.C. App. 271, 312 S.E.2d 905 (1984).

Requirement of Court Order Based Upon Motion and Good Cause Eliminated. — The new procedure for obtaining production and inspection of documents has eliminated the requirement of a court order based upon motion and good cause. This new rule simply requires serving the request for production upon the other party. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Prerequisites of Production. — This rule requires that as a prerequisite of production, documents must be (1) "designated," (2) "within the scope" of G.S. 1A-1, Rule 26(b), and (3) in the "possession, custody or control" of a party from whom they are sought. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Failure to Disclose. — When it was revealed in the course of a personal injury trial that the injured party incorrectly responded to the defending motorist's request for production, under G.S. 1A-1, Rule 34, seeking medical reports from any medical practitioner who had ever treated the injured party for any back or neck difficulties, because the injured party did not reveal an emergency room visit for an unrelated automobile accident in which the injured party complained of neck pain, the trial court did not abuse its discretion in declining to impose sanctions because the injured party's counsel obtained and delivered the documents in question, the motorist was given an opportunity to cross-examine the injured party about the documents, the injured party admitted her untruthful response during cross-examination, explaining that she had forgotten about the emergency room visit following the accident in which she was not seriously hurt, and she had not sought other medical treatment following the emergency room visit. Messina v. Bell, 158 N.C. App. 111, 581 S.E.2d 80, 2003 N.C. App. LEXIS 978 (2003).

Where the injured parties served the neighbor with an amended notice of deposition and a request to produce documents under G.S. 1A-1, N.C. R. Civ. P. 34, where the neighbor responded by filing an objection to discovery and a motion for a protective order, and where the trial court overruled the neighbor's request and ordered the neighbor to produce three letters requested by the injured parties, an order with which the neighbor complied, the injured parties were not entitled to sanctions under G.S. 1A-1, N.C. R. Civ. P. 37(b); there was no evidence that the neighbor did not comply with the trial court's order compelling production of the three letters. Becker v. Pierce, 168 N.C. App. 671, 608 S.E.2d 825, 2005 N.C. App. LEXIS 452 (2005).

Asserting Work Product Privilege Insufficient Without Written Objection or Protective Order. — Assertion by counsel of a work product privilege to the tapes and transcripts was insufficient to meet the requirements of this rule where he did not file a written objection nor seek a protective order, and his failure to do either entitled the opposing party to proceed under Rule 37(d). Pugh v. Pugh, 113 N.C. App. 375, 438 S.E.2d 214 (1994).

The party seeking production must show that prerequisites are satisfied. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

"Designation" by Categories. — "Designation," as used in this rule, does not necessarily mean that documents must be separately described. Designation by categories may be sufficient, depending upon the categories utilized. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

As to what constituted good cause under this rule prior to 1975 amendment, see Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

When a party requests production of documents under this rule, he must show good cause, which includes the elements of necessity and relevance. Williams v. State Farm Mut. Auto. Ins. Co., 67 N.C. App. 271, 312 S.E.2d 905 (1984).

A mere statement that an examination is material and necessary is not sufficient to support a production order. Williams v. State Farm Mut. Auto. Ins. Co., 67 N.C. App. 271, 312 S.E.2d 905 (1984).

Dismisal Proper. — Dismissal of plaintiff's suit was affirmed as it could be inferred that the trial court considered lesser sanctions given that it stated that lesser sanctions were urged by plaintiff and that, given the severity of disobedience by plaintiff's counsel, lesser sanctions were inappropriate; plaintiff's misconduct was serious as plaintiff did not answer or object to any of an insurer's discovery requests, seek a protective order, or proffer any justification for the inaction. Badillo v. Cunningham, 177 N.C. App. 732, 629 S.E.2d 909, 2006 N.C. App. LEXIS 1226 (2006).

Applied in Lineberger v. Colonial Life & Accident Ins. Co., 12 N.C. App. 135, 182 S.E.2d 643 (1971); Midgett v. Crystal Dawn Corp., 58 N.C. App. 734, 294 S.E.2d 386 (1982); Kirkhart v. Saieed, 107 N.C. App. 293, 419 S.E.2d 580 (1992); Chateau Merisier, Inc. v. Le Mueble Artisanal GEKA, S.A., 142 N.C. App. 684, 544 S.E.2d 815, 2001 N.C. App. LEXIS 173 (2001); Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

Cited in Walter v. Walter, 149 N.C. App. 723, 561 S.E.2d 571, 2002 N.C. App. LEXIS 290 (2002).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — *The cases cited below were decided under former G.S. 8-89 and G.S. 8-90.*

As to liberal construction of former provisions, see Abbitt v. Gregory, 196 N.C. 9, 144 S.E. 297 (1928); H.L. Coble Constr. Co. v. Housing Auth., 244 N.C. 261, 93 S.E.2d 98 (1956); Diocese of W.N.C. v. Sale, 254 N.C. 218, 118 S.E.2d 399 (1961).

Former §§ 8-89 and 8-90 did not supersede the subpoena duces tecum. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Former § 8-89 only authorized the judge to order one party to exhibit the writing to the other and required a copy to be given him or permit him to take a copy of the same, within a specified time. It was not intended that there should be an investigation of the controversies, with witnesses and lawyers on both sides. Sheek v. Sain, 127 N.C. 266, 37 S.E. 334 (1900).

An examination of an adverse party could be joined with an order under former § 8-89 for an inspection of writings in the possession or under the control of the party to be examined. Abbitt v. Gregory, 196 N.C. 9, 144 S.E. 297 (1928).

Substitute for Bill of Discovery. — Former G.S. 8-89 was primarily designed and intended to afford facilities for the ascertainment of truths that were formerly supplied by a bill of discovery. Girard Nat'l Bank v. McArthur, 165 N.C. 374, 81 S.E. 327 (1914).

Affidavit as Prerequisite to Order for Discovery and Inspection. — As a prerequisite to an order for pretrial discovery and inspection of documents under former provisions, the courts, following their own procedure for discovery in aid of a bill of equity, required the applicant to show by affidavit the necessity for the inspection and the materiality to the issue of the documents sought to be inspected. If the affidavit was insufficient, any order based upon it was invalid. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

The affidavit supporting an order for inspection of writings must sufficiently designate the writings sought to be inspected and show that they are material to the inquiry, and where the affidavit is insufficient an order based thereon is invalid. Dunlap v. London Guar. & Accident Co., 202 N.C. 651, 163 S.E. 750 (1932); Flanner

v. Saint Joseph Home for Blind Sisters, 227 N.C. 342, 42 S.E.2d 225 (1947); H.L. Coble Constr. Co. v. Housing Auth., 244 N.C. 261, 93 S.E.2d 98 (1956); Tillis v. Calvine Cotton Mills, 244 N.C. 587, 94 S.E.2d 600 (1956).

The affidavit must set forth facts showing the materiality and necessity of the papers sought to be produced, and the mere averment that they are material and necessary is insufficient. Patterson v. Southern Ry., 219 N.C. 23, 12 S.E.2d 652 (1941).

When Application for Order Is Sufficiently Definite. — An application for an order for inspection of writings is sufficiently definite when it refers to papers under the exclusive control of the adverse party which relate to the immediate issue in controversy, and which cannot be more definitely described by applicant. Rivenbark v. Shell Union Oil Corp., 217 N.C. 592, 8 S.E.2d 919 (1940).

While a "roving commission for the inspection of papers" will not be ordinarily allowed, an application for an order for inspection of writings was sufficiently definite when it referred to papers under the exclusive control of the adverse party, which related to the immediate issue in controversy and could not be definitely described, and an order based thereon would be upheld. Bell v. Murchison Nat'l Bank, 196 N.C. 233, 145 S.E. 241 (1928).

Instrument Sought Must Be Pertinent to Issue. — Upon motion to allow inspection or copy of books, papers, etc., before trial, it must be made to appear that the instrument in question relates to the merits of the action or is pertinent to the issue. Evans v. Seaboard Air Line Ry., 167 N.C. 415, 83 S.E. 617 (1914).

The law will not permit a "fishing or ransacking expedition," either by subpoena duces tecum or a bill of discovery. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

A person will not be ordered to allow an inspection of a writing if the party making the request knows the contents thereof. Sheek v. Sain, 127 N.C. 266, 37 S.E. 334 (1900).

Information to Be Used in Action Against Third Party. — Plaintiff could not proceed under former G.S. 8-89 to examine defendant's records and documents for the purpose of obtaining information to form the basis of an action against a third party. Flanner v. Saint Joseph Home for Blind Sisters, 227 N.C. 342, 42 S.E.2d 225 (1947).

As to requirement of due notice, see Vann v. Lawrence, 111 N.C. 32, 15 S.E. 1031 (1892).

What Constitutes Due Notice. — Due notice is notice sufficient to enable the party to have the document when called for. McDonald v. Carson, 95 N.C. 377 (1886).

Insufficient Notice. — Generally if a party dwells in another town than that in which the trial is had, a service of notice upon him at the place where the trial is had, or after he has left home to attend court, to produce papers, is not sufficient. Beard v. Southern Ry., 143 N.C. 136, 55 S.E. 505 (1906).

Duration of Notice. — A notice to produce papers, etc., "on a trial to be had this day" is not confined to a trial on that day, but extends to a trial at a subsequent term. State v. Kimbrough, 13 N.C. 431 (1830).

Necessity That Complaint Be Filed. — A court could not, under former G.S. 8-90, order the production of papers by defendant where no complaint had been filed. Branson v. Fentress, 35 N.C. 165 (1851).

Acquiring Information Necessary to Filing of Complaint. — In an action against a clinic and doctors for alleged tortious defamation and disclosures of confidential information acquired professionally, plaintiff was held entitled to an order requiring defendants to produce specified papers and documents to afford information necessary to the filing of the complaint. Nance v. Gilmore Clinic, Inc., 230 N.C. 534, 53 S.E.2d 531 (1949), distinguishing Flanner v. Saint Joseph Home for Blind Sisters, 227 N.C. 342, 42 S.E.2d 225 (1947), where the matter sought to be discovered was not necessary as a basis for filing the complaint.

In an action by a stockholder of a corporation to set aside as fraudulent an assignment by the corporation of a contract, the plaintiff was entitled to inspect the records and books of the corporation in order to obtain information upon which to frame his complaint. Holt v. Southern Finishing & Whse. Co., 116 N.C. 480, 21 S.E. 919 (1895).

Where no answer was filed, defendant was not entitled to an order to inspect a check in possession of the plaintiff. Sheek v. Sain, 127 N.C. 266, 37 S.E. 334 (1900).

Discretion of Court. — Whether the trial court would grant an order for the inspection of writings upon a sufficient affidavit rested in its sound discretion. Dunlap v. London Guar. & Accident Co., 202 N.C. 651, 163 S.E. 750 (1932); Tillis v. Calvine Cotton Mills, 244 N.C. 587, 94 S.E.2d 600 (1956).

It was within the sound discretion of the trial court to order a party to give to the adverse party an inspection and copy of any books, papers and documents in his possession or under his control which contained evidence relating to the merits of the action or the defense thereto. Abbitt v. Gregory, 196 N.C. 9, 144 S.E. 297 (1928).

Res Judicata Held Inapplicable. — An order of the judge reversing an order of the clerk with reference to the production of papers was a discretionary matter, and being an administrative order in the cause and not affecting the merits, was not res judicata; hence, the motion could be renewed and a new order obtained. Mills v. Biscoe Lumber Co., 139 N.C. 524, 52 S.E. 200 (1905).

Compelling Production After Earlier Refusal. — Where the judge refuses an inspection which is of the character authorized, it still rests within his discretion to compel the production of the writing later or upon trial, when its competency and pertinency as evidence bearing on the issue may be better determined. Evans v. Seaboard Air Line Ry., 167 N.C. 415, 83 S.E. 617 (1914).

Order of Court Upheld. — Trial court's refusal to grant plaintiff's motion for an order that defendant produce certain written statements signed by witnesses, employees of defendant, which statements these employees testified they used to refresh their recollection before becoming witnesses, was not error, the granting of such motion being in the discretion of the court, where the record failed to show that the requirements of former G.S. 8-89 and 8-90 were met by plaintiff, or that the written statements were in court. Star Mfg. Co. v. Atlantic Coast Line R.R., 222 N.C. 330, 23 S.E.2d 32 (1942).

Where plaintiff's motion was for inspection of writings in the possession of the corporate defendant, and the order allowed inspection of writings in the possession of both the corporate and individual defendant, but both defendants were represented by the same counsel and it appeared that the individual defendant was the president of the corporate defendant and that the writings referred to in the order all related to business of the corporate defendant, abuse of discretion in granting the order was not shown. Tillis v. Calvine Cotton Mills, 244 N.C. 587, 94 S.E.2d 600 (1956).

Former § 8-89 did not authorize issuance of an order that respondent deposit papers in the clerk's office. Mills v. Biscoe Lumber Co., 139 N.C. 524, 52 S.E. 200 (1905).

Papers produced by the method prescribed are competent evidence for all legitimate purposes. Austin v. Secrest, 91 N.C. 214 (1884).

Proof by Parol. — The contents of a paper writing cannot be proved by parol unless notice has been given to the adverse party who has it in his possession to produce it on trial. Murchison v. McLeod, 47 N.C. 239 (1855).

Motion to nonsuit a plaintiff for not producing books or papers could not be made unless a previous order of the court had been obtained for the production of such books or papers. Graham v. Hamilton, 25 N.C. 381 (1843).

Where plaintiff's affidavit stated that he had not seen letter ordered produced since he sent it, that he had not knowingly destroyed it, and that he had made diligent search for it and could not find it, sufficient cause was shown for a discharge of the rule for its production. Fuller v. McMillian, 44 N.C. 206 (1853).

An appeal lies from an order requiring a person to allow an inspection of paper writings. Sheek v. Sain, 127 N.C. 266, 37 S.E. 334 (1900).

Necessity of Stating Facts. — The Supreme Court will not pass upon the propriety of discharging a rule for the production of papers unless the facts are stated upon which the application is based. Maxwell v. McDowell, 50 N.C. 391 (1858).

Rule 35. Physical and mental examination of persons.

(a) *Order for examination.* — When the mental or physical condition (including the blood group) of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, a judge of the court in which the action is pending as defined by Rule 30(h) may order the party to submit to a physical or mental examination by a physician or to produce for examination his agent or the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) *Report of examining physician.* —

(1) If requested by the party against whom an order is made under Rule 35(a) or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After such request and delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a

person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subsection applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subsection does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician in accordance with the provisions of any other rule. (1967, c. 954, s. 1; 1975, c. 762, s. 2.)

COMMENT

Comment to this Rule as Originally Enacted. — *Section (a).* — This section differs from federal Rule 35(a) only in the inclusion of certain changes proposed by the Advisory Committee in its 1955 report. Such inclusions make clear the right to require a blood test in an action in which blood relationships are in controversy. The provision for the examination of a person in the custody or under the legal control of a party will permit the examination of a minor or incompetent.

This procedure is new to North Carolina practice. However, the right to require the plaintiff in a civil action to recover personal injuries to submit to a physical examination was recognized in Flythe v. Eastern Carolina Coach Co., 195 N.C. 777, 143 S.E. 865 (1928). Section 8-50.1 authorizes the court in actions in which the question of paternity arises to order a blood test.

Section (b). — This section permits the party examined to obtain the report of the physician making the examination. Since the party causing the examination could not obtain a copy of such a report made at the instance of the examined party because he might claim the report was privileged, this rule expressly provides that after the examined party requests a copy of the report of the examination made at the instance of the party causing the examination, the latter is entitled upon request to receive a report from the party examined of any examination previously or thereafter made concerning the same mental or physical examination.

The court is given the discretionary power to order that a copy of the report be furnished to any other party to the action.

Comment to the 1975 Amendment. — North Carolina adopted this provision in this form in advance of its adoption as a part of the federal rules. The provisions bringing an agent of a party within the scope of the rule is the only present change aside from the addition of subsection (b)(3).

Subsection (b)(3). — This new subsection removes any possible doubt that reports of examination may be obtained although no order for examination has been made under Rule 35(a). Examinations are very frequently made by agreement and sometimes before the party examined has an attorney. The federal courts have uniformly ordered that reports be supplied and it appears best to fill the technical gap in the present rule.

The subsection also makes clear that reports of examining physicians are discoverable not only under Rule 35(b) but under other rules as well. To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other party's doctor. But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b) — such as Rules 34 or 26(b)(3) or (4) — discovery should not depend upon whether the person examined demands a copy of the report.

Legal Periodicals. — For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For article, "The 1980 Amendments to the

Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

CASE NOTES

Mental Examination of Child in Termination Proceeding Held Not Required. — Trial court did not err in denying a father's motion requesting a mental examination of his 13-year old child in a termination of parental rights proceeding where the child was competent and of suitable age to testify about his feelings towards his father and there was no indication that the child's desires and opinions about the termination of his father's rights were influenced by anyone associated with the Department of Social Services or would have been different had an independent medical evaluation been conducted. In re Williams, 149 N.C. App. 951, 563 S.E.2d 202, 2002 N.C. App. LEXIS 364 (2002).

Cited in Williams v. Williams, 29 N.C. App. 509, 224 S.E.2d 656 (1976); Brondum v. Cox, 292 N.C. 192, 232 S.E.2d 687 (1977); Durham County v. Riggsbee, 56 N.C. App. 744, 289 S.E.2d 579 (1982); Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983); Kor Xiong v. Marks, — N.C. App. —, 668 S.E.2d 594, 2008 N.C. App. LEXIS 2016 (2008).

Rule 36. Requests for admission; effect of admission.

(a) *Request for admission.* — A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. If the request is served with service of the summons and complaint, the summons shall so state.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 60 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

There shall be sufficient space following each request in which the respondent may state the response. The respondent shall:

(1) State the response in the space provided, using additional pages if necessary; or

(2) Restate the request to be followed by the response. An objection to a request shall be made by stating the objection and the reason therefor either in the space following the request or following the restated request.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) *Effect of admission.* — Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding. (1967, c. 954, s. 1; 1975, c. 762, s. 2; 1981, c. 384, ss. 1, 2; 1987, c. 613, s. 3.)

COMMENT

Comment to this Rule as Originally Enacted. — Pretrial admissions of genuineness of documents were governed by former § 8-91. The provisions of this statute regarding taxation of costs are carried forward in Rule 37(c).

The last sentence of section (a) is designed to preclude a party from offering lack of knowledge as a ground for refusing to admit when, in fact, he has the means to such knowledge reasonably within his power. To allow such a technical ground for refusal on any other basis would render the effect of the admission provision practically useless.

Section (b) does not appear in the federal rule. This section places the burden on the party serving the request to answer to interrogatories or detail reasons why he cannot.

Comment to the 1975 Amendment. — Rule 36 serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be. The changes made in the rules are designed to serve these purposes more effectively. Certain disagreements in the courts about the proper scope of the rule are resolved. In addition, the procedural operation of the rule is brought into line with other discovery procedures, and the binding effect of an admission is clarified.

Section (a). — As revised, the section provides that a request may be made to admit any matters within the scope of Rule 26(b) that relate to statements or opinions of fact or of the application of law to fact. It thereby eliminates the requirement that the matters be "of fact." This change resolves conflicts in the federal court decisions as to whether a request to admit matters of "opinion" and matters involving "mixed law and fact" is proper under the rule.

Not only is it difficult as a practical matter to separate "fact" from "opinion," but an admission on a matter of opinion may facilitate proof or narrow the issues or both. An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues. For example, an admission that an employee acted in the scope of his employment may remove a major issue from the trial. The amended provision does not authorize requests for admissions of law unrelated to the facts of the case.

Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

Courts have also divided on whether an answering party may properly object to requests for admission as to matters which that party regards as "in dispute." The proper response in such cases is an answer. The very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial. In his answer, the party may deny, or he may give as his reason for inability to admit or deny the existence of a genuine issue. The party runs no risk of sanctions if the matter is genuinely in issue, since Rule 37(c) provides a sanction of costs only when there are no good reasons for a failure to admit.

On the other hand, requests to admit may be so voluminous and so framed that the answering party finds the task of identifying what is in dispute and what is not unduly burdensome. If so, the responding party may obtain a protective order under Rule 26(c). Some of the decisions sustaining objections on "disputability" grounds could have been justified by the burdensome character of the requests.

Another sharp split of authority exists on the question whether a party may base his answer on lack of information or knowledge without seeking out additional information. One line of cases has held that a party may answer on the basis of such knowledge as he has at the time he answers. A larger group of cases, supported by commentators, has taken the view that if the responding party lacks knowledge, he must inform himself in reasonable fashion.

The rule as revised adopts the majority view, as in keeping with a basic principle of the discovery rules that a reasonable burden may be imposed on the parties when its discharge will facilitate preparation for trial and ease the trial process. It has been argued against this view that one side should not have the burden of "proving" the other side's case. The revised rule requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. In most instances, the investigation will be necessary either to his own case or to preparation for rebuttal. Even when it is not, the information may be close enough at hand to be "readily obtainable." Rule 36 requires only that the party state that he has taken these steps. The sanction for failure of a party to inform himself before he answers lies in the award of costs after trial, as provided in Rule 37(c).

The requirement that the answer to a request for admission be sworn is deleted in favor of a provision that the answer be signed by the party or by his attorney. The provisions of Rule 36 make it clear that admissions function very much as pleadings do. Thus, when a party admits in part and denies in part, his admission is for purposes of the pending action only and may not be used against him in any other proceeding. The broadening of the rule to encompass mixed questions of law and fact reinforces this feature. Rule 36 does not lack a sanction for false answers; Rule 37(c) furnishes an appropriate deterrent.

The existing language describing the available grounds for objection to a request for admission is eliminated as neither necessary nor helpful. The statement that objection may be made to any request which is "improper" adds nothing to the provisions that the party serve an answer or objection addressed to each matter and that he state his reasons for any objection. None of the other discovery rules sets forth grounds for objection, except so far as all are subject to the general provisions of Rule 26.

Changes are made in the sequence of procedures in Rule 36 so that they conform to the new procedures in Rules 33 and 34. The major changes are as follows:

(1) The normal time for response to a request for admissions is lengthened from 20 to 30 days, conforming more closely to prevailing practice. A defendant need not respond, however, in less than 45 days after service of the summons and complaint upon him. The court may lengthen or shorten the time when special situations require it.

(2) The present requirement that the plaintiff wait 10 days to serve requests without leave of court is eliminated. The revised provision accords with those in Rules 33 and 34.

(3) The requirement that the objecting party move automatically for a hearing on his objection is eliminated, and the burden is on the requesting party to move for an order. The change in the burden of going forward does not modify present law on burden of persuasion. The award of expenses incurred in relation to the motion is made subject to the comprehensive provisions of Rule 37(a)(4).

(4) A problem peculiar to Rule 36 arises if the responding party serves answers that are not in conformity with the requirements of the rule — for example, a denial is not "specific," or the explanation of inability to admit or deny is not "in detail." Rule 36 now makes no provision for court scrutiny of such answers before trial, and it seems to contemplate that defective answers bring about admissions just as effectively as if no answer had been served. Some cases have so held.

Giving a defective answer the automatic effect of an admission may cause unfair surprise. A responding party who purported to deny or to be unable to admit or deny will for the first time at trial confront the contention that he has made a binding admission. Since it is not always easy to know whether a denial is "specific" or an explanation is "in detail," neither party can know how the court will rule at trial and whether proof must be prepared. Some courts, therefore, have entertained motions to rule on defective answers. They have at times ordered that amended answers be served, when the defects were technical, and at other times have declared that the matter was admitted. The rule as revised conforms to the latter practice.

Section (b). — The rule does not now indicate the extent to which a party is bound by his admission. Some courts view admissions as the equivalent of sworn testimony. At least in some jurisdictions a party may rebut his own testimony, and by analogy an admission made pursuant to Rule 36 may likewise be thought rebuttable.

The new provisions give an admission a conclusively binding effect, for purposes only of the pending action, unless the admission is withdrawn or amended. In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. Unless the party securing an admission can depend on its binding effect, he cannot safely avoid the expense of preparing to prove the very matters on which he has secured the admission, and the purpose of the rule is defeated.

Provision is made for withdrawal or amendment of an admission. This provision emphasizes the importance of having the action resolved on the merits, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

It is no longer necessary to make a sworn statement in response to the request for admissions under the present rule. The rule now only requires that the response be signed by the party or counsel. Rutherford v. Bass Air Conditioning Co., 38 N.C. App. 630, 248 S.E.2d 887 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 34 (1979); Southland Assocs. Realtors v. Miner, 65 N.C. App. 126, 308 S.E.2d 773 (1983).

Where a party deliberately destroys, alters or creates a false document to subvert an adverse party's investigation of his right to seek a legal remedy, and injuries are pleaded and proven, a claim for the resulting increased costs of the investigation will lie. Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984).

A trial judge may allow withdrawal of an admission. Whitley v. Coltrane, 65 N.C. App. 679, 309 S.E.2d 712 (1983).

Discretion with Trial Court to Allow or Disallow Withdrawal of Admissions. — Trial court was correct in not requiring plaintiff to present evidence that withdrawal or amendment would prejudice it in maintaining its action; the language of the rule gives the trial court the discretion to allow or not allow a party to withdraw admissions, and that in the exercise of that discretion, trial court was not required to consider whether the withdrawal of the admissions would prejudice plaintiff in maintaining its action. Interstate Hwy. Express, Inc. v. S & S Enters., Inc., 93 N.C. App. 765, 379 S.E.2d 85 (1989).

Trial court did not abuse its discretion in permitting a party to withdraw his admission that a signature on a contract was valid, as the trial court found that the party never intended to admit the validity of the signature, that the responses were submitted shortly after they were due, and that in the interest of justice the party who responded should not have been deprived of his right to have a jury determine the issue of the validity of the signature. Taylor v. Abernethy, 149 N.C. App. 263, 560 S.E.2d 233, 2002 N.C. App. LEXIS 182 (2002), cert. denied, 356 N.C. 695, 579 S.E.2d 102 (2003).

Trial court did not abuse its discretion in denying corporations' motions to withdraw their deemed admissions, after the corporations failed to timely answer a service provider's requests for admissions. Excel Staffing Serv. v. HP Reidsville, Inc., 172 N.C. App. 281, 616 S.E.2d 349, 2005 N.C. App. LEXIS 1582 (2005).

Procedure for Having Requests Deemed Admitted for Insufficiency. — To be entitled to have requests for admissions deemed admitted for insufficiency under this rule, a party must first move the trial court to determine the sufficiency of the responses, and then obtain a ruling from the court to this effect. Southern Nat'l Bank v. B & E Constr. Co., 46 N.C. App. 736, 266 S.E.2d 1 (1980).

A plaintiff does not waive his right to deemed admissions by waiting until after a defendant has untimely answered the request for admissions. Southland Amusements &

Vending, Inc. v. Rourk, 143 N.C. App. 88, 545 S.E.2d 254, 2001 N.C. App. LEXIS 231 (2001).

Facts admitted under this rule are sufficient to support a grant of summary judgment. Goins v. Puleo, 350 N.C. 277, 512 S.E.2d 748 (1999).

Unverified Responses to Request For Admissions Do Not Constitute Affidavit Sufficient to Defeat Motion for Summary Judgment. — Where defendant's responses to plaintiffs' request for admissions were not verified, they could not be deemed to be an affidavit; and as they were not in the category of "depositions, answers to interrogatories, and admissions on file" specified in G.S. 1A-1, Rule 56 as material that could be considered, they were insufficient to defeat plaintiffs' motion for summary judgment. Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005), cert. denied, — U.S. —, 126 S. Ct. 2972, 165 L. Ed. 2d 954 (2006).

Facts admitted by one defendant are not binding on a codefendant. Barclays Am. Fin., Inc. v. Haywood, 65 N.C. App. 387, 308 S.E.2d 921 (1983).

Plaintiff Not Bound by Facts Admitted by Codefendants as Between Themselves. — This rule was clearly not intended to permit codefendants who admit facts as between themselves to bind the plaintiff, the adverse party, to those facts as admitted. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

Failure to Respond to Plaintiff's Request. — By failing to respond to plaintiff's request for admissions, defendants allowed the facts in question to be judicially established. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Patient's failure to respond to health care providers' request for admission that the applicable standard of care was not breached entitled providers to summary judgment in patient's malpractice action. Goins v. Puleo, 350 N.C. 277, 512 S.E.2d 748 (1999).

Entry of default under G.S. 1A-1-55(a) did not preclude a seller from responding to the buyers' requests for admissions under G.S. 1A-1-36(b) because the seller was free to contest the sufficiency of the complaint to state a claim for recovery; by not responding to the requests, the seller admitted the matters requested, establishing a claim for breach of contract. Kniep v. Templeton, 185 N.C. App. 622, 649 S.E.2d 425, 2007 N.C. App. LEXIS 1943 (2007).

Admission Sufficient to Support Summary Judgment. — When facts are admitted pursuant to subsection (b), these facts have been held to be sufficient to support a grant of summary judgment. Fieldcrest Cannon v. Fireman's Fund Ins. Co., 124 N.C. App. 232, 477 S.E.2d 59, 1996 N.C. App. LEXIS 1062 (1996), aff'd per curiam, 489 S.E.2d 452 (1997), aff'd, 127 N.C. App. 729, 493 S.E.2d 658 (1997).

Under 1990 version of statute summary judgment was properly granted in favor of an insurer in a breach of contract action because two insureds admitted there was no breach of an insurance contract by failing to make a timely response to requests for admissions; moreover, the fact that the insureds' attorney failed to provide the discovery documents to the insureds did not provide a basis for relief from the judgment. Brown v. Foremost Affiliated Ins. Servs., 158 N.C. App. 727, 582 S.E.2d 335, 2003 N.C. App. LEXIS 1222 (2003).

Trial court did not err in granting judgment to a services provider against corporations, jointly and severally, on a breach of contract claim, as the corporations admitted to the breach, and the deemed admissions showed that the subsidiary corporations were mere instrumentalities of the parent corporation. Excel Staffing Serv. v. HP Reidsville, Inc., 172 N.C. App. 281, 616 S.E.2d 349, 2005 N.C. App. LEXIS 1582 (2005).

Use of Admission. — Subsection (b) is clear in its mandate that admissions made in one action may not be used against the party who made them in any other proceeding outside of the one pending. Fieldcrest Cannon v. Fireman's Fund Ins. Co., 124 N.C. App. 232, 477 S.E.2d 59, 1996 N.C. App. LEXIS 1062 (1996), aff'd per curiam, 489 S.E.2d 452 (1997), aff'd, 127 N.C. App. 729, 493 S.E.2d 658 (1997).

Correction of Admission. — Under circumstances in which it was clear that an owner's admission that his house had been condemned prior to a fire that destroyed the house was incorrect, and the owner attempted to supplement his response, the trial judge's allowance of the testimony was not error; moreover, a guaranty association was not prejudiced by the allowance given its concession that it received the correction a mere 15 minutes after the admission was made. Papdopoulos v. State Capital Ins. Co., 183 N.C. App. 258, 644 S.E.2d 256, 2007 N.C. App. LEXIS 1036 (2007).

Requests for Admissions Granted. — Trial court properly granted a will propounder's motion for time extension of time to request for admissions or allowing withdrawal of the admissions and denied the caveators' request for a jury instruction on revocation. In re Estate of Lowe, 156 N.C. App. 616, 577 S.E.2d 315, 2003 N.C. App. LEXIS 189 (2003).

Award of Attorney Fees and Costs Based on Denial of Request for Admissions Improper. — Driver met her burden of proof in showing that at the time for request of admission, reasonable grounds existed to believe that she might prevail on some matters denied, and good reasons, her lack of knowledge, existed for the failure to admit other issues at that time; accordingly, the trial court erred in awarding plaintiffs' attorney fees and costs based on the driver's denial. Oakes v. Wooten, 173 N.C. App.

506, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

Extension of Time to Respond. — Construction company's responses to requests for admission were timely where filed within the extension period granted by the trial court. Moore v. F. Douglas Biddy Constr., Inc., 161 N.C. App. 87, 587 S.E.2d 479 (2003).

Sanctions for Violation of Court Orders. — Trial court order precluding plaintiff from presenting any testimony or exhibits that implied or inferred that her back injury was caused by a pedestrian walkway failure that was the basis for the suit was proper as within the discretion of the trial court pursuant to G.S. 1A-1, Rule 37, where plaintiff committed discovery violations by failing to consult with her experts before answering various requests for admissions, failing to disclose certain experts before the cut-off date set by the trial court, and failing to produce documents to substantiate her injuries. In re Pedestrian Walkway Failure, 173 N.C. App. 254, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005).

Applied in Bowes v. Bowes, 43 N.C. App. 586, 259 S.E.2d 389 (1979); Laing v. Liberty Loan Co., 46 N.C. App. 67, 264 S.E.2d 381 (1980); Shreve v. Combs, 54 N.C. App. 18, 282 S.E.2d 568 (1981); VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

Cited in Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383; Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Riggins v. County of Mecklenburg, 14 N.C. App. 624, 188 S.E.2d 749 (1972); Jernigan v. State Farm Mut. Auto. Ins. Co., 16 N.C. App. 46, 190 S.E.2d 866 (1972); Austin v. Wilder, 26 N.C. App. 229, 215 S.E.2d 794 (1975); Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975); Emerson v. Great Atl. & Pac. Tea Co., 41 N.C. App. 715, 255 S.E.2d 768 (1979); Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981); Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981); Overnite Transp. Co. v. Styer, 57 N.C. App. 146, 291 S.E.2d 179 (1982); McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984); Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984); Watkins v. Hellings, 83 N.C. App. 430, 350 S.E.2d 590 (1986); WXQR Marine Broadcasting Corp. v. JAI, Inc., 83 N.C. App. 520, 350 S.E.2d 912 (1986); G.R. Little Agency, Inc. v. Jennings, 88 N.C. App. 107, 362 S.E.2d 807 (1987); McKinney v. Avery Journal, Inc., 99 N.C. App. 529, 393 S.E.2d 295 (1990); Roberts v. Young, 120 N.C. App. 720, 464 S.E.2d 78 (1995); Rahim v. Truck Air of Carolinas, Inc., 123 N.C. App. 609, 473 S.E.2d 688 (1996); Brannock v. Brannock, 135 N.C. App. 635, 523 S.E.2d 110, 1999 N.C. App. LEXIS 1240 (1999); Thompson v. First Citizens Bank & Trust Co., 151 N.C. App. 704, 567 S.E.2d 184, 2002 N.C. App. LEXIS 889 (2002).

Rule 37. Failure to make discovery; sanctions.

(a) *Motion for order compelling discovery.* — A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. — An application for an order to a party or a deponent who is not a party may be made to a judge of the court in which the action is pending, or, on matters relating to a deposition where the deposition is being taken in this State, to a judge of the court in the county where the deposition is being taken, as defined by Rule 30(h).

(2) Motion. — If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question shall complete the examination on all other matters before he adjourns the examination in order to apply for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or Incomplete Answer. — For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. — If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) *Failure to comply with order.* —

(1) Sanctions by Court in County Where Deposition Is Taken. — If a deponent fails to be sworn or to answer a question after being directed to do so by a judge of the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. — If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f) a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

d. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

e. Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in subdivisions a, b, and c of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on failure to admit.* — If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (i) the request was held objectionable pursuant to Rule 36(a), or (ii) the admission sought was of no substantial importance, or (iii) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (iv) there was other good reason for the failure to admit.

(d) *Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.* — If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (i) to appear before the person who is to take his deposition, after being served with a proper notice, or (ii) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (iii) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e), (f) Reserved for future codification purposes.

(g) *Failure to participate in the framing of a discovery plan.* — If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure. (1967, c. 954, s. 1; 1973, c. 827, s. 1; 1975, c. 762, s. 2; 1985, c. 603, ss. 5-7; 2001-379, s. 5.)

COMMENT

Comment to this Rule as Originally Enacted. — Under § 8-78 and former §§ 1-568.18 and 1-568.19, sanctions against either a deponent or adverse party for failure to answer or to appear are provided for. Under § 8-78 a deponent may be committed to jail upon warrant of the commissioner before whom the deposition is taken. Under former §§ 1-568.18 and 1-568.19 sanctions could be applied only upon order of court issued either by the clerk of superior court in which the action was pending or the judge having jurisdiction.

Under this rule sanctions can be applied only for failure to comply with a court order. Hence, if discovery procedure requires a court order as under Rules 34 or 35, failure to obey the order can be punished immediately under section (b)(2). But where the discovery procedure is set in motion by the parties themselves, the party seeking discovery must first obtain a court order under section (a) requiring the recalcitrant party or witness to make discovery. The only exception to this is found in section (d), which permits an immediate sanction against parties, their officers, or managing agents for a willful failure to appear.

Comment to the 1975 Amendment. — Rule 37 provides generally for sanctions against parties or persons unjustifiably resisting discovery. Experience in the federal courts brought to light a number of the defects in the language of the rule as well as instances in which it was not serving the purposes for which it was designed. In addition, changes being made in other discovery rules require conforming amendments to Rule 37.

Rule 37 sometimes refers to a "failure" to afford discovery and at other times to a "refusal" to do so. Taking note of this dual terminology, federal courts imported into "refusal" a requirement of "willfullness." In Societe Internationale v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958), the United States Supreme Court concluded that the rather random use of these two terms in Rule 37 showed no design to use them with consistently distinctive meanings, that "refused" in Rule 37(b)(2) meant simply a failure to comply, and that willfulness was relevant only to the selection of sanctions, if any, to be imposed. Substitution of "failure" for "refusal" throughout Rule 37 should eliminate confusion.

Section (a). — Rule 37(a) provides relief to a party seeking discovery against one who, with or without stated objections, fails to afford the discovery sought. It has always fully served this function in relation to depositions, but the amendments being made to Rules 33 and 34 give Rule 37(a) added scope and importance. Under existing Rule 33, a party objecting to interrogatories must make a motion for court hearing on his objections. The changes now made in Rules 33 and 37(a) make it clear that the interrogating party must move to compel answers, and the motion is provided for in Rule 37(a). Existing Rule 34, since it requires a court order prior to production of documents or things or permission to enter on land, has no relation to Rule 37(a). Amendments of Rules 34 and 37(a) create a procedure similar to that provided for Rule 33.

Subsection (a)(1). — This is a new provision making clear to which court a party may apply for an order compelling discovery. In relation to Rule 33 interrogatories and Rule 34 requests for inspection, the court where the action is pending is the appropriate enforcing tribunal. The new provision spells out the respective roles of the court where the action is pending and the court where the deposition is taken. In some instances, two courts are available to a party seeking to compel answers from a party deponent. The party seeking discovery may choose the court to which he will apply, but the court has power to remit the party to the other court as a more appropriate forum.

Subsection (a)(2). — This subsection contains the substance of existing provisions of Rule 37(a) authorizing motions to compel answers to questions put at depositions and to interrogatories. New provisions authorize motions for orders compelling designation under Rules 30(b)(6) and 31(a) and compelling inspection in accordance with a request made under Rule 34. If the court denies a motion, in whole or in part, it may accompany the denial with issuance of a protective order. Compare the converse provision in Rule 26(c).

Subsection (a)(3). — This new provision makes clear that an evasive or incomplete answer is to be considered, for purposes of subsection (a), a failure to answer. The federal courts have consistently held that they have the power to compel adequate answers. This power of the court is recognized and incorporated into the rule.

Subsection (a)(4). — This subsection adds provisions for award of expenses, including reasonable attorney's fees, to the prevailing party or person when a motion is made for an order compelling discovery. The prior North Carolina rule had no such provision. The provision requires that expenses be awarded unless the conduct of the losing party or person is found to have been "substantially justified." This language is intended to encourage judges to be more alert to abuses occurring in the discovery process.

On many occasions, to be sure, the dispute over discovery between the parties is genuine, though ultimately resolved one way or the other by the court. In such cases, the losing party is substantially justified in carrying the matter to court. But the rules should deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists. And the potential or actual imposition of expenses is virtually the sole formal sanction in the rules to deter a party from pressing to a court hearing frivolous requests for or objections to discovery.

The proposed provision provides in effect that expenses should ordinarily be awarded unless a court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust — as where the prevailing party also acted unjustifiably. The amendment does not significantly limit the discretion of the court, but rather presses the court to address itself to abusive practices.

Section (b). — This section deals with sanctions for failure to comply with a court order.

The scope of Rule 37(b)(2) is broadened by extending it to include any order "to provide or permit discovery," including orders issued under Rules 37(a) and 35. Various rules authorize orders for discovery — e.g., Rule 35(b)(1), Rule 26(c) as revised, Rule 37(d). Rule 37(b)(2) should provide comprehensively for enforcement of all these orders. On the other hand, the reference to Rule 34 is deleted to conform to the changed procedure in that rule.

Paragraph e provides that sanctions which have been available against a party for failure to comply with an order under Rule 35(a) to submit to examination will now be available against him for his failure to comply with a Rule 35(a) order to produce a third person for examination, unless he shows that he is unable to produce the person. In this context, "unable" means in effect "unable in good faith."

Subsection (b)(2) is amplified to provide for payment of reasonable expenses caused by the failure to obey the order. Although Rules 37(b)(2) and 37(d) have been silent as to award of expenses, federal courts have nevertheless ordered them on occasion. The provision places the burden on the disobedient party to avoid expenses by showing that his failure is justified or that special circumstances make an award of expenses unjust. Allocating the burden in this way conforms to the provisions as to expenses in Rule 37(a), and is particularly appropriate when a court order is disobeyed.

An added reference to directors of a party is similar to a change made in section (d) and is explained in the note to that section. The added reference to persons designated by a party under Rules 30(b)(6) or 31(a) to testify on behalf of the party carries out the new procedure in those rules for taking a deposition of a corporation or other organization.

Section (c). — Rule 37(c) provides a sanction for the enforcement of Rule 36 dealing with requests for admission. Rule 36 provides the mechanism whereby a party may obtain from another party in appropriate instances either (1) an admission, or (2) a sworn and specific denial, or (3) a sworn statement "setting forth in detail the reasons why he cannot truthfully admit or deny." If the party obtains the second or third of these responses, in proper form, Rule 36 does not provide for a pretrial hearing on whether the response is warranted by the evidence thus far accumulated. Instead, Rule 37(c) is intended to provide post-trial relief in the form of a requirement that the party improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial.

Rule 37(c), as now written, addresses itself in terms only to the sworn denial and is silent with respect to the statement of reasons for an inability to admit or deny. There is no apparent basis for this distinction, since the sanction provided in Rule 37(c) should deter all unjustified failures to admit. This omission in the rule has caused confused and diverse treatment in the federal courts. The amendment eliminates this defect in Rule 37(c) by bringing within its scope all failures to admit.

Additional provisions in Rule 37(c) protect a party from having to pay expenses if the request for admission was held objectionable under Rule 36(a) or if the party failing to admit had reasonable ground to believe that he might prevail on the matter. The latter provision emphasizes that the true test under Rule 37(c) is not whether a party prevailed at trial but whether he acted reasonably in believing that he might prevail.

Section (d). — The scope of section (d) is broadened to include responses to requests for inspection under Rule 34, thereby conforming to the new procedures of Rule 34.

The permissible sanctions are broadened to include such orders "as are just." Although former federal Rule 37(d) in terms provided for only three sanctions, all rather severe, the federal courts had interpreted it as permitting softer sanctions than those which it set forth. The rule is changed to provide the greater flexibility as to sanctions which the cases show is needed.

The resulting flexibility as to sanctions eliminates any need to retain the requirement that the failure to appear or respond be "willful." The concept of "willful failure" is at best subtle and difficult, and the cases do not supply a bright line. Many courts have imposed sanctions without referring to willfulness. In addition, in view of the possibility of light sanctions, even a negligent failure should come within Rule 37(d). If default is caused by counsel's ignorance of federal practice, or by his preoccupation with another aspect of the case, dismissal of the action and default judgment are not justified, but the imposition of expenses and fees may well be. "Willfulness" continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in Societe Internationale v. Rogers, 357 U.S. 197, 208, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958).

A provision is added to make clear that a party may not properly remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests to inspect as improper and objectionable. If he desires not to appear or not to respond, he must apply for a protective order. Prior to the adoption of this rule, federal cases were divided on whether a protective order must be sought. The party from whom discovery is sought is afforded, through Rule 26(c), a fair and effective procedure whereby he can challenge the request made. At the same time, the total noncompliance with which Rule 37(d) is concerned may impose severe inconvenience or hardship on the discovering party and substantially delay the discovery process.

The failure of an officer or managing agent of a party to make discovery as required by present Rule 37(d) is treated as the failure of the party. The rule as revised provides similar treatment for a director of a party. There is slight warrant for the present distinction between officers and managing agents on the one hand and directors on the other. Although the legal power over a director to compel his making discovery may not be as great as over officers or managing agents, the practical differences are negligible. That a director's interests are normally aligned with those of his corporation is shown by the provisions of old Rule 26(d)(2), transferred to 32(a)(2) (deposition of director of party may be used at trial by an adverse party for any purpose) and of Rule 43(b) (director of party may be treated at trial as a hostile witness on direct examination by any adverse party). Moreover, in those rare instances when a corporation is unable through good-faith efforts to compel a director to make discovery, it is unlikely that the court will impose sanctions.

Legal Periodicals. — For article on pretrial and discovery, see 5 Wake Forest Intra. L. Rev. 95 (1969).

For article, "The 1980 Amendment to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For note on default not constituting an admission of facts for purposes of summary judgment, see 17 Wake Forest L. Rev. 49 (1981).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

CASE NOTES

The discovery rules should be construed liberally so as to substantially accomplish their purposes. AT & T Co. v. Griffin, 39 N.C. App. 721, 251 S.E.2d 885, cert. denied, 297 N.C. 304, 254 S.E.2d 921 (1979); Carpenter v. Cooke, 58 N.C. App. 381, 293 S.E.2d 630, cert. denied and appeal dismissed, 306 N.C. 740, 295 S.E.2d 758 (1982).

Not every abuse of discovery merits imposition of punitive sanctions, etc. Rose v. Isenhour Brick & Tile Co., 120 N.C. App. 235, 461 S.E.2d 782 (1995), aff'd, 344 N.C. 153, 472 S.E.2d 774 (1996).

When it was revealed in the course of a personal injury trial that the injured party incorrectly responded to the defending motorist's request for production, under G.S. 1A-1, Rule 34, seeking medical reports from any medical practitioner who had ever treated the injured party for any back or neck difficulties, because the injured party did not reveal an emergency room visit for an unrelated automobile accident in which the injured party complained of neck pain, the trial court did not abuse its discretion in declining to impose sanctions because the injured party's counsel obtained and delivered the documents in question, the motorist was given an opportunity to cross-examine the injured party about the documents, the injured party admitted her untruthful response during cross-examination, explaining that she had forgotten about the emergency room visit following the accident in which she was not seriously hurt, and she had not sought other medical treatment following the emergency room visit. Messina v. Bell, 158 N.C. App. 111, 581 S.E.2d 80, 2003 N.C. App. LEXIS 978 (2003).

Administration of the discovery rules lies necessarily within the province of the trial courts. AT & T Co. v. Griffin, 39 N.C. App. 721, 251 S.E.2d 885, cert. denied, 297 N.C. 304, 254 S.E.2d 921 (1979); Carpenter v. Cooke, 58 N.C. App. 381, 293 S.E.2d 630, cert. denied and appeal dismissed, 306 N.C. 740, 295 S.E.2d 758 (1982).

Sanction Discretionary. — In a workers' compensation case, the North Carolina Industrial Commission did not err by not holding the employer in contempt for its failure to comply with a previous order and by not making specific findings on the issue of civil contempt because civil contempt is a completely discretionary sanction, thus, even if the Commission made explicit findings that all of the conditions outlined in G.S. 5A-21(a) were satisfied, it still would not have been required to sanction the employer. Bolick v. ABF Freight Sys., 188 N.C. App. 294, 654 S.E.2d 793, 2008 N.C. App. LEXIS 81 (2008), cert. denied, 362 N.C. 233, 659 S.E.2d 436 (2008).

Courts cannot compel disclosure of information which would tend to incriminate the person from whom it is sought and cannot impose sanctions on one who refuses to disclose privileged information. Stone v. Martin, 56 N.C. App. 473, 289 S.E.2d 898, appeal dismissed and cert. denied, 306 N.C. 392, 294 S.E.2d 220 (1982).

Where an employee physically appeared at a deposition and invoked his Fifth Amendment privilege, the imposition of sanctions for failure to appear was not appropriate. Bd. of Drainage Comm'rs Drainage Dist. No. 3 v. Dixon, 158 N.C. App. 509, 581 S.E.2d 469, 2003 N.C. App. LEXIS 1181 (2003), review denied, 357 N.C.

504, 587 S.E.2d 659 (2003), aff'd, review improvidently allowed, 358 N.C. 214, 593 S.E.2d 763 (2004).

But Privilege Against Self-Incrimination Not to Be Used as Sword to Defeat Civil Actions. — A defendant has the right to refuse to answer interrogatories and requests for admission on the ground that to answer may tend to incriminate him. Invocation of this constitutional privilege may legitimately serve as a shield, with potential to protect defendant from criminal responsibility which may ensue from the acts and omissions alleged. It is not an abuse of discretion, however, to refuse to allow that privilege to serve also as a sword, with potential to defeat civil actions which may likewise ensue from those acts and omissions. Stone v. Martin, 53 N.C. App. 600, 281 S.E.2d 402 (1981), reaffirmed on rehearing, 56 N.C. App. 473, 289 S.E.2d 898, appeal dismissed and cert. denied, 306 N.C. 392, 294 S.E.2d 220 (1982).

Where, in a suit by shareholders against corporation and individual defendants, none of the requested discovery to which the court ordered response would compel defendant to admit the calculation and intent requisite to establish fraudulent conduct, and such responses would therefore not necessarily tend to subject defendant to a punitive damages award, there was no impropriety in the court's order. Stone v. Martin, 56 N.C. App. 473, 289 S.E.2d 898, appeal dismissed and cert. denied, 306 N.C. 392, 294 S.E.2d 220 (1982).

Information Irrelevant for Discovery Purposes. — Whether or not plaintiff's replacement had a relationship with a high school student during his previous employment, the complete student records at high school and school personnel records were irrelevant to whether defendants intentionally inflicted emotional distress on plaintiff, constructively and wrongfully discharged her, or maliciously interfered with her contract; therefore, the trial court did not abuse its discretion in denying motion to compel discovery. Wagoner v. Elkin City Schs. Bd. of Educ., 113 N.C. App. 579, 440 S.E.2d 119, cert. denied, 336 N.C. 615, 447 S.E.2d 414 (1994).

Responding Party May Not Unilaterally Interpret Relevant Scope. — The responding party may not unilaterally "interpret" the relevant scope of its response and only provide that information it considers discoverable. Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

The trial judge has broad discretion in imposing sanctions to compel discovery under this rule. F.E. Davis Plumbing Co. v. Ingleside W. Assocs., 37 N.C. App. 149, 245 S.E.2d 555, cert. denied, 295 N.C. 648, 248 S.E.2d 250 (1978).

This rule is flexible, and a broad discretion must be given to the trial judge with regard to sanction. AT & T Co. v. Griffin, 39 N.C. App. 721, 251 S.E.2d 885, cert. denied, 297 N.C. 304, 254 S.E.2d 921 (1979); Laing v. Liberty Loan Co., 46 N.C. App. 67, 264 S.E.2d 381, appeal dismissed, 300 N.C. 557, 270 S.E.2d 109 (1980); Carpenter v. Cooke, 58 N.C. App. 381, 293 S.E.2d 630, cert. denied and appeal dismissed, 306 N.C. 740, 295 S.E.2d 758 (1982).

The imposition of sanctions under section (d) of this rule is in the sound discretion of the trial judge. American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

The imposition of sanctions under this rule for failure to comply with G.S. 1A-1, Rule 26(e) is within the sound discretion of the trial judge. Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983), cert. denied, 310 N.C. 631, 315 S.E.2d 697, 315 S.E.2d 698 (1984).

In addition to its inherent authority to regulate trial proceedings, the trial court has express authority under this rule to impose sanctions on a party who balks at discovery requests. Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

The choice of sanctions under Rule 37 is within the trial court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion. Brooks v. Giesey, 106 N.C. App. 586, 418 S.E.2d 236 (1992), aff'd, 334 N.C. 303, 432 S.E.2d 339 (1993).

Sanctions such as striking answers and/or counterclaims and awarding attorney fees are well within the court's discretion in cases involving a refusal to respond to discovery requests and a refusal to obey an order to compel discovery. Kewaunee Scientific Corp. v. Eastern Scientific Prods., Inc., 122 N.C. App. 734, 471 S.E.2d 451 (1996).

Trial court did not abuse its discretion in denying an insurer's motion for sanctions against an insured for the insured's failure to complete a deposition that was being taken, based on the insured's counterclaims against the insurer, arising from an underlying dog bite case that the insurer had provided legal representation and some coverage on, as a question regarding the scope of the attorney-client privilege between the appointed attorney from the insurer for the benefit of the insured, the insured, and the insurer, was a question of first impression, and the insured was "substantially justified" in relying on the attorney-client privilege when he terminated the deposition. Nationwide Mut. Fire Ins. Co. v. Bourlon, 172 N.C. App. 595, 617 S.E.2d 40, 2005 N.C. App. LEXIS 1789 (2005), aff'd, — N.C. —, 625 S.E.2d 779 (2006).

The trial court retains inherent authority to impose sanctions for discovery abuses beyond those enumerated by this rule. Cloer v.

Smith, 132 N.C. App. 569, 512 S.E.2d 779 (1999).

A trial court must consider less severe sanctions before dismissing a plaintiff's complaint under subsection (d) of this rule. Goss v. Battle, 111 N.C. App. 173, 432 S.E.2d 156 (1993).

In determining if dismissal of a workers' compensation proceeding was an abuse of discretion, factors to be considered include the exclusivity provision of G.S. 97-10.1, the appropriateness of alternative sanctions under this rule, the proportionality of dismissal to the actions meriting sanction, and whether other statutory powers, such as holding a person in contempt under G.S. 97-80, can bring the result desired by imposition of a sanction. Matthews v. Charlotte-Mecklenburg Hosp. Auth., 132 N.C. App. 11, 510 S.E.2d 388 (1999).

Sanctions Imposed on Attorney. — Trial court was justified in imposing sanctions on attorney where notice of plaintiff's deposition was actually sent to her office, and court of appeals could only assume that plaintiff was unaware that she needed to bring any documents with her because her counsel never informed her of such. Pugh v. Pugh, 113 N.C. App. 375, 438 S.E.2d 214 (1994).

The proximity of the discovery abuse to the date of trial is one factor the trial court may consider when determining whether or not to award sanctions. Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

Party Not Precluded from Presenting Witnesses and Exhibits at Trial. — Where plaintiff, in a deposition, specifically requested from the defendant the names of his trial witnesses and a list of his trial exhibits, but made no showing that he had a special need for defendant's list of witnesses and exhibits ten months prior to trial, the information sought was not discoverable and defendant's failure to provide such information could not preclude him from presenting witnesses and exhibits at the trial. King v. Koucouliotes, 108 N.C. App. 751, 425 S.E.2d 462, cert. granted, 334 N.C. 163, 432 S.E.2d 361, discretionary review improvidently granted, 335 N.C. 164, 436 S.E.2d 132 (1993).

Movant Need Not Show Prejudice to Obtain Sanctions. — This rule does not require the movant to show that it was prejudiced by the nonmovant's actions in order to obtain sanctions for abuse of discovery. Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

Discretion as to Time for Payment of Expenses Under Subsection (a)(4). — It is within the trial court's discretion to require that expenses assessed pursuant to subsection (a)(4) of this rule be paid at any time after entry of an order pursuant to the rule. Accordingly, the better practice would be for all such orders to include a provision as to when payment of such expenses shall be made. Hall v. Carter, 90 N.C. App. 668, 369 S.E.2d 623 (1988).

Default Judgment. — Under this rule, where an answer to the complaint has been filed, and a party fails to answer requested discovery, the opposing party may move the court to order the answer stricken, and if granted, for entry of default judgment against the disobedient party. O'Neal v. Murray, 105 N.C. App. 102, 411 S.E.2d 628 (1992).

Default Judgment as Sanction. — Sanctions in the form of striking defendants' answer as well as entering a default judgment against defendants were warranted where defendants' discovery conduct, which included concealing information, deleting emails, and then lying about it, was at best dilatory and at worst dishonest. Essex Group, Inc. v. Express Wire Servs., 157 N.C. App. 360, 578 S.E.2d 705, 2003 N.C. App. LEXIS 534 (2003).

Default Judgment not Applicable to Annulment Proceeding. — Default judgment was incorrectly entered pursuant to G.S. 1A-1, N.C. R. Civ. P. 37, due to a purported wife's failure to comply with the trial court's discovery orders in an annulment proceeding because a judgment for annulment could not be entered by default under G.S. 50-10(a). Hawkins v. Hawkins, — N.C. App. —, 664 S.E.2d 616, 2008 N.C. App. LEXIS 1520 (2008).

Court Order Not Prerequisite to Default Judgment. — While issuance of a court order compelling discovery is the more common procedure employed by courts, the clear wording of section (d) of this rule contradicts the position that this is a prerequisite to entry of a default judgment. First Citizens Bank & Trust Co. v. Powell, 58 N.C. App. 229, 292 S.E.2d 731 (1982), aff'd, 307 N.C. 467, 298 S.E.2d 386 (1983).

Order Deemed Conditional and Void. — Where a court order conditioned the dismissal of plaintiff's action upon plaintiff's failure to produce discovery materials previously ordered, the second order was not self-executing, and was therefore conditional and void. Cassidy v. Cheek, 308 N.C. 670, 303 S.E.2d 792 (1983).

Purpose of Mandatory Allowance of Expenses. — Provision in section (d) of this rule for a mandatory allowance of expenses against a party which fails to respond to a discovery request, unless other sanctions are imposed under this rule or unless the failure "was substantially justified or . . . other circumstances make an award of expenses unjust," is designed to discourage dilatory practices and frivolous refusals to comply with discovery procedures. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

If a party's failure to produce docu-

ments is shown to be due to inability fostered neither by its own conduct nor by circumstances within its control, it is exempt from the sanctions of this rule. Laing v. Liberty Loan Co., 46 N.C. App. 67, 264 S.E.2d 381, appeal dismissed, 300 N.C. 557, 270 S.E.2d 109 (1980).

Subsection (a)(3) of this rule specifically provides that an evasive or incomplete answer is to be treated as a failure to answer; however, if a party is unable to answer discovery requests because of circumstances beyond its control, it cannot be compelled to answer. A good faith effort at compliance with the court order is required of the deponent. Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

Burden to Show Justification for Failure to Answer Interrogatories. — This rule sets out possible consequences of a party's failure "without good cause" to comply with the court's order to answer interrogatories. If a noncomplying party wishes to avoid court-imposed sanctions for his failure, the burden is upon him to show that there is justification for his noncompliance. Silverthorne v. Coastal Land Co., 42 N.C. App. 134, 256 S.E.2d 397, cert. denied, 298 N.C. 300, 259 S.E.2d 302 (1979).

If a noncomplying party wishes to avoid court-imposed sanctions for his failure to answer interrogatories, the burden is upon him to show that there is justification for his noncompliance. Hayes v. Browne, 76 N.C. App. 98, 331 S.E.2d 763 (1985), cert. denied, 315 N.C. 587, 341 S.E.2d 25 (1986).

Subsection (a)(3) of this rule specifically provides that an evasive or incomplete answer is to be treated as a failure to answer; however, if a party is unable to answer discovery requests because of circumstances beyond its control, it cannot be compelled to answer. A good faith effort at compliance with the court order is required of the deponent. Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

Imposition of Section (d) Sanctions Dependent on Circumstances. — Whether such extreme sanctions as are authorized by section (d) of this rule should be imposed must be determined from the circumstances of each case. Cutter v. Brooks, 36 N.C. App. 265, 243 S.E.2d 423 (1978).

Section (d) Inapplicable When Answers, Responses or Objections are Filed. — If a party files answers or objections to interrogatories, or serves a written response to a request for inspection, no sanctions under section (d) of this rule may be obtained, and the proper procedure for the party seeking discovery is to obtain an order compelling discovery under section (a) of this rule. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Rule Inapplicable to Requests for Protective Order. — This rule was inapplicable to plaintiff's request for sanctions because plaintiff did not compel discovery, but instead sought to prevent discovery by asking for a protective order. Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994).

Sanctions Inappropriate for Alleged Violation of Protective Order No Longer In Place. — Because there was no binding protective order in effect under N.C. R. Civ. P. 26(f1) since the parties never stipulated to having such an order carrying over from a previous voluntarily dismissed medical malpractice action brought by a plaintiff, and the plaintiff did not violate Rule 26(e) with regard to supplementing its answers to interrogatories, no basis existed for a trial court's exclusion of an expert witness' testimony as a sanction imposed upon the plaintiff. Barham v. Hawk, 165 N.C. App. 708, 600 S.E.2d 1 (2004), aff'd, 360 N.C. 358, 625 S.E.2d 778 (2006).

Section (d) of this rule requires no finding that the refusal to attend a deposition was willful before the court imposes sanctions. American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Trial judge did not abuse his discretion by ordering default judgment without finding that defendant had willfully failed to appear at his deposition, as the 1975 amendment to section (d) of this rule omitted the requirement that sanctions be leveled against a party who failed to respond to pretrial discovery "without good cause." Cutter v. Brooks, 36 N.C. App. 265, 243 S.E.2d 423 (1978).

The language of section (d) of this rule requires no finding of willfulness. The 1975 amendment to section (d) deletes the specific reference to "willful" from the rule. Hayes v. Browne, 76 N.C. App. 98, 331 S.E.2d 763 (1985), cert. denied, 315 N.C. 587, 341 S.E.2d 25 (1986).

A showing of willfulness was not required to impose discovery sanctions where a party did not appear at depositions due to the failure of its attorney to notify it of the depositions. Henderson v. Wachovia Bank of N.C., N.A., 145 N.C. App. 621, 551 S.E.2d 464, 2001 N.C. App. LEXIS 735 (2001), cert. denied, 354 N.C. 572, 558 S.E.2d 869 (2001).

Default as Sanction for Failure to Attend Deposition. — Section (d) of this rule allows a judge to default a claim as a sanction for failure to appear for a deposition after having been given proper notice. American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978); Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190, cert. denied, 309 N.C. 319, 307 S.E.2d 162 (1983).

For case upholding default judgment after failure to respond to request for admissions or to answer interrogatories, see Bowes v. Bowes, 43 N.C. App. 586, 259 S.E.2d

389 (1979), cert. denied, 299 N.C. 120, 262 S.E.2d 5 (1980); Vick v. Davis, 77 N.C. App. 359, 335 S.E.2d 197 (1985), aff'd, 317 N.C. 328, 345 S.E.2d 217 (1986).

Issuance of Court Order Not Prerequisite to Entry of Default Judgment. — While issuance of a court order is the more common procedure employed by courts, the clear wording of section (d) of this rule contradicts position that this is a prerequisite to entry of a default judgment. First Citizens Bank & Trust Co. v. Powell, 58 N.C. App. 229, 292 S.E.2d 731 (1982), aff'd, 307 N.C. 467, 298 S.E.2d 386 (1983).

Hearing on Punitive Damages After Default. — Due process concerns demand that a party who is defaulted for failure to answer interrogatories be afforded an opportunity to be heard on the question of punitive damages. Hunter v. Spaulding, 97 N.C. App. 372, 388 S.E.2d 630 (1990).

Dismissal of Plaintiff's Action for Failure to Answer Interrogatories. — Where plaintiff was properly served with interrogatories but refused to answer them without good cause and did not serve on defendant objections to any of the interrogatories or ask for an extension of time to answer, the trial court properly dismissed plaintiff's action. Hammer v. Allison, 20 N.C. App. 623, 202 S.E.2d 307, cert. denied, 285 N.C. 233, 204 S.E.2d 23 (1974).

Where plaintiff served answers to interrogatories after defendant had filed motion to dismiss and plaintiff's failure to comply with G.S. 1A-1, Rule 33 clearly prejudiced the defendant's ability to prepare for trial, the court had authority to dismiss the action. Hayes v. Browne, 76 N.C. App. 98, 331 S.E.2d 763 (1985), cert. denied, 315 N.C. 587, 341 S.E.2d 25 (1986).

Failure of some answering defendants to answer interrogatories did not entitle plaintiffs to judgment based on their own conclusions and contentions. Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622, cert. denied, 281 N.C. 621, 190 S.E.2d 465 (1972).

Failure to Consider Lesser Sanctions Before Striking Defenses. — Where a trial court did not consider any lesser sanctions before striking defenses on the issue of liability and proceeding to trial on damages as a sanction for the failure of one of the defendants, a guardian of the person, to appear for deposition, the court was compelled to set aside the trial court's order striking the defenses and remand the case. Clawser v. Campbell, 184 N.C. App. 526, 646 S.E.2d 779, 2007 N.C. App. LEXIS 1467 (2007).

Defendant's supplemental response to interrogatories was not rendered "seasonable" within the meaning and intent of G.S. 1A-1, Rule 26(e)(1) by the mere fact that there was no occasion for imposition of sanctions for failing to respond to discovery request with due diligence and good faith. Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Dismissal of Counterclaim for Failure to Timely Answer Interrogatories. — Trial court's dismissal of defendant's counterclaim for his failure to comply with discovery order was not error where plaintiff served defendant with some 45 interrogatories and for no apparent reason defendant failed to respond, where trial court filed an order ordering defendant to submit his answers on or before 5:00 P.M. that same day and defendant still failed to comply, and where plaintiff later received defendant's answers, which were handwritten, unresponsive, and incomplete. Lincoln v. Grinstead, 94 N.C. App. 122, 379 S.E.2d 671 (1989).

Order Striking Defenses. — In an action to recover on a construction contract, where defendants failed to comply with a discovery order requiring specific information with respect to their allegations of misrepresentation by plaintiff, negligence and carelessness by plaintiff and overpayment to plaintiff, the trial court did not abuse its discretion in entering an order striking those defenses since the evidence disclosed that defendants were either alleging defenses which they could not support with evidence or were willfully refusing to disclose information to which plaintiff was entitled, and the sanction imposed by the court was within the limits prescribed by this rule. F.E. Davis Plumbing Co. v. Ingleside W. Assocs., 37 N.C. App. 149, 245 S.E.2d 555, cert. denied, 295 N.C. 648, 248 S.E.2d 250 (1978).

Because a driver's attempts to cure his failure to attend his deposition; his affidavit explaining the misunderstanding, which was presented to the trial court at hearing; and the severity of the sanctions imposed, an order striking his defenses was manifestly unsupported by reason, and hence, an abuse of discretion. But, he remained liable for the costs and fees incurred due to his absence from the deposition. Moore v. Mills, 190 N.C. App. 178, 660 S.E.2d 589, 2008 N.C. App. LEXIS 876 (2008).

Trial court abused its discretion by striking a real estate company's answer and entering default against it because the company was not in violation of a consent order calling for the production of documents when the company was not a party to the order, and buyers did not seek discovery from it.; there was no record evidence that the company acted improperly or that the company violated any discovery orders. Baker v. Rosner, — N.C. App. —, 677 S.E.2d 887, 2009 N.C. App. LEXIS 735 (2009).

Hearing officer's order excluding petitioner's expert witnesses for failure to identify them, in violation of court order,

until four days before the hearing date, showed no abuse of discretion. Mount Olive Home Health Care Agency, Inc. v. North Carolina Dep't of Human Resources, 78 N.C. App. 224, 336 S.E.2d 625 (1985).

Failure to Participate in Arbitration in Good Faith. — Failure of defendant in auto accident case to appear at arbitration hearing, and lack of evidence regarding attorney's authority, resulted in conclusion that defendant failed to participate in arbitration hearing in good faith and meaningful manner; the failure or refusal to participate in an arbitration proceeding in a good faith and meaningful manner was subject to sanctions by the court on motion of a party, or report of the arbitrator. Bledsole v. Johnson, 150 N.C. App. 619, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002), cert. granted, 356 N.C. 297, 570 S.E.2d 498 (2002).

Sanctions in Response to Motion in Limine Improper. — A sanction under subdivision (b)(2)(b) of this rule may only be imposed for failure of a party to comply with a court order compelling discovery. Thus, where the trial court ordered imposition of subdivision (b)(2)(b) sanctions in response to a motion in limine, and the movant did not obtain an order compelling discovery, the court improperly granted the motion in limine. Stilley v. Automobile Enters. of High Point, Inc., 55 N.C. App. 33, 284 S.E.2d 684 (1981), cert. denied, 305 N.C. 307, 290 S.E.2d 708 (1982); Stone v. Martin, 56 N.C. App. 473, 289 S.E.2d 898, appeal dismissed and cert. denied, 306 N.C. 392, 294 S.E.2d 220 (1982).

Where a party deliberately destroys, alters or creates a false document to subvert an adverse party's investigation of his right to seek a legal remedy, and injuries are pleaded and proven, a claim for the resulting increased costs of the investigation will lie. Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984).

Order requiring defendant to pay plaintiff's attorneys' fees was authorized by subsection (a)(4) of this rule, and was interlocutory, as it did not finally determine the action nor affect a substantial right which might be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order. Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

But Not Without Findings of Fact. — Where the trial court simply awarded attorneys' fees in the amount of $250.00, and the court's order contained no findings of fact to support any conclusion that the fees were reasonable, the award would be vacated, since subsection (a)(4) of this rule requires the award of expenses to be reasonable, and the record must contain findings of fact to support the award of any expenses, including attorneys' fees. Such findings should be consistent with the purpose of the subsection, which is not to punish the noncomplying party, but to reimburse the successful movant for his expenses. Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

Where plaintiff did not produce medical records, defendants were entitled to attorney's fees unless plaintiff proved such an award was unjust under the circumstances. Graham v. Rogers, 121 N.C. App. 460, 466 S.E.2d 290 (1996).

Findings of Fact Required. — Where the Industrial Commission made none of the four required findings before denying sanctions, it abused its discretion. Williams v. North Carolina Dep't of Correction, 120 N.C. App. 356, 462 S.E.2d 545 (1995).

For case holding denial of attorneys' fees for compelling discovery error, see Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176, aff'd and modified, 303 N.C. 675, 281 S.E.2d 43 (1981).

Abuse of Discretion for Failing to Impose Sanctions. — The Industrial Commission abused its discretion by failing to impose sanctions because representation for both parties was publicly funded and plaintiff did not personally incur any additional expense due to the omissions of which he complained. Williams v. North Carolina Dep't of Correction, 120 N.C. App. 356, 462 S.E.2d 545 (1995).

Prohibiting Introduction of Evidence as Sanction. — The sanction provision of this rule permits the court to make such orders as are "just" upon a party's failure to obey an order to provide or permit discovery, including refusing to permit the disobedient party to introduce the matters in question into evidence. Bumgarner v. Reneau, 332 N.C. 624, 422 S.E.2d 686 (1992).

Trial court's order enforcing arbitration award, which implicitly imposed sanctions of striking defendants' request for trial de novo or of entering judgment against defendants, was within the purview of G.S. 1A-1, Rule 37(b)(2)c, did not constitute an abuse of the court's discretion, and did not violate N.C. Arb., Rule 5(a). Mohamad v. Simmons, 139 N.C. App. 610, 534 S.E.2d 616, 2000 N.C. App. LEXIS 993 (2000).

Dismissal as Sanction. — The rule adopted in the federal courts, that dismissal with prejudice is a sanction of last resort, is applicable only in extreme circumstances, and is generally proper where less drastic sanctions are unavailable, has not been adopted by our courts. Indeed, the Court of Appeals' precedent all but expressly rejects the notion of progressive sanctions. Fulton v. East Carolina Trucks, Inc., 88 N.C. App. 274, 362 S.E.2d 868 (1987).

Dismissal of plaintiff's suit was affirmed as it could be inferred that the trial court considered lesser sanctions given that it stated that lesser sanctions were urged by plaintiff and that, given the severity of disobedience by plaintiff's counsel, lesser sanctions were inappropriate; plaintiff's misconduct was serious as plaintiff did not answer or object to any of an insurer's discovery requests, seek a protective order, or proffer any justification for the inaction. Badillo v. Cunningham, 177 N.C. App. 732, 629 S.E.2d 909, 2006 N.C. App. LEXIS 1226 (2006).

Trial court is not required to list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate for a failure to respond to discovery requests. Badillo v. Cunningham, 177 N.C. App. 732, 629 S.E.2d 909, 2006 N.C. App. LEXIS 1226 (2006).

Dismissal Conditioned on Noncompliance Held Void. — Order stating that action would be dismissed if plaintiff failed to comply with discovery order by a certain date was a conditional order and therefore void. Cassidy v. Cheek, 308 N.C. 670, 303 S.E.2d 792 (1983).

Although this rule gives the trial court authority to issue orders to compel discovery and to sanction failure to comply with such orders, where the court below conditioned the sanction, dismissal of plaintiff's case, upon plaintiff's failure to comply with the order to produce certain x-ray film within 30 days, because such order contained a condition to the dismissal of plaintiff's action, the order was not self-executing and was void as a conditional order. McCraw v. Hamrick, 88 N.C. App. 391, 363 S.E.2d 201 (1988).

Ultimate Compliance with Discovery Request Did Not Preclude Sanctions. — Where defendants were properly served with plaintiff's interrogatories about expert testimony, a crucial aspect of medical malpractice case, the fact that plaintiff's interrogatories were ultimately answered did not prevent the court from imposing sanctions under section (d) of this rule on plaintiff's motion. Segrest v. Gillette, 96 N.C. App. 435, 386 S.E.2d 88 (1989), rev'd on other grounds, 331 N.C. 97, 414 S.E.2d 334, reh'g denied, 331 N.C. 384, 417 S.E.2d 791 (1992).

Motion for Sanctions to Preceed Late Discovery Responses. — The untimely service of discovery responses cannot support sanctions if the discovery responses are served prior to the making or service of a motion requesting sanctions. Thus, untimely discovery responses served after the service of a motion seeking sanctions on this basis can support sanctions. Cheek v. Poole, 121 N.C. App. 370, 465 S.E.2d 561 (1996).

Where the plaintiff's untimely responses to discovery requests were served on the same day that the defendants served or made their motion for sanctions, the trial court had authority to enter sanctions for the untimely discovery responses. Cheek v. Poole, 121 N.C. App. 370, 465 S.E.2d 561 (1996).

Motion to Compel Discovery Not Prerequisite to Dismissal. — Motion for an order compelling discovery pursuant to subsection (a)(2) of this rule is not required before a motion to dismiss is granted. Fulton v. East Carolina Trucks, Inc., 88 N.C. App. 274, 362 S.E.2d 868 (1987).

Dismissal Not Proper Remedy for Failure to Pay Expenses Where Time Certain Not Specified. — Where the order entered by the judge did not set a time certain for the payment of the expenses assessed pursuant to subsection (a)(4) of this rule, the drastic remedy of dismissal granted by the judge was improper and would be reversed. Hall v. Carter, 90 N.C. App. 668, 369 S.E.2d 623 (1988).

Dismissal Upheld. — Dismissal of case with prejudice as the first sanction for failure of plaintiffs to answer defendants' interrogatories would be upheld. Fulton v. East Carolina Trucks, Inc., 88 N.C. App. 274, 362 S.E.2d 868 (1987).

Where the plaintiff never objected to discovery requests, obtained one extension of time to comply but failed to respond within the extended time, and failed to request an additional extension and, it was determined that plaintiff had established a pattern of disregarding due dates for responding to discovery, the decision of the trial court to dismiss the complaint was not manifestly unsupported by reason. Cheek v. Poole, 121 N.C. App. 370, 465 S.E.2d 561 (1996).

Trial judge did not abuse his discretion by dismissing plaintiff's personal injury suit for discovery violations because the plaintiff failed to produce a 2001 tax return critical to his assertion of damages involving lost profits and lost earning capacity, and made false representations regarding his profits from the sale of a house, which was central to the issue of damages. By failing to comply with the trial court's order to compel and then asserting his Fifth Amendment right against self-incrimination in a court-ordered deposition, the plaintiff opened himself up to dismissal of his civil case since, despite less severe sanctions being available, the defendants were deprived of necessary discovery. In re Pedestrian Walkway Failure, 173 N.C. App. 237, 618 S.E.2d 819, 2005 N.C. App. LEXIS 2032 (2005).

Trial court did not abuse its discretion when it dismissed with prejudice a guest's personal injury claims against a motor speedway and a concrete manufacturer as a discovery sanction under G.S. 1A-1-37(b)(2) when the guest gave conflicting information about a pre-existing back injury, failed to mention a prior worker's compensation claim or prior injuries as requested by the manufacturer and the trial court considered less severe sanctions before dismissing the guest's claims. Baker v. Charlotte Motor Speedway, Inc., 180 N.C. App. 296,

636 S.E.2d 829, 2006 N.C. App. LEXIS 2306 (2006).

Review of Sanctions Directed to Outcome of Case. — Impositions of sanctions that are directed to the outcome of the case, such as dismissals, default judgments, or preclusion orders, are reviewed on appeal from final judgment, and while the standard of review is often stated to be abuse of discretion, the most drastic penalties, dismissal or default, are examined in the light of the general purpose of the rules to encourage trial on the merits. American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Sanction Overturned Only for Abuse of Discretion. — The choice of sanctions to be imposed in the case of a failure to comply with an order to answer interrogatories having been left by the rule to the court's discretion, the decision will not be overturned unless an abuse of that discretion is shown. Silverthorne v. Coastal Land Co., 42 N.C. App. 134, 256 S.E.2d 397, cert. denied, 298 N.C. 300, 259 S.E.2d 302 (1979).

The choice of sanctions under this rule lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion. Routh v. Weaver, 67 N.C. App. 426, 313 S.E.2d 793 (1984); Vick v. Davis, 77 N.C. App. 359, 335 S.E.2d 197 (1985), aff'd, 317 N.C. 328, 345 S.E.2d 217 (1986).

The choice of sanctions under this rule cannot be overturned absent a showing of abuse of that discretion. Mount Olive Home Health Care Agency, Inc. v. North Carolina Dep't of Human Resources, 78 N.C. App. 224, 336 S.E.2d 625 (1985).

Although the sanctions imposed were severe, they are among those expressly authorized by statute; absent specific evidence of injustice, the court of appeals could not hold they constitute an abuse of discretion. Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990).

Sanctions under this rule are within the sound discretion of the trial court and will not be overturned on appeal absent a showing of abuse of that discretion. Hursey v. Homes By Design, Inc., 121 N.C. App. 175, 464 S.E.2d 504 (1995).

A trial court may be reversed for abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. Hursey v. Homes By Design, Inc., 121 N.C. App. 175, 464 S.E.2d 504 (1995).

The abuse of discretion standard is applied to the imposition and selection of sanctions under this rule. Crutchfield v. Crutchfield, 132 N.C. App. 193, 511 S.E.2d 31 (1999).

The choice of sanctions imposed that are authorized under G.S. 1A-1, Rule 37 are within the sound discretion of the trial court and may not be overturned on appeal absent a showing of abuse of that discretion or that the sanctions are manifestly unsupported by reason. Also, the rule does not require a movant to show that it was prejudiced by the nonmovant's actions in order to obtain sanctions for abuse of discovery. Thus, a trial court order entering a default judgment against the defendants for failure to comply with discovery requests was affirmed on appeal. Clark v. Penland, 146 N.C. App. 288, 552 S.E.2d 243, 2001 N.C. App. LEXIS 863 (2001).

Where an injured party could not avoid Rule 37 sanctions by dismissing a claim pursuant to G.S. 1A-1, Rule 41 when the sanctions motion was before the trial court, the proper standard of review in imposing sanctions was abuse of discretion, not de novo. Ayers v. Patz, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2093 (Aug. 20, 2002).

Trial court's order, under G.S. 1A-1, N.C. R. Civ. P. 37(b)(2), dismissing an internet company's counterclaims for the company's failure to comply with discovery was supported by reason and was therefore not an abuse of discretion. Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

Remedy for Errors in Discovery Orders Is Not Open Defiance. — When a party willfully disobeys an order entered with personal and subject matter jurisdiction, a judgment of contempt (a permissible sanction under this rule) is appropriate even if the order was erroneously issued. Such an order is not void and is entitled to respect. The proper remedy for any error therein is not by open defiance, but by appeal. Midgett v. Crystal Dawn Corp., 58 N.C. App. 734, 294 S.E.2d 386 (1982).

Sanctions Where Defendant Attested to Answers Not His Own. — Section (d) of this rule does not come into operation if the responding party meets the requirements of G.S. 1A-1, Rule 33. However, by attesting to answers that were not his, defendant did not meet the requirements of Rule 33. Therefore, the imposition of the sanctions of default against defendant was proper under section (d). Hunter v. Spaulding, 97 N.C. App. 372, 388 S.E.2d 630 (1990).

The imposition of sanctions under this rule for failure to comply with § 1A-1, Rule 26(e) is within the sound discretion of the trial judge. Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983), cert. denied, 310 N.C. 631, 315 S.E.2d 697, 315 S.E.2d 698 (1984).

Sanctions would be upheld for failure to produce documents, where the trial court considered all available sanctions before entering its order; the defendant's answer was stricken, it had to pay attorney's fees in the amount of $1,970, and a default judgment was entered in favor of plaintiff as to the issues of breach of contract and quantum meruit. Chateau Merisier, Inc. v. Le Mueble Artisanal GEKA, S.A., 142 N.C. App. 684, 544 S.E.2d 815, 2001 N.C. App. LEXIS 173 (2001), decided prior to 2001 amendment to subsection (c).

Finding of Negligence as Sanction Upheld. — Trial court properly sanctioned an employer and its employee for the employee's failure to respond to discovery in a personal injury suit by finding that they were negligent in the motor vehicle accident so that the only issues remaining at trial were the issues of the contributory negligence of the driver of the pickup that collided with the forklift the employee was driving for the employer and the amount of the damages suffered by the pickup driver and his passenger. Edwards v. Cerro, 150 N.C. App. 551, 564 S.E.2d 277, 2002 N.C. App. LEXIS 581 (2002).

In addition to its inherent authority to regulate trial proceedings, the trial court has express authority under this rule to impose sanctions on a party who balks at discovery requests. Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Burden of Party Seeking to Avoid Sanctions. — A party wishing to avoid court-imposed sanctions for failure to comply with an order compelling discovery bears the burden of showing justification for his noncompliance. McCraw v. Hamrick, 88 N.C. App. 391, 363 S.E.2d 201 (1988).

Award of expenses in malpractice case against defendant was justified under G.S. 1A-1, Rule 26(c) because defendant's motion to quash was denied and under subsection (a)(4) of this rule because plaintiffs' motion to compel was granted. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Section (c) of this rule does not require the trial court to make negative findings of fact with respect to the four exceptions therein, and where neither party made such a request of the trial judge, under G.S. 1A-1, Rule 52 it would be presumed that the court on proper evidence found facts to support its judgment. Watkins v. Hellings, 321 N.C. 78, 361 S.E.2d 568 (1987).

Appealability of Orders Denying Discovery. — Orders denying discovery need no sanctions under this rule for enforcement. They are appealable if they affect a substantial right of the party requesting discovery. Walker v. Liberty Mut. Ins. Co., 84 N.C. App. 552, 353 S.E.2d 425 (1987).

Appealability of Sanctions Order. — An order compelling discovery is not a final judgment, nor does it affect a substantial right, and consequently, it is not appealable. However, when the order is enforced by sanctions pursuant to section (b) of this rule, the order is appealable as a final judgment. Walker v. Liberty Mut. Ins. Co., 84 N.C. App. 552, 353 S.E.2d 425 (1987).

Where a party is adjudged to be in contempt for noncompliance with a discovery order or has been assessed with certain other sanctions, the order is immediately appealable since it affects a substantial right under G.S. 1-277 and 7A-27(d)(1). Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

Order holding defendant in contempt of court for his failure to comply with discovery order was appealable and tested the validity both of the original discovery order and the contempt order. Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

When a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right. Mims v. Wright, 157 N.C. App. 339, 578 S.E.2d 606, 2003 N.C. App. LEXIS 646 (2003).

Orders regarding discovery matters are reviewed for an abuse of discretion. Mims v. Wright, 157 N.C. App. 339, 578 S.E.2d 606, 2003 N.C. App. LEXIS 646 (2003).

Order imposing sanctions for discovery violations and ordering the production of documents was an interlocutory order that was appealable because of the portion of the order that imposed sanctions pursuant to G.S. 1A-1, N.C. R. Civ. P. 37(b). Such an appeal tests the validity of both the discovery order and the sanctions imposed. In re Pedestrian Walkway Failure, 173 N.C. App. 254, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005).

Appealability of an Order Setting Aside Or Rescinding a Sanctions Order. — An order setting aside or rescinding an order of dismissal issued pursuant to this section was interlocutory and not immediately appealable. Yang v. Three Springs Inc., 142 N.C. App. 328, 542 S.E.2d 666, 2001 N.C. App. LEXIS 82 (2001).

Attempted Appeal from Order Containing No Sanctions as Nullity. — As the order from which defendant first appealed contained no enforcement sanctions, but only ordered defendant to answer questions by a certain date, it was not properly appealable, and the attempted appeal therefrom was a nullity, notwithstanding the fact that the judge signed the appeal entries. Accordingly, such appeal did not divest the trial court of jurisdiction to subsequently enter sanctions against defendant. Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988).

Although interlocutory, a party may appeal from order imposing sanctions, by striking his defense and entering judgment as to liability. Vick v. Davis, 77 N.C. App. 359, 335 S.E.2d 197 (1985), aff'd, 317 N.C. 328, 345 S.E.2d 217 (1986).

As a general rule, discovery orders are interlocutory and therefore not immediately appealable because they do not dispose of the case but instead leave it for further action by the trial court in order to settle and determine the entire controversy; such orders are, however, immediately appealable if delaying the appeal will irreparably impair a substantial right of the party, and a substantial right is affected if the order deprives the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered. Mims v. Wright, 157 N.C. App. 339, 578 S.E.2d 606, 2003 N.C. App. LEXIS 646 (2003).

Findings on Motion for Expenses. — With regard to the imposition of discovery sanctions pursuant to section (c) of this rule, it is left to the discretion of the trial judge as to whether to make a finding of fact if a party does not choose to compel a finding through the simple mechanism of so requesting. Watkins v. Hellings, 321 N.C. 78, 361 S.E.2d 568 (1987).

In order to compel the deposition testimony of a nonparty, a subpoena must be issued from the county in which the deposition is to be taken, and a proper subpoena should have been issued from the Clerk of Superior Court of Wake County directing a nonparty in a divorce case to appear in Wake County; therefore, nonparty and her attorney were substantially justified in opposing the discovery sought pursuant to the subpoena issued from Mecklenburg County and the trial court's imposition of attorneys' fees under subsection (a)(4) of this rule was error. Cochran v. Cochran, 93 N.C. App. 574, 378 S.E.2d 580 (1989).

Sufficient Notice of Sanctions. — Defendant corporation had sufficient notice that any or all of the sanctions available under section (d) of this rule could be imposed against it where, although plaintiff did not specify the section of this rule it wished to proceed under, it did state in the motion that plaintiff had served "Plaintiff's First Interrogatories and Requests for Production of Documents" on defendant and that "Defendant has failed to timely respond to the aforesaid discovery requests and has refused, and continues to refuse, to provide responses to said requests." J.D. Dawson Co. v. Robertson Mktg., Inc., 93 N.C. App. 62, 376 S.E.2d 254 (1989).

Sanctions Upheld for Violation of Court Orders. — Sanctions imposed by trial court for violation of discovery order, of the Rules of Civil Procedure and of consent order, without justification, which sanctions included the striking of defenses, the payment of attorneys' fees, and the supplying of further answers to the interrogatories would be upheld in view of the facts. Martin v. Solon Automated Servs., Inc., 84 N.C. App. 197, 352 S.E.2d 278, appeal dismissed and cert. denied, 319 N.C. 678, 356 S.E.2d 789 (1987).

When defendant, who allegedly received embezzled funds, failed to demonstrate a good faith effort at compliance with court's request, and continued to provide evasive and incomplete answers, despite orders compelling discovery and continuances granted to enable her to comply, the trial court properly struck defendant's answer and entered a default judgment against her for $250,000. Atlantic Veneer Corp. v. Robbins, 133 N.C. App. 594, 516 S.E.2d 169 (1999).

Trial court did not abuse its discretion by sanctioning in a divorce proceeding a husband who wilfully disregarded two trial court directives requiring completion of the wife's interrogatories to the husband, where the husband's stated reason for refusing to answer the wife's interrogatories, in violation of the trial court's order, was that he would not sign the interrogatories unless they contained reference to a prenuptial agreement, which he alleged denied support to the wife. Leder v. Leder, 166 N.C. App. 498, 601 S.E.2d 882, 2004 N.C. App. LEXIS 1747 (2004), cert. denied, 359 N.C. 189, 607 S.E.2d 273 (2004).

Trial court did not abuse its discretion in striking the answers of a husband, wife, and real estate agent and entering default against them because there was ample evidence that they acted improperly and violated a consent order directing the production of financial documents; the wife failed to produce real property tax information and information regarding a possible trust in her possession, the husband did not produce any financial statements, and the agent did not produce any documents until after buyers filed a motion for sanctions. Baker v. Rosner, — N.C. App. —, 677 S.E.2d 887, 2009 N.C. App. LEXIS 735 (2009).

Sanctions Improper Where Burden of Proof Met. — Driver met her burden of proof in showing that at the time for request of admission, reasonable grounds existed to believe that she might prevail on some matters denied, and good reasons, her lack of knowledge, existed for the failure to admit other issues at that time; accordingly, the trial court erred in awarding plaintiffs' attorney fees and costs based on the driver's denial. Oakes v. Wooten, 173 N.C. App. 506, 620 S.E.2d 39, 2005 N.C. App. LEXIS 2100 (2005).

Trial court order precluding plaintiff from presenting any testimony or exhibits that implied or inferred that her back injury was caused by a pedestrian walkway failure that was the basis for the suit was proper as within the discretion of the trial court pursuant to G. S. 1A-1, Rule 37, where plaintiff committed discovery violations by failing to consult with her experts before answering various requests for admissions, failing to disclose certain experts before the cut-off date set by the trial court, and failing to produce documents to substantiate her injuries. In re Pedestrian Walkway Failure, 173 N.C. App. 254, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005).

Sanctions Properly Denied. — The trial court did not err in denying the defendants' motions to prohibit the testimony of an expert witness for the plaintiffs and for sanctions where (1) the defendants learned of the expert witness four months prior to trial and were aware of the plaintiffs' intention that the expert render certain opinions two months before trial, (2) notwithstanding the deficiency in the plaintiffs' supplemental response, the defendants declined to depose the expert and elected to wait until the week of trial to file their pre-trial motions, and (3) before the jury was selected, the trial court afforded the defendants an opportunity to "depose" the expert. Hill v. Williams, 144 N.C. App. 45, 547 S.E.2d 472, 2001 N.C. App. LEXIS 331 (2001).

Where the injured parties served the neighbor with an amended notice of deposition and a request to produce documents under G.S. 1A-1, N.C. R. Civ. P. 34, where the neighbor responded by filing an objection to discovery and a motion for a protective order, and where the trial court overruled the neighbor's request and ordered the neighbor to produce three letters requested by the injured parties, an order with which the neighbor complied, the injured parties were not entitled to sanctions under G.S. 1A-1, N.C. R. Civ. P. 37(b); there was no evidence that the neighbor did not comply with the trial court's order compelling production of the three letters. Becker v. Pierce, 168 N.C. App. 671, 608 S.E.2d 825, 2005 N.C. App. LEXIS 452 (2005).

Trial court abused its discretion when it decided to remit a portion of the verdict rather than granting the defendants' motion for a new trial based on the plaintiff's failure to comply with discovery requests. Gardner v. Harriss, 122 N.C. App. 697, 471 S.E.2d 447 (1996).

Taxing of Costs Not Abuse of Discretion. — Trial court did not abuse its discretion in taxing a party with costs pursuant to G.S. 1A-1-37(c) based upon requests for admissions in discovery that were improperly denied by the party. Cail v. Cerwin, 185 N.C. App. 176, 648 S.E.2d 510, 2007 N.C. App. LEXIS 1684 (2007).

Where plaintiff made a request for costs and asserted that appeal was in violation of § 1A-1, Rule 11, but did not make the request in a motion, pursuant to this rule, the court declined to consider the request. Enzor v. North Carolina Farm Bureau Mut. Ins. Co., 123 N.C. App. 544, 473 S.E.2d 638 (1996).

Applicability to Tort Action Before North Carolina Industrial Commission. — North Carolina Industrial Commission acted within its authority in issuing its order compelling state facilities and their employees to comply with discovery requests in a personal injury action brought under the North Carolina Tort Claims Act, G.S. 143-291 et seq., and the requested juvenile records, social services records, and law enforcement records sought in discovery were subject to disclosure. Moreover, the North Carolina Rules of Civil Procedure applied in tort claims before the Commission, to the extent that such rules were not inconsistent with the Tort Claims Act, and the Commission had the authority under G.S. 1A-1, N.C. R. Civ. P. 37 to enter an order compelling discovery and to impose sanctions on the party refusing to comply with the order. Jane Doe 1 v. Swannanoa Valley Youth Dev. Ctr., 163 N.C. App. 136, 592 S.E.2d 715, 2004 N.C. App. LEXIS 299 (2004).

Applicability to Workers' Compensation Claim. — G.S. 97-80(a) gave the North Carolina Industrial Commission (commission) the power to make rules consistent with the Workers' Compensation Act for carrying out its provisions, Workers' Comp. R. N.C. Indus. Comm'n 605(1); 2002 Ann. R. N.C. 765 provided that the commission was allowed to order discovery and impose discovery sanctions; and Workers' Comp. R. N.C. Indus. Comm'n 802 provided that "failure to comply" with the Workers' Compensation Rules may have subjected the violator to any of the sanctions outlined in G.S. 1A-1, Rule 37; a discovery sanction which struck the employer's defenses was proper and was affirmed where the sanction was imposed three and a half months after the employer had been ordered to respond to the interrogatories and was warned that his refusal to answer may have resulted in sanctions. Joyner v. Mabrey Smith Motor Co., 161 N.C. App. 125, 587 S.E.2d 451, 2003 N.C. App. LEXIS 1994 (2003).

Applied in Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976); Food Town Stores, Inc. v. City of Salisbury, 300 N.C. 21, 265 S.E.2d 123 (1980); FMS Mgt. Sys. v. Thomas, 65 N.C. App. 561, 309 S.E.2d 697 (1983); Carrigan v. Shenandoah Transplants of N.C., Inc., 72 N.C. App. 324, 325 S.E.2d 6 (1985); Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985); Jennings v. Jessen, 103 N.C. App. 739, 407 S.E.2d 264 (1991); Smitheman ex rel. Godwin v. National Presto Indus., Inc., 109 N.C. App. 636, 428 S.E.2d 465 (1993); Moore v. Sullivan, 123 N.C. App. 647, 473 S.E.2d 659 (1996); Perry v. GRP Fin. Servs. Corp., — N.C. App. —, 674 S.E.2d 780, 2009 N.C. App. LEXIS 451 (2009).

Cited in Waters v. Qualified Personnel, Inc., 32 N.C. App. 548, 233 S.E.2d 76 (1977); House of Style Furn. Corp. v. Scronce, 33 N.C. App. 365, 235 S.E.2d 258 (1977); Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Stanback v. Stanback, 37 N.C. App. 324, 246 S.E.2d 74 (1978); Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Johnson County Nat'l Bank & Trust Co. v. Grainger, 42 N.C. App. 337, 256 S.E.2d 500 (1979); Southern Nat'l Bank v. B & E Constr. Co., 46 N.C. App. 736, 266 S.E.2d 1 (1980); Thelen v. Thelen, 53 N.C. App. 684, 281 S.E.2d 737 (1981); Shepherd v. Oliver, 57 N.C. App. 188, 290 S.E.2d 761 (1982); Rhoads v. Bryant, 56 N.C. App. 635, 289 S.E.2d 637 (1982); Story v. Story, 57 N.C. App. 509, 291 S.E.2d 923 (1982); Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984); Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260 (1985); Wilson v. Wilson, 73 N.C. App. 96, 325 S.E.2d 668 (1985); Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986); Stone v. Martin, 85 N.C. App. 410, 355 S.E.2d 255 (1987); Jennings v. Jessen, 93 N.C. App. 731, 379 S.E.2d 53 (1989); North Carolina Press Ass'n v. Spangler, 94 N.C. App. 694, 388 S.E.2d 473 (1989); Turner v. Duke Univ., 325 N.C. 152, 381 S.E.2d 706 (1989); In re Vestal, 104 N.C. App. 739, 411 S.E.2d 167 (1991); Kirkhart v. Saieed, 107 N.C. App. 293, 419 S.E.2d 580 (1992); North Carolina Farm Bureau Mut. Ins. Co. v. Wingler, 110 N.C. App. 397, 429 S.E.2d 759 (1993); Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995); Frost v. Mazda Motor of Am., 353 N.C. 188, 540 S.E.2d 324, 2000 N.C. LEXIS 903 (2000); Patterson v. Sweatt, 146 N.C. App. 351, 553 S.E.2d 404, 2001 N.C. App. LEXIS 935 (2001); Parris v. Light, 146 N.C. App. 515, 553 S.E.2d 96, 2001 N.C. App. LEXIS 986 (2001); Long v. Joyner, 155 N.C. App. 129, 574 S.E.2d 171, 2002 N.C. App. LEXIS 1587 (2002); Page v. Mandel, 154 N.C. App. 94, 571 S.E.2d 635, 2002 N.C. App. LEXIS 1417 (2002); Myers v. Mutton, 155 N.C. App. 213, 574 S.E.2d 73, 2002 N.C. App. LEXIS 1576 (2002); Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002); Dalgewicz v. Dalgewicz, 167 N.C. App. 412, 606 S.E.2d 164, 2004 N.C. App. LEXIS 2375 (2004); Megremis v. Megremis, 179 N.C. App. 174, 633 S.E.2d 117, 2006 N.C. App. LEXIS 1828 (2006); Young v. Gum, 185 N.C. App. 642, 649 S.E.2d 469, 2007 N.C. App. LEXIS 1951 (2007); State v. Bare, — N.C. App. —, 677 S.E.2d 518, 2009 N.C. App. LEXIS 775 (2009).

Article 6.

Trials.

Rule 38. Jury trial of right.

(a) *Right preserved.* — The right of trial by jury as declared by the Constitution or statutes of North Carolina shall be preserved to the parties inviolate.

(b) *Demand.* — Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be made in the pleading of the party or endorsed on the pleading.

(c) *Demand — Specification of issues.* — In his demand a party may specify the issues which he wishes so tried; otherwise, he shall be deemed to have demanded trial by jury for all the issues so triable. If a party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the last pleading directed to such issues or within 10 days after service of the demand, whichever is later, or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues in the action.

(d) *Waiver.* — Except in actions wherein jury trial cannot be waived, the failure of a party to serve a demand as required by this rule and file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury as herein provided may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action.

(e) *Right granted.* — The right of trial by jury as to the issue of just compensation shall be granted to the parties involved in any condemnation proceeding brought by bodies politic, corporations or persons which possess the power of eminent domain. (1967, c. 954, s. 1; 1973, c. 149.)

COMMENT

This rule and Rule 39 provide for the preservation of the right to jury trial and methods for claim and waiver of that right. The principal change effected is that waiver of right to jury trial is accomplished by a failure seasonably to demand jury trial.

North Carolina Const., Art. IV, § 12, specifically provides that jury trial can be waived, and former § 1-184 set up three methods by which there could be such waiver. They were: (1) By failing to appear at the trial; (2) By written consent filed with the clerk; and (3) By oral consent entered in the minutes. All three methods are retained. See Rule 39(a). But a fourth is added which has as its object the early ascertainment of those cases in which there will be no jury. This knowledge is useful in calendaring a case and in counsel's preparation for trial.

The requirement of positive action by a party to preserve the right to jury trial is not at all new in certain areas — references and mandamus for example. In respect to references, see Simmons v. Lee, 230 N.C. 216, 53 S.E. 79 (1949). See also Rule 53 and the accompanying note. In respect to mandamus, see former § 1-513. This statute has been repealed and jury trial in respect to mandamus is now governed by this rule and Rule 39.

The procedure for demanding jury trial is simple. The demand may be within a pleading or endorsed thereon or by separate document. No particular form of words is prescribed. As to the time when the demand must be made, generally it will be "not later than 10 days after the service of the last pleading" directed to the issue in question. But it will be observed that section (c) makes it possible for a party to demand jury trial only for some of the issues. To adjust to the situation where, for example, a plaintiff in a negligence suit might have failed to demand jury trial on any issue and the defendant, at the last moment (on the 10th day after filing his answer), demands jury trial on only the damage issue, the rule allows the plaintiff 10 days after the service of the defendant's demand in which to demand jury trial on other issues.

The reference in section (d) to actions wherein jury trial cannot be waived would include actions for divorce not based on one year's separation. See § 50-10.

In keeping with present law [see J.L. Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N.C. 431, 49 S.E. 946 (1905)], Rule 39(b) authorizes a judge to disregard a waiver of jury trial.

Legal Periodicals. — For article on the general scope and philosophy of the new Rules of Civil Procedure, see 5 Wake Forest Intra. L. Rev. 1 (1969).

For article on trial under the new Rules of Civil Procedure, see 5 Wake Forest Intra. L. Rev. 138 (1969).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1047 (1981).

For an article discussing "reverse bad faith," the concept of allowing an insurer to assert a counterclaim for affirmative relief against an insured who brings a frivolous, bad faith action, see 19 Campbell L. Rev. 43 (1996).

CASE NOTES

Constitutional Right to Demand Jury Trial. — N. C. Const., Art. I, § 25 guarantees to every person the "sacred and inviolable" right to demand a jury trial of issues of fact arising in all controversies at law respecting property. Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971); Frissell v. Frissell, 47 N.C. App. 149, 266 S.E.2d 866 (1980).

No Constitutional Right to Jury Trial in Proceeding for Termination of Parental Rights. — The North Carolina constitutional requirement of trial by jury is not applicable to a proceeding for termination of parental rights. In re Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).

A party may waive his right to jury trial by (1) failing to appear at the trial, (2) written consent filed with the clerk, (3) oral consent entered in the minutes of the court, or (4) failing to demand a jury trial pursuant to section (b) of this rule. Sykes v. Belk, 278 N.C. 106, 179 S.E.2d 439 (1971); Frissell v. Frissell, 47 N.C. App. 149, 266 S.E.2d 866 (1980).

In addition to the waiver of right to jury trial as established by section (d) of this rule and G.S. 1A-1, Rule 39(a), a party may waive his right to jury trial by failing to appear at trial. Frissell v. Frissell, 47 N.C. App. 149, 266 S.E.2d 866 (1980), overruling Heidler v. Heidler, 42 N.C. App. 481, 256 S.E.2d 833 (1979), insofar as it is inconsistent with that opinion; Morris v. Asby, 48 N.C. App. 694, 269 S.E.2d 729 (1980).

Failure of a party to serve demand for trial by jury as required by the Rules of Civil Procedure constitutes a waiver. North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified on other grounds, 304 N.C. 627, 286 S.E.2d 89 (1982).

Where defendant first requested a jury trial almost eleven months after he served his answer, the last pleading filed in the case, defendant's failure to timely demand a jury trial constituted a waiver by him of jury trial of right. Whitfield v. Todd, 116 N.C. App. 335, 447 S.E.2d 796, cert. denied, 338 N.C. 524, 453 S.E.2d 170 (1994).

With regard to a third civil action filed in Mecklenburg County, North Carolina, by a property association for unpaid maintenance fees against two property owners, the trial court properly heard the case on the merits sitting without a jury as the owners failed to serve a demand for a trial by jury in writing at any time after commencement of the action and, secondly, the owners failed to appear on the date set for trial. Carolina Forest Ass'n v. White, — N.C. App. —, 678 S.E.2d 725, 2009 N.C. App. LEXIS 1066 (July 7, 2009).

Issue of Fact to Be Tried by Jury Unless Right Is Waived. — The credibility of testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

When Denial of Jury Trial Is Not Error. — Where a demand for jury trial is not made in compliance with this rule and there is no controversy as to any of the facts and therefore no issue of fact to be determined by a jury, the denial of a jury trial is not error. Glover v. Spinks, 12 N.C. App. 380, 183 S.E.2d 262 (1971).

Arbitration judgment was not void as a violation of an injured party's right to jury trial under this rule P. 38 and G.S. 1A-1, Rule 39, N.C. Const. art. I, § 25 or U.S. Const. amend. VII, because her right to a jury trial was protected by N.C. R. Arb. 5(a), which allowed any party to have a trial de novo upon written demand filed within 30 days of the arbitrator's award. Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002).

Trial court has discretion to grant a jury trial under § 1A-1, Rule 39(b) even though jury trial has been waived pursuant to section (b) of this rule. Bullard v. North Carolina Nat'l Bank, 31 N.C. App. 312, 229 S.E.2d 245 (1976).

Even though a party has failed to demand a jury trial as prescribed by section (b) of this rule, it is within the discretion of the trial judge to grant a subsequent motion for a jury trial under G.S. 1A-1, Rule 39(b). Wycoff v. Pritchard Paint & Glass Co., 31 N.C. App. 246, 229 S.E.2d 47 (1976).

The denial of a belated demand for a jury trial is within the discretion of the judge. Arney v. Arney, 71 N.C. App. 218, 321 S.E.2d 472 (1984), cert. denied, 313 N.C. 173, 326 S.E.2d 31 (1985).

Oral Request for Jury Trial. — Where the parties did not demand a jury trial in the manner provided by this rule, but all parties orally requested trial by jury, and the clerk noted the request in her order transferring the cause to the civil issue docket of the superior court, the purpose of this rule was accomplished. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Unilateral Withdrawal of Jury Request Not Permitted. — Plaintiff in a personal injury case could not unilaterally withdraw her jury request once defendant filed his motion to set aside default judgment, nor could she file an amendment pursuant to G.S. 1A-1, Rule 15 to withdraw her request and, thereby, contravene the strictures of this rule. Cabe v. Worley, 140 N.C. App. 250, 536 S.E.2d 328, 2000 N.C. App. LEXIS 1111 (2000).

Ten days from the date of the last pleading both parties are precluded from demanding a jury trial. Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

Defendant was denied constitutional right to a jury trial where action was transferred without notice from the superior court division to the district court division, so that defendant made no demand for jury trial in the district court within the 10-day time period formerly allowed by G.S. 7A-196 and the district court subsequently denied his demand for a jury trial. Thermo-Industries of Charlotte, Inc. v. Talton Constr. Co., 9 N.C. App. 55, 175 S.E.2d 370 (1970).

Plaintiff waived right to a jury in a hearing on permanent alimony by failure to appear at the hearing either personally or by counsel. Frissell v. Frissell, 47 N.C. App. 149, 266 S.E.2d 866 (1980).

Action for Alienation of Affection Where Location of Defendant's Acts in Its Issue. — In a tort claim alleging alienation of affection, where there was a question as to whether the defendant's acts of alienation took place in North Carolina or in three other jurisdictions which do not recognize that tort, the issue of where the tort took place should have been submitted to a jury. Darnell v. Rupplin, 91 N.C. App. 349, 371 S.E.2d 743 (1988).

Where, prior to effective date of the rules, the pleadings in an action were closed, and juries had been empaneled to try the case on two previous occasions since that date, the trial court erred in determining that defendant had waived the right to a jury trial under this rule by failing to file a written request therefor. Fishel v. Grifton United Methodist Church, 13 N.C. App. 238, 185 S.E.2d 322 (1971).

In special proceedings for condemnation of land for an airport, the trial judge did not err in denying motion for a jury trial on the issue of ownership of the property, as the issue of ownership was not triable by a jury of right, and moreover, appellant did not demand a trial by jury in writing within the prescribed time. Raleigh-Durham Airport Auth. v. Howard, 88 N.C. App. 207, 363 S.E.2d 184 (1987), cert. denied, 322 N.C. 113, 367 S.E.2d 916 (1988).

Denial of a co-owner's motion for a jury trial in his appeal from a clerk's order allowing a foreclosure was proper because, inter alia, G.S. 45-21.16 did not guarantee a right to a jury determination of the type of issues to be resolved by a hearing pursuant to G.S. 45-21.16. In re Foreclosure of Real Prop. Under Deed of Trust, — N.C. App. —, 667 S.E.2d 259, 2008 N.C. App. LEXIS 1756 (2008).

Applied in Wendel Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970); Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Rose & Day, Inc. v. Cleary, 14 N.C. App. 125, 187 S.E.2d 359 (1972); Whitaker v. Earnhardt, 26 N.C. App. 736, 217 S.E.2d 125 (1975); Fagan v. Hazzard, 29 N.C. App. 618, 225 S.E.2d 640 (1976); Brondum v. Cox, 30 N.C. App. 35, 226 S.E.2d 193 (1976); Miller v. Miller, 38 N.C. App. 95, 247 S.E.2d 278 (1978); Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979); Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979); Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980); Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980); Roberson v. Roberson, 65 N.C. App. 404, 309 S.E.2d 520 (1983); Williams & Michael, P.A. v. Kennamer, 71 N.C. App. 215, 321 S.E.2d 514 (1984); Williams v. International Paper Co., 89 N.C. App. 256, 365 S.E.2d 724 (1988).

Cited in Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972); Sprinkle v. Sprinkle, 17 N.C. App. 175, 193 S.E.2d 468 (1972); Laws v. Laws, 22 N.C. App. 344, 206 S.E.2d 324 (1974); Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978); In re Clark, 303 N.C. 592, 281 S.E.2d 47 (1981); North Carolina State Bar v. DuMont, 304 N.C. 627, 286 S.E.2d 89 (1982); Pettus v. Pettus, 62 N.C. App. 141, 302 S.E.2d 261 (1983); Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986); Cato Equip. Co. v. Matthews, 91 N.C. App. 546, 372 S.E.2d 872 (1988); Wachovia Bank & Trust Co. v. Templeton Oldsmobile-Cadillac-Pontiac, Inc., 109 N.C. App. 352, 427 S.E.2d 629 (1993); Delta Marine, Inc. v. Whaley, 813 F. Supp. 414 (E.D.N.C. 1993); Fulk v. Piedmont Music Ctr., 138 N.C. App. 425, 531 S.E.2d 476 (2000).

Rule 39. Trial by jury or by the court.

(a) *By jury.* — When trial by jury has been demanded and has not been withdrawn as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless

(1) The parties who have pleaded or otherwise appeared in the action or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the minutes, consent to trial by the court sitting without a jury, or

(2) The court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes.

(b) *By the court.* — Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a trial by jury in an action in which such a demand might have been made of right, the court in its discretion upon motion or of its own initiative may order a trial by jury of any or all issues.

(c) *Advisory jury and trial by consent.* — In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue or question of fact with an advisory jury or the court, with the consent of the parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. In either event the jury shall be selected in the manner provided by Rule 47(a). (1967, c. 954, s. 1.)

COMMENT

As indicated in the note to Rule 38, this rule carries forward the essence of former § 1-184 in respect to methods of waiver and the present power of the judge to require trial by jury, even though there has been a waiver. Moreover, provision is made for trial by jury when there is no right to such trial if the judge decides such a course is desirable or if the parties consent.

Editor's Note. — Rule 47, referred to in section (c) of this rule, does not contain a section (a).

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1047 (1981).

For an article discussing "reverse bad faith," the concept of allowing an insurer to assert a counterclaim for affirmative relief against an insured who brings a frivolous, bad faith action, see 19 Campbell L. Rev. 43 (1996).

CASE NOTES

Denial of respondent's belated demand for a jury trial is within the discretion of the judge. Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972).

Waiver of Right to Jury Trial by Failure to Appear. — In addition to the waiver of right to jury trial as established by G.S. 1A-1, Rule 38(d) and section (a) of this rule, a party may waive his right to jury trial by failing to appear at trial. Frissell v. Frissell, 47 N.C. App. 149, 266 S.E.2d 866 (1980), overruling Heidler v. Heidler, 42 N.C. App. 481, 256 S.E.2d 833 (1979), insofar as it is inconsistent with that opinion; Morris v. Asby, 48 N.C. App. 694, 269 S.E.2d 729 (1980).

Arbitration judgment was not void as a violation of an injured party's right to jury trial under G.S. 1A-1, Rule 38 and this rule, N.C. Const. art. I, § 25 or U.S. Const. amend. VII, because her right to a jury trial was protected by N.C. R. Arb. 5(a), which allowed any party to have a trial de novo upon written demand filed within 30 days of the arbitrator's award. Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002).

With regard to a third civil action filed in Mecklenburg County, North Carolina, by a property association for unpaid maintenance fees against two property owners, the trial court properly heard the case on the merits sitting without a jury as the owners failed to serve a demand for a trial by jury in writing at any time after commencement of the action and, secondly, the owners failed to appear on the date set for trial. Carolina Forest Ass'n v. White, — N.C. App. —, 678 S.E.2d 725, 2009 N.C. App. LEXIS 1066 (July 7, 2009).

Plaintiff waived right to jury trial in a hearing on permanent alimony by failure to appear at the hearing either personally or by counsel. Frissell v. Frissell, 47 N.C. App. 149, 266 S.E.2d 866 (1980).

Applied in Rose & Day, Inc. v. Cleary, 14 N.C. App. 125, 187 S.E.2d 359 (1972); Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973); Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976); Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979); Morris v. Morris, 45 N.C. App. 69, 262 S.E.2d 359 (1980); Phillips v. Phillips, 73 N.C. App. 68, 326 S.E.2d 57 (1985).

Cited in Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970); Laws v. Laws, 22 N.C. App. 344, 206 S.E.2d 324 (1974); Wycoff v. Pritchard Paint & Glass Co., 31 N.C. App. 246, 229 S.E.2d 47 (1976); Bullard v. North Carolina Nat'l Bank, 31 N.C. App. 312, 229 S.E.2d 245 (1976); Reeves v. Musgrove, 39 N.C. App. 43, 249 S.E.2d 455 (1978); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); Pettus v. Pettus, 62 N.C. App. 141, 302 S.E.2d 261 (1983).

Rule 40. Assignment of cases for trial; continuances.

(a) The senior resident superior court judge of any superior court district or set of districts as defined in G.S. 7A-41.1 may provide by rule for the calendaring of actions for trial in the superior court division of the various counties within his district or set of districts. Calendaring of actions for trial in the district court shall be in accordance with G.S. 7A-146. Precedence shall be given to actions entitled thereto by any statute of this State.

(b) No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. Good cause for granting a continuance shall include those instances when a party to the proceeding, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly or the Rules Review Commission. (1967, c. 954, s. 1; 1969, c. 895, s. 9; 1985, c. 603, s. 8; 1987 (Reg. Sess., 1988), c. 1037, s. 43; 1997-34, s. 10.)

COMMENT

Comment to this Rule as Originally Enacted. — This rule, as does the present Rule of Practice in the Superior Court, provides ultimately for judicial control of the calendar. The reference to the judge "senior in point of continuous service" is merely to designate the responsible judge in those districts having more than one judge.

Comment to the 1969 amendment. — The 1969 amendment added the provision concerning continuances. The previous code contained some detailed provisions on continuances. This brief provision was deemed appropriate out of an abundance of caution.

Legal Periodicals. — For article on legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For article on plea bargaining statutes and practices in North Carolina, see 59 N.C.L. Rev. 477 (1981).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

I. In General.
II. Calendaring of Actions.
III. Continuances.

I. IN GENERAL.

Failure to Prosecute. — Administrator's action was improperly dismissed pursuant to G.S. 1A-1, N.C. R. Civ. P. 41(b) for failure to prosecute, as there was no evidence that lesser sanctions were considered, that the administrator intended to thwart the progress of the action by engaging in a delaying tactic, or that the health care providers were prejudiced by the administrator's failure to appear at a hearing, since the providers failed to appear at the hearing as well. Spencer v. Albemarle Hosp., 156 N.C. App. 675, 577 S.E.2d 151, 2003 N.C. App. LEXIS 201 (2003).

Applied in Four Seasons Homeowners Ass'n v. Sellers, 62 N.C. App. 205, 302 S.E.2d 848 (1983); Alexander v. Wilkerson, 99 N.C. App. 340, 392 S.E.2d 765 (1990); Bowers v. Olf, 122 N.C. App. 421, 470 S.E.2d 346 (1996); Bowers v. Olf, 122 N.C. App. 421, 470 S.E.2d 346 (1996).

Cited in Laroque v. Laroque, 46 N.C. App. 578, 265 S.E.2d 444 (1980); Moon v. Central Bldrs., Inc., 65 N.C. App. 793, 310 S.E.2d 390 (1984); Broome v. Broome, 112 N.C. App. 823, 436 S.E.2d 918 (1993); Caswell Realty Assocs. v. Andrews Co., 128 N.C. App. 716, 496 S.E.2d 607 (1998); Ruth v. Ruth, 158 N.C. App. 293, 580 S.E.2d 383, 2003 N.C. App. LEXIS 1042 (2003); In re R.L., 186 N.C. App. 529, 652 S.E.2d 327, 2007 N.C. App. LEXIS 2314 (2007).

II. CALENDARING OF ACTIONS.

Local rules adopted pursuant to this rule are rules of court which are adopted to promote the effective administration of justice by ensuring that efficient calendaring procedures are employed. Wide discretion should be afforded in their application, so long as a proper regard is given to their purpose. Forman & Zuckerman v. Schupak, 38 N.C. App. 17, 247 S.E.2d 266 (1978).

The senior Superior Court judge "may provide by rule for the calendaring of actions for trial in the superior court division . . . ." Lomax v. Shaw, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

III. CONTINUANCES.

A motion for continuance is addressed to the sound discretion of the trial judge. State v. Courson, 27 N.C. App. 268, 218 S.E.2d 416, cert. denied, 288 N.C. 732, 220 S.E.2d 352 (1975); Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849, appeal dismissed, 297 N.C. 452, 256 S.E.2d 805, cert. denied, 298 N.C. 805, 262 S.E.2d 1 (1979), cert. denied and appeal dismissed, 446 U.S. 930, 100 S. Ct. 2144, 64 L. Ed. 2d 783 (1980); State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981); Spence v. Jones, 83 N.C. App. 8, 348 S.E.2d 819 (1986).

A motion to continue is addressed to the sound discretion of the trial judge, who should determine it as the rights of the parties require under the circumstances. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976); Daniel Boone Complex, Inc. v. Furst, 57 N.C. App. 282, 291 S.E.2d 296, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982); Reece v. Reece, 58 N.C. App. 404, 293 S.E.2d 662 (1982).

Granting a motion for a continuance is within the discretion of the trial court. State v. Edwards, 27 N.C. App. 369, 219 S.E.2d 249 (1975).

But continuances are not favored. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976); Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849, appeal dismissed, 297 N.C. 452, 256 S.E.2d 805, cert. denied, 298 N.C. 805, 262 S.E.2d 1 (1979), cert. denied and appeal dismissed, 446 U.S. 930, 100 S. Ct. 2144, 64 L. Ed. 2d 783 (1980); Reece v. Reece, 58 N.C. App. 404, 293 S.E.2d 662 (1982); Spence v. Jones, 83 N.C. App. 8, 348 S.E.2d 819 (1986).

Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice. Doby v. Lowder, 72 N.C. App. 22, 324 S.E.2d 26 (1984).

And May Be Granted Only for Good Cause. — Continuances are addressed to the sound discretion of trial judges and may be granted only for good cause shown and as justice may require. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Wood v. Brown, 25 N.C. App. 241, 212 S.E.2d 690, cert. denied, 287 N.C. 469, 215 S.E.2d 626 (1975).

Trial court did not abuse its discretion in denying a county's motion for a continuance, the basis for which was its counsel's attendance of a mandatory training session in order to file documents in other court cases. Brown v. County of Avery, 164 N.C. App. 704, 596 S.E.2d 334, 2004 N.C. App. LEXIS 975 (2004).

Wife's claim that the denial of her fourth request for a continuance under G.S. 1A-1-40 was a legal error was rejected as the wife had no right to counsel in an equitable distribution proceeding, and the issue was reviewed for abuse of discretion; it was not an abuse of discretion to deny the wife's fourth request in light of the numerous and lengthy delays and of the notice to the wife to hire an attorney and be ready to move forward, and the wife did not show good cause for, nor did justice require, another continuance. McIntosh v. McIntosh, 184 N.C. App. 697, 646 S.E.2d 820, 2007 N.C. App. LEXIS 1596 (2007).

Judge to Determine Whether Good Cause Is Shown. — This rule makes no attempt to enumerate the myriad circumstances which might be urged as grounds for a continuance, but leaves it to the judge to determine, in each case, whether "good cause" for a continuance has been shown. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Discretion of the trial judge in ruling on a motion for a continuance is not unlimited, and must not be exercised absolutely, arbitrarily or capriciously, but only in accordance with fixed legal principles. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

But court's ruling on a continuance is not reviewable absent manifest abuse of discretion. Wood v. Brown, 25 N.C. App. 241, 212 S.E.2d 690, cert. denied, 287 N.C. 469, 215 S.E.2d 626 (1975); State v. Courson, 27 N.C. App. 268, 218 S.E.2d 416, cert. denied, 288 N.C. 732, 220 S.E.2d 352 (1975); State v. Mitchell, 27 N.C. App. 313, 219 S.E.2d 295 (1975), cert. denied, 289 N.C. 301, 222 S.E.2d 701 (1976); State v. Edwards, 27 N.C. App. 369, 219 S.E.2d 249 (1975); State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981); Spence v. Jones, 83 N.C. App. 8, 348 S.E.2d 819 (1986).

Trial court did not abuse its discretion by denying the defendants' request for a continuance as their phone call to the court on the day of trial did not constitute a proper request for a continuance, and their assertion that they had an important business meeting with people from out-of-state that could not be rescheduled did not show "good cause" that the trial court should have granted any motion for a continuance that the defendants may have made. Carolina Forest Ass'n v. White, — N.C. App. —, 678 S.E.2d 725, 2009 N.C. App. LEXIS 1066 (July 7, 2009).

Denial of motion for continuance is not an abuse of discretion where the evidence introduced is conflicting or insufficient. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Where a motion for a continuance raises a constitutional issue, the trial court's decision thereon involves a question of law, not fact, which may be reviewed by an examination of the circumstances of each case. State v. Williams, 51 N.C. App. 613, 277 S.E.2d 546 (1981).

Substantial Justice as Chief Consideration. — The chief consideration to be weighed in passing upon the application for a continuance is whether the grant or denial of a continuance will be in furtherance of substantial justice. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976); Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849, appeal dismissed, 297 N.C. 452, 256 S.E.2d 805, cert. denied, 298 N.C. 805, 262 S.E.2d 1 (1979), cert. denied and appeal dismissed, 446 U.S. 930, 100 S. Ct. 2144, 64 L. Ed. 2d 783 (1980).

Before ruling on a motion to continue the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice.

Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Diligence and Good Faith of Movant Should Be Considered. — In considering a motion for continuance, the trial court must pass on the grounds urged in support of it, and also on the question of whether the moving party has acted with diligence and in good faith. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Father's phone calls to the courthouse, made three days before a scheduled hearing regarding custody of his children, absent extenuating circumstances, did not qualify as an application to the court for a continuance. Trivette v. Trivette, 162 N.C. App. 55, 590 S.E.2d 298, 2004 N.C. App. LEXIS 40 (2004).

Party seeking a continuance has the burden of showing sufficient grounds for it. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976); Fungaroli v. Fungaroli, 40 N.C. App. 397, 252 S.E.2d 849, appeal dismissed, 297 N.C. 452, 256 S.E.2d 805, cert. denied, 298 N.C. 805, 262 S.E.2d 1 (1979), cert. denied and appeal dismissed, 446 U.S. 930, 100 S. Ct. 2144, 64 L. Ed. 2d 783 (1980); Daniel Boone Complex, Inc. v. Furst, 57 N.C. App. 282, 291 S.E.2d 296, cert. denied, 306 N.C. 555, 294 S.E.2d 369 (1982); Reece v. Reece, 58 N.C. App. 404, 293 S.E.2d 662 (1982).

Failure of plaintiff to Demonstrate Diligence and Good Faith. — The trial court's finding that plaintiff failed to establish grounds for an additional continuance was proper where plaintiff demonstrated neither diligence nor a good faith effort to meet the schedule set by the trial court more than a month earlier. May v. City of Durham, 136 N.C. App. 578, 525 S.E.2d 223, 2000 N.C. App. LEXIS 109 (2000).

Due to personal representative's undue delay and bad faith in a wrongful death action, court did not abuse its discretion in denying representative's motion for a continuance of a hearing; the representative had ample time prior to the hearing to ask for an amendment of the complaint, the hearing was on the representative's motions, and there had never been any prior indication that the representative planned to allege anything except vicarious liability theories against the plaintiff. Draughon v. Harnett County Bd. of Educ., 166 N.C. App. 464, 602 S.E.2d 721, 2004 N.C. App. LEXIS 1785 (2004).

Motion for a continuance should be granted where nothing in the record controverts a sufficient showing made by the moving party. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Trial court's denial of plaintiff's motion to continue a summary judgment hearing was an abuse of discretion and subject to reversal where the record showed no reason whatever for refusing the continuance and a compelling reason for granting it. Freeman v. Monroe, 92 N.C. App. 99, 373 S.E.2d 443 (1988).

Trial court erred in failing to grant defendant a continuance after allowing withdrawal of defendant's counsel, since nothing in the record indicated that defendant sought to delay or evade trial, since defendant did not know that trial was scheduled, and since defendant's ability to produce witnesses and prove his case was prejudiced thereby. Benton v. Mintz, 97 N.C. App. 583, 389 S.E.2d 410 (1990).

Withdrawal of Attorney Shortly Before Trial. — The decision whether to grant a continuance because the moving party's attorney has withdrawn from the case on the day of trial rests in the trial judge's discretion, to be exercised after he has determined from the facts and circumstances of the particular case whether immediate trial or continuance will best serve the ends of justice. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Respondents were prima facie entitled to a continuance where respondents' affidavit and statements in open court that their attorney had withdrawn from the case on the day of the trial without warning were uncontroverted by the record. Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976).

Where counsel made efforts on defendant's behalf to secure other counsel, but defendant never signed the necessary documents or even responded to the firm's inquiries, the trial court's denial of a continuance based on removal of counsel the day before trial was a proper exercise of its discretion. Brown v. Rowe Chevrolet-Buick, Inc., 86 N.C. App. 222, 357 S.E.2d 181 (1987).

There was no abuse of discretion in trial court's refusal to grant plaintiff a continuance where plaintiff's attorney's withdrawal on the day before trial had been at plaintiff's request. Pickard Roofing Co. v. Barbour, 94 N.C. App. 688, 381 S.E.2d 341 (1989).

Presence of Attorney Required Elsewhere. — Attorneys, under the guise of having business requiring their presence elsewhere, ought not to be allowed to delay, defeat or prevent a litigant from having his case tried or being heard on a motion at some reasonably suitable and convenient time. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

The superior court judge was well within the bounds of the court's inherent authority to manage the case docket when he struck defendant's answer as a sanction for willful failure to execute agreed settlement because defendants offered no plausible excuse as to why they did not execute the two paragraph consent judgment, saying only that they did not understand it and in addition judge gave notice that failure to file the consent order would result in the imposition of sanctions.

Lomax v. Shaw, 101 N.C. App. 560, 400 S.E.2d 97 (1991).

Rule 41. Dismissal of actions.

(a) *Voluntary dismissal; effect thereof.* —

(1) By Plaintiff; by Stipulation. — Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

(2) By Order of Judge. — Except as provided in subsection (1) of this section, an action or any claim therein shall not be dismissed at the plaintiff's instance save upon order of the judge and upon such terms and conditions as justice requires. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time.

(b) *Involuntary dismissal; effect thereof.* — For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.

(c) *Dismissal of counterclaim; crossclaim, or third-party claim.* — The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim.

(d) *Costs.* — A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action. (1967, c. 954, s. 1; 1969, c. 895, s. 10; 1977, c. 290.)

COMMENT

Comment to this Rule as Originally Enacted. — *Section (a).* — The absolute right of a plaintiff to take a voluntary nonsuit for any or no reason at all at any time before verdict is beyond question under present law. Southeastern Fire Ins. Co. v. Walton, 256 N.C. 345, 123 S.E.2d 780 (1962). The vice of such an arrangement appears clearly in the following excerpt from an opinion of a federal judge:

"Before the effective date of [Rule 41] it not infrequently happened . . . that in a case . . . which had come to issue, perhaps after disposition of preliminary motions, which had gone to trial, in the trial of which plaintiff had introduced all his testimony, for the trial of which defendant had called witnesses from great distances and incurred great expense, the plaintiff would dismiss just at the moment the court was about to direct a verdict for defendant. The next day he might bring the same suit again. And the process might be repeated time after time. It was an outrageous imposition not only on the defendant but also on the court. Rule 41 has done much to put an end to that evil.

"The evil aimed at by the rule most largely is manifested in the extreme situation described. To a lesser extent it is present in any instance in which a defendant is damaged by being dragged into court and put to expense with no chance whatever . . . of having the suit determined in his favor." McCann v. Bentley Stores Corp., 34 F. Supp. 234 (W.D. Mo. 1940).

Under the rule, the plaintiff's absolute right of dismissal is confined to the period before answer or a motion for summary judgment — the period before which there has been a heavy expenditure of time and effort by the court and other parties. Thereafter, the plaintiff can dismiss only with the consent of the other parties or with the permission of the judge. This latter provision allowing dismissal with the permission of the judge should be ample to take care of the hardship case where, for quite legitimate reasons, the plaintiff is unable to press his claim. It should be noted, however, that the judge is authorized to condition the dismissal on terms. For the federal practice in respect to terms, see 5 *Moore's Federal Practice,* § 41.06.

It should also be observed that the first voluntary dismissal will have the same effect as is now accorded a voluntary nonsuit, i.e., it is not a judgment on the merits. But a second dismissal, no matter where the first action was brought, will be a judgment on the merits.

Section (b). — Under this section, whether the action be a nonjury action or a jury action, there may be a motion for a dismissal because of failure of a plaintiff to prosecute or for a failure "to comply with these rules or any order of court." The power of the court to dismiss for failure to prosecute is well established [see Wynne v. Conrad, 220 N.C. 355, 17 S.E.2d 514 (1941)] and the rule merely gives statutory recognition of this power.

In respect to a motion for dismissal because of noncompliance with these rules or an order of court, the propriety of a dismissal will, of course, depend on the rule or order which has not been complied with. The rule does not undertake to say in what circumstances a dismissal will be proper any more than it attempts arbitrarily to declare what is a failure to prosecute.

In an action tried by the court without a jury, the rule provides for a motion similar to the familiar motion for compulsory nonsuit under former § 1-183. It is contemplated that where there is a jury trial, Rule 50 will come into play with its motion for a directed verdict. For a discussion of the interrelation of this rule and Rule 50, see the comment to Rule 50. The practice under section (b) will be much like that under former § 1-183. But there are some changes. The court is empowered to determine that its adjudication shall be on the merits and to find the facts in appropriate cases at the close of the plaintiff's evidence.

Section (c). — This section makes clear that the rule is applicable to all situations in which a claim is capable of being pressed under these rules.

Section (d). — This section makes certain that one, other than a plaintiff suing in forma pauperis, will have paid the costs in the first action before he can maintain a second action on the same claim.

Comment to the 1969 amendment. — The most significant change produced by the 1969 amendments to Rule 41 is that a claimant's unfettered right to a voluntary, nonprejudicial dismissal endures up to the moment he rests his case. But the amended Rule specifies, as did the earlier version, that a second dismissal shall operate as an adjudication upon the merits.

There has been an attempt to make clear that the right to bring a new action within one year, after either a voluntary or an involuntary dismissal, is dependent on the original action having been commenced before the relevant statute of limitations has run. To that end, the last sentences of subsections 41(a)(1) and 41(a)(2) and section 41(b) now speak of "an action commenced within the time prescribed therefor."

Subsection 41(a)(1) has been rewritten to provide that the right to bring a new action within one year applies in the case of a dismissal by stipulation if the parties do not "specify a shorter time." Basically, the rights of the parties have not been affected because a stipulation requires unanimity among the parties. If any party objects to the extension of the statute of limitations, he may refuse to sign the stipulation and thereby compel the claimant to seek the court's permission under subsection 41(a)(2).

Section 41(b) has been rewritten, in conformity with the present federal rule, to make it clear that a motion for involuntary dismissal *under Rule 41* is available at the close of the claimant's case only in an action tried by the court without a jury. When there is a jury and a defendant wishes to challenge the sufficiency of the evidence, he must resort to Rule 50.

A second objective in the rewriting of section 41(b) was to make clear that the court's power to dismiss on terms, that is, to condition the dismissal ("Unless the court in its order for dismissal otherwise specifies, . . .") extends to all dismissals other than voluntary dismissals under section 41(a). Thus, if there were a motion to dismiss under Rule 37(b)(2)(iii) for failure to comply with a discovery order, the court, under the amended version of Rule 41(b), could in granting the motion specify that the dismissal was without prejudice.

Editor's Note. — Item (iii) of Rule 37(b)(2), referred to in the Comment to the 1969 amendment set out above, no longer exists. For general information regarding the official comments to the North Carolina Rules of Civil Procedure, see the Editor's Note under the heading for this Chapter.

Legal Periodicals. — For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

For survey of 1973 case law on involuntary dismissals under sections (b) and (c) of this rule, see 52 N.C.L. Rev. 822 (1974).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For article, "North Carolina's New Products Liability Act: A Critical Analysis," see 16 Wake Forest L. Rev. 171 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1053 (1981).

For note on default not constituting an admission of facts for purposes of summary judgment, see 17 Wake Forest L. Rev. 49 (1981).

For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

For survey of 1983 law on civil procedure, see 62 N.C.L. Rev. 1107 (1984).

For a note on lesser sanctions under section (b) of this rule, see 65 N.C.L. Rev. 1125 (1987).

For a discussion of the interaction between Civ. Procedure Rules 9(j) and 41(a)(1) in medical malpractice actions, see 79 N.C.L. Rev. 855 (2001).

For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

I. In General.
II. Voluntary Dismissal.
III. Involuntary Dismissal.
  A. In General.
  B. Failure to Prosecute or to Comply with Rules or Orders.
  C. Failure to Show Right to Relief.
IV. Costs.

I. IN GENERAL.

Legislative Intent. — The intent of subdivision (a)(1) is to protect a defendant from the harassment of repetitive lawsuits. Richardson v. McCracken Enters., 126 N.C. App. 506, 485 S.E.2d 844 (1997), review denied, 347 N.C. 269, 493 S.E.2d 745 (1997), aff'd, 347 N.C. 660, 496 S.E.2d 380 (1998).

In enacting the two dismissal provision of subdivision (a)(1), the legislature intended that a second dismissal of an action asserting claims based upon the same transaction or occurrence as a previously dismissed action would operate as an adjudication on the merits and bar a third action based upon the same set of facts. Richardson v. McCracken Enters., 126 N.C. App. 506, 485 S.E.2d 844 (1997), review denied, 347 N.C. 269, 493 S.E.2d 745 (1997), aff'd, 347 N.C. 660, 496 S.E.2d 380 (1998).

Motion for Nonsuit Replaced by Motion for Dismissal. — In nonjury trials the motion for nonsuit has been replaced by the motion for a dismissal. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972); Schafran v. A & H Cleaners, Inc., 19 N.C. App. 365, 198 S.E.2d 734, cert. denied, 284 N.C. 255, 200 S.E.2d 655 (1973); Phillips v. Woxman, 43 N.C. App. 739, 260 S.E.2d 97, cert. denied, 299 N.C. 545, 265 S.E.2d 404, cert. denied, 449 U.S. 835, 101 S. Ct. 108, 66 L. Ed. 2d 41 (1980).

In civil actions tried without a jury, the former motion for nonsuit has been replaced by the motion for dismissal. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

A motion for involuntary dismissal under section (b) of this rule has replaced the motion for nonsuit in civil actions tried without a jury. Joyner v. Thomas, 40 N.C. App. 63, 251 S.E.2d 906 (1979).

A motion for nonsuit is no longer proper in a civil action. In an action tried by the court without a jury, a defendant may move for a dismissal on the ground that upon the facts and the law plaintiff has shown no right to relief. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Since January 1, 1970, the former motion for involuntary nonsuit in nonjury trials has been replaced by the motion for dismissal authorized by sections (b) and (c) of this rule. International Harvester Credit Corp. v. Ricks, 16 N.C. App. 491, 192 S.E.2d 707 (1972).

Authority to Determine Whether Plaintiff May Commence New Action. — The authority to determine in which cases it is appropriate to allow the plaintiff to commence a new action has been vested, by this rule, in the trial or hearing judge and is no longer strictly controlled by statute. Gower v. Aetna Ins. Co., 13 N.C. App. 368, 185 S.E.2d 722, aff'd, 281 N.C. 577, 189 S.E.2d 165 (1972).

The authority to determine whether the nonmoving party in any action should be permitted to commence a new action has been vested in the trial judge under section (b) of this rule. The exercise of such power lies within the trial court's sound discretion and will not be disturbed on appeal in the absence of a showing of abuse of discretion. Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985).

Court exercised its discretion under G.S. 1A-41(b) and specified that a new action based on the same claim maybe commenced within one year or less after the dismissal of the instant action because G.S. 1A-41(a) was a tolling provision legislatively adopted that fell into a category of substantive matters of state law to be followed by federal courts absent substantial countervailing federal interests. Southstar Funding, L.L.C. v. Warren, Perry & Anthony, P.L.L.C., 445 F. Supp. 2d 583, 2006 U.S. Dist. LEXIS 61500 (E.D.N.C. 2006).

Action Not Based on Same Claim Where New Statute Eliminated Absolute Defense. — An alimony claim made pursuant to G.S. 50-16.3A(a) and filed within one year of plaintiff's dismissal of her first claim (under repealed G.S. 50-16.6(a)) failed to qualify as "a new action based on the same claim" under this section, because a G.S. 50-16.3A(a) claim for alimony was distinct from that set out by the repealed section in that it deferred to the court's discretion the decision of whether to award alimony where both the supporting and dependent spouse "each participated in an act of illicit sexual behavior," whereas the old section foreclosed a dependent adulterous spouse from recovering; to allow her to maintain this new action would have deprived the defendant husband of a statutory absolute defense he had had under the old law. Brannock v. Brannock, 135 N.C. App. 635, 523 S.E.2d 110, 1999 N.C. App. LEXIS 1240 (1999).

Function of the trial judge as trier of the facts is to evaluate the evidence without any limitation as to inferences favorable to plaintiff. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

Rule Does Not Contain Old Restrictions. — This rule does not contain the old restrictions that a new action may be brought only when the plaintiff's original action has been nonsuited, or a judgment therein reversed on appeal, or arrested. Gower v. Aetna Ins. Co., 13 N.C. App. 368, 185 S.E.2d 722, aff'd, 281 N.C. 577, 189 S.E.2d 165 (1972).

This motion should be used sparingly. Dubose Steel, Inc. v. Faircloth, 59 N.C. App. 722, 298 S.E.2d 60 (1982).

Review of Judgment Dismissing Action

Without Prejudice. — A judgment by a court determining its statutory authority to dismiss an action in such a way as not to bar further litigation on the merits therein may be questioned only by appeal and not collaterally. Gower v. Aetna Ins. Co., 281 N.C. 577, 189 S.E.2d 165 (1972).

A judgment by a court determining its statutory authority to dismiss an action in such a way as not to bar further litigation on the merits therein may be questioned only by appeal. Miller v. Ferree, 84 N.C. App. 135, 351 S.E.2d 845 (1987).

Dismissal Order Binding on Defendant. — Because defendant did not appeal the trial court's dismissal order which allowed plaintiff an additional year in which to refile, he was bound by that order and he could not attack the trial court's dismissal order collaterally by appealing the final judgment entered after plaintiff refiled. Jones v. Summers, 117 N.C. App. 415, 450 S.E.2d 920 (1994).

Dismissal under subsection (a) of this rule strips the trial court of authority to enter further orders in the case, except as provided by subsection (d) of this rule, which authorizes the court to enter specific orders apportioning and taxing costs. Walker Frames v. Shively, 123 N.C. App. 643, 473 S.E.2d 776 (1996).

Adversary Proceedings Terminated. — Where plaintiff's attorney validly took a voluntary dismissal in open court before defendants asserted any counterclaim, plaintiff terminated all adversary proceedings. Walker Frames v. Shively, 123 N.C. App. 643, 473 S.E.2d 776 (1996).

Reluctance to Allow Withdrawal Extends to Counterclaims. — The judicial reluctance to allow a plaintiff to withdraw at the last stages of litigation should extend as well to a defendant who wishes to withdraw its counterclaims. Whitaker's Inc. v. Nicol Arms, 93 N.C. App. 487, 378 S.E.2d 201 (1989).

Requirement of Detailed Findings. — The requirement of appropriately detailed findings is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. Mashburn v. First Investors Corp., 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Denial of a creditor's motion to dismiss a note collection case based on the N.C. R. Civ. P. 41(a)(1) two-dismissal rule was interlocutory, and since the creditor failed to show that the denial deprived him of a substantial right, the appeal was dismissed; N.C. R. Civ. P. 41(a)(1) does not create a conditional immunity from suit. Allen v. Stone, 161 N.C. App. 519, 588 S.E.2d 495, 2003 N.C. App. LEXIS 2198 (2003).

Substantial Right Held Not Affected, Precluding Immediate Appeal. — Trial court's order granting a motion to set aside a prior voluntary dismissal of a tort lawsuit, and its order denying defendants' motion to dismiss, (1) were interlocutory, (2) were not based on "minimum contacts," and (3) did not involve possible inconsistent jury verdicts; thus, there was no right of immediate appeal because defendants did not demonstrate any substantial right that qualified them for immediate appeal. Robinson v. Gardner, 167 N.C. App. 763, 606 S.E.2d 449, 2005 N.C. App. LEXIS 20 (2005), cert. denied, 359 N.C. 322, 611 S.E.2d 417 (2005).

Substantial evidence in the record supported an administrative law judge's findings and its dismissal of a day care's petition for a contested case hearing where the day care filed nothing in nearly six months following the filing of the petition, despite receiving several orders from the administrative law judge to file and serve prehearing statements and other responses to motions. Lincoln v. N.C. HHS, Nutrition Branch, 172 N.C. App. 567, 616 S.E.2d 622, 2005 N.C. App. LEXIS 1804 (2005).

Applied in Perry v. Suggs, 9 N.C. App. 128, 175 S.E.2d 696 (1970); First Nat'l Bank v. Black, 10 N.C. App. 270, 178 S.E.2d 108 (1970); Snellings v. Roberts, 12 N.C. App. 476, 183 S.E.2d 872 (1971); Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793 (1972); Hobson Constr. Co. v. Holiday Inns, Inc., 14 N.C. App. 475, 188 S.E.2d 617 (1972); Ramsey v. Ramsey, 16 N.C. App. 614, 192 S.E.2d 664 (1972); Smoky Mt. Enters., Inc. v. Rose, 283 N.C. 373, 196 S.E.2d 189 (1973); Livengood v. Piedmont & N. Ry., 18 N.C. App. 352, 197 S.E.2d 66 (1973); Forbes v. Pillmon, 18 N.C. App. 439, 197 S.E.2d 226 (1973); Atkins v. Walker, 19 N.C. App. 119, 198 S.E.2d 101 (1973); Cato Ladies Modes of N.C., Inc. v. Pope, 21 N.C. App. 133, 203 S.E.2d 405 (1974); Moore v. Wachovia Bank & Trust Co., 24 N.C. App. 675, 212 S.E.2d 170 (1975); Halsey v. Choate, 27 N.C. App. 49, 217 S.E.2d 740 (1975); Roger Staley, Inc. v. Waco Realty Co., 27 N.C. App. 541, 219 S.E.2d 654 (1975); Baltzley v. Wiseman, 28 N.C. App. 678, 222 S.E.2d 733 (1976); Bowen v. Hodge Motor Co., 292 N.C. 633, 234 S.E.2d 748 (1977); Ponder v. Ponder, 32 N.C. App. 150, 230 S.E.2d 786 (1977); Barbee v. Walton's Jewelers, Inc., 40 N.C. App. 760, 253 S.E.2d 596 (1979); Stillwell Enters., Inc. v. Interstate Equip. Co., 41 N.C. App. 204, 254 S.E.2d 770 (1979); Silverthorne v. Coastal Land Co., 42 N.C. App. 134, 256 S.E.2d 397 (1979); Benfield v. First Fed. Sav. & Loan Ass'n, 44 N.C. App. 371, 261 S.E.2d 150 (1979); Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980); Thompson v. Northwestern Sec. Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397 (1980); Greenhill v. Crabtree, 45 N.C. App. 49, 262 S.E.2d 315 (1980); Greenhill v. Crabtree, 301 N.C. 520, 271 S.E.2d 908 (1980); Employers Mut. Cas. Co. v. Griffin, 46 N.C. App. 826, 266 S.E.2d 18 (1980); Stutts v. Duke Power Co., 47 N.C. App. 76, 266 S.E.2d 861 (1980); Western Auto Supply Co. v. Vick, 303 N.C. 30, 277 S.E.2d 360 (1981); Young v. Kuehne Chem. Co., 53 N.C. App. 806, 281 S.E.2d 742 (1981); Lloyd v. Carnation Co., 61 N.C. App. 381, 301 S.E.2d 414 (1983); Hilton v. Howington, 63 N.C. App. 717, 306 S.E.2d 196 (1983); Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983); Martin Marietta Corp. v. Forsyth County Zoning Bd. of Adjustment, 65 N.C. App. 316, 309 S.E.2d 523 (1983); Davidson & Jones, Inc. v. North Carolina Dep't of Admin., 69 N.C. App. 563, 317 S.E.2d 718 (1984); Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984); Stokes v. Wilson & Redding Law Firm, 72 N.C. App. 107, 323 S.E.2d 470 (1984); Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51 (1985); Northwestern Bank v. Rash, 74 N.C. App. 101, 327 S.E.2d 302 (1985); Smith v. Starnes, 74 N.C. App. 306, 328 S.E.2d 20 (1985); Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985); Lyon v. Continental Trading Co., 76 N.C. App. 499, 333 S.E.2d 774 (1985); Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985); Sharpe v. Park Newspapers of Lumberton, Inc., 317 N.C. 579, 347 S.E.2d 25 (1986); Buchanan v. Hunter Douglas, Inc., 87 N.C. App. 84, 359 S.E.2d 271 (1987); Smith v. Butler Mt. Estates Property Owners Ass'n, 324 N.C. 80, 375 S.E.2d 905 (1989); Myers v. Barringer, 101 N.C. App. 168, 398 S.E.2d 615 (1990); Lutz v. Lutz, 101 N.C. App. 298, 399 S.E.2d 385 (1991); Woodard v. North Carolina Local Governmental Employees' Retirement Sys., 108 N.C. App. 378, 424 S.E.2d 431 (1993); Thompson v. Hank's of Carolina, Inc., 109 N.C. App. 89, 426 S.E.2d 278 (1993); In re Becker, 111 N.C. App. 85, 431 S.E.2d 820 (1993); Moore v. Pate, 112 N.C. App. 833, 437 S.E.2d 1 (1993); Pine Knoll Ass'n v. Cardon, 126 N.C. App. 155, 484 S.E.2d 446 (1997); Atkinson v. Atkinson, 132 N.C. App. 82, 510 S.E.2d 178 (1999); In re Blackburn, 142 N.C. App. 607, 543 S.E.2d 906, 2001 N.C. App. LEXIS 190 (2001); Kerik v. Davidson County, 145 N.C. App. 222, 551 S.E.2d 186, 2001 N.C. App. LEXIS 671 (2001); Fowler v. Worsley, 158 N.C. App. 128, 580 S.E.2d 74, 2003 N.C. App. LEXIS 946 (2003); Miles v. Carolina Forest Ass'n, 167 N.C. App. 28, 604 S.E.2d 327, 2004 N.C. App. LEXIS 2053 (2004); Webb v. Hardy, 182 N.C. App. 324, 641 S.E.2d 754, 2007 N.C. App. LEXIS 575 (2007); Nolan v. Town of Weddington, 182 N.C. App. 486, 642 S.E.2d 261, 2007 N.C. App. LEXIS 690 (2007); Pitt County v. Deja Vue, Inc., 185 N.C. App. 545, 650 S.E.2d 12, 2007 N.C. App. LEXIS 1937 (2007); Vaden v. Dombrowski, 187 N.C. App. 433, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007); Heatzig v. MacLean, 191 N.C. App. 451, 664 S.E.2d 347, 2008 N.C. App. LEXIS 1480 (2008); Goodman v. Holmes & McLaurin, — N.C. App. —, 665 S.E.2d 526, 2008 N.C. App. LEXIS 1622 (2008).

Cited in Gunter v. Anders, 114 N.C. App. 61, 441 S.E.2d 167; Nichols v. Wilson, 16 N.C. App. 286, 448 S.E.2d 119; Musgrave v. Mutual Sav. & Loan Ass'n, 8 N.C. App. 385, 174 S.E.2d 820 (1970); Blackwell v. Butts, 278 N.C. 615, 180 S.E.2d 835 (1971); Sheppard v. Barrus Constr. Co., 11 N.C. App. 358, 181 S.E.2d 130 (1971); Ross v. Perry, 12 N.C. App. 47, 182 S.E.2d 655 (1971); Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971); First-Citizens Bank & Trust Co. v. Carr, 279 N.C. 539, 184 S.E.2d 268 (1971); McElrath v. State Capital Ins. Co., 13 N.C. App. 211, 184 S.E.2d 912 (1971); Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972); Mayberry v. Campbell, 16 N.C. App. 375, 192 S.E.2d 27 (1972); Taylor v. Tri-County Elec. Membership Corp., 17 N.C. App. 143, 193 S.E.2d 402 (1972); Avis v. Hartford Fire Ins. Co., 283 N.C. 142, 195 S.E.2d 545 (1973); Briggs v. Briggs, 21 N.C. App. 674, 205 S.E.2d 547 (1974); Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974); Marriott Fin. Servs., Inc. v. Capitol Funds, Inc., 288 N.C. 122, 217 S.E.2d 551 (1975); Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975); Canady v. Creech, 288 N.C. 354, 218 S.E.2d 383 (1975); Hall v. GMC, 27 N.C. App. 202, 218 S.E.2d 721 (1975); Carolina Bldrs. Corp. v. Palms Constr. Co., 29 N.C. App. 667, 225 S.E.2d 628 (1976); Board of Transp. v. Williams, 31 N.C. App. 125, 229 S.E.2d 37 (1976); Hackett v. Hackett, 31 N.C. App. 217, 228 S.E.2d 758 (1976); House of Style Furn. Corp. v. Scronce, 33 N.C. App. 365, 235 S.E.2d 258 (1977); Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977); O'Grady v. First Union Nat'l Bank, 35 N.C. App. 315, 241 S.E.2d 375 (1978); Wake County Child Support Enforcement ex rel. Bailey v. Matthews, 36 N.C. App. 316, 244 S.E.2d 191 (1978); McAdams v. Union Sec. Life Ins. Co., 36 N.C. App. 463, 244 S.E.2d 692 (1978); Brooks v. Brown, 36 N.C. App. 738, 245 S.E.2d 209 (1978); Hoglen v. James, 38 N.C. App. 728, 248 S.E.2d 901 (1978); Gladstein v. South Square Assocs., 39 N.C. App. 171, 249 S.E.2d 827 (1978); Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979); Deutsch v. Fisher, 39 N.C. App. 304, 250 S.E.2d 304 (1979); Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640 (1979); Harrell v. W.B. Lloyd Constr. Co., 41 N.C. App. 593, 255 S.E.2d 280 (1979); Hall v. Lassiter, 44 N.C. App. 23, 260 S.E.2d 155 (1979); Tinkham v. Hall, 47 N.C. App. 651, 267 S.E.2d 588 (1980); Caison v. Nationwide Ins. Co., 45 N.C. App. 30, 262 S.E.2d 296 (1980); Hassell v. Wilson, 301 N.C. 307, 272 S.E.2d 77 (1980); Parslow v. Parslow, 47 N.C. App. 84, 266 S.E.2d 746 (1980); Thornburg v. Lancaster, 47 N.C. App. 131, 266

S.E.2d 738 (1980); West v. G.D. Reddick, Inc., 48 N.C. App. 135, 268 S.E.2d 235 (1980); Stevens v. Johnson, 50 N.C. App. 536, 274 S.E.2d 281 (1981); Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521 (1981); Eller v. Coca-Cola Co., 53 N.C. App. 500, 281 S.E.2d 81 (1981); Church v. Mickler, 55 N.C. App. 724, 287 S.E.2d 131 (1982); Cole v. Adams, 56 N.C. App. 714, 289 S.E.2d 918 (1982); Greensboro Hous. Auth. v. Kirkpatrick & Assocs., 56 N.C. App. 400, 289 S.E.2d 115 (1982); Carpenter v. Cooke, 58 N.C. App. 381, 293 S.E.2d 630 (1982); Riddle v. Riddle, 58 N.C. App. 594, 293 S.E.2d 819 (1982); Flack v. Garris, 58 N.C. App. 573, 293 S.E.2d 827 (1982); Cody v. Department of Transp., 60 N.C. App. 724, 300 S.E.2d 25 (1983); Boyd v. Boyd, 61 N.C. App. 334, 300 S.E.2d 569 (1983); Cassidy v. Cheek, 308 N.C. 670, 303 S.E.2d 792 (1983); Copy Prods., Inc. v. Randolph, 62 N.C. App. 553, 303 S.E.2d 87 (1983); Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983); Norman v. Royal Crown Bottling Co., 64 N.C. App. 200, 306 S.E.2d 828 (1983); Jones v. Allred, 64 N.C. App. 462, 307 S.E.2d 578 (1983); Butler Serv. Co. v. Butler Serv. Group, Inc., 66 N.C. App. 132, 310 S.E.2d 406 (1984); Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Jackson v. Jackson, 68 N.C. App. 499, 315 S.E.2d 90 (1984); Howard v. Ocean Trail Convalescent Ctr., 68 N.C. App. 494, 315 S.E.2d 97 (1984); Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984); Dixie Chem. Corp. v. Edwards, 68 N.C. App. 714, 315 S.E.2d 747 (1984); Herrell v. Adcock, 69 N.C. App. 222, 316 S.E.2d 347 (1984); In re City of Durham Annexation Ordinance Numbered 5991 for Area A, 69 N.C. App. 77, 316 S.E.2d 649 (1984); Warren v. Guttanit, Inc., 69 N.C. App. 103, 317 S.E.2d 5 (1984); Kabatnik v. Westminster Co., 71 N.C. App. 758, 323 S.E.2d 398 (1984); Howard v. Smoky Mt. Enters., Inc., 76 N.C. App. 123, 332 S.E.2d 200 (1985); Harwood v. Harrelson Ford, Inc., 78 N.C. App. 445, 337 S.E.2d 158 (1985); Burns v. Forsyth County Hosp. Auth., 81 N.C. App. 556, 344 S.E.2d 839 (1986); Reavis v. Reavis, 82 N.C. App. 77, 345 S.E.2d 460 (1986); Baker v. Mauldin, 82 N.C. App. 404, 346 S.E.2d 240 (1986); Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986); Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986); Olschesky v. Houston, 84 N.C. App. 415, 352 S.E.2d 884 (1987); City Fin. Co. v. Boykin, 86 N.C. App. 446, 358 S.E.2d 83 (1987); Parker v. Lippard, 87 N.C. App. 43, 359 S.E.2d 492 (1987); McCraw v. Hamrick, 88 N.C. App. 391, 363 S.E.2d 201 (1988); Smith v. Butler Mt. Estates Property Owners Ass'n, 90 N.C. App. 40, 367 S.E.2d 401 (1988); Lemons v. Old Hickory Council, 322 N.C. 271, 367 S.E.2d 655 (1988); Clark v. Williamson, 91 N.C. App. 668, 373 S.E.2d 317 (1988); Shaw v. LaNotte, Inc., 92 N.C. App. 198, 373 S.E.2d 882 (1988); Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988); North Carolina Baptist Hosps. v. Mitchell, 323 N.C. 528, 374 S.E.2d 844 (1988); Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989); G & S Bus. Servs., Inc. v. Fast Fare, Inc., 94 N.C. App. 483, 380 S.E.2d 792 (1989); Bamberger v. Bernholz, 96 N.C. App. 555, 386 S.E.2d 450 (1989); Kirby Bldg. Sys. v. McNiel, 327 N.C. 234, 393 S.E.2d 827 (1990); Koufman v. Koufman, 97 N.C. App. 227, 388 S.E.2d 207 (1990); Webster v. Powell, 98 N.C. App. 432, 391 S.E.2d 204 (1990); Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990); Estridge v. Ford Motor Co., 101 N.C. App. 716, 401 S.E.2d 85 (1991); Furr v. Noland, 103 N.C. App. 279, 404 S.E.2d 885 (1991); Hull v. Oldham, 104 N.C. App. 29, 407 S.E.2d 611 (1991); Brockwell v. Lake Gaston Sales & Serv., 105 N.C. App. 226, 412 S.E.2d 104 (1992); Hoots v. Pryor, 106 N.C. App. 397, 417 S.E.2d 269 (1992); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992); Brandenburg Land Co. v. Champion Int'l Corp., 107 N.C. App. 102, 418 S.E.2d 526 (1992); Marlowe v. Clark, 112 N.C. App. 181, 435 S.E.2d 354 (1993); Faulkenbury v. Teachers' & State Employees' Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420 (1993); Pieper v. Pieper, 108 N.C. App. 722, 425 S.E.2d 435 (1993); Lowry v. Duke Univ. Medical Ctr., 109 N.C. App. 83, 425 S.E.2d 739 (1993); Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993); Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); Goss v. Battle, 111 N.C. App. 173, 432 S.E.2d 156 (1993); Stegall v. Stegall, 336 N.C. 473, 444 S.E.2d 177 (1994); Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994); Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994); Devane ex rel. Robinson v. Chancellor, 120 N.C. App. 636, 463 S.E.2d 293 (1995); Democratic Party v. Guilford County Bd. of Elections, 342 N.C. 856, 467 S.E.2d 681 (1996); Robinson v. Parker, 124 N.C. App. 164, 476 S.E.2d 406 (1996); Fieldcrest Cannon v. Fireman's Fund Ins. Co., 124 N.C. App. 232, 477 S.E.2d 59, 1996 N.C. App. LEXIS 1062 (1996); Beck v. Beck, 125 N.C. App. 402, 481 S.E.2d 317 (1997); T & T Dev. Co. v. Southern Nat'l Bank, 125 N.C. App. 600, 481 S.E.2d 347 (1997); Pine Knoll Ass'n v. Cardon, 126 N.C. App. 155, 484 S.E.2d 446 (1997); Shiloh Methodist Church v. Keever Heating & Cooling Co., 127 N.C. App. 619, 492 S.E.2d 380 (1997); Crutchfield v. Crutchfield, 132 N.C. App. 193, 511 S.E.2d 31 (1999); Cash v. State Farm Mut. Auto. Ins. Co., 137 N.C. App. 192, 528 S.E.2d 372, 2000 N.C. App. LEXIS 312 (2000); Allen v. Carolina Permanente Med. Group, P.A., 139 N.C. App. 342, 533 S.E.2d 812, 2000 N.C. App. LEXIS 903 (2000); Hyde v. Chesney Glen Homeowners Ass'n, Inc., 137 N.C. App. 605, 529 S.E.2d 499, 2000 N.C. App. LEXIS 504 (2000); Formyduval v. Bunn, 138 N.C. App. 381, 530 S.E.2d 96 (2000); Brisson v.

Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000); Melton v. Family First Mortg. Corp., 156 N.C. App. 129, 576 S.E.2d 365, 2003 N.C. App. LEXIS 67 (2003); Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002); DOT v. Charlotte Area Manufactured Hous., Inc., 160 N.C. App. 461, 586 S.E.2d 780, 2003 N.C. App. LEXIS 1822 (2003); Cunningham v. Sams, 161 N.C. App. 295, 588 S.E.2d 484, 2003 N.C. App. LEXIS 2038 (2003); Finley Forest Condo. Ass'n v. Perry, 163 N.C. App. 735, 594 S.E.2d 227, 2004 N.C. App. LEXIS 570 (2004); Draughon v. Harnett County Bd. of Educ., 166 N.C. App. 449, 602 S.E.2d 717, 2004 N.C. App. LEXIS 1784 (2004); Draughon v. Harnett County Bd. of Educ., 166 N.C. App. 464, 602 S.E.2d 721, 2004 N.C. App. LEXIS 1785 (2004); Jones v. Ratley, 168 N.C. App. 126, 607 S.E.2d 38, 2005 N.C. App. LEXIS 147 (2005); In re J.A.G., — N.C. App. —, — S.E.2d —, 2005 N.C. App. LEXIS 1091 (June 7, 2005); Hill v. Hill, 181 N.C. App. 69, 638 S.E.2d 601, 2007 N.C. App. LEXIS 65 (2007); Wells v. Cumberland County Hosp. Sys., 181 N.C. App. 590, 640 S.E.2d 400, 2007 N.C. App. LEXIS 255 (2007); Hailey v. Auto-Owners Ins. Co., 181 N.C. App. 677, 640 S.E.2d 849, 2007 N.C. App. LEXIS 397 (2007); Pers. Earth Movers, Inc. v. Thomas, 182 N.C. App. 329, 641 S.E.2d 751, 2007 N.C. App. LEXIS 577 (2007); Town of Green Level v. Alamance County, 184 N.C. App. 665, 646 S.E.2d 851, 2007 N.C. App. LEXIS 1622 (2007); N.C. Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007); Herring v. Winston-Salem/Forsyth County Bd. of Educ., 188 N.C. App. 441, 656 S.E.2d 307, 2008 N.C. App. LEXIS 231 (2008); Warner v. Brickhouse, 189 N.C. App. 445, 658 S.E.2d 313, 2008 N.C. App. LEXIS 649 (2008); Dailey v. Popma, 191 N.C. App. 64, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (2008); Moody v. Sears Roebuck & Co., 191 N.C. App. 256, 664 S.E.2d 569, 2008 N.C. App. LEXIS 1324 (2008); Eakes v. Eakes, — N.C. App. —, 669 S.E.2d 891, 2008 N.C. App. LEXIS 2255 (2008); Ventriglia v. Deese, — N.C. App. —, 669 S.E.2d 817, 2008 N.C. App. LEXIS 2263 (2008); Barringer v. Wake Forest Univ. Baptist Med. Ctr., — N.C. App. —, 677 S.E.2d 465, 2009 N.C. App. LEXIS 673 (2009).

II. VOLUNTARY DISMISSAL.

Subsection (a)(1) of this rule, as first enacted, was patterned closely upon the cognate federal rule. McCarley v. McCarley, 24 N.C. App. 373, 210 S.E.2d 531 (1975), aff'd in part and rev'd in part, 289 N.C. 109, 221 S.E.2d 490 (1976).

Federal Courts Applying State Substantive Law. — When a federal court is applying state substantive law, the North Carolina statute of limitations and attendant tolling provisions apply, regardless of whether the case was in federal court on diversity or federal question jurisdiction. Altman v. City of High Point, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 26412 (M.D.N.C. Jan. 17, 2002).

How Filing Requirements of Subdivision (a)(1)(i) May Be Met. — No means other than oral notice in open court have been allowed to substitute for the filing requirements of subdivision (a)(1)(i) of this rule. Johnson v. Hutchens, 103 N.C. App. 384, 405 S.E.2d 597 (1991).

Contact with defendant's attorney by telephone or mail concerning voluntary dismissal does not satisfy the filing requirements of subdivision (a)(1)(i) of this rule. Johnson v. Hutchens, 103 N.C. App. 384, 405 S.E.2d 597 (1991).

A plaintiff is free to abandon an alleged or potential claim against another party at any time. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Under subdivision (a)(1) of this rule, plaintiff may voluntarily dismiss his suit, without order of the court, by filing a notice of dismissal at any time before resting his case. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Under the plain language of subdivision (a)(1), a plaintiff is vested with the authority to dismiss any of its claims prior to close of its case-in-chief. Roberts v. Young, 120 N.C. App. 720, 464 S.E.2d 78 (1995).

Validity of Underlying Complaint. — In order to obtain a one-year extension by way of a voluntary dismissal without prejudice, the underlying complaint must conform in all respects to the rules of pleading. Robinson v. Entwistle, 132 N.C. App. 519, 512 S.E.2d 438 (1999).

There are two elements to the two dismissal rule: (1) plaintiff must have filed the notices to dismiss under subdivision (a)(1)(i) of this rule, since the two dismissal rule does not apply where plaintiff's dismissal is by stipulation or by order of court; and (2) the second suit must have been based on or including the same claim as the first suit. City of Raleigh v. College Campus Apts., Inc., 94 N.C. App. 280, 380 S.E.2d 163 (1989), aff'd, 326 N.C. 360, 388 S.E.2d 768 (1990).

The "same defendant" limitation is absent in the two dismissal rule of subsection (a) (1) of this rule. There is no basis for judicially adding a requirement that the General Assembly intended to leave out, as the statute is clear and unambiguous. City of Raleigh v. College Campus Apts., Inc., 94 N.C. App. 280, 380 S.E.2d 163 (1989), aff'd, 326 N.C. 360, 388 S.E.2d 768 (1990).

The two-dismissal rule applies only when the plaintiff has twice dismissed an action based on or including the same claim, and, as plaintiffs dismissed their first action only once, the two-dismissal rule did not apply; plaintiffs' voluntary dismissal of their own claim against one defendant did not constitute an adjudication on the merits pursuant to subdivision (a)(1) and plaintiffs were not barred from bringing action for crop damage. Hopkins v. Ciba-Geigy Corp., 111 N.C. App. 179, 432 S.E.2d 142 (1993).

Two Dismissal Rule Not Applicable. — Trial court properly ruled that a bank's action to recover the balance due on an auto lease was not barred by the two dismissal rule, G.S. 1A-1, Rule 41(a)(1); the instant action was based on a different default of the lease agreement by lessors than earlier actions which were voluntarily dismissed by the bank. Centura Bank v. Winters, 159 N.C. App. 456, 583 S.E.2d 723, 2003 N.C. App. LEXIS 1541 (2003).

As to the effect of 1969 amendment of subsection (a)(1) of this rule, see McCarley v. McCarley, 24 N.C. App. 373, 210 S.E.2d 531 (1975), aff'd in part and rev'd in part, 289 N.C. 109, 221 S.E.2d 490 (1976).

A voluntary dismissal is effective whether or not a court has jurisdiction. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

No Court Action Required. — Subsection (a)(1) of this rule clearly does not require court action, other than ministerial record-keeping functions, to effect a dismissal. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

A notice of dismissal pursuant to subdivision (a)(1) of this section is an action taken by the plaintiff ending the suit, and no action of the court is necessary to give the notice its full effect. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Amendment Pursuant to § 1A-1, Rule 60(b). — A voluntary dismissal under subsection (a)(1) of this rule can be amended pursuant to G.S. 1A-1, Rule 60(b). Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

Applicability of Section (a) to Defendant's Counterclaim. — Although the language of section (a) of this rule refers to plaintiffs, the rule applies with equal force to a defendant's counterclaim. Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110, cert. denied, 320 N.C. 790, 361 S.E.2d 70 (1987), overruled on other grounds, Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Voluntary Dismissal Lies Only Prior to Final Judgment. — A voluntary dismissal under this rule will lie only prior to entry of final judgment. After final judgment, any correction, modification, amendment, or setting aside can only be done by the court. Wood v. Wood, 37 N.C. App. 570, 246 S.E.2d 549 (1978), rev'd on other grounds, 297 N.C. 1, 252 S.E.2d 799 (1979); Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110, cert. denied, 320 N.C. 790, 361 S.E.2d 70 (1987), overruled on other grounds, Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Dismissal After Entry of Final Order Ineffective. — Purported voluntary dismissal of petition for attorney's fees was of no legal efficacy where it came after the clerk entered a final order on the petition. In re Estate of Tucci, 104 N.C. App. 142, 408 S.E.2d 859 (1991), cert. dismissed, 331 N.C. 748, 417 S.E.2d 236 (1992).

Under subsection (a) and existing case law, parties may not voluntarily dismiss a final custody and child support order. Massey v. Massey, 121 N.C. App. 263, 465 S.E.2d 313 (1996).

Order May Not Be Vacated by Stipulation. — Where an order of the trial court awarding plaintiff permanent custody and obligating defendant to pay permanent child support was rendered, nothing in this rule granted authority to the parties to vacate by stipulation the order previously entered in the action. Massey v. Massey, 121 N.C. App. 263, 465 S.E.2d 313 (1996).

Plaintiff May Not Dismiss If Defendant Has Asserted Grounds for Relief. — A plaintiff may not dismiss his action by filing a notice of dismissal if to do so would defeat the rights of a defendant who has theretofore asserted some ground for affirmative relief, even though the plaintiff acts before resting his case. McCarley v. McCarley, 24 N.C. App. 373, 210 S.E.2d 531 (1975), modified on other grounds, 289 N.C. 109, 221 S.E.2d 490 (1976).

Upon defendant's demand for affirmative relief, defendant's right to have his claim adjudicated in the case "has supervened," and plaintiff thereby loses the right to withdraw, without defendant's consent, allegations upon which defendant's claim is based. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Where defendant sets up a claim for affirmative relief against plaintiffs arising out of the same transactions alleged by plaintiffs, plaintiffs cannot take a voluntary dismissal under this rule without the consent of defendant. Maurice v. Hatterasman Motel Corp., 38 N.C. App. 588, 248 S.E.2d 430 (1978).

As Where Defendant Asserts Counterclaim Arising Out of Same Transaction. — Defendant's assertion of a counterclaim arising out of the same transaction alleged in plaintiff's complaint could effectively deprive plaintiff not only of his ability to escape defendant's claim against him, but also of his right under this rule to dismiss his own claim. Layell v. Baker, 46 N.C. App. 1, 264 S.E.2d 406 (1980).

Where a counterclaim is filed which arises out of the same transaction alleged in the complaint, plaintiff thereby loses the right to withdraw allegations upon which defendant's claim is based by taking a voluntary nonsuit without defendant's consent. Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980).

Having filed a counterclaim arising out of the same transaction alleged in plaintiff-husband's complaint, defendant thereby deprived plaintiff of his statutory right under this rule to take a voluntary dismissal without her consent. Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980).

Refiling by Third-Party Plaintiff After Voluntary Dismissal. — A third-party plaintiff who originally files a third-party complaint within the time limits set out in G.S. 1A-1, Rule 14 and subsequently enters a voluntary dismissal may, within one year, refile the complaint or an amended complaint without leave of court. Clark v. Visiting Health Prof'ls, Inc., 136 N.C. App. 505, 524 S.E.2d 605, 2000 N.C. App. LEXIS 63 (2000).

When Plaintiff May Voluntarily Dismiss Where Defendant Has Asserted Counterclaim. — Plaintiff may voluntarily dismiss his complaint when defendant asserts a counterclaim arising out of the same transaction alleged in the complaint and defendant's attorney simultaneously voluntarily dismisses the counterclaim. Gillikin v. Pierce, 98 N.C. App. 484, 391 S.E.2d 198, cert. denied, 327 N.C. 427, 395 S.E.2d 677 (1990).

Where plaintiff took a voluntary dismissal of its remaining 26 claims after plaintiff had been granted summary judgment on defendants' counterclaims and after their initial appeal had been dismissed as interlocutory, since plaintiff's claims were still pending at the time the trial court entered judgment on defendants' counterclaims and their appeal was dismissed as interlocutory, defendants' counterclaims were completely adjudicated at the time plaintiff took its voluntary dismissal; plaintiff was entitled to take a voluntary dismissal of their claims and refile them within one year of the voluntary dismissal without defendant's consent. Berkeley Fed. Sav. Bank v. Terra Del Sol, Inc., 119 N.C. App. 249, 457 S.E.2d 736 (1995), discretionary review improvidently allowed, 342 N.C. 639, 466 S.E.2d 276 (1996).

Voluntary Dismissal by Plaintiff After Denial of Summary Judgment by Defendant. — The trial court's denial of summary judgment became moot and was not appealable by the defendant doctor, where the medical malpractice plaintiffs voluntarily dismissed their fraud claim without prejudice after the trial court denied the defendant surgeon's motion for summary judgment. Teague v. Randolph Surgical Assocs., 129 N.C. App. 766, 501 S.E.2d 382 (1998).

Voluntary Dismissal by Plaintiff After Grant of Partial Summary Judgment by Defendant. — Because defendants were granted partial summary judgment as to plaintiffs' personal injury claims, dismissal of plaintiffs' appeal was not warranted, as the appeal from the entry of partial summary judgment was no longer interlocutory following plaintiffs' voluntary dismissal of their remaining claims. Curl v. Am. Multimedia, Inc., 187 N.C. App. 649, 654 S.E.2d 76, 2007 N.C. App. LEXIS 2558 (2007).

Voluntary Dismissal by Plaintiff After Motion to Dismiss. — Defendants' motion to dismiss plaintiff's negligence claim was not a request for affirmative relief that canceled plaintiff's ability to voluntarily dismiss plaintiff's case without prejudice; thus, the trial court properly granted plaintiff's motion for dismissal without prejudice under G.S. 1A-1, N.C. R. Civ. P. 41(a). Williams v. Poland, 154 N.C. App. 709, 573 S.E.2d 230, 2002 N.C. App. LEXIS 1538 (2002).

Presumption That Attorney Acts for Client. — While subdivision (a)(1)(ii) of this rule requires the consent of the parties to the litigation, there is a presumption that an attorney has authority to act for his client and one challenging the attorney's actions as being unauthorized has the burden of rebutting the presumption. Gillikin v. Pierce, 98 N.C. App. 484, 391 S.E.2d 198, cert. denied, 327 N.C. 427, 395 S.E.2d 677 (1990).

Counterclaim in Divorce Suit as Claim for Affirmative Relief. — Where complaint in a suit for absolute divorce alleged facts entitling either or both of the parties to an absolute divorce, defendant's answer admitting these allegations, together with his prayer for an absolute divorce on the same grounds, was, in effect, a counterclaim seeking affirmative relief and arising out of the same transactions alleged in the complaint. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Cross-Claim Seeking Contingent Indemnification Not Claim for Affirmative Relief. — Trial court properly allowed voluntary dismissal without prejudice by plaintiff where defendant's cross-claim was an action for indemnification contingent upon the plaintiff's recovery and thus was in no way affirmative relief. Travelers Ins. Co. v. Ryder Truck Rental, Inc., 34 N.C. App. 379, 238 S.E.2d 193 (1977).

Defendant's failure, prior to discharge of jury, to bring to court's attention pendency of counterclaim did not amount to implied consent to the voluntary dismissal by the plaintiff of his complaint. Layell v. Baker, 46 N.C. App. 1, 264 S.E.2d 406 (1980).

Effect on Counterclaim of Consent to Voluntary Dismissal. — Defendant's written "consent" to the voluntary dismissal of plaintiff's claim, which was expressly given "without prejudice to defendant's prosecution of her claim," at most removed the barrier which defendant's counterclaim otherwise presented to plaintiff's right under this rule to dismiss his own claim, but did not effect a dismissal of defendant's counterclaim, nor did it permit plaintiff simply to walk away from the litigation which he had himself begun. Layell v. Baker, 46 N.C. App. 1, 264 S.E.2d 406 (1980).

Filing of Voluntary Dismissal Did Not Strip Appellate Court of Jurisdiction. — Filing of a voluntary dismissal under G.S. 1A-1, Rule 41(a)(1) did not strip the appellate court of its authority to docket an appeal that had already been filed by defendants in the matter, or to consider the merits thereof. Reid v. Town of Madison, 145 N.C. App. 146, 550 S.E.2d 826, 2001 N.C. App. LEXIS 554 (2001).

Voluntary Dismissal Substantially Same as Former Nonsuit. — A voluntary dismissal under the current Rules of Civil Procedure is substantially the same as a voluntary nonsuit under the former procedure. Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973); Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110, cert. denied, 320 N.C. 790, 361 S.E.2d 70 (1987), overruled on other grounds, Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Voluntary Dismissal of Termination of Parental Rights Proceeding. — Fact that county department of social services had dismissed a prior petition for termination of mother's parental rights did not preclude a subsequent petition since the best interests of the children was always the primary focus, with no procedural rule barring the court's continuing jurisdiction over such a matter. In re L.O.K., 174 N.C. App. 426, 621 S.E.2d 236, 2005 N.C. App. LEXIS 2476 (2005).

Filing of Voluntary Dismissal Was Not Done to Manipulate the Rules. — Because the procedural posture of the case, which included a voluntary dismissal as to a motel, did not cause the appellate court to believe that counsel was manipulating the Rules of Civil Procedure in an attempt to appeal an order that should not be appealable, the appellate court did not dismiss the appeal as interlocutory, where the trial court granted summary judgment based upon contributory negligence. Duval v. OM Hospitality, LLC, 186 N.C. App. 390, 651 S.E.2d 261, 2007 N.C. App. LEXIS 2190 (2007).

Common-Law Rule as to Time for Voluntary Dismissal Changed. — This State continued up until the present time to follow the common-law rule which permitted the plaintiff to take a nonsuit at any time before the verdict. But this rule of practice has been changed by the adoption of this rule, which provides that an action or any claim therein may be dismissed by the plaintiff without an order of court "by filing a notice of dismissal at any time before the plaintiff rests his case." Clemmons v. Life Ins. Co., 6 N.C. App. 708, 171 S.E.2d 87 (1969).

This rule had the effect of changing former practice only to the extent that the plaintiff desiring to take a voluntary nonsuit (now a voluntary dismissal) must now act before he rests his case, whereas under former practice he could do so at any time before the verdict. McCarley v. McCarley, 289 N.C. 109, 221 S.E.2d 490 (1976).

Subsection (a)(1) of this rule had the effect of changing this State's former practice with respect to voluntary nonsuits only to the extent that the plaintiff desiring to take a voluntary dismissal must now act before he rests his case. In other respects former practice was not expressly changed by the rule. Danielson v. Cummings, 43 N.C. App. 546, 259 S.E.2d 332 (1979), aff'd, 300 N.C. 175, 265 S.E.2d 161 (1980).

Major thrust of subsection (a)(1) of this rule is to limit the time within which plaintiff has an absolute right to dismiss his action without prejudice, which period is now any time before he rests his case. Whitehurst v. Virginia Dare Transp. Co., 19 N.C. App. 352, 198 S.E.2d 741 (1973).

Rule permits one voluntary dismissal, but the right must be exercised before plaintiff rests his case. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Voluntary Dismissal Without Prejudice After Resting Case No Longer a Matter of Right. — Under the new Rules of Civil Procedure a plaintiff can no longer take a voluntary nonsuit as a matter of right or secure a voluntary dismissal without prejudice after he has rested his case. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

The clear meaning of section (a) of this rule is that a plaintiff may not bring an action which twice has been dismissed voluntarily; however, where the dismissal of plaintiff's first action was involuntary, section (a) does not apply. Jarman v. Washington, 93 N.C. App. 76, 376 S.E.2d 252 (1989).

When Plaintiff's Case Rested on Summary Judgment Hearing. — Where a party appears at a summary judgment hearing and produces evidence or is given an opportunity to produce evidence and fails to do so, and the question is submitted to the court for decision, he has "rested his case" within the meaning of subdivision (a)(1)(i) of this rule. He cannot thereafter take a voluntary dismissal under subdivision (a)(1)(i). Maurice v. Hatterasman Motel Corp., 38 N.C. App. 588, 248 S.E.2d 430 (1978).

For summary judgment motions, the record must show that plaintiff has been given the opportunity to introduce any evidence relating to the motion and to argue his position, and having done so and submitted the matter to the trial court for determination, plaintiff will then be deemed to have rested his case for the purpose of summary judgment and will be precluded from dismissing his case pursuant to this rule during the pendency of the summary judgment motion. Alston v. Duke Univ., 133 N.C. App. 57, 514 S.E.2d 298 (1999).

Voluntary Dismissal Appropriate When Case Not Rested. — Plaintiff was entitled to take a voluntary dismissal of her medical malpractice action, where her counsel made every effort to have the trial court rule on her motion to amend the discovery scheduling order before hearing the defendant's motion for summary judgment, and immediately moved for dismissal without resting her case once the court denied her motion. Alston v. Duke Univ., 133 N.C. App. 57, 514 S.E.2d 298 (1999).

Plaintiff cannot be made to choose which remedy he will pursue before he takes a voluntary dismissal. Caroon v. Eubank, 30 N.C. App. 244, 226 S.E.2d 691 (1976).

Plaintiff's voluntary dismissal of a prior action is a final termination of that action, and no valid order can be made thereafter in that cause. Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

A voluntary dismissal under subsection (a)(1) of this rule terminates the action, and no suit is pending thereafter in which the court can make a valid order. Sutton v. Sutton, 18 N.C. App. 480, 197 S.E.2d 9 (1973); Caroon v. Eubank, 30 N.C. App. 244, 226 S.E.2d 691 (1976).

Where plaintiff takes a voluntary dismissal pursuant to subsection (a)(1) of this rule, no suit is pending thereafter on which the court can make a final order. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

This rule provides that dismissal is without prejudice, unless otherwise stated, allowing plaintiff to commence a new action based on the same claim within one year. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Order Dismissing Case with Prejudice After Voluntary Dismissal Held Invalid. — Plaintiffs' dismissal was effective upon its announcement, and an order dismissing the case with prejudice, entered after plaintiffs' voluntary dismissal, was invalid and had no effect upon plaintiffs' rights. Lowe v. Bryant, 55 N.C. App. 608, 286 S.E.2d 652 (1982).

Voluntarily Dismissed Suit Based on Defective Complaint Does Not Toll the Statute of Limitations. — Although a voluntary dismissal without prejudice will toll the statute of limitations if the dismissed complaint is reinstituted within one year, this rule cannot revive an action on a properly directed summons if the complaint was defective, no amendment of the complaint was ever requested, and the defect was never cured. Sweet v. Boggs, 134 N.C. App. 173, 516 S.E.2d 888 (1999).

Savings Provision Not Applicable to Claim Under Federal Employers' Liability Act. — Trial court erred in tolling the statute of limitations in an employee's Federal Employers' Liability Act (FELA), 45 U.S.C.S. §§ 51-60, claim for up to a year after the trial court's dismissal of the claim because there was no basis for this order other than savings provision of G.S. 1A-1, N.C. R. Civ. P. 41, which was inapplicable to a FELA claim. Carlisle v. CSX Transp., Inc., — N.C. App. —, 668 S.E.2d 98, 2008 N.C. App. LEXIS 1977 (2008).

Where plaintiff's first voluntarily dismissed suit was based on defective process, his second action, filed after the statute of limitations applicable to the action had expired, was barred by the statute of limitations and the trial court properly entered summary judgment for defendant. Johnson v. City of Raleigh, 98 N.C. App. 147, 389 S.E.2d 849, cert. denied, 327 N.C. 140, 394 S.E.2d 176 (1990), rev'd on other grounds, 328 N.C. 689, 394 S.E.2d 469 (1991).

A voluntary dismissal of negligence action without prejudice did not toll the statute of limitations in a case in which the plaintiff, seeing the statute of limitations about to run, received an order extending the time for filing a complaint but failed to serve defendant with civil summons and the order. The defective service of process discontinued plaintiff's original action, and the trial court properly treated the voluntary dismissal as if it had never been filed and the statute of limitations as if it had not been tolled. Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994).

First Voluntary Dismissal Not Adjudication on Merits. — In an action instituted for temporary and permanent alimony, child custody and support and attorneys' fees, defendant was in no position to complain that the issues raised had been determined in a previous action in which plaintiff had taken a voluntary dismissal, since the first such dismissal was not an adjudication upon the merits. Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973).

In personal injury plaintiffs' action against an intoxicated driver who caused a traffic accident by driving a van across a highway median, and against a company that owned the van and against the occupants of a house who allegedly negligently entrusted the van to the driver, the company and the occupants were dismissed with prejudice following summary judgment in their favor; plaintiffs then entered a consent order dismissing, without prejudice, their remaining claims against the driver, thereby resolving all claims against all remaining defendants. The summary judgment order was not a final appealable order and the consent order against the driver did not render the dismissal order resulting from that summary judgment a final judgment as contemplated by G.S. 1A-1, N.C. R. Civ. P. 54.(2005); the court dismissed plaintiffs appeal of that dismissal order on the reasoning that G.S. 1A-1, N.C. R. Civ. P. 41(a)(1) (2005), allowed plaintiffs to take one voluntary dismissal against the driver without finally resolving the claims against the driver, so there was no final judgment that would allow an appeal of the summary judgment in favor of the company and the occupants. Hill v. West, 177 N.C. App. 132, 627 S.E.2d 662, 2006 N.C. App. LEXIS 692 (2006).

Second Voluntary Dismissal Barred Derivative Action. — Plaintiff's second voluntary dismissal against manager of restaurant operated to bar her derivative claims against restaurant itself. Graham v. Hardee's Food Sys., 121 N.C. App. 382, 465 S.E.2d 558 (1996).

Voluntary Dismissal with Prejudice Barred Derivative Action. — Plaintiff could not proceed against an alleged employer on the theory of respondeat superior after having voluntarily dismissed with prejudice and without payment a negligence claim against the alleged employee; even if dismissal was not with prejudice, it was the second dismissal of plaintiff's claims against the employee, an adjudication on the merits and, therefore, a bar to the action against the employer. Wrenn v. Maria Parham Hosp., 135 N.C. App. 672, 522 S.E.2d 789, 1999 N.C. App. LEXIS 1233 (1999).

Where the victims of an automobile accident were unable to take a voluntary dismissal under G.S. 1A-1, Rule 41(a)(1)(i), they took a voluntary dismissal with prejudice at the original civil negligence trial; thus, they were barred from refiling a negligence suit against defendant driver. Pardue v. Darnell, 148 N.C. App. 152, 557 S.E.2d 172, 2001 N.C. App. LEXIS 1264 (2001).

Unless Otherwise Specified Voluntary Dismissal Without Prejudice, with One Exception. — Unless otherwise specified, a voluntary dismissal, whether by plaintiff's notice, by stipulation, or by order of the judge, is without prejudice, with one express exception, applicable only to a dismissal effected by plaintiff's notice: namely, that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed an action based on or including the same claim. Parrish v. Uzzell, 41 N.C. App. 479, 255 S.E.2d 219 (1979).

Where plaintiff obtained a voluntary dismissal of first action by electing to dismiss without prejudice and so informing the court, which then ordered the case dismissed without prejudice, and obtained a voluntary dismissal of a second action by making an oral motion to the court to be allowed to take a voluntary dismissal without prejudice, which motion was allowed by an order entered "in the Court's discretion and in the interest of justice," while each dismissal was obtained at plaintiff's instance, neither was effected by the plaintiff filing a notice of dismissal as authorized by subdivision (a)(1)(i) of this rule, to which alone the "second dismissal" rule applies, and therefore she was not barred from maintaining a further action based on the same claim. Parrish v. Uzzell, 41 N.C. App. 479, 255 S.E.2d 219 (1979).

"Second dismissal" rule does not make voluntary dismissals by stipulation or order of court "on the merits," even though preceded by a prior voluntary dismissal, although, of course, the stipulation itself or the order of the judge can provide that the dismissal is with prejudice, whether or not there has been a prior dismissal effected by the filing of a notice. Parrish v. Uzzell, 41 N.C. App. 479, 255 S.E.2d 219 (1979).

The "second dismissal" rule does not apply to make voluntary dismissals by stipulation or by order of court "on the merits," even when they follow a previously filed notice of voluntary dismissal. North Carolina R.R. v. Ferguson Bldrs. Supply, 103 N.C. App. 768, 407 S.E.2d 296 (1991).

Institution of New Claim Allowed Within One Year After Voluntary Dismissal Without Prejudice. — Under this rule, a voluntary dismissal without prejudice allows a new action on the same claim to be instituted within one year. Webb v. Nolan, 361 F. Supp. 418 (M.D.N.C. 1972), aff'd, 484 F.2d 1049 (4th Cir. 1973), appeal dismissed, 415 U.S. 903, 94 S. Ct. 1397, 39 L. Ed. 2d 461 (1974).

When a party properly takes a first voluntary dismissal of an action filed within the statute of limitations, that party then has one year to refile the same action, even though the refiling may be beyond the general statute of limitations. Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

The plaintiffs' voluntary dismissal pursuant to this section effectively extended the statute of limitations by allowing plaintiffs to refile their good faith medical malpractice complaint against defendants within one year, even though the original complaint lacked a Rule 9(j) certification. Brisson v. Kathy A. Santoriello, M.D., P.A., 351 N.C. 589, 528 S.E.2d 568 (2000).

Dismissal of an administratrix's second medical malpractice complaint filed after her earlier malpractice complaint was voluntarily dismissed was error because there was no evidence that the initial complaint's N.C. R. Civ. P. 9(j) certification was insufficient; the administratrix had an absolute right under N.C. R. Civ. P. 41(a)(1) to dismiss the original action and re-file her claim within one year, regardless of whether there had been a ruling on her G.S. 8C-1, N.C. R. Evid. 702(e) motion to qualify the witness she used for the certification of her original complaint as an expert. The fact that the second complaint relied on Rule 9(j)(1) instead of Rule 9(j)(2) did not give rise to an inference that the administratrix did not reasonably expect her expert for the first certification to qualify. Ford v. McCain, — N.C. App. —, 666 S.E.2d 153, 2008 N.C. App. LEXIS 1657 (2008).

The one-year limitation period within which plaintiff might have renewed her claim under subdivision (a)(1) commenced on the date plaintiff's counsel stated in open court that he intended to file notice of voluntary dismissal and not five days later when voluntary dismissal was filed. Baker v. Becan, 123 N.C. App. 551, 473 S.E.2d 413 (1996).

Second Complaint Not Barred by Statute of Limitations. — Where there was no evidence of record that plaintiff's sole intent in filing the first complaint was to dismiss it in order to gain another year in which to file a "sufficient" complaint, plaintiff waited over two months to dismiss his original complaint and there was no judicial admission that plaintiff filed and dismissed his first complaint in bad faith, the "savings" provision of subdivision (a)(1) properly applied to plaintiff's complaint so that his second complaint was not barred by the statute of limitations. Hawkins v. State, 117 N.C. App. 615, 453 S.E.2d 233, cert. dismissed as improvidently granted, 342 N.C. 188, 463 S.E.2d 79 (1995).

In a medical malpractice case, the trial court erred in granting the doctor and hospital's motions for judgment on the pleadings and denying the injured party's motion to set aside the dismissal where the injured party filed the case on the last day of a 120-day extension filed an amended complaint containing the expert testimony certification, voluntarily dismissed the action and later refiled the complaint; the statute of limitations for malpractice actions under G.S. 1-15(1c) had not run, because the original complaint was timely filed, and the first action was properly dismissed without prejudice and properly re-filed within a year. Bass v. Durham County Hosp. Corp., 158 N.C. App. 217, 580 S.E.2d 738, 2003 N.C. App. LEXIS 1044 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

Trial court erred in granting the seller's motion to dismiss in a case where the buyer sued the seller under multiple theories arising out of the sale of a log home package, after the parties had settled their dispute during trial, after the trial court had instructed them to file a stipulation of voluntary dismissal by a particular date, after they filed a stipulation on that date, and the buyer filed a complaint for breach of the settlement agreement and a second complaint stating his original causes of action; the one-year statute of limitations for refiling did not bar the buyer's second complaint because he filed it within one year of the date that the trial court directed the written stipulation of voluntary dismissal be filed, and, thus, the one-year refiling period began to run from that date and not the earlier date on which the buyer announced in open court that he intended to file an involuntary dismissal. Keyzer v. Amerlink, Ltd., 164 N.C. App. 761, 596 S.E.2d 878, 2004 N.C. App. LEXIS 1138 (2004).

Re-filed Suit Barred By Statute of Limitations. — Trial court properly dismissed an estate's medical malpractice suit against the hospital defendants, the medical practice defendants, and a doctor where a first complaint that was voluntarily dismissed did not contain a G.S. 1A-1, N.C. R. Civ. P. 9(j) certification, and the re-filed complaint was filed after the statute of limitations expired and the 120-day extension, if it had been sought, would have expired; there was no expert review prior to the commencement of the original action, which was contrary to the North Carolina legislature's intent in enacting Rule 9(j). Estate of Barksdale v. Duke Univ. Med. Ctr., 175 N.C. App. 102, 623 S.E.2d 51, 2005 N.C. App. LEXIS 2753 (2005).

Summary judgment in favor of a doctor in an executrix's refiled malpractice case was proper because, although the original complaint contained the required G.S. 1A-1-9(j) expert certification, the executrix admitted in discovery that she had not consulted with her expert until nearly seven months after the filing of her complaint, and thus the allegation in her original complaint was ineffective to meet the requirements of G.S. 1A-1-9(j); therefore, voluntary dismissal of the original complaint did not toll the statute of limitations and the refiled complaint was untimely. Winebarger v. Peterson, 182 N.C. App. 510, 642 S.E.2d 544, 2007 N.C. App. LEXIS 691 (2007).

Invasion of privacy claim was barred by the three-year statute of limitations under G.S. 1-52(5) as an employee first filed a complaint against an employer in 2003 or 2004, but the complaint was voluntarily dismissed and the invasion of privacy claim was not made until the complaint was re-filed in 2005, and the objectionable statements were made in December 2001 and early to mid-January 2002; the G.S. 1A-1-41(a) tolling of the applicable statute of limitations applied only to the claims in the original complaint and not to other causes of action that might arise out of the same set of operative facts. Losing v. Food Lion, L.L.C., 185 N.C. App. 278, 648 S.E.2d 261, 2007 N.C. App. LEXIS 1704 (2007), cert. denied, 362 N.C. 236, 659 S.E.2d 735 (2008).

Defective service in the alleged accident victims' original negligence action under G.S. 1A-1 and N.C. R. Civ. P. 4 resulted in the victims' subsequent refiled action, despite the voluntary dismissal by the victims of the original action under G.S. 1A-1 and N.C. R. Civ. P. 41(a) being brought after the statute of limitations under G.S. 1-52(16) ran. Camara v. Gbarbera, 191 N.C. App. 394, 662 S.E.2d 920, 2008 N.C. App. LEXIS 1325 (2008).

Medical Malpractice Complaint Had to Comply with G.S. 1A-1, N.C. R. Civ. P. 9(j). — Estate's claim that at the time its original complaint was filed, it was not required to comply with G.S. 1A-1, N.C. R. Civ. P. 9(j) under Anderson v. Assimos, 553 S.E.2d 63 (2001), was rejected because: (1) the North Carolina Supreme Court vacated the ruling in Anderson to the extent that it concluded that Rule 9(j) was unconstitutional before the estate voluntarily dismissed its complaint, (2) once the North Carolina Supreme Court's decision became controlling, the estate was required to comply with Rule 9(j), and (3) the estate had the opportunity to amend its complaint to include the Rule 9(j) certification and to have the amendment relate back to the original filing date, but it did not do so. Estate of Barksdale v. Duke Univ. Med. Ctr., 175 N.C. App. 102, 623 S.E.2d 51, 2005 N.C. App. LEXIS 2753 (2005).

Plaintiff conceded that summary judgment was proper on plaintiff's Fair Credit Reporting Act (FCRA), 15 U.S.C.S. § 1681 et seq., claim; as for plaintiff's FCRA claim under 15 U.S.C.S. §§ 1681n and 1681o, plaintiff conceded that the two-year statute of limitations under 15 U.S.C.S. § 1681p barred her claim. Plaintiff also conceded that the savings provision of N.C. R.Civ. P. 41, G.S. 1A-1 did not extend the statute of limitations for her FCRA claim. Ross v. Wash. Mut. Bank, 566 F. Supp. 2d 468, 2008 U.S. Dist. LEXIS 51060 (E.D.N.C. 2008).

Failure to Refer to Rule Inconsequential. — A voluntary dismissal taken by plaintiff in an earlier action without prejudice need not refer to this rule in order to gain the rule's benefit of a one year extension within which to file the same lawsuit. As this rule is the only procedural rule which addresses voluntary dismissals, no confusion as to the effect of the dismissal could possibly result from this omission. Bradley Freight Lines v. Pope, Flynn & Co., 42 N.C. App. 285, 256 S.E.2d 522, cert. denied, 298 N.C. 295, 259 S.E.2d 299 (1979).

Tolling Provisions of Former § 1-25 Incorporated into Section (a). — The tolling provisions of former G.S. 1-25, under which plaintiff had the right to bring an unlimited series of actions based on the same claim provided that he brought each new action within one year of dismissal of the immediately preceding action, was incorporated into section (a) of this rule. Parrish v. Uzzell, 41 N.C. App. 479, 255 S.E.2d 219 (1979).

One-Year Provision Extends Rather Than Restricts Statute of Limitation. — When the General Assembly adopted the provisions of former G.S. 1-25 into subsection (a)(1) of this rule, it adopted also that body of case law interpreting the former section, the effect being that the provision of subsection (a)(1) is an extension of time beyond the general statute of limitation rather than a restriction upon the general statute of limitation. Whitehurst v. Virginia Dare Transp. Co., 19 N.C. App. 352, 198 S.E.2d 741 (1973).

While a party always has the time limit prescribed by the general statute of limitation, and in addition thereto the one year provided in this rule, this rule may not be used to limit the time to one year if the general statute of limitation has not expired. Whitehurst v. Virginia Dare Transp. Co., 19 N.C. App. 352, 198 S.E.2d 741 (1973); Cieszko v. Clark, 92 N.C. App. 290, 374 S.E.2d 456 (1988).

But Party May Not Use Rule to Avoid Statute of Limitations. — This rule does not authorize a party to take a dismissal without prejudice of a previous action barred by the statute of limitations and then to refile the action in order to avoid the statute of limitations. Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp., 36 N.C. App. 778, 245 S.E.2d 234 (1978).

Voluntary Dismissal as Final Adjudication. — Once the one-year period for refiling an action has elapsed and the action can no longer be resurrected, the voluntary dismissal acts as a final adjudication for purposes of G.S. 1A-1, Rule 60(b). Robinson v. General Mills Restaurants, Inc., 110 N.C. App. 633, 430 S.E.2d 696, cert. granted, 334 N.C. 623, 435 S.E.2d 340, 435 S.E.2d 341 (1993).

Complaint Filed Solely to Toll Statute May Not Be Voluntarily Dismissed Without Prejudice. — A plaintiff may not file a complaint within the time permitted by the statute of limitations for the sole purpose of tolling the statute of limitations, but with no intention of pursuing the prosecution of the action, then voluntarily dismiss the complaint and thereby gain an additional year pursuant to subsection (a)(1) of this rule. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

Nor May Pleading in Violation of § 1A-1, Rule 11(a). — Subsection (a)(1) of this rule and G.S. 1A-1, 11(a) must be construed in pari materia to require that, in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year "extension" by way of a voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading, including G.S. 1A-1, Rule 11(a). A pleading filed in violation of G.S. 1A-1, Rule 11(a) should be stricken as "sham and false" and may not be voluntarily dismissed without prejudice in order to give the pleader the benefit of the "saving" provision of subsection (a)(1) of this rule. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

Where an action was discontinued by

operation of law under § 1A-1, Rule 4(e), the statute of limitations having thereafter immediately run its remaining course, the judge's subsequent order of voluntary dismissal allowing plaintiff another year within which to refile the action was nugatory. Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

Limitations Bar Not Avoided by Filing Federal Complaint. — A civil action is commenced in such a manner as to avoid a statute of limitations bar pursuant to this rule if, within the period of limitations prescribed, a plaintiff files "a complaint with the court"; hence, plaintiff's filing of a complaint in federal district court would be unavailing to prevent a statute of limitations bar in action brought in State court. Evans v. Chipps, 56 N.C. App. 232, 287 S.E.2d 426 (1982), overruled on other grounds, Fowler v. Valencourt, 334 N.C. 345, 432 S.E.2d 306 (1993).

When One-Year Period Begins to Run. — When a case has proceeded to trial and both parties are present in court, the one-year period in which a plaintiff is allowed to reinstitute a suit from subsection (a)(1) of this rule begins to run from the time of oral notice of voluntary dismissal given in open court. Danielson v. Cummings, 300 N.C. 175, 265 S.E.2d 161 (1980). But see Thompson v. Newman, 331 N.C. 709, 417 S.E.2d 224 (1992).

The one-year period for commencing another action after the taking of a voluntary dismissal began to run when plaintiff's counsel announced in open court the submission of a voluntary dismissal, the proceedings thereupon being stopped, and not when the written notice of dismissal was thereafter filed. Danielson v. Cummings, 43 N.C. App. 546, 259 S.E.2d 332 (1979), aff'd, 300 N.C. 175, 265 S.E.2d 161 (1980). But see Thompson v. Newman, 331 N.C. 709, 417 S.E.2d 224 (1992).

When a trial court instructs, or expressly permits, a plaintiff who has given oral notice of voluntary dismissal pursuant to subsection (a)(1) of this rule to file written notice to the same effect at a later date during the session of court at which oral notice was given, and plaintiff files written notice accordingly, the one-year period for refiling provided by the rule begins to run when written notice is filed. Thompson v. Newman, 331 N.C. 709, 417 S.E.2d 224 (1992).

Effect of Appeal by Defendant on One-Year Period. — Where plaintiff takes a voluntary dismissal under subsection (a)(2) of this rule and defendant appeals from that dismissal, plaintiff's one-year period to reinstitute his claim does not run from the taking of the dismissal in the trial court, but instead runs from the date of final appellate action. West v. G.D. Reddick, Inc., 302 N.C. 201, 274 S.E.2d 221 (1981).

Fraud Claim Not Exempt from Limitation of § 1-52. — Though a claim of fraud rested upon somewhat the same allegations that were made in support of a negligent misrepresentation claim when action was first filed, where the plaintiffs did not in effect or otherwise also allege that the defendants had defrauded them, this rule did not exempt the fraud claim from the fatal effects of the limitations period under G.S. 1-52. Stanford v. Owens, 76 N.C. App. 284, 332 S.E.2d 730, cert. denied, 314 N.C. 670, 336 S.E.2d 402 (1985).

Adequacy of Oral Notice of Dismissal. — Clearly, when parties confront each other face-to-face in a properly convened session of court where a written record is kept of all proceedings, there is no necessity to file a paper writing in order to take notice of a voluntary dismissal. In such a case, oral notice of dismissal is clearly adequate, and fully satisfies the "filing" requirements of subdivision (a)(1)(i) of this rule. Danielson v. Cummings, 300 N.C. 175, 265 S.E.2d 161 (1980).

While section (a) of this rule requires "filing a notice of dismissal," such notice may also be given orally in open court. Banner v. Banner, 86 N.C. App. 397, 358 S.E.2d 110, cert. denied, 320 N.C. 790, 361 S.E.2d 70 (1987), overruled on other grounds, Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Oral notice of a voluntary dismissal is effective and satisfies the requirements of this Rule. Gilliam v. First Union Nat'l Bank, 125 N.C. App. 416, 481 S.E.2d 334 (1997).

Attempt at Voluntary Dismissal Ineffectual Where Summons Never Served. — Where plaintiff's prior wrongful death action against defendants was discontinued when the original summons was never served on defendants and no alias or pluries summons was issued or endorsement made within the time specified in G.S. 1A-1, Rule 4(d), plaintiff's attempt to dismiss her prior action voluntarily pursuant to subsection (a)(1) of this rule was ineffectual to bring the provisions of this rule into play. Wheeler v. Roberts, 45 N.C. App. 311, 262 S.E.2d 829 (1980).

Attempt at Voluntary Dismissal Ineffectual Where Second Summons Did Not Relate Back to Original Summons Directed to Other Defendant. — Since the original summons was not directed to the corporation but to a different defendant, a later summons against the corporation did not relate back to the original summons, and since there was not a properly directed summons that was merely not served, G.S. 1A-1-4(d) did not apply and the later summons was not a valid alias or pluries summons; thus, service on the corporation fell outside of the authorized time and the case was not filed within the one year period required by G.S. 1A-1-41(a)(1). Stack v. Union Reg'l Mem'l Med. Ctr., Inc., 171 N.C. App. 322, 614 S.E.2d 378, 2005 N.C. App. LEXIS 1255 (2005), cert. denied, 360 N.C. 66, 621 S.E.2d 877 (2005).

The purpose of subsection (a)(2) of this rule is to permit a superior court judge in the exercise of his discretion to dismiss an action without prejudice if in his opinion an adverse judgment with prejudice would defeat justice. King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971).

Under subsection (a)(2) of this rule, at the instance of the plaintiff, the court may permit a voluntary dismissal upon such terms and conditions as justice requires. King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971).

Discretion of Trial Court Under Subsection (a)(2). — Whether an order granting voluntary dismissal under subsection (a)(2) of this rule should be entered is a matter of trial court discretion. West v. G.D. Reddick, Inc., 38 N.C. App. 370, 248 S.E.2d 112 (1978).

A dismissal under subsection (a)(2) of this rule is granted or denied solely within the discretion of the trial judge, and may be conditionally granted or granted upon such terms as justice requires. Lewis v. Piggott, 16 N.C. App. 395, 192 S.E.2d 128 (1972).

A dismissal without prejudice is permissible under subsection (a)(2) of this rule only when so ordered by the court, in the exercise of its judicial discretion, upon finding that justice so requires. King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971).

Dismissals entered pursuant to subsection (a)(2) of this rule are within the discretion of the trial court, which may, in the further exercise of its discretion, dismiss with or without prejudice. Smith v. Williams, 82 N.C. App. 672, 347 S.E.2d 842 (1986).

Consent of Counterclaiming Defendant Not Required Under Subsection (a)(2). — Contrary to the practice under subsection (a)(1) of this rule, and contrary to the language and practice under Federal Rule 41(a)(2), the consent of a counterclaiming defendant is not required for dismissals entered pursuant to subsection (a)(2) of this rule to be without prejudice. Smith v. Williams, 82 N.C. App. 672, 347 S.E.2d 842 (1986).

No Time Limit on Motion Under Subsection (a)(2). — This rule places no time limit on the right of a plaintiff to move for a voluntary dismissal under subsection (a)(2) of this rule. West v. G.D. Reddick, Inc., 38 N.C. App. 370, 248 S.E.2d 112 (1978).

Voluntary Dismissal After Defendant Moves for Directed Verdict. — Prior to granting the motion of the answering defendants for a directed verdict against plaintiffs and the entry of a judgment adverse to plaintiffs, plaintiffs are entitled to move, if so advised, that an order be entered providing for a voluntary dismissal upon such terms and conditions as justice requires. Whether such order should be entered will be addressed to the discretion of the superior court judge. King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971).

When a defendant's motion for a directed verdict under G.S. 1A-1, Rule 50(a) is granted, the defendant is entitled to judgment unless the court permits a voluntary dismissal of the action under subsection (a)(2) of this rule. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Court Lacked Jurisdiction After Plaintiff Files Timely Voluntary Dismissal. — Where plaintiff had a motion to amend his complaint pending before the trial court and, consequent to the defendants' motion to dismiss, filed a timely voluntary dismissal under subdivision (a)(1)(i) of this rule, and the trial court had before it matters outside the pleadings, the trial court did not have jurisdiction to dismiss plaintiff's complaint with prejudice pursuant to Rule 12(b)(6). Schnitzlein v. Hardee's Food Sys., 134 N.C. App. 153, 516 S.E.2d 891, 1999 N.C. App. LEXIS 679 (1999), cert. denied, 351 N.C. 109, 540 S.E.2d 365 (1999).

Motion Under § 1A-1, Rule 12(f) Not Proper to Challenge Notice of Dismissal Without Prejudice. — A motion to strike "any insufficient defense or any redundant, irrelevant, immaterial, impertinent or scandalous matter" under G.S. 1A-1, Rule 12(f) is not the proper motion by which to challenge a notice of dismissal without prejudice. Travelers Ins. Co. v. Ryder Truck Rental, Inc., 34 N.C. App. 379, 238 S.E.2d 193 (1977).

Federal Rule Does Not Supplant State Rule. — Federal Rule 41 does not purport to control the application of a state statute of limitations, and does not supplant state rule that is an integral part of the state's one-year savings statute. Thus, in a diversity action, plaintiff's complaint was properly dismissed where it was filed approximately one year and four months after leave was sought in open court to dismiss his original complaint, since one-year savings period starts to run when the plaintiff, prior to resting his case, announces in open court that he will seek a voluntary dismissal. Shuford v. K.K. Kawamura Cycle Co., 649 F.2d 261 (4th Cir. 1981).

As to adoption of one-year tolling provision in federal diversity action, see Haislip v. Riggs, 534 F. Supp. 95 (W.D.N.C. 1981).

Application of Standards Governing Dismissals Under Subsection (a)(2) to Mistrials. — The standards governing the granting of dismissals under subsection (a)(2) of this rule should also be applied in ascertaining whether a judge was warranted in declaring a mistrial "to further the ends of justice." Thompson v. Town & Country Constr. Co., 39 N.C. App. 240, 249 S.E.2d 810 (1978).

Plaintiff Held Entitled to Dismissal as No Longer a Real Party in Interest. — Where plaintiff sued a class of defendants pursuant to G.S. 1A-1, Rule 23, but thereafter lost her status as a real party in interest by conveying the property that was the subject of the suit and filed a notice of voluntary dismissal under section (a) of this rule, upon which the new owners were joined as plaintiffs, the trial judge should have dismissed the original plaintiff as no longer a real party in interest on that ground alone. Crowell v. Chapman, 306 N.C. 540, 293 S.E.2d 767 (1982).

Plaintiff Deemed Not to Have Rested in Summary Judgment Hearing. — Although the record reflected that plaintiffs submitted affidavits prior to the hearing as evidence in opposition to a summary judgment motion, where the trial court heard argument of counsel for the defendants and plaintiffs' attorney orally took a voluntary dismissal, without receiving an opportunity to present additional evidence or argue his clients' position, plaintiffs had not rested their case and the timing of plaintiffs' motion for a voluntary dismissal was proper under this rule. Wesley v. Bland, 92 N.C. App. 513, 374 S.E.2d 475 (1988).

Appeal De Novo from Magistrate's Judgment. — Subsection (a)(1) of this rule is available in actions in the district court on appeal de novo from a magistrate's judgment. First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

Subsection (a)(1) Not Subject to Provisions of § 7A-228. — The requirements of G.S. 7A-228 are not inconsistent with those of subsection (a)(1) of this rule. Section 7A-228 sets forth the right to appeal for trial de novo in district court and the procedures to perfect the appeal. Subsection (a)(1) of this rule sets forth the right to a voluntary dismissal and the procedures to effect the dismissal. Section 7A-228 does not address the same phase of the action as subsection (a)(1) of this rule; the rule is therefore not "subject to" the provisions of the statute. First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

Sections 7A-225 and 7A-226 Do Not Address Effect of Voluntary Dismissal. — Sections 7A-225 and 7A-226 merely establish priority of liens; the statutes do not address the effect of a voluntary dismissal in the district court. Subsection (a)(1) of this rule allows plaintiff to voluntarily dismiss the action without prejudice and G.S. 7A-225 and 7A-226 do not alter this right. First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

Res Judicata Inapplicable to Voluntary Dismissal of Appeal from Magistrate's Judgment. — Magistrate's judgment did not become a final judgment where, after the magistrate's judgment was entered, plaintiff exercised its right to appeal for trial de novo in the district court pursuant to G.S. 7A-228(a), and then took a voluntary dismissal of the action pursuant to section (a) of this rule. Therefore the doctrine of res judicata did not apply. First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

Voluntary Dismissal With Prejudice is Subject to Usual Rules of Res Judicata. — Where campground owners paid a county in full for landfill fees when faced with a suit for collection of those fees, the county's voluntary dismissal of the suit upon payment was res judicata to the owners' later challenge to the constitutionality of the landfill fees. Stafford v. County of Bladen, 163 N.C. App. 149, 592 S.E.2d 711, 2004 N.C. App. LEXIS 305 (2004), appeal dismissed sub nom. Stafford v. Bladen Co., cert. denied, 358 N.C. 545, 599 S.E.2d 409 (2004).

A stipulation of dismissal does not trigger the two dismissal rule; only a unilateral dismissal by plaintiff has this effect. Thus where defendant could have declined to enter into stipulation, thereby requiring plaintiff to conclude the matter in the first State action or take another voluntary dismissal, which, with regard to 42 U.S.C. § 1983 claim, would indisputably have been the second, but consented to the dismissal of some of these claims without prejudice, it would be inequitable to interpret the two dismissal rule in a fashion that would bar their refiling. Kuhn v. Williamson, 122 F.R.D. 192 (E.D.N.C. 1988).

Application of Two Dismissal Rule in Federal Actions. — North Carolina courts would likely treat causes of action based on 42 U.S.C. § 1983 and negligence as separate claims, arising as they do under different bodies of law and calling for different elements of proof, and would not apply this rule to bar plaintiff from proceeding with his action. Kuhn v. Williamson, 122 F.R.D. 192 (E.D.N.C. 1988).

Where federal pro se action was dismissed on the same day that an agent for defendants was served with complaint, it was likely that the case ended before defendant knew of its existence, and in reality, defendant had faced only two lawsuits, the first State action and this one; since the two dismissal rule is in derogation of previously existing right, and thus is to be strictly construed, dismissal of the action would be inappropriate. Kuhn v. Williamson, 122 F.R.D. 192 (E.D.N.C. 1988).

Applicability of Tolling Provision to Voluntary Dismissal in Federal Court. — Unlike former G.S. 1-25, section (a)(1) of this rule specifically holds that the savings provision applies when voluntary dismissal was granted "under this subsection." Thus a statute of limitations will be tolled when voluntary dismissal is granted pursuant to this rule, regardless of whether or not the dismissal is granted in a State court. Bockweg v. Anderson, 96 N.C. App. 660, 387 S.E.2d 59, cert. denied, 326 N.C. 481, 392 S.E.2d 86 (1990).

As the Fourth Circuit has stated that voluntary dismissal of a federal diversity action arising out of North Carolina will be granted pursuant to this rule because the one-year tolling provision confers a "substantive right" where there is "no countervailing federal interest," dismissal by federal district court would be deemed to have been granted under section (a) of this rule so as to trigger the one-year savings provision of section (a) for the purposes of refiling in State court. Bockweg v. Anderson, 96 N.C. App. 660, 387 S.E.2d 59, cert. denied, 326 N.C. 481, 392 S.E.2d 86 (1990).

Where former employee filed a non-diversity action for age discrimination against his former employer in federal court and then voluntarily dismissed the action, the trial court properly granted summary judgment to employer on the employee's later claim for wrongful discharge filed in state court, since the state action was filed outside the three-year statute of limitations and the one-year savings provision following a voluntary dismissal was not applicable to the state action. Renegar v. R.J. Reynolds Tobacco Co., 145 N.C. App. 78, 549 S.E.2d 227, 2001 N.C. App. LEXIS 550 (2001).

Refiling in Federal Court as Tolling of Limitations Period. — Plaintiff's claims for medical malpractice were not barred by the three-year statute of limitations of G.S. 1-15(c), since the refiling of the original State court action in a federal district court invoked the "savings" provision of subsection (a)(1) of this rule, and thereby tolled the limitations period. Porter v. Groat, 713 F. Supp. 893 (M.D.N.C. 1989).

Effect of Voluntary Dismissal of Torrens Proceeding. — Effect of plaintiffs' voluntary dismissal of Torrens proceeding was to toll the limitations period on defendants' adverse claim to the disputed property for the subsequent 12 months; when plaintiffs failed to bring a new action within that period, however, the limitations period continued to run from the point at which it had been tolled. Willis v. Mann, 96 N.C. App. 450, 386 S.E.2d 68 (1989), cert. denied, 326 N.C. 367, 389 S.E.2d 820 (1990).

Later Action to Be Considered Without Reference to Disposition of Prior Action. — Where plaintiff was granted a voluntary dismissal without prejudice to his original action, and then refiled his claim within the one-year time limit established by the statute, such refiling began his case anew for all purposes and was properly considered on its merits without reference to the disposition of the prior action; therefore, judge's ruling in the prior action did not foreclose judge in second proceeding from considering defendant's summary judgment motion in new action. Tompkins v. Log Sys., 96 N.C. App. 333, 385 S.E.2d 545 (1989), cert. denied, 326 N.C. 366, 389 S.E.2d 819 (1990).

Administrative Adjustment of Claims. — Once the conditions of G.S. 136-29(a) (administrative adjustment of claims) were satisfied by the claimant filing its claim within six months of an adverse ruling by the state highway administrator, the trial court was vested with jurisdiction and the claimant was allowed, as a matter of right under subsection (a)(1) of this rule, to take a voluntary dismissal and refile its claim within one year. C.W. Matthews Contracting Co. v. State, 75 N.C. App. 317, 330 S.E.2d 630 (1985).

Defendant Not Granted Voluntary Dismissal Absent Counterclaim. — There is no rule, statute, or case which grants a defendant the right to take a voluntary dismissal, whether with or without prejudice, unless the party defendant taking the dismissal has a pleading which contains a counterclaim, crossclaim, or third-party claim. DOT v. Combs, 71 N.C. App. 372, 322 S.E.2d 602 (1984).

Lien May Not Be Cancelled. — In light of the requirement of G.S. 44A-16(4) that a judgment must be filed to discharge a lien, a lien may not be cancelled by taking a voluntary dismissal without prejudice. Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

A party may refile an action to perfect a lien after taking a voluntary dismissal without prejudice pursuant to subsection (a)(1) of this rule. Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

Equitable Distribution Claim. — Where defendant sets up a claim for affirmative relief against a plaintiff arising out of the same transactions alleged by the plaintiff, plaintiff cannot take a voluntary dismissal without the consent of the defendant; however, plaintiff's original claim may be barred by law if the court finds that separation agreements fully disposed of the parties' rights arising out of the marriage, and thus bar an equitable distribution claim. Rabon v. Rabon, 102 N.C. App. 452, 402 S.E.2d 461 (1991).

Trial court did not have authority to reaffirm divorce decree and reserve for future resolution the issue of equitable distribution; since the trial court did not set aside the divorce but rather attempted to nullify the consequences of defendant's failure to assert her claim for equitable distribution prior to the entry of judgment of divorce, the order failed; even if the court effectively set aside, briefly, the divorce decree itself and then immediately reinstated the divorce decree with a reservation of an equitable distribution claim, the reservation of the equitable distribution claim would be a legal nullity because plaintiff voluntarily dismissed his equitable distribution claim and defendant did not, during the time the divorce was arguably set aside, file an answer, counterclaim or separate action requesting equitable distribution. Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Where at the time the plaintiff filed his voluntary dismissal of his claim for equitable distribution, the defendant had filed no pleadings, plaintiff was free to enter his voluntary dismissal of his equitable distribution claim without any notice to the defendant or the defendant's consent. Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991).

Attorneys' Fees. — Where the plaintiffs filed a voluntary dismissal with prejudice pursuant to this rule, the trial court was not deprived of jurisdiction to determine the appropriateness of attorney fees under G.S. 1A-1, Rule 11 or G.S. 6-21.5. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Collateral Issues. — Attorneys' fee requests under G.S. 1A-1, Rule 11 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under this rule does not deprive the trial court of jurisdiction to determine these collateral issues. Higgins v. Patton, 102 N.C. App. 301, 401 S.E.2d 854 (1991), overruled on other grounds, Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992).

Attorneys' fee requests under G.S. 1A-1, Rule 11 and G.S. 6-21.5 raise collateral issues which often require consideration by the trial court after the action has been terminated, and a voluntary dismissal under this rule does not deprive the trial court of jurisdiction to determine these collateral issues. To hold otherwise would allow a litigant or attorney to "purge his violation of G.S. 1A-1, Rule 11 or G.S. 6-211.5 merely by taking a dismissal, and thereby lose all incentive to stop, think and investigate more carefully before serving and filing papers." Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

A voluntary dismissal pursuant to subsection (a) does not deprive the court of jurisdiction to consider collateral issues such as sanctions that require consideration after the action has been terminated. Renner v. Hawk, 125 N.C. App. 483, 481 S.E.2d 370 (1997), cert. denied, 346 N.C. 283, 487 S.E.2d 553 (1997).

Rescission Offer. — Judgment that simply made the bare conclusion that an investment firm tendered a "valid" rescission offer and that, therefore, the investor was barred from bringing suit under the provisions of subdivision (g)(1) of G.S. 78A-56 did not rise to the level of separate findings of fact and conclusions of law; the judgment, therefore, did not comport with the requirements of this rule and G.S. 1A-1, Rule 52(a). Mashburn v. First Investors Corp., 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Court Costs. — Where plaintiff takes a voluntary dismissal pursuant to this rule, no suit is pending thereafter on which the court could make a final order. However, the trial court retains authority to apportion and tax court costs. Bryson v. Sullivan, 102 N.C. App. 1, 401 S.E.2d 645 (1991), modified on other grounds, 330 N.C. 644, 412 S.E.2d 327 (1992).

Sanctions Following Dismissal. — Absent a rule to the contrary, sanctions motions may appropriately be filed after a voluntary dismissal. Renner v. Hawk, 125 N.C. App. 483, 481 S.E.2d 370 (1997), cert. denied, 346 N.C. 283, 487 S.E.2d 553 (1997).

Review of Sanctions Following Dismissal. — Fact that plaintiffs voluntarily dismissed their claims against city did not preclude the appellate court from reviewing the grant of defendants' motion for sanctions against plaintiffs' counsel under G.S. 1A-1, Rule 11. Johnson v. Harris, 149 N.C. App. 928, 563 S.E.2d 224, 2002 N.C. App. LEXIS 383 (2002).

Savings Provision. — The one-year savings provision of subdivision (a)(1) of this rule applies when plaintiffs and defendants stipulate to a voluntary dismissal without prejudice of an action in a federal district court sitting in North Carolina and plaintiffs file the same action within the one-year period in a North Carolina state court. Bockweg v. Anderson, 328 N.C. 436, 402 S.E.2d 627 (1991).

Savings Provision Preserves Derivative Claims. — Plaintiff's additional claim for punitive damages could be made for the first time pursuant to the savings provision of this rule more than a year after the statute of limitations expired because it was derivative of the original claims, violation of civil rights and loss of consortium. Staley v. Lingerfelt, 134 N.C. App. 294, 517 S.E.2d 392, 1999 N.C. App. LEXIS 763 (1999), cert. denied, 351 N.C. 109, 540 S.E.2d 367 (1999).

Plaintiff's additional claim for piercing the corporate veil could be made for the first time pursuant to the savings provision of G.S. 1A-1, N.C. R. Civ. P. 41 more than a year after the statute of limitations expired because it was derivative of the original negligence claim; therefore, its filing date related back to the original filing date, and made the current claim timely. Strawbridge v. Sugar Mt. Resort, Inc., 243 F. Supp. 2d 472, 2003 U.S. Dist. LEXIS 1513 (W.D.N.C. 2003).

Savings Provision Cannot Preserve Non-Derivative Claims. — Plaintiff's additional claims of assault and battery, false arrest and imprisonment, malicious prosecution, intentional infliction of emotional distress, negligent infliction of emotional distress, trespass by a public officer and violations of the North

Carolina constitution could not be made for the first time pursuant to the savings provision of this rule more than a year after the statute of limitations expired because they were not derivative of the original claims, namely, violation of civil rights and loss of consortium. Staley v. Lingerfelt, 134 N.C. App. 294, 517 S.E.2d 392, 1999 N.C. App. LEXIS 763 (1999), cert. denied, 351 N.C. 109, 540 S.E.2d 367 (1999).

Husband and wife's additional claim for violation of the Uniform Fraudulent Claims Act, G.S. 39-23.1 could not be made for the first time pursuant to the savings provision of G.S. 1A-1, N.C. R. Civ. P. 41 more than a year after the statute of limitations expired because they were not derivative of the original claims for negligence. Strawbridge v. Sugar Mt. Resort, Inc., 243 F. Supp. 2d 472, 2003 U.S. Dist. LEXIS 1513 (W.D.N.C. 2003).

After Voluntary Dismissal with Prejudice, Specific Performance of Settlement Agreement Could Not Be Ordered. — Once the deputy voluntarily dismissed his claims with prejudice, he no longer had the option of seeking to specifically enforce the settlement agreement in the original action; therefore, the trial court erred in ordering specific performance of the settlement agreement based upon the deputy's motion for sanctions. Estate of Barber v. Guilford County Sheriff's Dep't, 161 N.C. App. 658, 589 S.E.2d 433, 2003 N.C. App. LEXIS 2256 (2003).

Where plaintiff took a voluntary dismissal and re-filed his personal injury claim within the time permitted by subsection (a), his spouse had the right to join with it her derivative cause of action for loss of consortium. Sloan v. Miller Bldg. Corp., 128 N.C. App. 37, 493 S.E.2d 460 (1997).

Action against insurer was not barred by the injured party's voluntary dismissal of claims against the insurer where the claims in the first action were based in tort but the claims in the subsequent action were based in contract and unfair insurance practices arising from the failure to satisfy another state's judgment. Sawyers v. Farm Bureau Ins. Co. of N.C., Inc., 170 N.C. App. 17, 612 S.E.2d 184, 2005 N.C. App. LEXIS 893 (2005).

Effect on Subsequent Prejudgment Interest Award. — Superior court's prejudgment interest award was erroneous and violated G.S. 24-5(b) because the court awarded interest beginning with the date that the suit was originally filed: (1) under G.S. 24-5(b), plaintiff was entitled to prejudgment interest only for the period of time that his suit was pending prior to a judgment being entered in his favor; (2) plaintiff had voluntarily dismissed his original complaint a year after he filed it, and he had not refiled his suit until a year after that; and (3) the case was not pending, for purposes of awarding prejudgment interest under G.S. 24-5(b) before plaintiff refiled it as permitted by N.C. R. Civ. P. 41. Brookshire v. N.C. DOT, DMV, 180 N.C. App. 670, 637 S.E.2d 902, 2006 N.C. App. LEXIS 2513 (2006).

Dismissal Allowed. — Where plaintiff/husband had filed no reply and there was no other pending matter before the court, wife/defendant was free to file her voluntary dismissal of permanent alimony counterclaim without permission of the court or notice to plaintiff. Riviere v. Riviere, 134 N.C. App. 302, 517 S.E.2d 673 (1999).

Dismissal Not Allowed. — Where plaintiff attempted to dismiss her counterclaim, in action which sought enforcement of the parties' separation agreement after defendant had replied and sought affirmative relief arising out of the same transaction, plaintiff's counterclaim could not be dismissed because plaintiff had not moved to strike parts of defendants reply in 10 years. Lafferty v. Lafferty, 125 N.C. App. 611, 481 S.E.2d 401 (1997), cert. denied, 346 N.C. 280, 487 S.E.2d 549 (1997).

III. INVOLUNTARY DISMISSAL.

A. In General.

Section (b) of this section is identical to the federal rule. Joyner v. Thomas, 40 N.C. App. 63, 251 S.E.2d 906 (1979); Daniels v. Montgomery Mut. Ins. Co., 81 N.C. App. 600, 344 S.E.2d 847 (1986), rev'd in part, aff'd in part, 320 N.C. 669, 360 S.E.2d 772 (1987).

The Savings Provision. — The section (b) language by which the judge may, in his discretion, grant plaintiff an additional one year or less to refile is often referred to as the "savings provision" of Rule 41(b). 84 Lumber Co. v. Barkley, 120 N.C. App. 271, 461 S.E.2d 780 (1995).

Generally, if a plaintiff wishes to take advantage of the savings provision under section (b) it is plaintiff's responsibility to convince the court to include in the order or opinion a statement specifying that plaintiff had additional time to refile. 84 Lumber Co. v. Barkley, 120 N.C. App. 271, 461 S.E.2d 780 (1995).

Section 1A-1, Rule 4(e) and section (b) of this rule are not in conflict, and both can be given effect. Gower v. Aetna Ins. Co., 13 N.C. App. 368, 185 S.E.2d 722, aff'd, 281 N.C. 577, 189 S.E.2d 165 (1972).

Discontinuance under § 1A-1, Rule 4(e) is not analagous to a dismissal under section (b) of this rule. Central Sys. v. General Heating & Air Conditioning Co., 48 N.C. App. 198, 268 S.E.2d 822, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

The fact that an action was discontinued under G.S. 1A-1, Rule 4(e) for failure to serve defendant with summons within the time allowed after plaintiff had taken a voluntary dismissal under this rule did not bar plaintiff from bringing another action for the same cause. Central Sys. v. General Heating & Air Conditioning Co., 48 N.C. App. 198, 268 S.E.2d 822, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

Section 1A-1, Rule 50 has no application to trials before the judge without a jury. In actions tried before the judge without a jury a motion to dismiss is made pursuant to section (b) of this rule. Crump v. Coffey, 59 N.C. App. 553, 297 S.E.2d 131 (1982).

In the landlord and tenant dispute where there was no jury trial, the trial court erroneously granted a directed verdict under G.S. 1A-1-50 in favor of the landlord; in such cases, involuntary dismissal under G.S. 1A-1-41(b) was the appropriate method for disposing of the case. Dean v. Hill, 171 N.C. App. 479, 615 S.E.2d 699, 2005 N.C. App. LEXIS 1275 (2005).

Section (b) of this rule means that the court may not dismiss an action ex mero motu for failure to prosecute. Simmons v. Tuttle, 70 N.C. App. 101, 318 S.E.2d 847 (1984).

Involuntary Dismissal May Be Used to Sanction Disobedient Parties. — The power to sanction disobedient parties, even to the point of dismissing their actions or striking their defenses, did not originate with this rule. It is longstanding and inherent. For courts to function properly, it could not be otherwise. Minor v. Minor, 62 N.C. App. 750, 303 S.E.2d 397 (1983).

Under subsection (b) of this rule, a trial court may enter sanctions for failure to prosecute only where the plaintiff or his attorney "manifests and intention to thwart the progress of the action to its conclusion" or "fails to progress the action towards its conclusion" by engaging in some delaying tactic. Whether a plaintiff or his attorney has manifested an intent to thwart the progress of an action or has engaged in some delaying tactic may be inferred from the facts surrounding the delay in the prosecution of the case. The sanctions may be entered against either the represented party or the attorney, even when the attorney is solely responsible for the delay or violation. Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

As to use of power of dismissal as sanction for violation of provision of § 1A-1, Rule 8(a)(2) as to pleading of malpractice damages, see Schell v. Coleman, 65 N.C. App. 91, 308 S.E.2d 662 (1983), appeal dismissed and cert. denied, 311 N.C. 763, 321 S.E.2d 145 (1984).

Although a dismissal with prejudice pursuant to subsection (b) is available as a sanction for a violation of subdivision (a)(2), it is not the only available sanction and should be imposed only where the trial court determines that less drastic sanctions are insufficient. McLean v. Mechanic, 116 N.C. App. 271, 447 S.E.2d 459 (1994), review denied, 339 N.C. 738, 454 S.E.2d 654, cert. denied, 339 N.C. 738, 454 S.E.2d 653 (1995).

Function of Judge. — Since the court will determine the facts anyway, the function of the judge on a motion to dismiss under subsection (b) of this rule is to evaluate the evidence without any limitations as to inferences in favor of the plaintiff. Holthusen v. Holthusen, 79 N.C. App. 618, 339 S.E.2d 823 (1986); C.F.R. Foods, Inc. v. Randolph Dev. Co., 107 N.C. App. 584, 421 S.E.2d 386, cert. denied.

When a motion to dismiss pursuant to section (b) of this rule is made, the judge becomes both judge and jury, and he must consider and weigh all competent evidence before him. Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis, 86 N.C. App. 51, 356 S.E.2d 372 (1987); C.F.R. Foods, Inc. v. Randolph Dev. Co., 107 N.C. App. 584, 421 S.E.2d 386, cert. denied.

Discretion of Court. — Dismissal under section (b) of this rule is left to the sound discretion of the trial court. Smith v. Quinn, 91 N.C. App. 112, 370 S.E.2d 438 (1988), rev'd on other grounds, 324 N.C. 316, 378 S.E.2d 28 (1989).

Section (b) of this rule provides the basis for concluding that dismissal under § 1A-1, Rule 12(b)(6) is an adjudication on the merits; therefore, dismissal under G.S. 1A-1, Rule 12(b)(6) bars subsequent relitigation of the same claim. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

There is no exception under section (b) of this rule for filing beyond the limitations period for a plaintiff whose prior action was dismissed by an order and judgment which did not specify that a subsequent action could be commenced within one year. Burgess v. Equilink Corp., 652 F. Supp. 1422 (W.D.N.C.), aff'd, 828 F.2d 17 (4th Cir. 1987).

Where the first dismissal order did not specify additional time within which a second action could be commenced, the dismissal under section (b) of this rule did not extend any applicable statute of limitation. Jarman v. Washington, 93 N.C. App. 76, 376 S.E.2d 252 (1989).

The savings provision of subsection (b) did not apply to allow plaintiff an additional year to file in state court when the federal court order dismissing his action did not specify additional time within which to file. Clark v. Velsicol Chem. Corp., 110 N.C. App. 803, 431 S.E.2d 227, cert. granted, 334 N.C. 687, 436 S.E.2d 371 (1993), aff'd per curiam, 336 N.C. 599, 444 S.E.2d 223 (1994).

Dismissals Are Generally with Prejudice Absent Order of Trial Court. — With certain exceptions, section (b) of this rule provides that all dismissals, including those under G.S. 1A-1, Rule 12(b)(6), operate as an adjudication upon the merits unless the trial court specifies that the dismissal is without prejudice. Johnson v. Bollinger, 86 N.C. App. 1, 356 S.E.2d 378 (1987).

Burden of Moving for Dismissal Without Prejudice. — Since a dismissal order operates as an adjudication on the merits unless the order specifically states the contrary, the party whose claim is being dismissed has the burden to convince the court that he deserves a second chance; thus, that party should move the trial court that the dismissal be without prejudice. Johnson v. Bollinger, 86 N.C. App. 1, 356 S.E.2d 378 (1987).

When Involuntary Dismissal Under Section (b) Is Without Prejudice. — Ordinarily, an involuntary dismissal under section (b) of this rule operates as an adjudication upon the merits and ends the lawsuit. However, the rule sets forth specific exceptions to this proposition, and as to these grounds, an order of involuntary dismissal is not rendered on the merits and may not constitute a dismissal with prejudice. Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985).

Dismissal with prejudice under section (b) of this rule cannot be premised on party's failure to comply with erroneous order. In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (1985).

Motion to Dismiss Provides Procedure to Render Judgment Against Plaintiff. — A motion for dismissal pursuant to this rule, made at the close of plaintiff's evidence in a non-jury trial, not only tests the sufficiency of plaintiff's proof to show a right to relief, but also provides a procedure whereby the judge may weigh the evidence, determine the facts, and render judgment on the merits against the plaintiff, even though the plaintiff may have made out a prima facie case. McKnight v. Cagle, 76 N.C. App. 59, 331 S.E.2d 707, cert. denied, 314 N.C. 541, 335 S.E.2d 20 (1985).

Dismissal as to One of Several Necessary Defendants Held Error. — Where questions of law and fact were raised by the complaint which were common to all of the named defendants, and a justiciable controversy was asserted between the parties, and the complaint alleged that one of the defendants was a permissive and necessary party in the action, the trial judge committed error in allowing the motion of that defendant to dismiss the action as to her under section (b) of this rule. First-Citizens Bank & Trust Co. v. Carr, 10 N.C. App. 610, 179 S.E.2d 838, rev'd on other grounds, 279 N.C. 539, 184 S.E.2d 268 (1971).

The words "with prejudice" are plain and should be given their plain meaning. Barnes v. McGee, 21 N.C. App. 287, 204 S.E.2d 203 (1974).

A dismissal "with prejudice" is the converse of a dismissal "without prejudice" and indicates a disposition on the merits. Barnes v. McGee, 21 N.C. App. 287, 204 S.E.2d 203 (1974).

Dismissal with Prejudice Is Subject to Usual Rules of Res Judicata. — Dismissal with prejudice, unless the court has made some other provision, is subject to the usual rules of res judicata and is effective not only on the immediate parties but also on their privies. Barnes v. McGee, 21 N.C. App. 287, 204 S.E.2d 203 (1974).

Dismissal with prejudice pursuant to a motion under section (b) of this rule is a judgment on the merits, subject to the usual rules of res judicata. Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis, 86 N.C. App. 51, 356 S.E.2d 372 (1987).

A dismissal with prejudice precludes subsequent litigation to the same extent as if the action had been prosecuted to a final adjudication adverse to the plaintiff. Barnes v. McGee, 21 N.C. App. 287, 204 S.E.2d 203 (1974).

Dismissal of plaintiff's claim against defendant employee "with prejudice" barred further prosecution of that claim against the employee and, insofar as he was concerned, was equivalent to a judgment on the merits in his favor; the dismissal would have the same result for the employer whose liability, if any, was derived solely from that of the employee. Barnes v. McGee, 21 N.C. App. 287, 204 S.E.2d 203 (1974).

Where order of the federal district court dismissed plaintiff's action primarily for the failure of his federal question claims, and did not elaborate on his State law claims, and plaintiff, although he had ample opportunity to seek an amendment of the order to specify that the dismissal of the State law claims was without prejudice and that a new action based on those claims could be brought within one year pursuant to section (b) of this rule, did not properly seek amendment of the order to comply with the criterion of section (b) of this rule, his failure to do so took his claims out of the saving clause thereof, so that his State claims were time-barred by the applicable statutes of limitations. Burgess v. Equilink Corp., 652 F. Supp. 1422 (W.D.N.C.), aff'd, 828 F.2d 17 (4th Cir. 1987).

Judge May Consider Motion at Conclusion of Plaintiff's Evidence. — The trial judge may weigh the evidence, find the facts and sustain defendant's motion under section (b) of this rule at the conclusion of plaintiff's evidence even though plaintiff has made out a prima facie case which would have precluded a directed verdict for defendant in a jury trial. Childers v. Hayes, 77 N.C. App. 792, 336 S.E.2d 146 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

Motion at Close of All Evidence. — Where the court sits as finder of fact, if it allows a motion under section (b) of this rule it must find facts just as it would in entering judgment without allowing the motion. There is therefore little point in making such a motion at the close of all the evidence. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Motion to Dismiss Improper. — In a jury trial the defendant's motion to dismiss was improper, as was the court's granting of the motion. Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995).

Dismissal at Close of Evidence. — Section (b) of this rule does not specifically provide for involuntary dismissal at the close of all the evidence. However, where such a motion is made and ruled upon and the court has made findings as required by G.S. 1A-1, Rule 52, the judgment entered will be treated as a judgment on the merits. African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 649 (1984).

Findings of Fact and Conclusions of Law. — As a fact-finder, the trial judge, in ruling on a motion for involuntary dismissal, must find the facts on all issues raised by the pleadings, and state his conclusions of law based thereon, in order that appellate court may determine from the record the basis of his decision. The findings of fact are conclusive on appeal if supported by competent evidence. McKnight v. Cagle, 76 N.C. App. 59, 331 S.E.2d 707, cert. denied, 314 N.C. 541, 335 S.E.2d 20 (1985).

When a motion under section (b) of this rule is made in a nonjury trial, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. Childers v. Hayes, 77 N.C. App. 792, 336 S.E.2d 146 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

Where the record did not reveal any request by former wife that the trial court make findings of fact and conclusions of law, the former wife's assignment of error asserting that the trial court failed to make those findings and conclusions in dismissing her action was overruled. Elliott v. Estate of Elliott, 163 N.C. App. 577, 596 S.E.2d 819, 2004 N.C. App. LEXIS 512 (2004), cert. denied, 358 N.C. 731, 601 S.E.2d 530 (2004).

Findings Required. — The appellate court would treat a motion for a directed verdict made pursuant to Rule 50(a) as a Rule 41(b) motion, because the motion was made in a bench trial, and would reverse the trial court's order dismissing the plaintiff's claim for unfair and deceptive trade practices because the court failed to make the required findings. Hill v. Lassiter, 135 N.C. App. 515, 520 S.E.2d 797, 1999 N.C. App. LEXIS 1148 (1999).

Trial court's involuntary dismissal of an animal rights organization's lawsuit against a private agency was reversed and remanded for the trial court to make proper findings under G.S. 19A-1(2) of the North Carolina Protection of Animals Statutes, to determine whether the agency's testing of cats and euthanization practices constituted unjustifiable pain, suffering, or death. Justice for Animals, Inc. v. Lenoir County SPCA, Inc., 168 N.C. App. 298, 607 S.E.2d 317, 2005 N.C. App. LEXIS 254 (2005).

Authority to Dismiss in Absence of Motion. — The trial judge has the authority to dismiss a claim pursuant to section (b) of this rule in the absence of a motion by the defendant to do so. Blackwelder Furn. Co. v. Harris, 75 N.C. App. 625, 331 S.E.2d 274 (1985).

Whether a judge may dismiss a claim pursuant to section (b) of this rule depends on the facts and circumstances surrounding the particular case. Blackwelder Furn. Co. v. Harris, 75 N.C. App. 625, 331 S.E.2d 274 (1985).

Dismissal with Prejudice Upheld. — The trial court did not abuse its discretion in dismissing plaintiff's action with prejudice where the court gave plaintiff an opportunity to amend his complaint or to offer evidence, and plaintiff declined. Mumford v. Hutton & Bourbonnais Co., 47 N.C. App. 440, 267 S.E.2d 511 (1980).

Trial judge did not abuse his discretion in dismissing the borrowers' declaratory judgment action against a lender with prejudice, rather than without prejudice under G.S. 1A-1-41(b), because the trial judge's dismissal of the action with prejudice was not manifestly unsupported by reason. Trent v. River Place, LLC, 179 N.C. App. 72, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006).

Dismissal of a passenger's claim against an estate based on a decedent's ownership of an auto involved in an accident was proper because the claim against the driver was a claim against an agent, and, since the driver was named as a party, proper service was required; since the summons as to the driver was allowed to lapse and the statute of limitations had since run, the driver had no liability to impute to the estate. Therefore, neither the driver nor the estate could have been determined judicially to have been negligent, and the passenger's cause of action against the estate failed. Atkinson v. Lesmeister, 186 N.C. App. 442, 651 S.E.2d 294, 2007 N.C. App. LEXIS 2203 (2007).

Dismissal for Failure to Join Party Is Not on Merits. — Dismissal for failure to join a necessary party or a proper party which the court, in its discretion, decides should be joined is not a dismissal on the merits and may not be with prejudice. Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc., 12 N.C. App. 448, 183 S.E.2d 834 (1971).

When Involuntary Dismissal under Section (b) Is Without Prejudice. — Ordinarily, an involuntary dismissal under section (b) of this rule operates as an adjudication upon the merits and ends the lawsuit. However, the rule sets forth specific exceptions to this proposition, and as to these grounds, an order of involuntary dismissal is not rendered on the merits and may not constitute a dismissal with prejudice. Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985).

Power of Trial Judge to Order Dismissal Without Prejudice. — The major exception to the general proposition that an involuntary dismissal under section (b) of this rule operates as a final adjudication is found in the power lodged by section (b) in the trial judge to specifically order that the dismissal is without prejudice and, therefore, not an adjudication on the merits. Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985).

The authority to determine in which cases it is appropriate to allow the nonmovant to commence a new action has been vested by section (b) of this rule in the trial judge and is no longer strictly controlled by statute as it was under former rules of practice. Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985).

Although this rule does not expressly provide an option for the court to examine the quality of the nonmoving party's evidence and then decline to make a ruling on the merits although granting the moving party's motion for involuntary dismissal, this authority is encompassed within the rule's otherwise unqualified grant of authority to the trial court to dismiss an action on terms by specifying that its order of dismissal is "without prejudice." Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985).

Review of Order Authorizing Dismissal Without Prejudice. — The trial court's authority to order an involuntary dismissal without prejudice is exercised in the broad discretion of the trial court and the ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion. Whedon v. Whedon, 313 N.C. 200, 328 S.E.2d 437 (1985).

Petition for Certiorari. — Commencing an action in federal court did not toll negligence statute of limitation and did not keep it tolled until the United States Supreme Court ruled on a petition for certiorari to review an involuntary dismissal of that federal action. Clark v. Velsicol Chem. Corp., 110 N.C. App. 803, 431 S.E.2d 227, cert. granted, 334 N.C. 687, 436 S.E.2d 371 (1993), aff'd per curiam, 336 N.C. 599, 444 S.E.2d 223 (1994).

Error Where Less Drastic Sanctions Were Not Addressed. — Where the trial court made no findings of fact or conclusions of law which addressed whether less drastic sanctions would be effective in ensuring compliance with the court's order or would best serve the interests of justice, the trial court erred in dismissing plaintiff's complaint. Rivenbark v. Southmark Corp., 93 N.C. App. 414, 378 S.E.2d 196 (1989).

Statute of Limitations Applicable. — Order which stated dismissal was without prejudice and contained no specification whatsoever with regard to the time in which plaintiff could commence a new action based on the same claim was subject to the statutory statute of limitations. 84 Lumber Co. v. Barkley, 120 N.C. App. 271, 461 S.E.2d 780 (1995).

Only in an action tried without a jury may the defendant move for an involuntary dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995).

Time Not Extended Following Involuntary Dismissal by Federal Court. — Assuming that this rule could apply following involuntary dismissal by federal court, as the court did not specify a new action could be brought within one year, the time to file the complaint in state court was not extended for one year. State v. Holman, 350 N.C. 86, 511 S.E.2d 305, 1999 N.C. App. LEXIS 44 (1999), cert. denied, 528 U.S. 909, 120 S. Ct. 255, 145 L. Ed. 2d 214 (1999).

Dismissal of State Claims by Federal Court Without Prejudice as Involuntary Dismissal. — Plaintiffs were not entitled to the additional year to refile provided in section (a) of this rule where federal court's order did not so specify and the court's dismissal of the state claims without prejudice constituted an involuntary dismissal under section (b); whether plaintiffs who bring their case in federal court gain the additional year provided by section (a) of this rule is governed by how the federal court gained jurisdiction over the state issues, i.e. in a nondiversity case, a voluntary dismissal does not toll the statute of limitations or invoke a savings provision. Harter v. Vernon, 139 N.C. App. 85, 532 S.E.2d 836, 2000 N.C. App. LEXIS 815 (2000), cert. denied and appeal dismissed, 353 N.C. 263, 546 S.E.2d 97 (2000), cert denied, 532 U.S. 1022, 121 S. Ct. 1962, 149 L. Ed. 2d 757 (2001).

Dismissal Properly Granted. — Involuntary dismissal of plaintiff's claim for costs needed to finish a construction project was proper where the plaintiffs' failed to demonstrate which costs were attributable to the defendant and where the evidence indicated that the plaintiffs' breached the contract before the defendant-contractor stopped working on the project. Greensboro Masonic Temple v. McMillan, 142 N.C. App. 379, 542 S.E.2d 676, 2001 N.C. App. LEXIS 95 (2001).

Trial court properly dismissed a county's appeal from a small claims court judgment in favor an of employee where the county failed to appear for the scheduled trial de novo before the trial court; the fact that the county had obtained an arbitrator's award was irrelevant. Brown v. County of Avery, 164 N.C. App. 704, 596 S.E.2d 334, 2004 N.C. App. LEXIS 975 (2004).

Dismissal Properly Denied. — Evidence was sufficient in a claim for conversion brought by the children of the decedent's first marriage to support the trial court's conclusion that the decedent's second wife converted the decedent's and the wife's jointly titled assets in the administration of the decedent's estate; thus, the trial court did not err in denying the wife's and the bond surety's motions for dismissal. State ex rel. Pilard v. Berninger, 154 N.C. App. 45, 571 S.E.2d 836, 2002 N.C. App. LEXIS 1407 (2002), cert. denied, 356 N.C. 694, 579 S.E.2d 100 (2003).

Trial court's findings supported the court's conclusion that a seawall built by a contractor was constructed in an unworkmanlike manner, which allowed soil and sand to pass through the fabric in the seawall and allowed erosion of an owner's land to occur. Therefore, the trial court did not err by denying the contractor's motion to dismiss the owner's breach of contract claim under N.C. R. Civ. P. 41(b). Matthews v. Davis, 191 N.C. App. 545, 664 S.E.2d 16, 2008 N.C. App. LEXIS 1475 (2008).

Dismissal Held Abuse of Discretion. — The involuntary dismissal of employee's workers' compensation claim, entered by deputy commissioner upon employee's failure to prosecute, which did not mention whether it was entered with or without prejudice, would be construed as having been entered with prejudice, and would be vacated based on the deputy commissioner's abuse of discretion, as lesser sanctions were appropriate and available. Harvey v. Cedar Creek BP, 149 N.C. App. 873, 562 S.E.2d 80, 2002 N.C. App. LEXIS 299 (2002).

B. Failure to Prosecute or to Comply with Rules or Orders.

When Motion for Involuntary Dismissal May Be Properly Entertained Prior to Trial. — A motion for involuntary dismissal pursuant to this rule and G.S. 1A-1, Rule 60 prior to a trial of the cause is improperly entertained, unless made on the specific grounds that the plaintiff has failed to prosecute or comply with the Rules of Civil Procedure or any order of the court. Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973).

Dismissal for Failure to Prosecute Authorized. — This rule, substantially the same as its federal counterpart, authorizes dismissal with prejudice of a plaintiff's claim for failure to prosecute. Green v. Eure, 18 N.C. App. 671, 197 S.E.2d 599 (1973).

Section (b) of this rule, which is substantially the same as the court's own rule, has been held not to abrogate the inherent power of the court to dismiss a case for want of prosecution, as where plaintiff refuses to proceed at trial. Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980).

When Dismissal for Failure to Prosecute Is Proper. — Dismissal for failure to prosecute is proper only where the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action toward its conclusion. Green v. Eure, 18 N.C. App. 671, 197 S.E.2d 599 (1973); Jones v. Stone, 52 N.C. App. 502, 279 S.E.2d 13, cert. denied, 304 N.C. 195, 285 S.E.2d 99 (1981).

Where plaintiff's failure to proceed did not arise out of a deliberate attempt to delay, but out of misunderstanding, dismissal was improper. Green v. Eure, 18 N.C. App. 671, 197 S.E.2d 599 (1973).

When Dismissal for Failure to Prosecute Not Proper. — The trial court erred in dismissing plaintiff's action for failure to appear and prosecute his action, where plaintiff's attorney was present and appeared ready to go forward with his case. Terry v. Bob Dunn Ford, Inc., 77 N.C. App. 457, 335 S.E.2d 227 (1985).

Decision not to dismiss for failure to prosecute was not an abuse of discretion where the supplier was engaged in settlement discussion and document gathering, and the delay, while substantial and unusual, was not deliberate or for an improper motive or purpose, and no material prejudice was caused to defendants. James River Equip., Inc v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006), review denied, appeal dismissed, 361 N.C. 167, 639 S.E.2d 651 (2006).

Involuntary Dismissal Not Required for Failure to Prosecute. — The trial court did not abuse its discretion by dismissing the plaintiff's action without prejudice, under this rule, while imposing costs on the plaintiff where it found that the plaintiff had intentionally delayed prosecution in violation of Rule 11(a). Melton v. Stamm, 138 N.C. App. 314, 530 S.E.2d 622, 2000 N.C. App. LEXIS 602 (2000).

Trial Judge May Dismiss Claim Under Section (b) Without Motion by Defendant. — The trial judge has authority to dismiss a claim pursuant to section (b) of this rule, even absent a motion by defendant to do so. However, whether a judge may dismiss a claim pursuant to section (b) depends on the facts and circumstances surrounding the particular case. Blackwelder Furn. Co. v. Harris, 75 N.C. App. 625, 331 S.E.2d 274 (1985), limiting Simmons v. Tuttle, 70 N.C. App. 101, 318 S.E.2d 847 (1984).

A trial judge may, depending upon the facts and circumstances surrounding the particular case, dismiss a claim under section (b) of this rule, for failure to prosecute, without a motion by defendant. Perkins v. Perkins, 88 N.C. App. 568, 364 S.E.2d 166 (1988).

A mere lapse of time does not justify dismissal if the plaintiff has not been lacking in diligence. Jones v. Stone, 52 N.C. App. 502, 279 S.E.2d 13, cert. denied, 304 N.C. 195, 285 S.E.2d 99 (1981).

Defendant may move for dismissal of an action for plaintiff's failure to comply with the Rules of Civil Procedure. The grant of power to make such a motion implies discretionary power to allow it. It equally implies appellate review limited to determination of whether abuse appears in the exercise of that discretion. Jones v. Boyce, 60 N.C. App. 585, 299 S.E.2d 298 (1983).

Failure to Comply with Erroneous Order Not Grounds for Dismissal. — A dismissal under section (b) of this rule may not be premised upon a party's failure to comply with an erroneous order. Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981); overruled to extent that it may be read as establishing a rule that dismissal with prejudice may not be premised on a party's refusal to comply with an erroneous order from which there has been no direct appeal by Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987).

Imposition of Lesser Sanctions for Noncompliance. — The trial court has the authority, pursuant to section (b) of this rule, to impose lesser sanctions against a party or counsel for failure to comply with a court order. The lesser sanctions imposed may include costs plus attorneys' fees. In considering what sanctions to impose, the trial court must make findings concerning the effectiveness of alternative sanctions and must make findings that the plaintiff is capable of performing the alternative. Daniels v. Montgomery Mut. Ins. Co., 81 N.C. App. 600, 344 S.E.2d 847, rev'd in part and aff'd in part, 320 N.C. 669, 360 S.E.2d 772 (1987).

Use of Less Drastic Sanctions When Sufficient. — A dismissal with prejudice, pursuant to section (b) of this rule, is an available sanction for a plaintiff's violation of G.S. 1A-1, Rule 8(a)(2). It is not, however, the only available sanction and should be applied only when the trial court determines that less drastic sanctions will not suffice. Miller v. Ferree, 84 N.C. App. 135, 351 S.E.2d 845 (1987).

Trial court abused its discretion in dismissing plaintiff's claim for equitable distribution pursuant to G.S. 1A-1, Rule 41(b) for failure to prosecute; the court did not consider whether lesser sanctions were appropriate or whether plaintiff deliberately delayed the matter, or the amount of prejudice to defendant. Wilder v. Wilder, 146 N.C. App. 574, 553 S.E.2d 425, 2001 N.C. App. LEXIS 971 (2001).

Dismissal of an amended complaint for a failure to comply with a court order for a more definite statement was vacated, as the trial court had not considered lesser sanctions; the trial court had to at least consider lesser sanctions before imposing dismissal as a sanction in a civil case pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(e) or 41(b). Page v. Mandel, 154 N.C. App. 94, 571 S.E.2d 635, 2002 N.C. App. LEXIS 1417 (2002), cert. denied, 356 N.C. 676, 577 S.E.2d 631 (2003).

Motion to Have Bankruptcy Trustee Made Party to Action. — Since the plaintiff made a motion to have its trustee in bankruptcy a party to the action, which the court improperly denied, as the trustee appeared to be a necessary party, without making the required findings of fact, and since the trustee was present when the case was called, the court erred in dismissing the plaintiff's claim for failure to prosecute. Blackwelder Furn. Co. v. Harris, 75 N.C. App. 625, 331 S.E.2d 274 (1985).

Dismissal for Failure to Prosecute Held Error. — Where nothing in the record indicated that the plaintiffs failed to assist or cooperate with their attorneys or that they were not diligent in prosecuting their action, the entry of sanctions against either the plaintiffs or their attorney could not be upheld on the ground of the plaintiffs' failure to prosecute. Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992).

When, in a workers' compensation proceeding, an employer and insurer moved to dismiss a worker's claim for failure to prosecute, the deputy commissioner considering that motion, as well as the North Carolina Industrial Commission, upon an appeal of the deputy commissioner's order, had to consider the factors applicable to dismissing a case under G.S. 1A-1, N.C. R. Civ. P. 41(b), for a failure to prosecute, which were (1) whether the worker acted in a manner which deliberately or unreasonably delayed the matter, (2) the amount of prejudice, if any, to the employer or insurer caused by the worker's failure to prosecute, and (3) the reason, if one existed, that sanctions short of dismissal would not suffice, and their failure to consider these factors rendered their order dismissing the worker's claim insufficient as a matter of law. Lee v. Roses, 162 N.C. App. 129, 590 S.E.2d 404, 2004 N.C. App. LEXIS 14 (2004).

The trial court did not abuse its discretion in ordering dismissal of plaintiff's action pursuant to this rule, given plaintiff's intentional noncompliance and the ineffectiveness of previously imposed sanctions. Daniels v. Montgomery Mut. Ins. Co., 320 N.C. 669, 360 S.E.2d 772 (1987).

Based on the parties' failure to appear, the fact that no pleading had been filed in almost two years, and the fact that the case had been placed on two prior clean-up calendars, dismissal without prejudice was proper. Perkins v. Perkins, 88 N.C. App. 568, 364 S.E.2d 166 (1988).

Where trial court found that corporate officer's failure to account made it impossible for receivers to defend against claims of that officer and his wife against the corporation in liquidation, trial court was authorized, pursuant to section (b) of this rule, to dismiss the claims of the officer and his wife on their receivership in the event that the corporate officer failed to provide an accounting within 30 days of the effective date of the court's order. Lowder v. All Star Mills, Inc., 103 N.C. App. 479, 405 S.E.2d 794 (1991).

Dismissal for Failure to Properly Serve Defendant. — Where plaintiff did not deliver endorsed summons to some proper person for service as required by G.S. 1A-1, Rule 4(a), where unconscionable delay was most critical to defendant, and where there was no contention that defendant was unavailable for service, the trial judge properly dismissed plaintiff's action pursuant to section (b) of this rule based upon plaintiff's violation of section (a) of this rule for the purposes of delay and in order to gain an unfair advantage over the defendant. Smith v. Quinn, 324 N.C. 316, 378 S.E.2d 28 (1989).

Merits Considered Where Dismissal for Failure to Timely Serve Notice Not Assigned as Error. — Even though the dismissal of a case for failure to timely serve notice of the lawsuit under G.S. 1A-1-4 was not assigned as an error, the merits of a patient's challenge were considered as the patient challenged the dismissal for failure to prosecute under G.S. 1A-1-41(b). Stocum v. Oakley, 185 N.C. App. 56, 648 S.E.2d 227, 2007 N.C. App. LEXIS 1685 (2007).

Taking of a voluntary dismissal in a first action did not bar a doctor from moving to impose sanctions in a refiled action under G.S. 1A-1-41(b) as: (1) a patient violated the North Carolina Rules of Civil Procedure for the purpose of delay and to gain an unfair advantage, and did not file an action with an intent to prosecute under Rule 41(b); (2) the doctor filed the doctor's dismissal motion within a reasonable time; and (3) it was not an abuse of discretion to find that no sanction short of dismissal would suffice, and the finding was supported by sufficient evidence. Stocum v. Oakley, 185 N.C. App. 56, 648 S.E.2d 227, 2007 N.C. App. LEXIS 1685 (2007).

Dismissal for Discovery Violations. — Trial judge did not abuse his discretion by dismissing plaintiff's personal injury suit for discovery violations because the plaintiff failed to produce a 2001 tax return critical to his assertion of damages involving lost profits and lost earning capacity, and made false representations regarding his profits from the sale of a house, which was central to the issue of damages. By failing to comply with the trial court's order to compel and then asserting his Fifth Amendment right against self-incrimination in a court-ordered deposition, the plaintiff opened himself up to dismissal of his civil case since, despite less severe sanctions being available, the defendants were deprived of necessary discovery. In re Pedestrian Walkway Failure, 173 N.C. App. 237, 618 S.E.2d 819, 2005 N.C. App. LEXIS 2032 (2005).

C. Failure to Show Right to Relief.

Section (b) of this rule is applicable only in an action tried by the court without a jury. Pergerson v. Williams, 9 N.C. App. 512, 176 S.E.2d 885 (1970); Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973).

And Has No Application to Directed Verdicts in Jury Trials. — Section (b) of this rule has no application when considering a motion for a directed verdict in a jury trial. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

A motion to dismiss under section (b) of this rule is properly made only in cases tried by a judge without a jury, the proper motion in jury cases being for a directed verdict under G.S. 1A-1, Rule 50(a). Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Motion Treated as for Directed Verdict. — It is permissible for motions made under section (b) of this rule at the close of plaintiff's evidence in jury trials to be treated as motions for directed verdict under G.S. 1A-1, Rule 50(a). Sample v. Morgan, 311 N.C. 717, 319 S.E.2d 607 (1984).

Motion for Involuntary Dismissal Appropriate Test for Sufficiency of Plaintiff's Evidence in Nonjury Trial. — When trial is by the court without a jury, the appropriate motion by which a defendant may test the sufficiency of plaintiff's evidence to show a right to relief is a motion for involuntary dismissal as provided for in section (b) of this rule. Aiken v. Collins, 16 N.C. App. 504, 192 S.E.2d 617 (1972); Ayers v. Tomrich Corp., 17 N.C. App. 263, 193 S.E.2d 764 (1973); Town of Rolesville v. Perry, 21 N.C. App. 354, 204 S.E.2d 719 (1974); Neasham v. Day, 34 N.C. App. 53, 237 S.E.2d 287 (1977); Tanglewood Land Co. v. Wood, 40 N.C. App. 133, 252 S.E.2d 546 (1979); Lumbee River Elec. Membership Corp. v. City of Fayetteville, 60 N.C. App. 534, 299 S.E.2d 305, rev'd on other grounds, 309 N.C. 726, 309 S.E.2d 209 (1983).

A motion for directed verdict under G.S. 1A-1, Rule 50(a) is appropriate only in a case tried before a jury. In nonjury trials, a motion for involuntary dismissal under section (b) of this section provides a procedure whereby, at the close of the plaintiff's evidence, the judge can give judgment against the plaintiff, not only because his proof has failed to make out a case, but also on the basis of facts as the judge may determine them. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

In a nonjury trial, when a motion to dismiss pursuant to section (b) of this rule is made, the judge becomes both judge and jury. He must consider and weigh all competent evidence before him, and must pass on the credibility of the witnesses and determine the weight to be accorded their testimony. In re Hughes, 74 N.C. App. 751, 330 S.E.2d 213 (1985).

As Compared with Motion for Directed Verdict in Jury Trial. — A motion for a directed verdict under G.S. 1A-1, Rule 50(a) is proper when a trial is being held before a jury. Where a case is tried by the judge without a jury, the appropriate motion in such case is for involuntary dismissal under section (b) of this rule. Bryant v. Kelly, 10 N.C. App. 208, 178 S.E.2d 113 (1970), rev'd on other grounds, 279 N.C. 123, 181 S.E.2d 438 (1971).

Where a case is tried before a jury, the appropriate motion by which a defendant tests the sufficiency of plaintiff's evidence to permit a recovery is the motion for a directed verdict under G.S. 1A-1, Rule 50(a). The motion for involuntary dismissal, made under section (b) of this rule, performs a similar function in an action tried by the court without a jury. Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971).

A motion for a directed verdict is proper only in a jury trial; where the case is tried without a jury the proper motion is for involuntary dismissal under section (b) of this rule. Mills v. Koscot Interplanetary, Inc., 13 N.C. App. 681, 187 S.E.2d 372 (1972).

A motion to dismiss under this rule is not properly available in cases being tried by jury. The proper motion would be a motion for directed verdict under G.S. 1A-1, Rule 50(a). Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973).

A motion for a directed verdict under G.S. 1A-1, Rule 50 and a motion for involuntary dismissal under section (b) of this rule are to be distinguished; the former is proper when the case is tried before a jury, and the latter is appropriate where the court sits as trier of fact. McNeely v. Southern Ry., 19 N.C. App. 502, 199 S.E.2d 164, cert. denied, 284 N.C. 425, 200 S.E.2d 660 (1973).

Treatment of Motion Incorrectly Designated as Motion for Directed Verdict. — Where defendant's motion was incorrectly designated as a motion for a directed verdict, the Court of Appeals could treat it as a motion for involuntary dismissal under section (b) of this rule and pass on the merits of the questions appellant sought to raise. Higgins v. Builders & Fin., Inc., 20 N.C. App. 1, 200 S.E.2d 397 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974).

Treatment of Motion as One for Directed Verdict. — It is permissible for motions made under section (b) of this rule at the close of plaintiff's evidence in jury trials to be treated as motions for directed verdict under G.S. 1A-1, Rule 50(a). Sample v. Morgan, 311 N.C. 717, 319 S.E.2d 607 (1984).

Involuntary Dismissal in Jury Trial Treated as Directed Verdict. — Where judgment of involuntary dismissal in a trial before a jury was improperly entered under section (b) of this rule, which is applicable only in a trial by the court without a jury, it may properly be treated as a motion for directed verdict under G.S. 1A-1, Rule 50(a). Pergerson v. Williams, 9 N.C. App. 512, 176 S.E.2d 885 (1970).

Different Test Applied Under Motions for Directed Verdict and Involuntary Dismissal. — The distinction between a motion for a directed verdict and a motion for an involuntary dismissal is more than one of mere nomenclature, as a different test is to be applied to determine the sufficiency of the evidence to withstand the motion when the case is tried before court and jury than when the court alone is finder of the facts. Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972).

Defendants' motion to dismiss in an action tried before the judge without a jury was actually a motion to dismiss made under G.S. 1A-1-41(b), not G.S. 1A-1-50(a); the distinction was significant because, under G.S. 1A-1-41(b), the trial judge did not consider the evidence in the light most favorable to the plaintiff, as he would have when considering a G.S. 1A-1-50(a) motion for a directed verdict in a trial before a jury. Hammonds v. Lumbee River Elec. Mbrshp. Corp., 178 N.C. App. 1, 631 S.E.2d 1, 2006 N.C. App. LEXIS 1301 (2006).

Significance of motion to dismiss under section (b) of this rule is that it may be made at the close of plaintiff's case; there is little point in such a motion at the close of all the evidence, since at that stage the judge will determine the facts in any event. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973); Russell v. Taylor, 37 N.C. App. 520, 246 S.E.2d 569 (1978); Newsome v. Newsome, 43 N.C. App. 580, 259 S.E.2d 577 (1979).

In a bench trial, there is little point to a motion to dismiss at the close of all the evidence, since at that point in trial the judge will decide the facts in any event. When the judge decides the case, either on a motion for dismissal or at the close of all the evidence, he must make findings of fact and separate conclusions of law. In re Hughes, 74 N.C. App. 751, 330 S.E.2d 213 (1985).

Court May Determine Facts and Render Judgment on Motion. — If trial judge allows defendant's motion to dismiss made at the close of plaintiff's evidence, on the grounds that upon the facts and the law plaintiff has shown no right to relief, the court, as the trier of the facts, should determine the facts and render judgment against plaintiff. Wells v. Sturdivant Life Ins. Co., 10 N.C. App. 584, 179 S.E.2d 806 (1971).

In a nonjury case, section (b) of this rule provides a procedure whereby, at the close of plaintiff's evidence, the judge can give judgment against plaintiff not only because his proof has failed in some essential aspect to make out a case, but also on the basis of facts as he may then determine them to be from the evidence then before him. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973); Fearing v. Westcott, 18 N.C. App. 422, 197 S.E.2d 38 (1973); O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978); Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

When the motion to dismiss is allowed, the trial judge must determine the facts and render judgment against the plaintiff. The trial judge's findings are conclusive on appeal if supported by any competent evidence even though there may be evidence to support findings to the contrary. United Leasing Corp. v. Miller, 60 N.C. App. 40, 298 S.E.2d 409 (1982), cert. denied, 308 N.C. 194, 302 S.E.2d 248 (1983).

Section (b) of this rule permits the trial judge to weigh the evidence, to find facts against the movant, and to sustain respondents' motion at the conclusion of the movant's evidence. In re Foreclosure of Deed of Trust, 63 N.C. App. 744, 306 S.E.2d 475, cert. denied, 309 N.C. 820, 310 S.E.2d 358 (1983).

Despite Plaintiff's Prima Facie Case. — As trier of the facts, the judge may weigh the evidence, find the facts against the plaintiff and sustain the defendant's motion under section (b) of this rule at the conclusion of the plaintiff's evidence even though the plaintiff has made out a prima facie case which would have precluded a directed verdict for the defendant in a jury case. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973); Williams v. Liles, 31 N.C. App. 345, 229 S.E.2d 215 (1976); Neasham v. Day, 34 N.C. App. 53, 237 S.E.2d 287 (1977); Newsome v. Newsome, 43 N.C. App. 580, 259 S.E.2d 577 (1979); United Leasing Corp. v. Miller, 60 N.C. App. 40, 298 S.E.2d 409 (1982); Lumbee River Elec. Membership Corp. v. City of Fayetteville, 60 N.C. App. 534, 299 S.E.2d 305 (1983); Thompson v. Wrenn, 61 N.C. App. 582, 301 S.E.2d 103 (1983); Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

At the close of the movant's evidence, the judge may grant judgment against the movant on the basis of facts as he determines them to be. This is true even where the movant has made out a prima facie case which would withstand a motion for directed verdict for the respondent in a jury trial. In re Foreclosure of Deed of Trust, 63 N.C. App. 744, 306 S.E.2d 475, cert. denied, 309 N.C. 820, 310 S.E.2d 358 (1983).

Unlike Practice on Former Motion for Nonsuit. — The questions presented by a motion under section (b) of this rule and a motion for nonsuit are not the same. The motion for nonsuit asks the court to determine whether the plaintiff's evidence, taken as true, would support a judgment for plaintiff. The motion to dismiss, on the other hand permits the trial judge to weigh the evidence, find facts against plaintiff and sustain defendant's motion at the conclusion of plaintiff's evidence, even though plaintiff may have made out a prima facie case which would have repelled the motion for nonsuit. Joyner v. Thomas, 40 N.C. App. 63, 251 S.E.2d 906 (1979).

Motion to dismiss differs from the former motion for judgment as for nonsuit in that the lodging of a motion to dismiss under section (b) of this rule permits the trial judge to weigh the evidence, find facts against plaintiff and sustain defendant's motion at the conclusion of plaintiff's evidence, even though plaintiff may have made out a prima facie case which would have repelled the motion for nonsuit under the former practice. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Under former practice the motion for nonsuit presented the question of whether plaintiff's evidence, taken as true, would support findings upon which the trier of facts could properly base a judgment for plaintiff. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973).

But Court Is Not Compelled to Pass on Motion. — The judge is not compelled to make determinations of facts and pass upon a motion under section (b) of this rule for involuntary dismissal at the close of plaintiff's evidence. He may decline to render any judgment until the close of all the evidence and, except in the clearest cases, he should defer judgment until the close of all the evidence. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973); Russell v. Taylor, 37 N.C. App. 520, 246 S.E.2d 569 (1978); Passmore v. Woodard, 37 N.C. App. 535, 246 S.E.2d 795 (1978).

When a motion under this rule is made at the close of plaintiff's evidence, the judge may decline to render any judgment until the close of all of the evidence. Fearing v. Westcott, 18 N.C. App. 422, 197 S.E.2d 38 (1973).

Under section (b) of this rule, the trial judge may decline to render judgment until all the evidence is in. Neasham v. Day, 34 N.C. App. 53, 237 S.E.2d 287 (1977).

Under section (b) of this rule, the judge is not required to rule on the motion at the close of the plaintiff's evidence and may decline to render any judgment until the close of all the evidence. African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 649 (1984).

And except in the clearest of cases, the court should decline to rule on a motion to dismiss until the close of all the evidence. Henderson County v. Osteen, 297 N.C. 113, 254 S.E.2d 160 (1979).

The practice of withholding judgment until all the evidence has been presented is considered the better practice except in the clearest cases. Neasham v. Day, 34 N.C. App. 53, 237 S.E.2d 287 (1977).

It is the better practice for the trial court to decline to render any judgment until the close of all the evidence. Joyner v. Thomas, 40 N.C. App. 63, 251 S.E.2d 906 (1979).

Except in the clearest cases, it is the better practice in the case of a motion to dismiss for the trial judge to decline to render judgment until all the evidence is in. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976); Joyner v. Thomas, 40 N.C. App. 63, 251 S.E.2d 906 (1979).

The permissive language of section (b) of this rule makes it clear that the court may decline to render judgment until all of the evidence has been presented. In fact, a judge should decline to do so except in the clearest of cases. Esteel Co. v. Goodman, 82 N.C. App. 692, 348 S.E.2d 153 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 745 (1987).

No Provision Made for Section (b) Motion at Close of All Evidence. — Section (b) of this rule does not provide for a motion for involuntary dismissal made at the close of all the evidence. Castle v. B.H. Yates Co., 18 N.C. App. 632, 197 S.E.2d 611 (1973).

Where the trial judge defers ruling on a motion under section (b) of this rule until the close of all the evidence, there is little point for counsel to renew the motion, for at that stage of a nonjury trial the judge must determine the facts in any event, pursuant to G.S. 1A-1, Rule 52. O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978).

Section (b) of this rule provides for a motion for dismissal at the close of plaintiff's evidence; it does not provide for such motion at the close of all the evidence. Menzel v. Metrolina Anesthesia Assocs., 66 N.C. App. 53, 310 S.E.2d 400 (1984).

There is little point in a motion for dismissal at the close of all the evidence, since at that stage the judge will determine the facts in any event. Menzel v. Metrolina Anesthesia Assocs., 66 N.C. App. 53, 310 S.E.2d 400 (1984).

Allowance of Motion at Close of All Evidence Held Not to Prejudice Plaintiff. — The fact that defendant made a motion for involuntary dismissal at the close of all the evidence, which motion is not sanctioned under the rules, and that the trial judge inadvertently allowed it, in no way prejudiced plaintiff, where the trial judge thereafter entered a judgment on the merits pursuant to G.S. 1A-1, Rule 52. Castle v. B.H. Yates Co., 18 N.C. App. 632, 197 S.E.2d 611 (1973).

Section (b) of this rule does not provide for a motion for involuntary dismissal made at the close of all the evidence, but the fact that the parties made such motions at the close of all the evidence and that the trial judge ruled on those motions was of no consequence where thereafter the court rendered a judgment on the merits by making findings. Reid v. Midgett, 25 N.C. App. 456, 213 S.E.2d 379 (1975); Tanglewood Land Co. v. Wood, 40 N.C. App. 133, 252 S.E.2d 546 (1979).

Defendant's Motion Challenges Sufficiency of Plaintiff's Evidence. — Defendant's motion for an involuntary dismissal in an action tried by the court without a jury challenges the sufficiency of the plaintiff's evidence to establish his right to relief. Wells v. Sturdivant Life Ins. Co., 10 N.C. App. 584, 179 S.E.2d 806 (1971); Pegram-West, Inc. v. Hiatt Homes, Inc., 12 N.C. App. 519, 184 S.E.2d 65 (1971).

A motion for involuntary dismissal under section (b) of this rule serves in part to test the legal sufficiency of all evidence admitted on behalf of the plaintiff in a nonjury case. Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980).

A defendant in an action being tried without a jury may test the sufficiency of the plaintiff's evidence by moving at the close of plaintiff's evidence for involuntary dismissal under subsection (b) of this rule on the ground that upon the facts and the law the plaintiff has shown no right to relief. United Carolina Bank v. First Union Nat'l Bank, 109 N.C. App. 201, 426 S.E.2d 462 (1993).

But Does Not Challenge Competence of Evidence to Prove Particular Point Nor Renew Objection to Its Admission. — A motion for involuntary dismissal under section (b) of this rule does not challenge the competence of the evidence to prove a particular point, nor does it renew an objection to its admission in the first place. Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980).

Question Raised by Section (b). — A motion under section (b) of this rule does not raise the question of whether the particular findings made by the court are supported by the evidence, but only the question of whether any findings could be made from the evidence which would support a recovery. Pegram-West, Inc. v. Hiatt Homes, Inc., 12 N.C. App. 519, 184 S.E.2d

65 (1971); Gibbs v. Heavlin, 22 N.C. App. 482, 206 S.E.2d 814 (1974); Barnhill v. Barnhill, 68 N.C. App. 697, 315 S.E.2d 548 (1984).

A motion under section (b) of this rule raises the question of whether any findings of fact could be made from the evidence which would support a recovery. Browne v. Catawba County Dep't of Social Servs., 22 N.C. App. 476, 206 S.E.2d 792 (1974); Sanders v. Walker, 39 N.C. App. 355, 250 S.E.2d 84 (1979), overruled on other grounds, Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., 305 N.C. 633, 291 S.E.2d 137 (1982).

The question raised by defendants' motion to dismiss made at the close of all the evidence is whether any findings of fact could be made from the evidence which would support a recovery for plaintiffs. If such findings can be made, the motion to dismiss must be denied. Neasham v. Day, 34 N.C. App. 53, 237 S.E.2d 287 (1977).

The question raised by a motion to dismiss pursuant to section (b) of this rule, made at the close of all the evidence, is whether any findings of fact could be made from the evidence which would support a recovery for the party with the burden of proof. Ayden Tractors, Inc. v. Gaskins, 61 N.C. App. 654, 301 S.E.2d 523 (1983).

Substantially the same question is presented by a motion for dismissal under this rule as was presented by the former motion for nonsuit. Schafran v. A & H Cleaners, Inc., 19 N.C. App. 365, 198 S.E.2d 734, cert. denied, 284 N.C. 255, 200 S.E.2d 655 (1973).

In a nonjury case, after the plaintiff has rested his case, the defendant may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The question presented is whether the plaintiff's evidence, taken as true, would support findings of fact upon which the trier of fact could properly base a judgment for the plaintiff. Woodlief v. Johnson, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

Court to Pass on Sufficiency, Weight and Credibility of Evidence. — In ruling on a motion to dismiss under section (b) of this rule, the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and, if so, he must pass upon the weight and credibility of the evidence upon which the plaintiff must rely in order to recover. Airport Knitting, Inc. v. King Kotton Yarn Co., 11 N.C. App. 162, 180 S.E.2d 611 (1971); Mills v. Koscot Interplanetary, Inc., 13 N.C. App. 681, 187 S.E.2d 372 (1972); Ayers v. Tomrich Corp., 17 N.C. App. 263, 193 S.E.2d 764 (1973); Schafran v. A & H Cleaners, Inc., 19 N.C. App. 365, 198 S.E.2d 734, cert. denied, 284 N.C. 255, 200 S.E.2d 655 (1973); Town of Rolesville v. Perry, 21 N.C. App. 354, 204 S.E.2d 719 (1974); Phillips v. Woxman, 43 N.C. App. 739, 260 S.E.2d 97 (1979), cert. denied, 299 N.C. 545, 265 S.E.2d 404, cert. denied, 449 U.S. 835, 101 S. Ct. 108, 66 L. Ed. 2d 41 (1980).

On a motion to dismiss defendant's counterclaim under section (b) of this rule, where all the evidence is in, it is incumbent upon the judge to consider and weigh it all, and render judgment on the merits of the claim and counterclaim in the form directed by G.S. 1A-1, Rule 52(a). Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973).

Defendants' motion for involuntary dismissal in a quiet title action was properly granted where the trial judge used the procedure under G.S. 1A-1, Rule 41(b) and determined that plaintiff failed to prove by the greater weight of the evidence that she was the fee simple owner of the real property. Vernon v. Lowe, 148 N.C. App. 694, 559 S.E.2d 288, 2002 N.C. App. LEXIS 56 (2002).

Principles Applicable in Determining Sufficiency of Evidence. — In determining the sufficiency of the evidence on a motion under this rule, the trial judge is subject to the same principles applicable under the former procedure with respect to the sufficiency of the evidence to withstand the motion for nonsuit. Presson v. Presson, 12 N.C. App. 109, 182 S.E.2d 614 (1971).

Evidence to Be Evaluated Without Limitations as to Inferences to Be Indulged in Plaintiff's Favor. — In a nonjury case, in which all issues of fact are in any event to be determined by the judge, the function of the judge on a motion to dismiss under section (b) of this rule is to evaluate the evidence without any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case. Bryant v. Kelly, 10 N.C. App. 208, 178 S.E.2d 113 (1970), rev'd on other grounds, 279 N.C. 123, 181 S.E.2d 438 (1971); Rogers v. City of Asheville, 14 N.C. App. 514, 188 S.E.2d 656 (1972); Lineberry v. Carolina Golf & Country Club, Inc., 16 N.C. App. 600, 192 S.E.2d 853 (1972); McNeely v. Southern Ry., 19 N.C. App. 502, 199 S.E.2d 164, cert. denied, 284 N.C. 425, 200 S.E.2d 660 (1973); Bank of N.C. v. Investors Title Ins. Co., 42 N.C. App. 616, 257 S.E.2d 453 (1979); Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., 305 N.C. 633, 291 S.E.2d 137 (1982).

The judge's evaluation of the evidence pursuant to a motion under this rule is to be conducted free of any limitations as to the inferences which a court must indulge in favor of plaintiff's evidence on a motion for a directed verdict in a jury case. Fearing v. Westcott, 18 N.C. App. 422, 197 S.E.2d 38 (1973); Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976).

Under section (b) of this rule, in a trial without a jury, the trial judge does not consider the evidence in the light most favorable to the plaintiff. Instead, he must consider and weigh all the competent evidence before him, passing upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom. Inland Bridge Co. v. North Carolina State Hwy. Comm'n, 30 N.C. App. 535, 227 S.E.2d 648 (1976).

In ruling on a motion for involuntary dismissal at the close of plaintiff's evidence pursuant to section (b) of this rule, the trial judge need not view the evidence in the light most favorable to plaintiff. Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., 305 N.C. 633, 291 S.E.2d 137 (1982).

Previously two different standards had been applied to motions under section (b) of this rule; (1) that the judge is to evaluate the evidence without any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case, and (2) that the evidence must be viewed in the light most favorable to the plaintiff. The correct rule is that the judge is not obliged to consider plaintiff's evidence in a light most favorable to plaintiff. United Leasing Corp. v. Miller, 60 N.C. App. 40, 298 S.E.2d 409 (1982), cert. denied, 308 N.C. 194, 302 S.E.2d 248 (1983).

Evidence to Be Accorded Full Probative Value. — In ruling on a motion under section (b) of this rule, all relevant evidence admitted by the trial court must be accorded its full probative value, irrespective of whether it was erroneously received. Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980).

Exercise of Judicial Discretion. — The determination of whether to dismiss for a violation of G.S. 1A-1, Rule 8(a)(2) and whether such a dismissal should be with prejudice so as to bar a subsequent action involves the exercise of judicial discretion. Miller v. Ferree, 84 N.C. App. 135, 351 S.E.2d 845 (1987).

Deference to Be Accorded to Court's Judgment. — In the context of an involuntary dismissal, the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary. The trial court's judgment must be granted the same deference as a jury verdict. Carter v. Foster, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

When Involuntary Dismissal Should Be Granted. — An involuntary dismissal under this rule is to be granted if the plaintiff has shown no right to relief or if she has shown a right to relief but the trial court as trier of fact determines that defendant is entitled to a judgment on the merits. Jones v. Nationwide Mut. Ins. Co., 42 N.C. App. 43, 255 S.E.2d 617 (1979); Ayden Tractors, Inc. v. Gaskins, 61 N.C. App. 654, 301 S.E.2d 523, cert. denied, 309 N.C. 319, 307 S.E.2d 162 (1983); Carter v. Foster, 103 N.C. App. 110, 404 S.E.2d 484 (1991).

Dismissal Properly Denied. — In an action for breach of express and implied warranties and damages arising out of plaintiff's purchase of an automobile from defendant, it was undisputed that defendant informed plaintiffs of a warranty and that the car suffered from several defects. Plaintiffs attempted to have the car repaired within the warranty period, but to no avail. Based on these facts and other evidence, it would have been improper for the trial court to find that plaintiffs had shown "no right to relief" for their breach of warranty claims; therefore, the trial court properly denied defendant's motion to dismiss. Riley v. Ken Wilson Ford, Inc., 109 N.C. App. 163, 426 S.E.2d 717 (1993).

Because the trial court carefully laid out in sequential order the facts regarding the father's relationship with a married woman, resulting in him resigning from his job, and culminating in his separation from his wife who provided at least 50 percent of the minor child's care, including helping the child with his homework, and then found that the child's grades had suffered as a result, it provided a nexus between the substantial change in circumstances and the effect on the child's welfare to overrule the father's motion to dismiss the mother's custody modification action; moreover, when balanced against the mother's attainment of both a stable living environment and a vast improvement in health after suffering from a brain tumor, the trial court's custody modification order in favor of the mother was proper. Karger v. Wood, 174 N.C. App. 703, 622 S.E.2d 197, 2005 N.C. App. LEXIS 2609 (2005).

Trial court did not err in denying a mother's motion to dismiss a petition by the county department of social services, seeking to have her three-month-old son adjudicated as abused, dependent, and neglected, at the close of the department's case as the motion under G.S. 1A-1-41(b) was moot as to the abuse allegation because the trial court dismissed it after the close of all evidence; further, pursuant to G.S. 1A-1-41(b), the trial court had discretion to deny such a motion until the close of all evidence. In re J.A.G., 172 N.C. App. 708, 617 S.E.2d 325, 2005 N.C. App. LEXIS 1785 (2005).

Record on appeal insufficient to apply two dismissal rule. — With regard to a third civil action filed by a property association for unpaid maintenance fees against two property owners, the appellate court could not conclude, given the absence of any indication that the owners made a dismissal motion predicated on the two dismissal rule in the trial court and in the absence of relevant material from the record before the appellate court, that the association's complaint should have been dismissed under the two dismissal rule of G.S.

1A-1, N.C. R. Civ. P. 41(a)(1). Carolina Forest Ass'n v. White, — N.C. App. —, 678 S.E.2d 725, 2009 N.C. App. LEXIS 1066 (July 7, 2009).

Findings and Conclusions to Be Stated in Granting Motion. — Where the trial court chooses to grant defendant's motion at the close of plaintiff's evidence, he must then find the facts and state his conclusions of law separately. Joyner v. Thomas, 40 N.C. App. 63, 251 S.E.2d 906 (1979).

When the judge decides a case on a motion for dismissal under section (b) of this rule, he must make findings of fact and state separately his conclusions of law. Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision and to make definite what was decided for purposes of res judicata and estoppel. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973).

If the court grants a motion under section (b) of this rule, the rule requires the judge to make findings of fact in accordance with G.S. 1A-1, Rule 52(a). Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided for purpose of res judicata and estoppel. Finally, the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts. In re Lowery, 65 N.C. App. 320, 309 S.E.2d 469 (1983).

Failure to Make Findings Is Reversible Error. — The requirement under section (b) of this rule that findings of fact be made is mandatory, and the failure to do so is reversible error. W & H Graphics, Inc. v. Hamby, 48 N.C. App. 82, 268 S.E.2d 567 (1980).

Where the order dismissing plaintiff's claim is not supported by findings of fact as required by section (b) of this rule, the judgment appealed from will be vacated and the cause remanded to the district court. Carteret County Gen. Hosp. Corp. v. Manning, 18 N.C. App. 298, 196 S.E.2d 538 (1973).

In an action to recover the value of general hospital services, the trial court erred in granting defendant's motion for an involuntary dismissal under this rule where the judgment contained no findings of fact but only conclusions of law; moreover, it would have been better for the trial court to delay ruling on defendant's motion for involuntary dismissal until the close of all the evidence rather than at the close of plaintiff's evidence. Memorial Hosp. v. Brown, 50 N.C. App. 526, 274 S.E.2d 277 (1981).

Trial court's findings of fact were not sufficient to sustain its judgment that a widow was estopped from claiming that a deed she and her husband executed in 1998 was invalid because her husband was incompetent when he signed the deed; the appellate court reversed the trial court's judgment and remanded the case for additional findings of fact. Beck v. Beck, 163 N.C. App. 311, 593 S.E.2d 445, 2004 N.C. App. LEXIS 367 (2004).

Dismissal for Insufficient Evidence as Adjudication on Merits. — Section (b) of this rule provides that a dismissal for insufficient evidence operates as an adjudication upon the merits unless the trial court specifies otherwise. Phipps v. Paley, 90 N.C. App. 170, 368 S.E.2d 21, cert. denied, 323 N.C. 175, 373 S.E.2d 114 (1988).

Conclusive Effect on Appeal of Facts Found by Judge on Motion to Dismiss. — Where, on a motion to dismiss, the trial court as the trier of the facts has found the facts specially, such findings are conclusive upon appeal if supported by competent evidence, even though there may be evidence which might sustain findings to the contrary. In such case the trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected. Bryant v. Kelly, 10 N.C. App. 208, 178 S.E.2d 113 (1970), rev'd on other grounds, 279 N.C. 123, 181 S.E.2d 438 (1971).

In ruling on a motion for involuntary dismissal under section (b) of this rule, where the trial court, as the trier of fact, has found specific facts, such findings are conclusive upon appeal if supported by competent evidence, even though there may be evidence which would sustain findings to the contrary. Williams v. Liles, 31 N.C. App. 345, 229 S.E.2d 215 (1976).

In the context of an involuntary dismissal, the trial court's findings of fact are conclusive if supported by any competent evidence, even though there is evidence to the contrary. State ex rel. Ingram v. North Carolina Farm Bureau Ins. Agency, Inc., 50 N.C. App. 510, 274 S.E.2d 497, modified on other grounds, 303 N.C. 287, 278 S.E.2d 248 (1981).

Where the trial judge's findings are supported by the evidence and those findings in turn support his conclusions of law, they are binding on appeal. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

The findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if, arguendo, there is evidence to the contrary. The trial court's judgment therefore must be granted the same deference as a jury verdict. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

Remedy Held Unavailable. — In a case not tried by a jury, though the judge's determination that plaintiff was contributorily negligent as a matter of law was error, it was not reversible error. The transcript indicated that the judge made a factual finding from the evidence that plaintiff was contributorily negligent, a finding clearly supported by competent evidence. If the case had been tried to a jury and dismissed before the jury considered it, a new trial would have had to be ordered, but ordering a new trial before a fact-finder who has permissibly found that plaintiff was contributorily negligent and could not prevail in her action would avail her nothing. Church v. Greene, 100 N.C. App. 675, 397 S.E.2d 649 (1990).

Remand for New Trial. — Where a court on appeal reverses a trial court's determination that plaintiff's evidence is legally sufficient, nothing in the Rules of Civil Procedure precludes it from determining in a proper case that plaintiff is nevertheless entitled to a new trial, since, had it not been for the erroneous admission of the incompetent evidence in the first place, plaintiff might well have introduced other, competent evidence of the same import which would have properly withstood defendant's motion for involuntary dismissal or directed verdict; therefore, where the Court of Appeals found plaintiff's evidence at trial legally insufficient to support his quantum meruit claim against defendant, its failure to overrule trial court's denial of defendant's motion for involuntary dismissal and remand of the cause for a new trial was not error. Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980).

IV. COSTS.

Purpose of section (d) of this rule, aside from securing the payment of costs, is to prevent vexatious suits made possible by the ease with which a plaintiff may dismiss. Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

The object of this statutory rule is clearly to provide superior and district courts with authority for the efficient collection of costs in cases in which voluntary dismissals are taken; therefore, the filing of notice of dismissal, while it may terminate adversary proceedings in the case, does not terminate the court's authority to enter orders apportioning and taxing costs. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

Section 6-21(6) to Be Considered in Pari Materia with Section (d). — Section 6-21(6) must be considered in pari materia with at least two other statutes, G.S. 1-7 and section (d) of this rule. Thigpen v. Piver, 37 N.C. App. 382, 246 S.E.2d 67, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

Section (d) of this rule is substantially the same as the federal rule. Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

Procedure. — Under section (d) of this rule, the trial court or the clerk of the court in the first action shall tax the costs of the action to the plaintiff taking a voluntary dismissal under section (d) of this rule. Then, if the plaintiff commences an action against the same defendant based upon or including the same claim before the costs of the previous action have been paid, the trial court in the second action shall, upon motion of the defendant, order the plaintiff to pay the costs of the first action within 30 days. If the plaintiff does not comply with this order, the court shall dismiss the action. Fields v. Irvin H. Whitehouse & Sons, 98 N.C. App. 395, 390 S.E.2d 725, cert. denied, 327 N.C. 427, 395 S.E.2d 676 (1990).

Federal Rule 41(d) speaks to the same evil but provides far different remedial measures than this rule. Kahn v. Sturgil, 66 F.R.D. 487 (M.D.N.C. 1975).

And Is in Direct Conflict with Section (d). — The remedial measures provided in federal Rule 41 for failure of a plaintiff to pay the costs of a previously dismissed action are in direct conflict with what is set forth in section (d) of this rule. Kahn v. Sturgil, 66 F.R.D. 487 (M.D.N.C. 1975).

The provision for dismissal upon failure to pay costs has no counterpart in the federal rules, and is couched in unambiguous mandatory language. Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972).

Although the federal rule might well authorize eventual dismissal of a recalcitrant plaintiff via federal Rule 41(b), perfunctory dismissal as prescribed by section (d) of this rule is clearly not contemplated or authorized. Kahn v. Sturgil, 66 F.R.D. 487 (M.D.N.C. 1975).

The language of section (d) of this rule constitutes a mandatory directive to the trial court. Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73, cert. denied, 283 N.C. 754, 198 S.E.2d 723 (1973); Sanford v. Starlite Disco, Inc., 66 N.C. App. 470, 311 S.E.2d 67 (1984).

Payment of costs taxed in the first action is a mandatory condition precedent to the bringing of a second action on the same claim. Plaintiffs are in no position to claim surprise or prejudice for failing to comply with a requirement that conditions their right to reinstate their previous action. Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73, cert. denied, 283 N.C. 754, 198 S.E.2d 723 (1973).

Section (d) of this rule is explicit and mandatory in its direction to the court to dismiss an action brought by a plaintiff who has not paid the costs of a previous similar action dismissed pursuant to section (a) of this rule. Kahn v. Sturgil, 66 F.R.D. 487 (M.D.N.C. 1975).

Costs from Earlier Action. — A trial court, in one action, can tax costs incurred in an earlier action that was voluntarily dismissed. Sealey v. Grine, 115 N.C. App. 343, 444 S.E.2d 632 (1994).

The 30-day provision in section (d) of this rule should not be read in conjunction with § 1A-1, Rule 6(b), which provides for an enlargement of the time within which to take a given action, and the court did not err in not considering plaintiff's alleged excusable neglect as an explanation for his late payment of the costs. Sanford v. Starlite Disco, Inc., 66 N.C. App. 470, 311 S.E.2d 67 (1984).

Defendant did not waive its rights under section (d) of this rule by failing to assert them in a responsive pleading. Sims v. Oakwood Trailer Sales Corp., 18 N.C. App. 726, 198 S.E.2d 73, cert. denied, 283 N.C. 754, 198 S.E.2d 723 (1973).

Costs on Filing of "Conditional" Voluntary Dismissal. — Where despite the "conditional" label plaintiffs attempted to place upon their notice of dismissal, plaintiffs actually filed a notice of voluntary dismissal, and expressly stated in that document that the dismissal was entered pursuant to the provisions of section (a) of this rule, the voluntary dismissal entered by plaintiffs was sufficient to dismiss the case without prejudice pursuant to section (a), and the trial court did not err in taxing costs to plaintiffs, because the provisions of section (d) required the court to do so. Cullen v. Carolina Healthcare Sys., 136 N.C. App. 480, 524 S.E.2d 596, 2000 N.C. App. LEXIS 56 (2000).

Analyzing Whether Costs are Properly Assessed. — In analyzing whether costs are properly assessed under N.C. R. Civ. P. 41(d), an appellate court must undertake a three-step analysis: First, if the costs are items provided as costs under G.S. 7A-305, then a trial court is required to assess these items as costs; Second, for items not costs under G.S. 7A-305, it must be determined if they are "common law costs." Third, as to "common law costs," an appellate court must determine if a trial court abused its discretion in awarding or denying these costs under G.S. 6-20. Lord v. Customized Consulting Specialty, Inc., 164 N.C. App. 730, 596 S.E.2d 891, 2004 N.C. App. LEXIS 1144 (2004).

Dismissal of New Action Upheld Where Costs in Original Action Not Paid. — Where a plaintiff took a voluntary nonsuit in original action against defendant, and when new action was instituted, the costs in the original action had not been paid, then nothing else appearing, upon motion of defendant, dismissal was proper on the grounds that this new action was instituted before the costs in the original action had been paid. Galligan v. Smith, 14 N.C. App. 220, 188 S.E.2d 31, cert. denied, 281 N.C. 514, 189 S.E.2d 36 (1972).

Trial court in first action had no authority to order costs paid with 30 days of filing of second action. — The trial court in the first action had the authority only to order that costs be paid by plaintiff. Under section (d) of this rule, the trial court in the first action did not have the authority to order that the costs be paid within 30 days of the filing of a second action. Fields v. Irvin H. Whitehouse & Sons, 98 N.C. App. 395, 390 S.E.2d 725, cert. denied, 327 N.C. 427, 395 S.E.2d 676 (1990).

Provision in cost taxing order in plaintiff's first action against defendant, which plaintiff had voluntarily dismissed, directing plaintiff to pay the costs within 30 days and staying any pending undertaking, of which there was none, was not authorized by section (d) of this rule or any other rule or statute, and its effect, if any, was limited to that action; it could not control second action against same defendant, as section (d) expressly vests that authority in the judge presiding over the second case. Schaffner v. Pantelakos, 98 N.C. App. 399, 391 S.E.2d 41 (1990).

Court's Authority After Dismissal. — The filing of notice of dismissal, while it may terminate adversary proceedings in the case, does not terminate the court's authority to enter orders apportioning and taxing costs. Fields v. Irvin H. Whitehouse & Sons, 98 N.C. App. 395, 390 S.E.2d 725, cert. denied, 327 N.C. 427, 395 S.E.2d 676 (1990).

Correction of Order. — The trial court's failure to allow and tax costs could be considered an oversight or omission in its order, and since the substantive rights of the parties were not affected thereby, the court had authority under G.S. 1A-1, Rule 60(a) to correct such inadvertent omission. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

Authority of Superior Court Clerk. — Although a voluntary dismissal is not per se a final judgment, the clerk of superior court has authority to tax costs against a plaintiff who takes a dismissal; in fact, the clerk is ordinarily the proper official to tax such costs. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

Clerk Has No Authority to Order Compensation for Survey. — Where in an action involving a boundary dispute a survey has been ordered and made, and the trial judge has failed to order compensation, the clerk has no authority to do so. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

Assistant clerk of the superior court had the authority to tax the cost of a deposition against a plaintiff who took a voluntary dismissal of his case before it reached the trial calendar. Thigpen v. Piver, 37 N.C. App. 382, 246 S.E.2d 67, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

Deposition Expenses. — Trial court had full authority to tax, in its discretion, deposition expenses as costs pursuant to section (d) of this rule and G.S. 6-20. Alsup v. Pitman, 98 N.C. App. 389, 390 S.E.2d 750 (1990).

"Costs" also includes "deposition expenses," unless the depositions were unnecessary, even though an award of deposition expenses is not expressly allowed by statute. Sealey v. Grine, 115 N.C. App. 343, 444 S.E.2d 632 (1994).

Where an injured party could not avoid G.S. 1A-1, Rule 37 sanctions by dismissing a claim pursuant to this rule when the sanctions motion was before the trial court, the proper standard of review in imposing sanctions was abuse of discretion, not de novo. Ayers v. Patz, — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2093 (Aug. 20, 2002).

Expert Witness Costs Limited. — Even though about $170,000 was requested, a partial award of $1,726.25 for expert witness costs was not an abuse of discretion under G.S. 6-20 as expert witness fees were discretionary, "common law" costs that were not provided for in G.S. 7A-305(d); the trial judge, who presided over 20 days of trial, was in the best position to assess whether the costs were justified under G.S. 1A-1, N.C. R. Civ. P. 41(d). Bennett v. Equity Residential, — N.C. App. —, 665 S.E.2d 514, 2008 N.C. App. LEXIS 1609 (2008).

Expenses sought by defendant medical providers pursuant to this section were too far removed from deposition itself to be considered direct "deposition expenses"; for instance, some of the travel expenses related to travel to visit defendants' witnesses, not travel to and from deposition, and the record failed to show conclusively that any of the expenses incurred for copying, long distance phone calls and postage stemmed directly from deposition. Muse v. Eckberg, 139 N.C. App. 446, 533 S.E.2d 268, 2000 N.C. App. LEXIS 911 (2000).

Defendants Not Entitled to Costs Where Plaintiff Took Voluntary Dismissal. — Where plaintiff took voluntary dismissal, and then refiled, defendants were not entitled to expert witness fees, deposition transcripts, court reporter fees, or attorney travel costs under G.S. 1A-1, Rule 41(a); assuming, arguendo, that all the expenses denied by the trial court were recoverable as common law costs under G.S. 6-20, such an award was permissive, not mandatory. Cosentino v. Weeks, 160 N.C. App. 511, 586 S.E.2d 787, 2003 N.C. App. LEXIS 1830 (2003).

Costs recoverable following a voluntary dismissal are the costs enumerated in G.S. 7A-305(d); therefore, since a defendant requested costs not enumerated therein, a motion for costs following plaintiff's voluntary dismissal was properly denied. PharmaResearch Corp. v. Mash, 163 N.C. App. 419, 594 S.E.2d 148, 2004 N.C. App. LEXIS 410 (2004), cert. denied and dismissed, 358 N.C. 733, 601 S.E.2d 858 (2004).

Construction with Other Law. — The trial court did not abuse its discretion and violate G.S. 7A-305 in taxing the expert witness fees to appellant/patient pursuant to G.S. 6-20 after he voluntarily dismissed his negligence suit pursuant to G.S. 1A-1, Rule 41 on the day of trial; costs which are to be taxed under Rule 41(d) include those costs enumerated in G.S. 7A-305(d) and that section does not preclude liability for other costs such as those outlined in G.S. 6-20. Lewis v. Setty, 140 N.C. App. 536, 537 S.E.2d 505, 2000 N.C. App. LEXIS 1216 (2000).

Order to Pay Costs. — Trial court's order that an employee pay costs in the first case he brought against an agency was a civil judgment, and the trial court was not authorized to dismiss the employee's second case against the agency for his failure to pay costs ordered in first case; however, the agency's motion to dismiss was well founded, and the trial court's refusal to award sanctions was affirmed. Leverette v. Batts Temp. Servs. , 165 N.C. App. 328, 598 S.E.2d 192, 2004 N.C. App. LEXIS 1174 (2004), cert. denied, 359 N.C. 69, 604 S.E.2d 666 (2004).

Rule 42. Consolidation; separate trials.

(a) *Consolidation.* — Except as provided in subdivision (b)(2) of this section, when actions involving a common question of law or fact are pending in one division of the court, the judge may order a joint hearing or trial of any or all the matters in issue in the actions; he may order all the actions consolidated; and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. When actions involving a common question of law or fact are pending in both the superior and the district court of the same county, a judge of the superior court in which the action is pending may order all the actions consolidated, and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) *Separate trials.* —

(1) The court may in furtherance of convenience or to avoid prejudice and shall for considerations of venue upon timely motion order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

(2) Upon motion of any party in an action that includes a claim commenced under Article 1G of Chapter 90 of the General Statutes involving a managed care entity as defined in G.S. 90-21.50, the court shall order separate discovery and a separate trial of any claim, cross-claim, counterclaim, or third-party claim against a physician or other medical provider. (1967, c. 954, s. 1; 2001-446, s. 4.8.)

COMMENT

Section (a), providing for consolidation of actions "involving a common question of law or fact," invokes a power that North Carolina courts have long exercised. See McIntosh, *North Carolina Practice and Procedure* (1st ed.) pp. 536-537, § 506. Section (b) furnishes the court with the contrasting power of severance. With the multisided lawsuit made possible by these rules, it is safe to say that there will be more frequent occasion for the exercise of this power than formerly. Indeed, the power of severance is an indispensable safety valve to guard against the occasion where a suit of unmanageable size is thrust on the court. Whether or not there should be a severance rests in the sound discretion of the judge. For occasions where severance has been thought appropriate, see 5 *Moore's Federal Practice,* § 42.03.

Editor's Note. — Session Laws 2001-446, s. 8 provides: "Nothing in this act obligates the General Assembly to appropriate funds to implement this act."

CASE NOTES

I. In General.
II. Consolidation.
III. Separate Trials.

I. IN GENERAL.

Purpose of Rule. — This rule was enacted in view of the multisided lawsuit made possible by these rules for the purpose of guarding against the occasion where a suit of unmanageable size is thrust on the court. Wallace v. Evans, 60 N.C. App. 145, 298 S.E.2d 193 (1982).

Applied in Frances Hosiery Mills, Inc. v. Burlington Indus., Inc., 19 N.C. App. 678, 200 S.E.2d 668 (1973); Whalehead Properties v. Coastland Corp., 299 N.C. 270, 261 S.E.2d 899 (1980); Behr v. Behr, 46 N.C. App. 694, 266 S.E.2d 393 (1980); Braddy v. Nationwide Mut. Liab. Ins. Co., 122 N.C. App. 402, 470 S.E.2d 820 (1996); N.C. State Bar v. Rogers, 164 N.C. App. 648, 596 S.E.2d 337, 2004 N.C. App. LEXIS 965 (2004).

Cited in Graham v. Martin, 149 N.C. App. 831, 561 S.E.2d 583, 2002 N.C. App. LEXIS 298 (2002); In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65, 2002 N.C. App. LEXIS 1273 (2002); Moquin v. Hedrick, 163 N.C. App. 345, 593 S.E.2d 435, 2004 N.C. App. LEXIS 372 (2004).

II. CONSOLIDATION.

Power of Judge to Consolidate Actions. — A trial court has the discretionary power, even ex mero motu, to consolidate actions for trial. He may do so even though the actions are instituted by different plaintiffs against a common defendant, or by the same plaintiff against several defendants, when the causes of action grow out of the same transaction and substantially the same defenses are interposed, provided that such consolidation results in no prejudice or harmful complications to either party. Greenville City Bd. of Educ. v. Evans, 21 N.C. App. 493, 204 S.E.2d 899, cert. denied, 285 N.C. 588, 206 S.E.2d 862 (1974).

Trial court in the exercise of its discretion may consolidate several cases involving different plaintiffs against a common defendant when the causes of action grow out of the same transaction and substantially the same defenses are interposed, if such consolidation does not result in prejudice or harmful complications to either party. Wood v. Brown, 25 N.C. App.

241, 212 S.E.2d 690, cert. denied, 287 N.C. 469, 215 S.E.2d 626 (1975).

Decision as to Consolidation Is Within Discretion of Trial Judge. — Where two cases were properly before the district court, it was within the discretion of the trial judge as to whether consolidation should be allowed. In re Moore, 11 N.C. App. 320, 181 S.E.2d 118 (1971).

Consolidation Motion Properly Denied Where General Contractor's Action Predated Subcontractor's. — Denial of subcontractor's motion to consolidate actions under G.S. 1A-1-42 was proper because general contractor's action predated subcontractor's action and subcontractor's action was abated; contrary to subcontractor's argument, the filing of its action did not relate back to the filing of the claim of lien. Barrier Geotechnical Contrs., Inc. v. Radford Quarries of Boone, Inc., 184 N.C. App. 741, 646 S.E.2d 840, 2007 N.C. App. LEXIS 1599 (2007).

And Will Not Be Disturbed Absent Abuse of Discretion and Showing of Prejudice. — An action of the trial judge as to a matter within his judicial discretion will not be disturbed unless a clear abuse of discretion is shown. Moreover, when the consolidation of actions for the purpose of trial is assigned as error, the appellant must show injury or prejudice arising therefrom. In re Moore, 11 N.C. App. 320, 181 S.E.2d 118 (1971).

The trial court did not abuse its discretion by denying defendant's motion to consolidate cases. Markham v. Nationwide Mut. Fire Ins. Co., 125 N.C. App. 443, 481 S.E.2d 349 (1997), cert. denied, 346 N.C. 281, 487 S.E.2d 551 (1997).

Judge Who Will Preside Must Make Consolidation Determination. — Where a judge entered an interlocutory order of consolidation under this rule, which order was entered out of term and out of session, and he was not scheduled to preside at the session of court at which he had set the consolidated cases for trial, such consolidation was in error, since the determination whether or not to consolidate actions for trial is left to the sound discretion of the judge who will preside during the trial. Oxendine v. Catawba County Dep't of Social Servs., 49 N.C. App. 571, 272 S.E.2d 417 (1980), modified and aff'd, 303 N.C. 699, 281 S.E.2d 370 (1981).

The discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial; therefore, the trial court in a child custody hearing erred in granting defendant's motion to consolidate plaintiffs' custody action and petition for adoption for trial in the superior court where the judge had a hearing on defendant's motion and entered his order of consolidation out of term and out of session, but there was no indication that he was scheduled to preside at the session of court during which he set the consolidated cases to be presented for trial. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

III. SEPARATE TRIALS.

Section (b) Confers Same Power as § 1A-1, Rule 20(b). — Section (b) of this rule, which gives to the trial judge general power to sever, confers the same power contemplated by G.S. 1A-1, Rule 20(b). Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972).

Severance Authorized. — Although the basic philosophy of the party joinder provisions is to allow relatively unrestricted initial joinder, there are provisions in G.S. 1A-1, Rule 20(b) and section (b) of this rule for the trial judge to sever and order separate trials. Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972); Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646, cert. denied, 300 N.C. 379, 267 S.E.2d 685 (1980), overruled on other grounds, Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981).

The trial judge has discretion to sever issues for trial in order to further convenience or avoid prejudice. On remand, if the trial judge exercises such discretion, it is recommended that he enter findings and conclusions that will establish the appropriateness of severance. Vance Trucking Co. v. Phillips, 66 N.C. App. 269, 311 S.E.2d 318, cert. denied, 311 N.C. 309, 317 S.E.2d 907 (1984).

Within Discretion of Trial Judge. — Whether or not there should be severance rests in the sound discretion of the trial judge. Aetna Ins. Co. v. Carroll's Transf., Inc., 14 N.C. App. 481, 188 S.E.2d 612 (1972); Wallace v. Evans, 60 N.C. App. 145, 298 S.E.2d 193 (1982).

Severance is not a matter of right, but lies within the court's discretion. Board of Transp. v. Royster, 40 N.C. App. 1, 251 S.E.2d 921 (1979).

The decision to sever issues is in the discretion of the trial judge. Pinner v. Southern Bell Tel. & Tel. Co., 60 N.C. App. 257, 298 S.E.2d 749, cert. denied, 308 N.C. 387, 302 S.E.2d 253 (1983).

While severance is discretionary, this rule provides for exercise of that discretion only in furtherance of convenience or to avoid prejudice. Wallace v. Evans, 60 N.C. App. 145, 298 S.E.2d 193 (1982).

The plain language of subsection (b) vests in the trial court broad discretionary authority to determine when bifurcation is appropriate. Roberts v. Young, 120 N.C. App. 720, 464 S.E.2d 78 (1995).

When Bifurcation Is Appropriate. — A bifurcated trial is particularly appropriate where separate submission of issues avoids confusion and promotes a logical presentation to the jury, and where resolution of a separated issue will potentially dispose of the entire case. In re Will of Hester, 320 N.C. 738, 360 S.E.2d 801, rehearing denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

There was no error in the bifurcation of a personal injury action, as the trial court was granted the authority to bifurcate a trial in furtherance of convenience or to avoid prejudice, in accordance with Rule 42(b); although commonly used in complicated tort proceedings, it was not restricted to such cases, and, if the jury in the instant case had found negligence, there would have been an opportunity to present evidence on damages. Marshall v. Williams, 153 N.C. App. 128, 574 S.E.2d 1, 2002 N.C. App. LEXIS 1071 (2002), appeal dismissed, 356 N.C. 614, 574 S.E.2d 683 (2002).

Separation Held Proper. — Claim against one of several defendants arose from circumstances totally different from those that gave rise to the other claims involved and trying that issue separately was a comparatively simple process that had the advantage of possibly making it unnecessary to try the other issues; therefore, severance of that claim was proper. Hoots v. Toms & Bazzle, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

Issues concerning the validity of a testator's 1995 will and the revocation of the testator's 2002 will were separate, distinct, and compartmentalized, and a trial court's order trifurcating the issues of the trial was not improper. In re Will of McFayden, 178 N.C. App. 704, 632 S.E.2d 520, 2006 N.C. App. LEXIS 1635 (2006), rev'd in part, — N.C. —, 635 S.E.2d 65 (2006).

Caveators alleged a second will, the original of which was lost, revoked the testator's earlier will under G.S. 31-5.1; pursuant to G.S. 1A-1-42, the trial court did not abuse its discretion by trifurcating the case on three issues: (1) the validity of the earlier will; (2) whether the testator destroyed the later will; and (3) the validity of the later will, as these issues were separate, distinct, and compartmentalized. In re Will of McFayden, 179 N.C. App. 595, 635 S.E.2d 65, 2006 N.C. App. LEXIS 2053 (2006).

No Error Where Sound Grounds for Separation Exist. — Since subsection (b) of this rule authorizes the trial judge to order a separate trial of any claim or issue "in furtherance of convenience or to avoid prejudice," the severance of the claim against one of several defendants was within the court's discretion, and was not error since sound grounds therefor existed. Hoots v. Toms & Bazzle, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

Bifurcation of Caveat Proceedings. — Although this rule has most frequently been applied in complicated tort proceedings, there is no reason why bifurcation of a caveat proceeding may not be approached in the same fashion as in other civil litigation. In re Will of Hester, 320 N.C. 738, 360 S.E.2d 801, rehearing denied, 321 N.C. 300, 362 S.E.2d 780 (1987).

Bifurcation of Underlying and Malpractice Claims. — Severance of a legal malpractice claim, under G.S. 1A-1, Rule 42(b), into a trial on whether the client's underlying claim was valid, followed by a trial on whether the attorney committed malpractice, did not abuse discretion. Kearns v. William F. Horsley, Donaldson & Black, P.A., 144 N.C. App. 200, 552 S.E.2d 1, 2001 N.C. App. LEXIS 544 (2001).

Rule 43. Evidence.

(a) *Form.* — In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules.

(b) *Examination of hostile witnesses and adverse parties.* — A party may interrogate any unwilling or hostile witness by leading questions and may contradict and impeach him in all respects as if he had been called by the adverse party. A party may call an adverse party or an agent or employee of an adverse party, or an officer, director, or employee of a public or private corporation or of a partnership or association which is an adverse party, or an officer, agent or employee of a state, county or municipal government or agency thereof which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party.

(c) *Record of excluded evidence.* — In an action tried before a jury, if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any grounds or that the witness is privileged.

(d) *Affirmation in lieu of oath.* — Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) *Evidence on motions.* — When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. (1967, c. 954, s. 1.)

COMMENT

While these rules do not deal extensively with questions of evidence, matters dealt with by the federal rules have been considered.

Section (a). — This section continues the usual practice of testimony being taken orally in open court. The "unless" clause refers principally to the provisions for the use of depositions in Rule 26(d).

Section (b). — This section deals with the situation where a party is forced to call his adversary as a witness. Under former provisions of § 8-50, one was permitted in this situation to cross-examine the witness and to contradict him but not to impeach him. This latter restriction is removed on the theory that a party who is so desperate as to be forced to call his adversary as a witness should be allowed the greatest latitude in refuting his adversary's testimony, should that be desirable. Section (b) also enlarges and spells out in greater detail the category of witnesses to whom its special provisions apply. The former provisions of § 8-50 said only that where a corporation is a party, its "officers or agents" are within its scope.

Section (c). — This section continues present practice.

Section (d). — This section makes available to all the privilege of using an affirmation instead of an oath. Under § 11-4, only Quakers, Moravians, Dunkers and Mennonites are so privileged.

Section (e). — This section continues present practice.

Legal Periodicals. — For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

CASE NOTES

I. In General.
II. Form of Evidence.
III. Examination of Hostile Witnesses and Adverse Parties.
IV. Record of Excluded Evidence.
V. Evidence on Motions.

I. IN GENERAL.

Applied in Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975); Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977); Hedgecock Bldrs. Supply Co. v. White, 92 N.C. App. 535, 375 S.E.2d 164 (1989); Deer Corp. v. Carter, 177 N.C. App. 314, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006); Wells Fargo Bank, N.A. v. Affiliated FM Ins. Co., — N.C. App. —, 666 S.E.2d 774, 2008 N.C. App. LEXIS 1766 (2008).

Cited in Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Bowes v. Bowes, 287 N.C. 163, 214 S.E.2d 40 (1975); State v. Pope, 24 N.C. App. 644, 211 S.E.2d 841 (1975); Moore v. Galloway, 35 N.C. App. 394, 241 S.E.2d 386 (1978); Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979); State v. Moore, 300 N.C. 694, 268 S.E.2d 196 (1980); State v. Austin, 299 N.C. 537, 263 S.E.2d 574 (1980); State v. Crouch, 48 N.C. App. 72, 268 S.E.2d 529 (1980); State ex rel. Ingram v. North Carolina Farm Bureau Ins. Agency, Inc., 303 N.C. 287, 278 S.E.2d 248 (1981); Propst Constr. Co. v. North Carolina Dep't of Transp., 56 N.C. App. 759, 290 S.E.2d 387 (1982); Shields v. Nationwide Mut. Fire Ins. Co., 61 N.C. App. 365, 301 S.E.2d 439 (1983); State v. Baker, 77 N.C. App. 465, 335 S.E.2d 56 (1985); Williams v. Institute for Computational Studies, 85 N.C. App. 421, 355 S.E.2d 177 (1987); Battle v. Nash Technical

College, 103 N.C. App. 120, 404 S.E.2d 703 (1991); Inspirational Network, Inc. v. Combs, 131 N.C. App. 231, 506 S.E.2d 754 (1998); Cloer v. Smith, 132 N.C. App. 569, 512 S.E.2d 779 (1999); Bruggeman v. Meditrust Acquisition Co., 138 N.C. App. 612, 532 S.E.2d 215 (2000); Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003); Adams, Kleemeier, Hagan, Hannah & Fouts, PLLC v. Jacobs, 158 N.C. App. 376, 581 S.E.2d 798, 2003 N.C. App. LEXIS 1195 (2003); Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 611 S.E.2d 179, 2005 N.C. App. LEXIS 799 (2005); State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 188 N.C. App. 302, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008); Johns v. Johns, — N.C. App. —, 672 S.E.2d 34, 2009 N.C. App. LEXIS 110 (2009).

II. FORM OF EVIDENCE.

Court's Discretion. — In an alienation of affection suit, when the trial court's exercise of personal jurisdiction was challenged, under G.S. 1A-1, Rule 43(e) the trial court could decide the matter based on affidavits or could conduct an evidentiary hearing with witness testimony or depositions. Eluhu v. Rosenhaus, 159 N.C. App. 355, 583 S.E.2d 707, 2003 N.C. App. LEXIS 1525 (2003), aff'd, 358 N.C. 372, 595 S.E.2d 146 (2004).

Affidavits Preferred for Pretrial Motions. — For pretrial motion hearings it is affidavits and not oral testimony that is the preferred form of evidence. Lowder v. All Star Mills, Inc., 60 N.C. App. 699, 300 S.E.2d 241 (1983).

Use of Deposition at Trial Limited. — Although the Rules of Civil Procedure provide extensive rights of discovery to any party, the use of a deposition in a civil case at the trial stage is sharply limited. Maness v. Bullins, 11 N.C. App. 567, 181 S.E.2d 750, cert. denied, 279 N.C. 395, 183 S.E.2d 242 (1971). See also Rule 32.

Oral Testimony in Equitable Distribution Trial. — The trial court may not by rule or otherwise deprive the parties in an equitable distribution trial of the opportunity to present oral testimony in open court. Murrow v. Murrow, 87 N.C. App. 174, 359 S.E.2d 811 (1987).

Oral Testimony in Termination of Parental Rights. — Although a trial court considering a termination of parental rights petition can consider written reports, prior court order, and oral arguments by the attorneys involved in the case, some oral testimony needs to be taken by the court. In re A.M., — N.C. App. —, 665 S.E.2d 534, 2008 N.C. App. LEXIS 1632 (2008).

III. EXAMINATION OF HOSTILE WITNESSES AND ADVERSE PARTIES.

Section (b) of this rule changed the established law of the State applicable to civil cases, while the rule against impeachment of one's own witnesses in criminal cases remains unchanged. State v. Anderson, 283 N.C. 218, 195 S.E.2d 561 (1973).

And Is Counterpart to § 1A-1, Rule 26(e). — See Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Section (b) of this rule is applicable when plaintiff calls defendant as an adverse witness to testify at trial, instead of introducing the adverse examination of the defendant. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Applicability of Section (b) to Adverse Party's Testimony Under § 1A-1, Rule 26(e). — The rule applicable to the testimony at trial of an adverse party under section (b) of this rule is equally applicable to the adverse party's testimony under adverse examination under G.S. 1A-1, Rule 26(e). Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

A party calling his adversary as a witness is not concluded by his uncontradicted testimony, but may rely on such portion of his testimony as is favorable to him, and is not bound by his adverse testimony. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973).

Right to Elicit Facts Showing Hostility of Witness. — A party to either a civil or criminal proceeding may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him, hostile to his cause or interested adversely to him in the outcome of the litigation. State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975).

Use of Leading Questions on Cross-Examination. — Leading questions may be asked on cross-examination, but the cross-examiner may be barred from doing so when the witness is not in fact unwilling or hostile. Fisher v. Thompson, 50 N.C. App. 724, 275 S.E.2d 507 (1981).

The rulings of the judge on the use of leading questions are discretionary and may not be reversed absent an abuse of that discretion. Fisher v. Thompson, 50 N.C. App. 724, 275 S.E.2d 507 (1981).

Termination of Parental Rights. — A respondent in a proceeding to terminate her parental rights is a party to the proceeding, and may be called to testify as an adverse party when she appeared at the proceeding, and a subpoena was not required. In re Davis, 116 N.C. App. 409, 448 S.E.2d 303, cert. denied, 338 N.C. 516, 452 S.E.2d 808 (1994).

IV. RECORD OF EXCLUDED EVIDENCE.

Right of Counsel to Make Trial Record. — While it is fundamental that trial counsel be allowed to make a trial record sufficient for appellate review, not every failure by the trial court to comply with the rule will be deemed prejudicial error. State v. Rudd, 60 N.C. App. 425, 299 S.E.2d 251 (1983).

Efforts by trial counsel to make a record should rarely occasion threats by the trial judge to incarcerate counsel, lest not only should a good trial record fail to be made, but also that such actions by the trial court may amount to such manifest abuse of the trial court's discretion in the conduct of the trial as to prejudice the outcome. State v. Rudd, 60 N.C. App. 425, 299 S.E.2d 251 (1983).

When attempts to make a record by trial counsel are met by not mere failure or refusal of the trial court to make such a record, but are met also by overt hostility of the trial judge to such efforts, the risks that a good trial record will not be made are significantly increased. State v. Rudd, 60 N.C. App. 425, 299 S.E.2d 251 (1983).

While recognizing that the balancing of the needs of judicial efficiency against lawyer exuberance will often be difficult for the trial judge, the risk of regrettable judicial mistakes will be less likely if trial judges avoid overt hostile reactions to create a record by trial counsel. State v. Rudd, 60 N.C. App. 425, 299 S.E.2d 251 (1983).

Judge Need Not be Present for Record to be Made. — Where the trial court allowed the ex-husband to introduce the excluded evidence into the record, and there was no binding authority that required a trial court to personally take an offer of proof, the trial court's failure to personally consider the ex-husband's offer of proof was not prejudicial. Rhew v. Felton, 178 N.C. App. 475, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560, appeal dismissed, review denied, 636 S.E.2d 810 (2006).

The trial judge should be loath to deny an attorney his right to have an excluded answer placed in the record, because the appellate division may not concur in his judgment that the proffered testimony is clearly inadmissible. Nix v. Allstate Ins. Co., 68 N.C. App. 280, 314 S.E.2d 562 (1984).

Exclusion Based on Claim of Privilege. — Normally, excluded evidence must be placed in the record if offered, "unless it clearly appears . . . that the witness is privileged." If the exclusion is based upon a claim of privilege, disclosure of the answer should not be required, as it would in some sense destroy the very privilege ostensibly recognized. Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984).

Section (c) of this rule does not state time to be of the essence in making a motion to let the record show the answers that would have been given to questions to which objections were sustained. State v. Willis, 20 N.C. App. 43, 200 S.E.2d 408 (1973), aff'd, 285 N.C. 195, 204 S.E.2d 33 (1974).

Right to Appeal Waived for Failure to Make Offer of Proof. — Passenger waived her right to appeal the refusal of the trial court to allow her to rehabilitate her expert witness, a chiropractor; the passenger failed to make an offer of proof under G.S. 1A-1, N.C. R. Civ. P. 43(c), indicating the relevance of the question or that the testimony was sought for purposes allowed under G.S. 8C-1, N.C. R. Evid. 411. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

An offer of proof under section (c) of this rule must be specific and must indicate what testimony the excluded witness would give. Currence v. Hardin, 296 N.C. 95, 249 S.E.2d 387 (1978).

Showing of Essential Content of Excluded Testimony Required. — A simple indication or assertion that excluded testimony will concern a physician's diagnosis of a party's condition, although it indicates the general subject of the testimony, is not sufficiently specific for purposes of review. A showing of the essential content or substance of the witness' testimony is required before the court can determine whether the error in excluding the evidence is prejudicial. Currence v. Hardin, 296 N.C. 95, 249 S.E.2d 387 (1978).

Significance of the Excluded Evidence Must Be Shown. — Whether an objection is to the admissibility of testimony or to the competency of a witness to testify, the significance of the excluded evidence must be made to appear in the record if the matter is to be heard on review. Unless the significance of the evidence is obvious from the record, counsel offering the evidence must make a specific offer of what he expects to prove by the answer of the witness. Currence v. Hardin, 296 N.C. 95, 249 S.E.2d 387 (1978).

Exclusion of testimony cannot be held prejudicial on appeal unless appellant shows what witness would have testified if permitted to do so. Spinella v. Pearce, 12 N.C. App. 121, 182 S.E.2d 620 (1971); Gibbs v. Duke, 32 N.C. App. 439, 232 S.E.2d 484, cert. denied, 292 N.C. 640, 235 S.E.2d 61 (1977); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Judge's Refusal to Allow Preservation of Answer Not Prejudicial Error Where Im-

materiality Is Demonstrated. — While section (c) of this rule specifically requires the judge to preserve the offer of evidence in the record in a civil case, where the witness has already answered the question sufficiently to demonstrate the immateriality of the inquiry, the judge's refusal to allow the preservation of the answer will not be held prejudicial error. State v. Chapman, 294 N.C. 407, 241 S.E.2d 667 (1978).

Or Where Evidence Is Clearly Not Prejudicial. — In actions tried without a jury, answers to questions to which objections have been properly sustained need not be placed into the record by the trial court if the evidence is clearly not admissible on any grounds. Sheppard v. Sheppard, 38 N.C. App. 712, 248 S.E.2d 871 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 34 (1979).

While section (c) of this rule requires the trial court, upon request, to allow the insertion of excluded evidence in the record, the trial judge is not required to allow insertion of an answer in the record if it clearly appears that the proffered testimony is not admissible on any grounds. Nix v. Allstate Ins. Co., 68 N.C. App. 280, 314 S.E.2d 562 (1984).

V. EVIDENCE ON MOTIONS.

Requirements of § 1A-1, Rule 56(e) Read into Section (e) of this Rule. — To the extent that section (e) of this rule applies to a motion to dismiss, the requirement of G.S. 1A-1, Rule 56(e) that affidavits on motions for summary judgment shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein should be read into section (e) of this rule. Moreover, as a motion to dismiss can result in termination of a lawsuit just as much as a motion for summary judgment, the judge should rely only on material that would be admissible at trial in ruling on such a motion. Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979).

Rulings Must be Based on Material That Would be Admissible at Trial. — To the extent N.C. R. Civ. P. 43(e) applies to a motion to dismiss, a trial court in ruling on a N.C. R. Civ. P. 12(b)(2) motion should rely only on material that would be admissible at trial. N.C. R. Civ. P. 43(e) has been applied to motions related to default judgments, and because a default judgment also results in the termination of a lawsuit, affidavits purporting to establish personal jurisdiction over a defendant should be based on personal knowledge. Lemon v. Combs, 164 N.C. App. 615, 596 S.E.2d 344, 2004 N.C. App. LEXIS 964 (2004).

Evidence as to Motions for Fees. — Since a court may hear motions for fees on affidavits, it is not improper for court to allow fees without giving appellants a chance to cross-examine the receivers, attorneys and accountants as to the services rendered. Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230, aff'd in part and rev'd in part, 309 N.C. 695, 309 S.E.2d 193 (1983).

Oral testimony at a hearing on a motion for summary judgment is admissible by virtue of section (e) of this rule. Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

While under section (e) of this rule oral testimony is permissible on a motion for summary judgment, the admission of such testimony is in the court's discretion. Hillman v. United States Liab. Ins. Co., 59 N.C. App. 145, 296 S.E.2d 302 (1982), cert. denied, 307 N.C. 468, 299 S.E.2d 221 (1983).

For Use in Supplementary Capacity. — Under section (e) of this rule, oral testimony offered at a hearing on a motion under G.S. 1A-1, Rule 56 for summary judgment should be used only in a supplementary capacity, to provide a small link of required evidence, and not as the main evidentiary body of the hearing. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

Although section (e) of this rule does permit the court to hear oral testimony in ruling upon a motion for summary judgment, this procedure should normally be utilized only if a small link of evidence is needed, and not for a long drawn out hearing to determine whether there is to be a trial. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

Within Discretion of the Court. — While oral testimony is permissible on a motion for summary judgment, the admission of such testimony is in the court's discretion. Pearce Young Angel Co. v. Don Becker Enters., Inc., 43 N.C. App. 690, 260 S.E.2d 104 (1979).

Affidavit Not Based on Personal Knowledge Held Insufficient. — Where appellants sought a bond under G.S. 1-292 for a stay pending appeal of an order requiring them to sell land to appellee, an affidavit stating that appellee would incur damages of about $1.369 million per year if delayed in developing the land did not support the trial court's $1 million bond requirement, as there was no showing the affidavit was based on the affiant's personal knowledge. Currituck Assocs.-Residential P'ship v. Hollowell, 170 N.C. App. 399, 612 S.E.2d 386, 2005 N.C. App. LEXIS 1000 (2005).

As to propriety of considering affidavits in show cause hearings for injunctions, see State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

For case upholding court's direction that evidentiary hearing on motion for

relief from default judgment should be heard wholly on oral testimony, see Webb v. James, 46 N.C. App. 551, 265 S.E.2d 642 (1980).

Rule 44. Proof of official record.

(a) *Authentication of copy.* — An official record or an entry therein, when admissible for any purpose, may be evidence by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is without the State of North Carolina but within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) *Proof of lack of record.* — A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) *Other proof.* — This rule does not prevent the proof of official records specified in Title 28, U.S.C. §§ 1738 and 1739 in the manner therein provided; nor of entry or lack of entry in official records by any method authorized by any other applicable statute or by the rules of evidence at common law. (1967, c. 954, s. 1.)

COMMENT

North Carolina had no general statute, applying to all official custodians of records, in respect to the proof of official records. Section (a) supplies this omission and makes unnecessary reliance on statutes applicable to particular custodians and to particular situations. For reference to and discussion of the North Carolina statutes, see Stansbury, *North Carolina Evidence,* § 154.

Section (b) provides a simple method for producing evidence of nonexistence of a record.

Section (c), out of an abundance of caution, leaves as alternative methods of proof any methods now existing. For various statutes, see Chapter 8 of the General Statutes, Article 2 and Article 3. 28 U.S.C., §§ 1738 and 1739 have to do with proof of records in other states and in territories and possessions of the United States. In addition, the two sections prescribe the "faith and credit" these records are to have when duly authenticated.

Legal Periodicals. — For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

CASE NOTES

Authentication of Copy. — Minutes of a meeting of the Joint Appropriations Expansion Budget Committee on Education were properly admitted although they were not admitted into evidence through the legislative librarian, where the minutes were introduced through an administrative officer for the General Assembly and custodian of materials contained in the legislative library and the minutes were testified to be a true and accurate copy of the original of the minutes. This was sufficient authentication of the official minutes. Morgan v. Polk County Bd. of Educ., 74 N.C. App. 169, 328 S.E.2d 320 (1985).

Judgment from a Kentucky court in a class action against an insurer was properly authenticated for use in a North Carolina court, under G.S. 1A-1, N.C. R. Civ. P. 44(c), through the affidavit of an attorney. Freeman v. Pac. Life Ins. Co., 156 N.C. App. 583, 577 S.E.2d 184, 2003 N.C. App. LEXIS 190 (2003).

Presumption of Validity. — Once a judgment creditor was entitled to a presumption that an out of state judgment was entitled to full faith and credit, the plaintiff was not required to bring forth evidence that none of the defenses available to defendants were valid; rather the defendants were required to bring forth evidence to rebut the presumption of validity, and, as the defendants offered no such evidence, the trial court correctly ordered that the plaintiff's motion to enforce the judgment be allowed and ordered that the out of state judgment be given full faith and credit. Lust v. Fountain of Life, Inc., 110 N.C. App. 298, 429 S.E.2d 435 (1993).

Foreign judgment that the judgment creditor obtained in New York was entitled to a presumption that the judgment was entitled to full faith and credit, as the judgment creditor met its burden of showing that entitlement by filing a properly authenticated judgment; however, the general contractor timely moved for relief from the foreign judgment by raising the defense that the New York trial court that entered it did not have personal jurisdiction over the general contractor, and because the trial court did not make any findings of fact or conclusions of law regarding the motion to enforce the judgment, the conclusion that the foreign judgment was enforceable in North Carolina was not supported by competent evidence and the case had to be remanded to the trial court for further proceedings. Quantum Corp. Funding, Ltd. v. B.H. Bryan Bldg. Co., 175 N.C. App. 483, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

Applied in Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972); Downey v. Downey, 29 N.C. App. 375, 224 S.E.2d 255 (1976); Moye v. Thrifty Gas Co., 40 N.C. App. 310, 252 S.E.2d 837 (1979); Thelen v. Thelen, 53 N.C. App. 684, 281 S.E.2d 737 (1981).

Cited in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); Burke v. Harrington, 35 N.C. App. 558, 241 S.E.2d 715 (1978); Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979); Orix Fin. Servs. v. Raspberry Logging, Inc., 190 N.C. App. 657, 660 S.E.2d 609, 2008 N.C. App. LEXIS 1012 (2008).

Rule 44.1. Determination of foreign law.

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or by other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Chapter 8 of the General Statutes and State law. The court's determination shall be treated as a ruling on a question of law. (1995, c. 389, s. 5.)

Rule 45. Subpoena.

(a) *Form; Issuance.* —

(1) Every subpoena shall state all of the following:
  - a. The title of the action, the name of the court in which the action is pending, the number of the civil action, and the name of the party at whose instance the witness is summoned.
  - b. A command to each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated records, books, papers, documents, or tangible things in the possession, custody, or control of that person therein specified.
  - c. The protections of persons subject to subpoenas under subsection (c) of this rule.
  - d. The requirements for responses to subpoenas under subsection (d) of this rule.

(2) A command to produce evidence may be joined with a command to appear at trial or hearing or at a deposition, or any subpoena may be issued separately.

(3) A subpoena shall issue from the court in which the action is pending.

(4) The clerk of court in which the action is pending shall issue a subpoena, signed but otherwise blank, to a party requesting it, who shall complete it before service. Any judge of the superior court, judge of the district court, magistrate, or attorney, as officer of the court, may also issue and sign a subpoena.

(b) *Service.* —

(1) Manner. — Any subpoena may be served by the sheriff, by the sheriff's deputy, by a coroner, or by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to that person or by registered or certified mail, return receipt requested. Service of a subpoena for the attendance of a witness only may also be made by telephone communication with the person named therein only by a sheriff, the sheriff's designee who is not less than 18 years of age and is not a party, or a coroner.

(2) Service of copy. — A copy of the subpoena served under subdivision (1) of this subsection shall also be served upon each party in the manner prescribed by Rule 5(b). This subdivision does not apply to subpoenas issued under G.S. 15A-801 or G.S. 15A-802.

(c) *Protection of Persons Subject to Subpoena.* —

(1) Avoid undue burden or expense. — A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

(2) For production of public records or hospital medical records. — Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

(3) Written objection to subpoenas. — Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of records may, within 10 days after

service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:

a. The subpoena fails to allow reasonable time for compliance.
b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
c. The subpoena subjects a person to an undue burden.
d. The subpoena is otherwise unreasonable or oppressive.
e. The subpoena is procedurally defective.

(4) Order of court required to override objection. — If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.

(5) Motion to quash or modify subpoena. — A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.

(6) Order to compel; expenses to comply with subpoena. — When a court enters an order compelling a deposition or the production of records, books, papers, documents, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers, documents, or tangible things specified in the subpoena.

(7) Trade secrets; confidential information. — When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash; expenses. — When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) *Duties in Responding to Subpoenas.* —

(1) Form of response. — A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label the documents to correspond with the categories in the request.

(2) Specificity of objection. — When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, or other tangible things not produced, sufficient for the requesting party to contest the objection.

(d1) *Opportunity for Inspection of Subpoenaed Material.* — A party or attorney responsible for the issuance and service of a subpoena shall, within five business days after the receipt of material produced in compliance with the subpoena, serve all other parties with notice of receipt of the material produced in compliance with the subpoena and, upon request, shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party.

(e) *Contempt; Expenses to Force Compliance With Subpoena.* —

(1) Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of court. Failure by any party without adequate cause to obey a subpoena served upon the party shall also subject the party to the sanctions provided in Rule 37(d).

(2) The court may award costs and attorney's fees to the party who issued a subpoena if the court determines that a person objected to the subpoena or filed a motion to quash or modify the subpoena, and the objection or motion was unreasonable or was made for improper purposes such as unnecessary delay. (1967, c. 954, s. 1; 1969, c. 886, s. 1; 1971, c. 159; 1975, c. 762, s. 3; 1983, c. 665, s. 1; c. 722; 1989, c. 262, s. 1; 2003-276, s. 1; 2007-514, s. 1.)

COMMENT

Comment to this Rule as Originally Enacted. — This rule would seem to be largely self-explanatory. An effort has been made to provide a convenient and highly flexible practice in respect to subpoenas. It will be noted that the subpoena is to be directed to the witness rather than to the sheriff as our present statute provides. The party obtaining the subpoena will deliver it to the appropriate sheriff or other proper person for service.

The differences between sections (a) and (c) on the one hand, and section (d) on the other should also be noted. In sections (a) and (c), it is contemplated that the subpoena will issue from the court where the action is to be tried wherever the witness is likely to be found, while in section (d) the idea is that the subpoena shall issue from the court of the county where the deposition is to be taken. The limitations of section (d) in no way affect where the subpoena may be served nor do they in any way apply to sections (a) and (c).

Comment to the 1975 Amendment. — *Section (d).* — The reference in subsection (d)(1) is amended to conform to the relocation of the section to which it refers. The second paragraph of subsection (d)(1) is borrowed from the federal rule. Former subsection (d)(2) is relocated to Rule 30(b)(1) where, as modified, it applies to all deponents, and not just those whose presence can be compelled only by subpoena.

Section (e). — This provision is amended to require service of a copy of a subpoena duces tecum by delivery or by registered or certified mail and to allow a person other than a sheriff, his deputy or a coroner to serve a subpoena for the attendance of a witness by registered or certified mail. The amendment also requires the server to be of legal age.

Legal Periodicals. — For article, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Taking a Deposition Under North Carolina Law," see 21 N.C. Cent. L.J. 215 (1995).

CASE NOTES

Subpoenas are not available by statute until an action has been commenced. In re Superior Court Order Dated April 8, 1983, 70 N.C. App. 63, 318 S.E.2d 843 (1984), rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

At the investigatory stage there is insufficient evidence to support a finding of probable cause, and administrative or criminal search warrants cannot be used. In re Superior Court Order Dated April 8, 1983, 70 N.C. App. 63, 318 S.E.2d 843 (1984), rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

Corporations have never possessed the kind of protection under U.S. Const., Amend. XIV accorded to persons and their homes. Corporations' special status as creatures of the state exposes them to exhaustive state scrutiny in exchange for the privilege of state recognition. In re Superior Court Order Dated April 8, 1983, 70 N.C. App. 63, 318 S.E.2d 843 (1984), rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

Nothing in common law prohibits an order requiring production of bank records as part of an investigation of criminal activities of the bank's customers, and, if anything, the common law courts affirmatively possessed such power. By extension, then, the Superior Courts of North Carolina continue to possess such power where the interests of justice so require. In re Superior Court Order Dated April 8, 1983, 70 N.C. App. 63, 318 S.E.2d 843 (1984), rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

In order to compel the deposition testimony of a nonparty, a subpoena must be issued from the county in which the deposition is to be taken, and a proper subpoena should have been issued from the Clerk of Superior Court of Wake County directing a nonparty in a divorce case to appear in Wake County; therefore, nonparty and her attorney were substantially justified in opposing the discovery sought pursuant to the subpoena issued from Mecklenburg County, and the trial court's imposition of attorneys' fees under G.S. 1A-1, Rule 37(a)(4) was error. Cochran v. Cochran, 93 N.C. App. 574, 378 S.E.2d 580 (1989).

Where it was evident that plaintiffs waited until the last minute to serve an extremely broad subpoena, the court properly found that the subpoena was unreasonable and oppressive and did not abuse its discretion in quashing it. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

Mental Health Records Previously Admitted Into Evidence. — Trial court did not err by considering mental health records of a mother contained within the underlying file and previously admitted into evidence in proceedings to terminate her parental rights, because the mental health records challenged by the mother were originally admitted into evidence during a permanency planning review hearing and were not challenged by the mother at that time. In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005).

Award of Costs for Expert Witnesses Compelled to Appear and Testify. — Health care providers were entitled to an award of costs for expert witnesses that they called to appear and testify in the executors' medical malpractice action against the health care providers. Pursuant to G.S. 1A-1, N.C. R. Civ. P. 45(e)(1), the expert witnesses were compelled to attend because they had been served with subpoenas, and the award of costs did not also depend on the opposing party being served with the subpoena. Greene v. Hoekstra, 189 N.C. App. 179, 657 S.E.2d 415, 2008 N.C. App. LEXIS 416 (2008).

Applied in State v. Neely, 26 N.C. App. 707, 217 S.E.2d 94 (1975); State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); Wilson v. Wilson, 124 N.C. App. 371, 477 S.E.2d 254 (1996); Rush v. Living Centers-Southeast, Inc., 135 N.C. App. 509, 521 S.E.2d 145, 1999 N.C. App. LEXIS 1157 (1999); Kilgo v. Wal-Mart Stores, Inc., 138 N.C. App. 644, 531 S.E.2d 883, 2000 N.C. App. LEXIS 791 (2000).

Cited in Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258 (1972); Williams v. Williams, 18 N.C. App. 635, 197 S.E.2d 629 (1973); Bowes v. Bowes, 287 N.C. 163, 214 S.E.2d 40 (1975); State v. Bowden, 290 N.C. 702, 228 S.E.2d 414 (1976); North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976); State v. Richardson, 59 N.C. App. 558, 297 S.E.2d 921 (1982); North Carolina State Bar v. Speckman, 87 N.C. App. 116, 360 S.E.2d 129 (1987); Hall v. Cumberland

County Hosp. Sys., 121 N.C. App. 425, 466 S.E.2d 317 (1996); Chamberlain v. Thames, 131 N.C. App. 705, 509 S.E.2d 443 (1998); Fallis v. Watauga Med. Ctr., Inc., 132 N.C. App. 43, 510 S.E.2d 199, 1999 N.C. App. LEXIS 37 (1999).

Rule 46. Objections and exceptions.

(a) *Rulings on admissibility of evidence.* —

(1) When there is objection to the admission of evidence on the ground that the witness is for a specified reason incompetent or not qualified or disqualified, it shall be deemed that a like objection has been made to any subsequent admission of evidence from the witness in question. Similarly, when there is objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of questioning.

(2) If there is proper objection to the admission of evidence and the objection is overruled, the ruling of the court shall be deemed excepted to by the party making the objection. If an objection to the admission of evidence is sustained or if the court for any reason excludes evidence offered by a party, the ruling of the court shall be deemed excepted to by the party offering the evidence.

(3) No objections are necessary with respect to questions propounded to a witness by the court or a juror but it shall be deemed that each such question has been properly objected to and that the objection has been overruled and that an exception has been taken to the ruling of the court by all parties to the action.

(b) *Pretrial rulings, interlocutory orders, trial rulings, and other orders not directed to the admissibility of evidence.* — With respect to pretrial rulings, interlocutory orders, trial rulings, and other orders of the court not directed to the admissibility of evidence, formal objections and exceptions are unnecessary. In order to preserve an exception to any such ruling or order or to the court's failure to make any such ruling or order, it shall be sufficient if a party, at the time the ruling or order is made or sought, makes known to the court the party's objection to the action of the court or makes known the action that the party desires the court to take and the party's grounds for its position. If a party has no opportunity to object or except to a ruling or order at the time it is made, the absence of an objection or exception does not thereafter prejudice that party.

(c) Repealed by Session Laws 2001-379, s. 6, effective October 1, 2001. (1967, c. 954, s. 1; 2001-379, s. 6.)

COMMENT

Section (a)(1) is aimed at situations where repeated objections in respect to the admission of evidence have been necessary in order to assure review. In Shelton v. Southern Ry., 193 N.C. 670, 139 S.E. 232 (1927), the court declared:

"It is thoroughly established in this State that, if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination, the benefit of the exception is ordinarily lost."

This proposition has recently been reaffirmed in Dunes Club, Inc. v. Cherokee Ins. Co., 259 N.C. 293, 130 S.E.2d 625 (1963). Thus, apparently the only course of safety for counsel to follow under prior practice would be to object at every opportunity. It would seem that a single objection should suffice in either of the two situations specified in subsection (a)(1).

Section (a)(2) continues the present practice.

Section (a)(3) continues the present practice of making unnecessary objection or exception with respect to questions propounded by a juror or the judge. See former § 1-206(d).

Section (b), it will be noted, applies to all nonevidentiary rulings and orders. In this respect, it is new. However, the general principle of the section has been in North Carolina practice for some time in respect to rulings on motions for nonsuit. See former § 1-183.

Section (c) continues present practice. See former § 1-206, subsection (b), and the note to Rule 51.

Cross References. — As to instructions, generally, see G.S. 1-181, G.S. 1A-1, Rule 51, and Rule 10(b) of the North Carolina Rules of Appellate Procedure.

Legal Periodicals. — For article discussing North Carolina jury instruction practice, see 52 N.C.L. Rev. 719 (1974).

For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

For survey of 1980 law on evidence, see 59 N.C.L. Rev. 1173 (1981).

For article discussing the mechanics of objecting, see 4 Campbell L. Rev. 339 (1982).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Subsection (a)(1) of this rule operates to preserve the continued effect of a specific objection, once made, to a particular line of questioning. It eliminates, therefore, the burdens and tactical disadvantages which would otherwise result to objecting counsel from the necessity for repeated statements of essentially the same objection. Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980).

But subsection (a)(1) of this rule does not modify the general principle that the benefit of an objection, seasonably made, is lost if thereafter substantially the same evidence is admitted without any objection. Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980).

General Objection Insufficient Under Subsection (a)(1). — A general objection will not suffice to afford counsel the benefits of subsection (a)(1) of this rule. Rather, objecting counsel must alert the trial judge to the specific legal infirmities which may inhere in a "specified line of questioning." If at that point counsel's objection is overruled, he is entitled to assume that the court will continue to make the same ruling in response to subsequent objections to the same line of questioning. Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980).

A general objection will not enable a party to take advantage of subsection (a)(1) of this rule. Butler & Sidbury, Inc. v. Green St. Baptist Church, 90 N.C. App. 65, 367 S.E.2d 380 (1988).

In order to obtain the benefit of subsection (a)(1) of this rule, either the objecting party must precisely define the objectionable line of questioning, or the line of questioning objected to must be apparent to the court and the parties. Butler & Sidbury, Inc. v. Green St. Baptist Church, 90 N.C. App. 65, 367 S.E.2d 380 (1988).

Requirement of subsection (a)(1) of this rule that counsel object to a "specified" line of questioning was obviously satisfied where the "line" of questioning objected to was apparent to the court and the parties. Duke Power Co. v. Winebarger, 300 N.C. 57, 265 S.E.2d 227 (1980); McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 885 (1984).

Section (b) of this rule only requires a statement of the grounds for an objection, not the case law in support thereof. Doby v. Fowler, 49 N.C. App. 162, 270 S.E.2d 532 (1980).

Where no proper exception was made, but the transcript showed that the plaintiff informed the court of his opposition to the directed verdict and the grounds for his opposition, the exception was properly preserved pursuant to section (b) of this rule. McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 885 (1984).

Preserving Matters Underlying a Motion in Limine. — It is not sufficient to simply file a pretrial motion in limine to exclude evidence which the trial judge has not heard; to preserve for appeal matters underlying a motion in limine, the movant must make at least general objection when the evidence is offered at trial. Beaver v. Hampton, 106 N.C. App. 172, 416 S.E.2d 8 (1992), rev'd in part and aff'd in part, 333 N.C. 455, 427 S.E.2d 317 (1993).

Filing of Rule 12 (b)(6) Motion Sufficient. — For rulings and orders of the trial court not directed to admissibility of evidence, no formal objections or exceptions are necessary; thus, when defendants filed their motion to dismiss under G.S. 1A-1, Rule 12(b)(6), G.S. 1A-1, no further action in the trial court was required by defendants in order to preserve their exception. Inman v. Inman, 136 N.C. App. 707, 525 S.E.2d 820, 2000 N.C. App. LEXIS 136 (2000).

Right of Court to Exclude Evidence on Its Own Motion. — In the exercise of its right to control and regulate the conduct of a trial, a trial court may, of its own motion, exclude or strike evidence which is wholly incompetent or inadmissible for any purpose, even though no objection is interposed to such evidence; the exercise of such right must be kept within proper bounds. Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971).

Failure to Object to Discussion Between Court and Jurors. — Plaintiff who did not object or otherwise voice a concern during a discussion between the court and jurors regarding court's procedure for correcting jury's failure to deliberate on the issues, failed to preserve an exception to that procedure. Tin Originals, Inc. v. Colonial Tin Works, Inc., 98 N.C. App. 663, 391 S.E.2d 831 (1990).

Failure to Object to Substitution Order. — Because defendants did not specifically reference the trial court's order of substitution in the notice of appeal and because the record contained no indication that they had objected to the entry of that order, the appellate court lacked jurisdiction to review their contentions regarding the order. Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005), cert. denied, — U.S. —, 126 S. Ct. 2972, 165 L. Ed. 2d 954 (2006).

Plaintiff vigorously opposed defendant's motion for a protective order by filing an objection to defendants' motion, filing a motion to compel discovery of the disputed documents, and presenting his arguments during a trial court hearing. Therefore, at the time the ruling or order was made or sought, he made known to the trial court his objection to the action of the trial court and made known the action that he desired the trial court to take and his grounds for his position, G.S. 1A-1, R. 46(b). Yorke v. Novant Health, Inc., — N.C. App. —, 666 S.E.2d 127, 2008 N.C. App. LEXIS 1620 (2008).

Applied in State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976); Nicholson v. Hugh Chatham Mem. Hosp., 43 N.C. App. 615, 259 S.E.2d 586 (1979); Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984); State v. McGill, 73 N.C. App. 206, 326 S.E.2d 345 (1985); State v. Bright, 78 N.C. App. 239, 337 S.E.2d 87 (1985); In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986); Holley v. Hercules, Inc., 86 N.C. App. 624, 359 S.E.2d 47 (1987); Badgett v. Davis, 104 N.C. App. 760, 411 S.E.2d 200 (1991); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691 (1992).

Cited in Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252 (1978); In re Will of Ray, 35 N.C. App. 646, 242 S.E.2d 194 (1978); Skvarla v. Park, 62 N.C. App. 482, 303 S.E.2d 354 (1983); Gaunt v. Pittaway, 139 N.C. App. 778, 534 S.E.2d 660, 2000 N.C. App. LEXIS 1036 (2000).

II. DECISIONS UNDER PRIOR LAW.

***Editor's Note.** — The cases cited below were decided under former G.S. 1-206.*

Exceptions taken upon the trial should be as specific as possible and should point out the nature of the error complained of. Williams v. Johnston, 94 N.C. 633 (1886); State v. English, 164 N.C. 497, 80 S.E. 72 (1913). See Streator v. Streator, 145 N.C. 337, 59 S.E. 112 (1907); Hendricks v. Ireland, 162 N.C. 523, 77 S.E. 1011 (1913).

A "broadside" exception cannot be entertained on appeal. Kelly v. Johnson, 135 N.C. 650, 47 S.E. 672 (1904); Jackson v. Williams, 152 N.C. 203, 67 S.E. 755 (1910).

Formal Objections to Charge Not Required. — Errors in charge of the court, or the granting or refusing to grant prayers for instruction, shall be deemed excepted to without the filing of any formal objections, if specifically raised and properly presented in the case on appeal, and prepared and tendered in proper time; and when exceptions are taken, they should be considered and passed upon by the trial court, and upon being overruled, should be made to appear in the record on the appeal. Paul v. Burton, 180 N.C. 45, 104 S.E. 37 (1920). See also, Rice v. Swannanoa-Berkeley Hotel Co., 209 N.C. 519, 184 S.E. 3 (1936).

Omitted Charge Not Error Absent Request Therefor. — An omission to give a charge to which a party would have been entitled is not error, unless the same was requested on the trial and refused. Fry v. Currie, 91 N.C. 436 (1884), rehearing denied, 103 N.C. 203, 9 S.E. 393 (1889).

Exception to Charge Held Sufficient. — Where the judge below, in instructing the jury, submitted a phase of a question which there was no evidence to support, an oral exception to the question immediately taken, noted, and assigned as error for the case on appeal was sufficient to present the matter on appeal, even though no written instruction on the subject was prayed for by the excepting counsel. Lee v. Williams, 112 N.C. 510, 17 S.E. 165 (1893).

Exceptions to Instructions May be Raised on Appeal. — In regard to the trial court's instructions as to applicable law and as to the contentions of the parties with respect to such law, a party is not required to except at the trial, but may set out exceptions for the first time in his case on appeal. State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950). See also, Cherry v. Atlantic Coast Line R.R., 186 N.C. 263, 119 S.E. 361 (1923).

Rule 47. Jurors.

Inquiry as to the fitness and competency of any person to serve as a juror and the challenging of such person shall be as provided in Chapter 9 of the General Statutes. (1967, c. 954, s. 1.)

Rule 48. Juries of less than twelve — majority verdict.

Except in actions in which a jury is required by statute, the parties may stipulate that the jury will consist of any number less than 12 or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury. (1967, c. 954, s. 1.)

COMMENT

Since jury trial may be waived entirely, it is certainly appropriate with the consent of the parties that trial be by a jury of less than 12 and that the usual rule of unanimity not prevail. The rule recognizes the exception in actions for divorce provided by G.S. 50-10. Under the rule therefore, if there is a jury trial in a divorce action (there may not be; G.S. 50-10 provides for waiver when the ground alleged is one year's separation) it will be by a jury of 12 and the rule of unanimity will prevail.

Legal Periodicals. — For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1047 (1981).

CASE NOTES

When Agreement Pursuant to Rule May Be Made. — An agreement, made pursuant to this rule, that a verdict of a majority of the jurors will be accepted as the verdict, need not be made before the jury begins its deliberations, but may be made at any time, and defendant who agreed to accept a verdict of less than 12 could not complain when the verdict ultimately rendered was 11 to one, and the court accepted it as the verdict. U.S. Indus., Inc. v. Tharpe, 47 N.C. App. 754, 268 S.E.2d 824, cert. denied, 301 N.C. 90, 273 S.E.2d 311 (1980).

Rule 49. Verdicts.

(a) *General and special verdicts.* — The judge may require a jury to return either a general or a special verdict and in all cases may instruct the jury, if it renders a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. A general verdict is that by which the jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only.

(b) *Framing of issues.* — Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reducing to writing, before or during the trial.

(c) *Waiver of jury trial on issue.* — If, in submitting the issues to the jury, the judge omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the judge may make a finding; or, if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered.

(d) *Special finding inconsistent with general verdict.* — Where a special finding of facts is inconsistent with the general verdict, the former controls, and the judge shall give judgment accordingly. (1967, c. 954, s. 1.)

COMMENT

A distinguished scholar has said that the North Carolina verdict practice "has enabled, more than any other factor perhaps, a very small judiciary to care for the litigation of one of the larger states." Green, *A New Development in Jury Trial,* 13 ABAJ 715, at p. 716 (1927). The Commission shares this high opinion of the North Carolina practice and, in its more essential respects, the Commission proposed its retention. It will be observed that sections (a), (b) and (d) are practically drawn verbatim from former §§ 1-200 [section (b) of this rule]; 1-201 [the last two sentences of section (a)]; § 1-202 [section (d)]; former § 1-203 [the first sentence of section (a)].

There are some changes produced by the rule. Former § 1-203 permitted the jury "in their discretion" to return either a general or special verdict "in every action for the recovery of money only or specific real property." No instances of an exercise of this discretion were known to the Commission, and it saw no purpose in not allowing the judge to control the form of verdict. Accordingly, it omitted any reference to the jury's discretion in this respect.

Section (c) changes the law in respect to issues omitted by the judge in submitting a case to the jury. The right to jury trial on such issues would be lost in the absence of a demand for such submission and the judge would be empowered to make a finding on the issue in question. The idea is that the inadvertent omission of an issue ought not to jeopardize a whole trial when an impartial fact finder is on hand to make the requisite finding. Ample means for a party to protect his right to jury trial on all issues are clearly available. All he has to do is demand their submission "before the jury retires."

Section (c) also employs, in the case of an omitted issue and an omitted finding by the judge, a presumption of a finding in accord with the judgment. Formerly, in this situation, nothing was presumed in support of the judgment in jury cases. Tucker v. Satterthwaite, 120 N.C. 118, 27 S.E. 45 (1897).

Finally, it will be observed that the rule speaks of issues "raised in the pleadings or by the evidence." Normally, the issues will be raised by the pleadings but under Rule 15(b) provision is made for regarding the pleadings as amended whenever an issue outside the pleadings is tried with consent of the parties, express or implied. Thus, it will not be essential for the pleadings to reflect, on every occasion, all the issues.

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Purpose. — This rule was designed to prevent otherwise proper trials from being jeopardized through the inadvertent omission of an issue. Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977).

Section (b) of this rule contains substantially the same language as former § 1-200. Brant v. Compton, 16 N.C. App. 184, 191 S.E.2d 383, cert. denied, 282 N.C. 672, 196 S.E.2d 809 (1972).

Issues in a case arise only upon the controverted material facts raised by the pleadings and supported by the evidence. Crowder v. Jenkins, 11 N.C. App. 57, 180 S.E.2d 482 (1971).

The judge is required to submit such issues as are necessary to settle the material controversies arising on the pleadings. Harrison v. McLear, 49 N.C. App. 121, 270 S.E.2d 577 (1980).

It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. Howell v. Howell, 24 N.C. App. 127, 210 S.E.2d 216 (1974).

It is the duty of the trial judge to submit to the jury such issues as are necessary to settle the material controversies raised in the pleadings. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971); Rental Towel & Uniform Serv. v. Bynum Int'l, Inc., 304 N.C. 174, 282 S.E.2d 426 (1981).

It is the duty of the trial judge to submit to the jury issues which are raised by the evidence, and which, when answered, will resolve all material controversies between the parties. Wooten v. Nationwide Mut. Ins. Co., 60 N.C. App. 268, 298 S.E.2d 727, cert. denied, 308 N.C. 392, 302 S.E.2d 258 (1983); La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986), appeal dismissed and cert. denied, 319 N.C. 459, 354 S.E.2d 888 (1987).

The trial judge must submit to the jury all issues which are necessary to settle the material controversies arising out of the pleadings. Winston-Salem Joint Venture v. City of Winston-Salem, 65 N.C. App. 532, 310 S.E.2d 58 (1983).

Trial court properly submitted the issues to the jury which reflected the material controversies involved in the case, and did not abuse its discretion by combining the issues. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

The issues to be submitted to the jury are those raised by the pleadings and supported by the evidence. Johnson v. Massengill, 280 N.C. 376, 186 S.E.2d 168 (1972).

Form and number of issues submitted is a matter which rests in the sound discretion of the trial judge, assuming that the issue is raised by the pleadings, liberally construed. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

Ordinarily it is within the sound discretion of the trial judge as to the form of the issues. Brant v. Compton, 16 N.C. App. 184, 191 S.E.2d 383, cert. denied, 282 N.C. 672, 196 S.E.2d 809 (1972).

The number, form and phraseology of the issues lie within the sound discretion of the trial court, and the issues will not be held for error if they are sufficiently comprehensive to resolve all factual controversies and to enable the court to render a judgment fully determining the cause. Rental Towel & Uniform Serv. v. Bynum Int'l, Inc., 304 N.C. 174, 282 S.E.2d 426 (1981).

The form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, assuming that the issue is raised by the pleadings, liberally construed. Lenins v. K-Mart Corp., 98 N.C. App. 590, 391 S.E.2d 843 (1990).

The trial judge must explain and apply the law to the specific facts pertinent to the issue involved. Harrison v. McLear, 49 N.C. App. 121, 270 S.E.2d 577 (1980).

Separate Submission of Related Issues Upheld. — Where the allegations of the complaint were sufficient to justify submission to the jury of the questions of fraud, duress and undue influence, which are not synonymous although they overlap to some degree, submission of these several possibilities in a single issue would have been confusing and would have necessitated an exceedingly complicated charge; thus there was no abuse of the trial court's discretion in their submission as three separate issues. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

In a will caveat proceeding, the parties may not waive, either by consent or by implication, jury resolution of an issue upon which the evidence is in conflict and material facts are in controversy and, therefore, the provisions of subsection (c) cannot apply and the trial judge cannot resolve disputed factual issues in such proceeding. In re Will of Dunn, 129 N.C. App. 321, 500 S.E.2d 99 (1998), review dismissed and cert. denied, 348 N.C. 693, 511 S.E.2d 645 (1998).

Failure to Submit Issue Held Error. — Where the evidence presented was ample to allow the jury to make a finding on an issue, the trial court erred by not submitting the issue requested. Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971).

Trial court did not err in failing to submit an issue as to whether the parties had entered into a contract as alleged in the complaint, where defendant did not deny plaintiff's allegations as to the making of the contract or the terms thereof and did not allege a different contract, and where defendant made no demand for the submission of such an issue. Johnson v. Massengill, 280 N.C. 376, 186 S.E.2d 168 (1972).

The trial judge may vacate the answer to a particular issue when to do so does not affect or alter the import of the answers to the other issues. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

Waiver of issue by failure to object. — By application of section (c) of this rule, where the defendants failed to object to the first issue submitted to the jury, they waived their right to appeal on the ground that it was erroneous. Barnett v. Security Ins. Co., 84 N.C. App. 376, 352 S.E.2d 855 (1987).

Right to have an issue of fact determined by the jury is waived unless a party demands its submission before the jury retires. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

Assuming the plaintiff's evidence warranted the submission of an issue of punitive damages, plaintiff waived his right to have this issue submitted when he tendered to the court the issues which were submitted and failed to request the submission of an issue of punitive damages. Frazier v. Glasgow, 24 N.C. App. 641, 211 S.E.2d 852, cert. denied, 286 N.C. 722, 213 S.E.2d 721 (1975).

When defendants neither objected to an issue which was submitted to the jury nor requested the court to submit the issue, they waived their right to have such issue passed upon by the jury. Van Poole v. Masser, 25 N.C. App. 203, 212 S.E.2d 548 (1975).

If the parties consent to the issues submitted or do not object at the time or ask for different or additional issues, the objection cannot be made later. Brant v. Compton, 16 N.C. App.

184, 191 S.E.2d 383, cert. denied, 282 N.C. 672, 196 S.E.2d 809 (1972).

Where the jury's findings are indefinite or inconsistent, the presiding judge may give additional instructions and direct the jury to retire again to bring in a proper verdict, but he may not tell them what their verdict shall be. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

Resubmission of Issues for Inconsistency. — In an action to recover on a written contract of guaranty, where the trial judge noted inconsistency in the jury's answers to the third and fourth issues, which related only to the amount of damages, it was within the court's sound discretion to either resubmit all issues or resubmit only on issues as to damages. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

No Inconsistency. — In an action regarding the purchase and sale of a business, when the jury answered interrogatories as to claimed misrepresentations under a deceptive trade practices claim in the negative, but answered interrogatories as to misrepresentations under a negligent misrepresentation claim in the affirmative, the trial court was not required by G.S. 1A-1, Rule 49(d) to enter judgment on the special findings in the questions pertaining to deceptive trade practices, as the jury was not confused and was properly instructed. Kindred of N.C., Inc. v. Bond, 160 N.C. App. 90, 584 S.E.2d 846, 2003 N.C. App. LEXIS 1765 (2003).

Award of Damages as Surplusage. — Trial court erred in failing to treat jury's award of damages to plaintiff as surplusage after jury found plaintiff contributorily negligent. Rogers v. Sportsworld of Rocky Mount, Inc., 134 N.C. App. 709, 518 S.E.2d 551 (1999).

Finding Deemed Made in Accord with Judgment Entered. — Where an alleged usage of trade was not in writing, the question of its existence was not submitted to the jury as an issue of fact, plaintiff made no demand for its submission before the jury retired, and the trial judge himself made no finding on the issue, the judge was "deemed to have made a finding in accord with the judgment entered." Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

Where defendant did not formally object to instructions or request additional instructions, and jury was not asked to determine key factual contract issues, the trial court was "deemed to have made a finding in accord with the judgment entered." Patterson v. Strickland, 139 N.C. App. 510, 515 S.E.2d 915 (1999).

Before a verdict is complete it must be accepted by the court. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

It is the duty of the presiding judge, before accepting a verdict, to scrutinize its form and substance to prevent insufficient or inconsistent findings from becoming a record of the court. Southern Nat'l Bank v. Pocock, 29 N.C. App. 52, 223 S.E.2d 518, cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

Applied in Streeter v. Streeter, 33 N.C. App. 679, 236 S.E.2d 185 (1977); Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880 (1982); Stiles v. Charles M. Morgan Co., 64 N.C. App. 328, 307 S.E.2d 409 (1983); Fallston Finishing, Inc. v. First Union Nat'l Bank, 76 N.C. App. 347, 333 S.E.2d 321 (1985); Dobruck v. Lineback, 77 N.C. App. 233, 334 S.E.2d 455 (1985); Petty v. City of Charlotte, 85 N.C. App. 391, 355 S.E.2d 210 (1987); Morris v. Bailey, 86 N.C. App. 378, 358 S.E.2d 120 (1987); Northwestern Bank v. NCF Fin. Corp., 88 N.C. App. 614, 365 S.E.2d 14 (1988); Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

Cited in Deal v. Christenbury, 50 N.C. App. 600, 274 S.E.2d 867 (1981); Rental Towel & Uniform Serv. v. Bynum Int'l, Inc., 51 N.C. App. 203, 281 S.E.2d 664 (1981); Shreve v. Combs, 54 N.C. App. 18, 282 S.E.2d 568 (1981); Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268 (1982); Durham v. Quincy Mut. Fire Ins. Co., 311 N.C. 361, 317 S.E.2d 372 (1984); Cagle v. Teachy, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-196, 1-198, 1-200 and 1-201.*

The object of pleading is to produce proper issues of law and fact, so that justice may be administered between the parties litigant with regularity and certainty. Parsley v. Nicholson, 65 N.C. 207 (1871). See also, Braswell v. Johnston, 108 N.C. 150, 12 S.E. 911 (1891); Tucker v. Satterthwaite, 120 N.C. 118, 27 S.E. 45 (1897).

Submission of issues is not a mere matter within the discretion of the court, but is a mandatory requirement of the law, and a failure to observe this requirement will entitle the party who has not in some way lost the right to have the error of the court corrected. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

Former G.S. 1-200 was mandatory, and where no issues were tendered by either party, it was the duty of the judge either to compel counsel to prepare the proper issues or to prepare them himself and submit them to the jury. Such an adherence to the requirements was absolutely essential, not only to the fair trial of the case, but to an intelligent appreciation of its merits upon appeal. Denmark v.

Atlantic & N.C.R.R., 107 N.C. 185, 12 S.E. 54 (1890); Burton v. Rosemary Mfg. Co., 132 N.C. 17, 43 S.E. 480 (1903); Griffin v. United Servs. Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945). See also, Stanback v. Haywood, 209 N.C. 798, 184 S.E. 831 (1936), citing Tucker v. Satterthwaite, 120 N.C. 118, 27 S.E. 45 (1897).

Former provisions were mandatory. It was the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as were necessary to settle the material controversies arising on the pleadings. Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954); Nebel v. Nebel, 241 N.C. 491, 85 S.E.2d 876 (1955). See also, Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960); Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

But ordinarily the form and number of issues in a civil action are left to the sound discretion of the judge, and a party cannot complain because a particular issue was not submitted to jury in the form tendered. Griffin v. United Servs. Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945); Durham Lumber Co. v. Wrenn-Wilson Constr. Co., 249 N.C. 680, 107 S.E.2d 538 (1959); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960).

Ordinarily it is within the sound discretion of the trial judge as to what issues shall be submitted to the jury and the form thereof. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

It is within the sound discretion of the trial judge to determine what issues shall be submitted, and to frame them subject to the restrictions that the verdict must constitute a sufficient basis for a judgment, and that a party may not be debarred, for want of an additional issue or issues, of the opportunity to present to the jury some view of the law arising out of the evidence. Stanback v. Haywood, 209 N.C. 798, 184 S.E. 831 (1936).

The form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, it being sufficient that the issues be framed so as to present the material matters in dispute, to enable each party to have the full benefit of his contentions before the jury, and to enable the court, when the issues are answered, to determine the rights of the parties under the law. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

The court need not submit issues in any particular form. If they are framed in such a way as to present the material matters in dispute and so as to enable each of the parties to have the full benefit of his contention before the jury and a fair chance to develop his case, and if, when answered, the issues are sufficient to determine the rights of the parties and to support the judgment, the statutory requirements are fully met. O'Briant v. O'Briant, 239 N.C. 101, 79 S.E.2d 252 (1953).

Of the issues raised by the pleadings, the judge may in his discretion submit one or many, provided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions on some issue passed upon. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

It was not error for the court to submit only an issue involving the question whether plaintiff had been injured and had sustained damage through the negligence of a defendant, even where contributory negligence was set up as a defense. McAdoo v. Richmond & D.R.R., 105 N.C. 140, 11 S.E. 316 (1890); People ex rel. Boyer v. Teague, 106 N.C. 576, 11 S.E. 665 (1890).

The judge is required to submit such issues as are necessary to settle the material controversies arising on the pleadings. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

It is the duty of the judge to submit such issues as are necessary to settle the material controversies in the pleadings. In the absence of such issues, without admissions of record sufficient to justify the judgment rendered, the Supreme Court will remand the case for a new trial. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

It is the duty of the judge, either of his own motion or at the suggestion of counsel, to submit such issues as are necessary to settle the material controversies arising on the pleadings. Wheeler v. Wheeler, 239 N.C. 646, 80 S.E.2d 755 (1954); Nebel v. Nebel, 241 N.C. 491, 85 S.E.2d 876 (1955). See also, Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956); General Tire & Rubber Co. v. Distributors, Inc., 253 N.C. 459, 117 S.E.2d 479 (1960).

But it is not contemplated that an issue be submitted as to every important material fact controverted by the pleadings, nor is it necessary, expedient, or proper to do so. Patton v. Western N.C.R.R., 96 N.C. 455, 1 S.E. 863 (1887).

Issues of fact raised by the pleadings must be submitted to the jury. Baker v. Malan Constr. Corp., 255 N.C. 302, 121 S.E.2d 731 (1961).

When They Are Material and Determinative of Parties' Rights. — Even though the facts relating to a particular issue are controverted in the pleadings, when such issue is not "material to be tried" and is not determinative of the rights of the parties, it is error to submit such issue. Henry Vann Co. v. Barefoot, 249 N.C. 22, 105 S.E.2d 104 (1958).

It is necessary to submit to the jury only such issues as arise upon the pleadings and are material to be tried. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

What Is Material Fact. — A material fact is one which constitutes a part of plaintiff's cause of action or defendant's defense. Wells v. Clayton, 236 N.C. 102, 72 S.E.2d 16 (1952); In re Estate of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966); Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Material Fact Not Denied Is Taken as True. — If a material fact alleged in the complaint is not denied by the answer, such allegation, for the purpose of the action, is taken as true, and no issue arises therefrom. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Evidential Issues Need Not Be Submitted. — The only issues proper to be submitted to the jury are those raised by the constitutive facts alleged on the one side and denied on the other; and those issues which are merely evidential and which, when found by the jury, only furnish facts which would be evidence to prove the main issue, should never be submitted. Patton v. Western N.C.R.R., 96 N.C. 455, 1 S.E. 863 (1887).

When Issue Is Raised for Jury. — An issue of fact is raised for the determination of the jury whenever a material fact, which is one constituting a part of plaintiff's cause of action or defendant's defense, is alleged by one party and denied by the other. Sullivan v. Johnson, 3 N.C. App. 581, 165 S.E.2d 507 (1969).

An issue of fact arises on the pleadings whenever a material fact is maintained by one part and controverted by the other. Wells v. Clayton, 236 N.C. 102, 72 S.E.2d 16 (1952); In re Estate of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

An issue of fact arises when the answer controverts a material allegation of the complaint. Baker v. Malan Constr. Corp., 255 N.C. 302, 121 S.E.2d 731 (1961).

Issues Presenting All Phases of Controversy Sufficient. — If the issues submitted by the court are sufficient in form and substance to present all phases of the controversy, there is no ground for exception to the same. Bailey v. Hassell, 184 N.C. 450, 115 S.E. 166 (1922).

Issues and Answers Must Support Judgment Disposing of Whole Case. — The issues submitted, together with the answers thereto, must be sufficient to support a judgment disposing of the whole case. Griffin v. United Servs. Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945), citing Tucker v. Satterthwaite, 120 N.C. 118, 27 S.E. 45 (1897); Coulbourn v. Armstrong, 243 N.C. 663, 91 S.E.2d 912 (1956).

Separate Issues as to Separate Causes of Action. — Where plaintiff brings a single suit on two distinct causes of action, a separate issue should be submitted as to the damages arising on each separate cause of action. Kelley v. Durham Traction Co., 133 N.C. 418, 45 S.E. 826 (1903).

Submission of Single Issue on Inconsistent Causes of Action Held Error. — Where plaintiff alleged inconsistent causes of action in different counts of his complaint, it was error for the court to submit the case on a single issue as to whether plaintiff was injured by defendant's negligence, as alleged in the complaint. Griffin v. Atlantic Coast Line R.R., 134 N.C. 101, 46 S.E. 7 (1903), rehearing denied, 137 N.C. 247, 49 S.E. 212 (1904).

Submission of Issues Held Insufficient. — Where, in an action for damages, defendant tendered the issues: (1) Were plaintiff's injuries caused by the defendant's negligence, (2) was there contributory negligence on the part of the plaintiff, and (3) what damage was the plaintiff entitled to recover, and the court declined to submit these, but substituted instead a single issue as to what damages, if any, the plaintiff was entitled to recover, this was error. Denmark v. Atlantic & N.C.R.R., 107 N.C. 185, 12 S.E. 54 (1980).

In an action to recover on a policy of life insurance, where there were issues squarely raised by the pleadings and supported by evidence as to valid delivery and payment of the first premium, but the court declined to submit such issues or others of similar import which would be determinative of questions presented, the appellate court would remand for a new trial. Griffin v. United Servs. Life Ins. Co., 225 N.C. 684, 36 S.E.2d 225 (1945).

Addition of Issue of Contributory Negligence. — Where plaintiff brought suit against two defendants as joint tort-feasors, and one defendant answered alleging contributory negligence while the other defendant did not file an answer, upon which plaintiff tendered issues of negligence of the answering defendant and the court added the issue of contributory negligence arising upon the pleading of this defendant, it was held that, as a rule, the court must submit the issue arising on the pleadings, but the plaintiff waived this by tendering only one issue as to the answering defendant and allowing the case to be tried on that theory. Ammons v. Fisher, 208 N.C. 712, 182 S.E. 479 (1935).

Where a contract alleged in the complaint was different from that submitted in the issue, an instruction that if the contract was as alleged the issue should be answered in the affirmative was error. Dickens v. Perkins, 134 N.C. 220, 46 S.E. 490 (1904).

Verdict, whether in response to one or many issues, must establish sufficient facts to enable the court to proceed to judgment. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

Distinct findings are contemplated upon material issues. These should be submitted where this can be done without repetition or confusion. Emery v. Raleigh & G.R.R., 102 N.C. 209, 9 S.E. 139, rehearing denied, 102 N.C. 234, 10 S.E. 141 (1889).

Judgment Based on Nondeterminative Issues Error. — A judgment upon the verdict of the jury upon issues raised by the pleadings which were not determinative of the controversy between the parties was erroneously entered. Merchants Nat'l Bank v. Carolina Broom Co., 188 N.C. 508, 125 S.E. 12 (1924).

Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

Stipulations May Eliminate Necessity of Submitting Issues. — Although the parties may not agree upon improper issues, they may, by stipulation or judicial admission, establish any material fact which has been in controversy between them, and thereby eliminate the necessity of submitting an issue to the jury with reference to it. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

But stipulations do not dispense with necessity that pleadings support proof. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

It is contemplated that issues shall be drawn before introduction of testimony. Beasley v. Surles, 140 N.C. 5, 140 N.C. 605, 53 S.E. 360, 53 S.E. 360 (1906).

Issues May Not Be Tendered or Objected to on Appeal. — If defendant has not tendered issues or otherwise objected to trial on the issues submitted, it cannot do so on appeal. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

If the parties consent to the issues submitted, or do not object at the time or ask for different or additional issues, the objection cannot be made later. East Coast Oil Co. v. Fair, 3 N.C. App. 175, 164 S.E.2d 482 (1968).

General Verdict Defined. — The verdict is general when the jury, under appropriate instructions from the court as to the applicable law, simply responds affirmatively or negatively to the issues submitted. Morrison v. Watson, 95 N.C. 479 (1886); Porter v. Western N.C.R.R., 97 N.C. 63, 97 N.C. 66, 2 S.E. 580, 2 S.E. 580 (1887).

A party has the right to be present upon the rendition of the verdict. State v. Jones, 91 N.C. 654 (1884).

Right to be present at the rendition of the verdict is personal to the parties themselves, and the absence of counsel at the rendition is not a ground for a new trial. Barger Bros. v. Alley, 167 N.C. 362, 83 S.E. 612 (1914).

Entry of a verdict against a plaintiff who is not present either in person or by attorney is irregular. Graham v. Tate, 77 N.C. 120 (1877).

Waiver of Right to Be Present. — The right of the parties to be present when the verdict is returned in a civil case is waivable. Barger Bros. v. Alley, 167 N.C. 362, 83 S.E. 612 (1914).

Right to Have Jury Polled. — The right of a party to have the jury polled after the rendition of its verdict exists in civil as well as criminal cases. State v. Young, 77 N.C. 498 (1877); State v. Toole, 106 N.C. 736, 11 S.E. 168 (1890); Smith v. Paul, 133 N.C. 66, 45 S.E. 348 (1903).

But it is not essential to validity of proceedings that the jury be polled; this is merely a privilege which may be asked for by either party. State v. Toole, 106 N.C. 736, 11 S.E. 168 (1890); Smith v. Paul, 133 N.C. 66, 45 S.E. 348 (1903).

On a poll of the jury, dissent of one juror renders the verdict invalid. Owens v. Southern Ry., 123 N.C. 183, 31 S.E. 383 (1898).

But mere reluctance on the part of one juror will not be fatal to the verdict. Lowe v. Dorsett, 125 N.C. 301, 34 S.E. 442 (1899).

New Trial Where Findings of Jury Conflict. — If there is an irreconcilable conflict in the findings of the jury upon the issues submitted, or between the verdict and the judgment, a new trial will be awarded. Morrison v. Watson, 95 N.C. 479 (1886). See also, Porter v. Western N.C.R.R., 97 N.C. 63, 97 N.C. 66, 2 S.E. 580, 2 S.E. 580 (1887).

For discussion of the provisions and requirements of former § 1-200, see Piedmont Wagon Co. v. Byrd, 119 N.C. 460, 26 S.E. 144 (1896).

When the facts constituting a waiver do not appear in the pleadings, the party relying thereon must specially plead the defense, and it must be pleaded with certainty and particularity and established by the greater weight of the evidence. Rural Plumbing & Heating, Inc. v. H.C. Jones Constr. Co., 268 N.C. 23, 149 S.E.2d 625 (1966).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) *When made; effect.* — A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order granting a motion for a directed verdict shall be effective without any assent of the jury.

(b) *Motion for judgment notwithstanding the verdict.* —

(1) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In either case the motion shall be granted if it appears that the motion for directed verdict could properly have been granted. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the judge may allow the judgment to stand or may set aside the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the judge may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. Not later than ten (10) days after entry of judgment or the discharge of the jury if a verdict was not returned, the judge on his own motion may, with or without further notice and hearing, grant, deny, or redeny a motion for directed verdict made at the close of all the evidence that was denied or for any reason was not granted.

(2) An appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, may not direct entry of judgment in accordance with the motion unless the party who made the motion for a directed verdict also moved for judgment in accordance with Rule 50(b)(1) or the trial judge on his own motion granted, denied or redenied the motion for a directed verdict in accordance with Rule 50(b)(1).

(c) *Motion for judgment notwithstanding the verdict — Conditional rulings on grant of motion.* —

(1) If the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate division has otherwise ordered. In case the motion for new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate division.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) *Motion for judgment notwithstanding the verdict — Denial of motion.* — If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate division concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate division reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. (1967, c. 954, s. 1; 1969, c. 895, s. 11.)

COMMENT

Comment to this Rule as Originally Enacted. — It will be recalled that Rule 41(b) provides the procedure in those cases tried to the court where the party defending believes the evidence of his adversary is insufficient to permit a recovery. Section (a) of this rule provides the procedure in comparable circumstances in those cases tried by jury. It further provides a procedure whereby a claimant in a jury trial may urge that he is entitled to a recovery as a matter of law.

The rule contemplates that a party defending may move for a directed verdict at the close of his adversary's evidence or at the close of all the evidence whether or not he has made a prior motion. The rule further contemplates that any party may move for a directed verdict at the close of all the evidence.

Some important changes are effected by Rules 41(a) and 50(a) taken together. Formerly, a party defending had available the motion for nonsuit provided by former § 1-183. Judgment pursuant to a grant of the motion was not a judgment on the merits. In addition, any party had available the common-law motion for a directed verdict which does, if granted, result in a judgment on the merits. Everett v. Williams, 152 N.C. 117, 67 S.E. 265 (1910). Despite the greater potential of the directed verdict, the motion was infrequently employed because the claimant could always, under prior practice, forestall the directed verdict by taking a voluntary nonsuit.

Under the rules, at the close of the claimant's evidence, the party defending in a jury trial will be restricted to the directed verdict motion — a motion that if granted will result in a judgment on the merits disposing of the case finally in the absence of reversal on appeal. But it should be remembered that the judge will have power under Rule 41(a)(2) on the claimant's motion to allow a dismissal that is not on the merits.

The last sentence in section (a) is simply for the purpose of avoiding a useless formality. When a judge decides that a directed verdict is appropriate, actually he is deciding that the question has become one exclusively of law and that the jury has no function to serve. In these circumstances, it is an idle gesture to require the jury to go through the motions of returning the verdict directed.

Section (b), providing for a motion for judgment notwithstanding the verdict or, as it is commonly called "a judgment NOV" (an abbreviation for non obstante veredicto) introduces an entirely new procedure to North Carolina practice. It is true that North Carolina had a judgment NOV of sorts — for use in a situation where the party against whom a verdict is rendered would have been entitled to a judgment on the pleadings. See McIntosh, *North Carolina Practice and Procedure* (1st ed.), § 612. The judgment NOV in this rule is an altogether different affair. In essence, it involves allowing a judge to consider the question of the sufficiency of the evidence after the jury has returned a verdict.

This power has been sought — unsuccessfully it must be said — by superior court judges on more than one occasion. See, e.g., Batson v. City Laundry Co., 202 N.C. 560, 163 S.E. 600 (1932); Jones v. Dixie Fire Ins. Co., 210 N.C. 559, 187 S.E. 769 (1936). A moment's reflection will show why. A motion challenging the sufficiency of the evidence will often present a close question of great difficulty. A jury verdict for the movant eliminates this question and an appeal based on the ruling on the motion. But under prior practice, the judge was not permitted to consider the question raised by the motion after submitting the case to the jury. He was required to rule, finally, before the case was submitted.

If the motion was granted, there would likely be an appeal. If the trial judge was affirmed, it was quite possible that the appeal was unnecessary since the jury, had it been allowed to consider the evidence, might well have found for the movant. If the trial judge was reversed, there would have to be a new trial, repeating much of the expenditure in time and effort that was put into the first trial because there was no verdict on which judgment could be entered.

Under the rule, whenever a motion for a directed verdict made at the close of all the evidence is not granted, it will be deemed that the judge submitted the case to the jury having reserved for later determination the legal question raised by the motion. Thus, if there is a verdict for the nonmovant or if for some reason a verdict is not returned, the judge can reconsider the sufficiency of the evidence and, if convinced that it is insufficient, can grant the motion. If, on appeal it should prove that the judge was correct, that is, that he properly granted the motion, then the appellate court can affirm and, in appropriate cases, order judgment entered for the movant. On the other hand, if it should prove that the trial judge improperly granted the motion, the appellate court is not restricted to granting a new trial, as under the prior practice, but can order judgment entered on the verdict.

The utility of the judgment NOV must be obvious. It will certainly eliminate some appeals and it will certainly eliminate some second trials.

Turning now to the procedure for employing the motion for judgment NOV, it will be observed that making an appropriate motion for a directed verdict is an absolute prerequisite for the motion for judgment NOV. 5 *Moore's Federal Practice,* § 50.08 and cases cited.

Second, it will be observed that the motion can, but need not be, coupled with a motion for a new trial. If it is joined with a motion for a new trial, the proper procedure, as laid down by the Supreme Court in Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147 (1940) and as spelled out in sections (c) and (d) is for the court to rule on both motions. If the motion for judgment is granted and this is approved on appeal, the lower court's ruling on the movant's (verdict loser's) motion for new trial becomes irrelevant. Final judgment for the movant is affirmed. If, however, the lower court is reversed on appeal as to the motion for judgment, then its ruling on the new trial motion becomes a matter of importance. If the movant (verdict loser) was granted a new trial, "the new trial shall proceed unless the appellate court has otherwise ordered." Of course, the appellate court might very well "otherwise order" since the nonmovant (verdict winner) could assert on appeal not only error in the grant of the motion for judgment but error in the grant of the new trial. If the movant was denied a new trial although granted a judgment NOV, he can, under section (c), "assert error in that denial" on appeal.

Section (d) deals with the situation where the motion for judgment is denied. The movant may have coupled with his motion a motion for new trial. If the new trial motion was also denied, then the movant could appeal in respect to both motions. If the appellate court reverses as to the motion for judgment, it can order judgment for the movant or a new trial as the case may be. If the appellate court affirms in respect to the motion for judgment, it may of course reverse or affirm in respect to the new trial motion.

Comment to the 1969 Amendment. — Rule 50, both in its old version and in the new, contemplates that when a party moves for a directed verdict and his motion is denied or for any reason is not granted, that party may, after an adverse verdict or the failure of the jury to return a verdict, move for judgment notwithstanding the verdict. When the movant for a directed verdict who is not immediately successful later moves for a judgment notwithstanding the verdict and his motion is granted or denied, and there is an appeal, the powers of the appellate court are reasonably clear, as outlined in section 50(c) and (d). But when the movant for a directed verdict later fails to move for a judgment notwithstanding the verdict, there has been in the federal courts uncertainty about the powers of an appellate court. See 5 *Moore's Federal Practice,* § 2365-2374. The uncertainty revolves around the question of whether an appellate court can direct entry of judgment for a party who was erroneously denied a directed verdict but who later failed to move, as the rule contemplates, for a motion for judgment notwithstanding the verdict. The Supreme Court ruled in *Cone v. West Virginia Pulp & Paper Co.,* 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849 (1947), that in the circumstances outlined the appellate court was limited to directing a new trial.

It might be said that the rationale of the court's ruling in the *Cone* case rests on a desire that no final conclusive judgment be rendered against a party unless the trial judge has had an opportunity to consider whether the loser should be given another chance. The trial judge would not have this opportunity in the absence of some such rule as that enunciated in *Cone.*

The Commission has from the first embraced the *Cone* result. The Commission has gone further and attempted to meet some of the problems spawned by the *Cone* decision.

Its first effort was the rather clumsy one comprised in the last two sentences of Rule 50(b) as it was originally enacted. These two sentences have now been deleted and they should be forgotten.

In their stead, the General Assembly has added a new final sentence to what is now section 50(b)(1) and a new section 50(b)(2). These additions make clear the power of a trial judge, once there has been a motion for a directed verdict, to consider on his own motion, after entry of judgment (see Rule 58 as to when judgment is deemed to be entered), entry of judgment in accordance with the directed verdict motion. The additions also make clear that without some post-verdict consideration of a motion for judgment or the reserved motion for a directed verdict, the appellate court cannot, if it should find erroneous the failure to grant the motion for directed verdict, direct entry of judgment for the appellant but can only order a new trial.

Legal Periodicals. — For article on legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

For comment on directing verdict in favor of the party with the burden of proof, see 50 N.C.L. Rev. 843 (1972).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For note on directed verdicts in favor of the party with the burden of proof, see 16 Wake Forest L. Rev. 607 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1067 (1981).

For survey of 1981 law on civil procedure, see 60 N.C.L. Rev. 1214 (1982).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

I. In General.
II. Directed Verdict.
  A. In General.
  B. Statement of Specific Grounds.
III. Judgment Notwithstanding The Verdict And New Trial.

I. IN GENERAL.

Right to Jury Trial. — N.C. Const., Art. I, § 25 has been construed to guarantee trial by jury in all civil actions where the parties have not waived the right. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Use of Federal Interpretations to Supplement Caselaw. — Since North Carolina and Federal Rules 50 are substantially similar, federal interpretations are instructive to supplement the North Carolina decisions. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

When Motions Granted. — A defendant is not entitled to a directed verdict or a judgment notwithstanding the verdict unless the evidence, viewed in the light most favorable to the plaintiff, establishes its defense as a matter of law. Goodwin v. Investors Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

Appeals After Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict. — Where the specific issues regarding the sufficiency of the evidence presented in plaintiffs' appeal of a judgment in favor of a husband and wife in a fraudulent transfer of property action had not been presented to the trial court in plaintiff's motion for directed verdict, the appellate court was precluded from considering them. Tiber Holding Corp. v. DiLoreto, 160 N.C. App. 583, 586 S.E.2d 538, 2003 N.C. App. LEXIS 1823 (2003).

Motions under this rule apply only to issues tried by a jury, not a judge. Holthusen v. Holthusen, 79 N.C. App. 618, 339 S.E.2d 823 (1986).

Attorneys' Fees. — Section 6-21.5 provides in part that the entry of judgment pursuant to this rule or G.S. 1A-1, Rule 56 may be some evidence that an attorneys' fee may be warranted. The statute's reference to these rules, which are applicable only if evidence in addition to the pleadings is before the court, thus implies that when deciding whether to grant a motion under G.S. 6-21.5 the trial court may consider evidence developed after the pleadings have been filed. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Motions Properly Denied. — Motions for a directed verdict and for judgment notwithstanding the verdict by corporations who employed bouncers were properly denied because the bouncers that beat up a patron were acting within the scope of their employment: (1) the operations manager sent the bouncers to check on the patron, (2) an organized plan to remove the patron from the bar was developed, (3) instead of waiting for the police, the bouncers, in consultation with the operations manager, tried to remove the patron, which quickly turned into a beating, and (4) the operations manager made no attempt to restrain the bouncers. Wallace v. M, M & R, Inc., 165 N.C. App. 827, 600 S.E.2d 514, 2004 N.C. App. LEXIS 1510 (2004).

Where defendants claimed adverse possession of a cemetery lot under G.S. 1-40, plaintiffs' motions for a directed verdict and for JNOV were properly denied; evidence that defendants had been farming the lot since the 1960's and that there had not been a burial in the lot in nearly 60 years provided more than a scintilla of evidence that defendants had made exclusive use of the lot as farmland for the requisite period; there was no evidence that plaintiffs had used the lot. Jernigan v. Herring, 179 N.C. App. 390, 633 S.E.2d 874, 2006 N.C. App. LEXIS 1901 (2006).

City did not preserve its claims of error in the denial of its motions for a directed verdict and for a judgment notwithstanding the verdict as it failed to renew its motion for a directed verdict at the close of the evidence. City of Charlotte v. Hurlahe, 178 N.C. App. 144, 631 S.E.2d 28, 2006 N.C. App. LEXIS 1296 (2006).

Superior court did not abuse its discretion when it denied defendants' motions for a directed verdict and for a judgment notwithstanding a jury's verdict because the fired state employee who filed the suit against defendants presented sufficient evidence to support submitting his retaliation claim under G.S. 126-85 to the jury; the employee presented more than a mere scintilla of evidence showing that he had engaged in protected activity by participating in a state investigation of his state agency employer, that he was terminated after his supervisors learned of that activity, and that the activity was a substantial or motivating factor in his termination. Brookshire v. N.C. DOT, DMV, 180 N.C. App. 670, 637 S.E.2d 902, 2006 N.C. App. LEXIS 2513 (2006).

Trial court did not err in denying an employer's motions for a directed verdict or judgment notwithstanding the verdict in a toxic workplace suit because the evidence on the issue of causation was sufficient to justify submission to the jury; the evidence showed that the facility had a history of leaks and moisture, that coworkers suffered injuries similar to that of the employee, and that the employee, who was in excellent health when he started working for the employer, suffered from irreversible vestibular dysfunction within less than two years. Cameron v. Merisel Props., 187 N.C. App. 40, 652 S.E.2d 660, 2007 N.C. App. LEXIS 2318 (2007).

Because: (1) the Court of Appeals of North Carolina declined to add a fourth element to the landowners' burden of proof in the first part of the cartway proceeding; (2) the jury instruction on the element of the landowners' claim to establish the right to a cartway, requiring them to show that their land was being used for one of the purposes enumerated in the statute, conformed with the pattern jury instructions without the addition of the language suggested by the adjoining landowners and fairly and accurately stated the landowners' element of proof as to the use of their property; and (3) the instruction requested by the adjoining landowners gave undue emphasis to their claim the landowners' intended to use the land for future residential development, which, while not enumerated under the statute, did not defeat the landowners' right to a cartway, the trial court's orders denying both a directed verdict and a judgment notwithstanding the verdict were upheld on appeal. Jones v. Robbins, 190 N.C. App. 405, 660 S.E.2d 118, 2008 N.C. App. LEXIS 901 (2008).

Issue Not Considered on Appeal. — Neighbors' claim in their directed verdict motion that there was insufficient evidence as to whether the property owners had an easement by prescription over the neighbors' property was not considered on appeal as the jury did not reach the issue and the neighbors failed to raise the issue in their brief on appeal. Boggess v. Spencer, 173 N.C. App. 614, 620 S.E.2d 10, 2005 N.C. App. LEXIS 2114 (2005).

Applied in Thomas v. Nationwide Mut. Ins. Co., 277 N.C. 329, 177 S.E.2d 286 (1970); Pompey v. Hyder, 9 N.C. App. 30, 175 S.E.2d 319 (1970); Stewart v. Nation-Wide Check Corp., 9 N.C. App. 172, 175 S.E.2d 615 (1970); Hull v. Winn-Dixie Greenville, Inc., 9 N.C. App. 234, 175 S.E.2d 607 (1970); Allied Concord Fin. Corp. v. Lane, 9 N.C. App. 329, 176 S.E.2d 36 (1970); Continental Ins. Co. v. Foard, 9 N.C. App. 630, 177 S.E.2d 431 (1970); King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971); Walker v. Pless, 11 N.C. App. 198, 180 S.E.2d 471 (1971); Johnson v. George Tenuta & Co., 13 N.C. App. 375, 185 S.E.2d 732 (1972); Wyche v. Alexander, 15 N.C. App. 130, 189 S.E.2d 608 (1972); Johnson v. City of Winston-Salem, 15 N.C. App. 400, 190 S.E.2d 342 (1972); Dawkins v. Benton, 16 N.C. App. 58, 190 S.E.2d 853 (1972); McArver v. Pound & Moore, Inc., 17 N.C. App. 87, 193 S.E.2d 360 (1972); Thomas v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 17 N.C. App. 125, 193 S.E.2d 312 (1972); Winters v. Burch, 17 N.C. App. 660, 195 S.E.2d 343 (1973); Clouse v. Chairtown Motors, Inc., 17 N.C. App. 669, 195 S.E.2d 327 (1973); Samples v. Maxson-Betts Co., 18 N.C. App. 359, 197 S.E.2d 71 (1973); Floyd v. Jarrell, 18 N.C. App. 418, 197 S.E.2d 229 (1973); Picklesimer v. Robbins, 19 N.C. App. 280, 198 S.E.2d 443 (1973); Kinlaw v. Tyndall, 19 N.C. App. 669, 199 S.E.2d 698 (1973); Ballance v. Wentz, 286 N.C. 294, 210 S.E.2d 390 (1974); Burlington Indus., Inc. v. Foil, 284 N.C. 740, 202 S.E.2d 591 (1974); Lea v. Dudley, 20 N.C. App. 702, 202 S.E.2d 799 (1974); Arnold v. Merchants Distribs., Inc., 21 N.C. App. 579, 205 S.E.2d 792 (1974); Norris v. Rowan Mem. Hosp., 21 N.C. App. 623, 205 S.E.2d 345 (1974); Williams v. Canal Ins. Co., 21 N.C. App. 658, 205 S.E.2d 331 (1974); Shaw v. Rose's Stores, Inc., 22 N.C. App. 140, 205 S.E.2d 789 (1974); In re Will of Mucci, 287 N.C.

26, 213 S.E.2d 207 (1975); Hardy v. Toler, 24 N.C. App. 625, 211 S.E.2d 809 (1975); Huffman v. Gulf Oil Corp., 26 N.C. App. 376, 216 S.E.2d 383 (1975); Hoffman v. Clement Bros. Co., 27 N.C. App. 548, 219 S.E.2d 638 (1975); Foster v. Shearin, 28 N.C. App. 51, 220 S.E.2d 179 (1975); Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258 (1976); Bynum v. North Carolina Blue Cross & Blue Shield, Inc., 28 N.C. App. 515, 222 S.E.2d 263 (1976); Hobson Constr. Co. v. Hajoca Corp., 28 N.C. App. 684, 222 S.E.2d 709 (1976); Dize Awning & Tent Co. v. City of Winston-Salem, 29 N.C. App. 297, 224 S.E.2d 257 (1976); Gray v. Gray, 30 N.C. App. 205, 226 S.E.2d 417 (1976); Mosley v. Perpetual Sav. & Loan Ass'n, 30 N.C. App. 522, 227 S.E.2d 163 (1976); Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977); Snider v. Dickens, 32 N.C. App. 388, 232 S.E.2d 289 (1977); Coggins v. Fox, 34 N.C. App. 138, 237 S.E.2d 332 (1977); Nationwide Mut. Ins. Co. v. Chantos, 298 N.C. 246, 258 S.E.2d 334 (1979); Lewis v. 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App. 386, 396 S.E.2d 342 (1990); Tin Originals, Inc. v. Colonial Tin Works, Inc., 98 N.C. App. 663, 391 S.E.2d 831 (1990); Hill v. Winn-Dixie Charlotte, Inc., 100 N.C. App. 518, 397 S.E.2d 347 (1990); Abernethy v. Spartan Food Sys., 103 N.C. App. 154, 404 S.E.2d 710 (1991); Boone Lumber, Inc. v. Sigmon, 103 N.C. App. 798, 407 S.E.2d 291 (1991); Wilson v. Pearce, 105 N.C. App. 107, 412 S.E.2d 148 (1992); Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1, 418 S.E.2d 648 (1992); Maintenance Equip. Co. v. Godley Bldrs., 107 N.C. App. 343, 420 S.E.2d 199 (1992); Phillips ex rel. Schultz v. Holland, 107 N.C. App. 688, 421 S.E.2d 608 (1992); Mabry v. Nationwide Mut. Fire Ins. Co., 108 N.C. App. 37, 422 S.E.2d 322 (1992); Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993); Harrison v. Edison Bros. Apparel Stores, 814 F. Supp. 457 (M.D.N.C. 1993); Phillips v. Winston-Salem/Forsyth County Bd. of Educ., 117 N.C. App. 274, 450 S.E.2d 753 (1994); Greene v. 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II. DIRECTED VERDICT.

A. In General.

Purpose of This Rule. — Settled principles establish that the purpose of a motion under section (a) of this rule for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for plaintiffs. Wallace v. Evans, 60 N.C. App. 145, 298 S.E.2d 193 (1982); Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984); Burris v. Shumate, 77 N.C. App. 209, 334 S.E.2d 514 (1985); Rice v. Wood, 82 N.C. App. 318, 346 S.E.2d 205, cert. denied, 318 N.C. 417, 349 S.E.2d 599 (1986); Hitchcock v. Cullerton, 82 N.C. App. 296, 346 S.E.2d 215 (1986); Britt v. Britt, 82 N.C. App. 303, 346 S.E.2d 259 (1986), modified on other grounds, 320 N.C. 573, 359 S.E.2d 467 (1987); Wellmon v. Hickory Constr. Co., 88 N.C. App. 76, 362 S.E.2d 591 (1987).

A motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury. DeHart v. R/S Fin. Corp., 78 N.C. App. 93, 337 S.E.2d 94 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986).

The purpose of a motion for a directed verdict is to test the legal sufficiency of the evidence.

Allison v. Food Lion, Inc., 84 N.C. App. 251, 352 S.E.2d 256 (1987).

As to the difference between directed verdicts in criminal and civil cases, see State v. Riley, 113 N.C. 648, 18 S.E. 168 (1893); Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

A motion for directed verdict is appropriate only to a case tried before a jury. In nonjury trials, a motion for involuntary dismissal under G.S. 1A-1, Rule 41(b) provides a procedure whereby, at the close of the plaintiff's evidence, the judge can give judgment against the plaintiff, not only because his proof has failed to make out a case, but also on the basis of facts as the judge may determine them. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

In the landlord and tenant dispute where there was no jury trial, the trial court erroneously granted a directed verdict under G.S. 1A-1-50 in favor of the landlord; in such cases, involuntary dismissal under G.S. 1A-1-41(b) was the appropriate method for disposing of the case. Dean v. Hill, 171 N.C. App. 479, 615 S.E.2d 699, 2005 N.C. App. LEXIS 1275 (2005).

Defendants' motion to dismiss in an action tried before the judge without a jury was actually a motion to dismiss made under G.S. 1A-1-41(b), not G.S. 1A-1-50(a); the distinction was significant because, under G.S. 1A-1-41(b), the trial judge did not consider the evidence in the light most favorable to the plaintiff, as he would have when considering a G.S. 1A-1-50(a) motion for a directed verdict in a trial before a jury. Hammonds v. Lumbee River Elec. Mbrshp. Corp., 178 N.C. App. 1, 631 S.E.2d 1, 2006 N.C. App. LEXIS 1301 (2006).

Plaintiff must make out his case by proving the facts essential to his cause of action or by proving facts permitting an inference of the material facts as a fair and logical conclusion. Southern Bell Tel. & Tel. Co. v. West, 100 N.C. App. 668, 397 S.E.2d 765 (1990), aff'd, 328 N.C. 566, 402 S.E.2d 409 (1991).

Degree of Probability Must Exist with Issue of Causation. — Some degree of probability, however small, must exist to provide the jury with a question of causation to resolve, not just mere possibility. Hinson v. National Starch & Chem. Corp., 99 N.C. App. 198, 392 S.E.2d 657 (1990).

Peremptory Instruction in Favor of Party with Burden of Proof Contrasted with Directed Verdict. — When there is no conflict in the evidence and but one inference is permissible from it, the court may give a peremptory instruction in favor of the party having the burden of proof. Such an instruction directs the jury to answer the issue in favor of the plaintiff if it finds the facts to be as all the evidence tends to show; otherwise not. A peremptory instruction does not deprive the jury of its right to reject the evidence because of lack of faith in its credibility. Such an instruction differs from a directed verdict. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

For case comparing motions for summary judgment and for directed verdict, see Edwards v. Northwestern Bank, 53 N.C. App. 492, 281 S.E.2d 86, cert. denied, 304 N.C. 389, 285 S.E.2d 831 (1981).

Denial of Summary Judgment No Bar to Directed Verdict. — The earlier denial of a motion for summary judgment should not, in any way, be considered a barrier to later consideration of a motion for directed verdict. Edwards v. Northwestern Bank, 53 N.C. App. 492, 281 S.E.2d 86, cert. denied, 304 N.C. 389, 285 S.E.2d 831 (1981).

Denial of a motion for summary judgment, based upon only a forecast of evidence, should not operate to bar the granting of a directed verdict or a judgment notwithstanding the verdict based on the evidence actually presented at trial. Whittaker Gen. Medical Corp. v. Daniel, 87 N.C. App. 659, 362 S.E.2d 302 (1987), rev'd on other grounds, 324 N.C. 523, 379 S.E.2d 824 (1989).

Nonsuit Replaced by Motion for Directed Verdict. — In jury trials the motion for nonsuit has been replaced by the motion for a directed verdict. Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972).

Treatment of Motion for "Judgment of Nonsuit" as Motion for Directed Verdict. — Defendant's motion for "judgment of nonsuit," made at the close of plaintiff's evidence and again at the close of all the evidence, was treated as a motion for a directed verdict under this rule. The new rules contemplate that the name of the motion is not as important as the substance. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

Classes of cases not subject to nonsuit would not be ordinarily subject to directed verdict under the new rules. Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

The words "without any assent of the jury" are used to dispel any apprehension that the jury is required to perform a perfunctory act in connection with the verdict in a case which is not submitted to it for determination. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

Directed Verdict Not Proper in Processioning Proceedings. — A directed verdict is never proper when the question is for the jury, and in processioning proceedings the determination of the boundary is for the jury. Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978).

The primary purpose of a processioning proceeding is to establish the correct location of the disputed dividing line. Such a proceeding may not be dismissed by a directed verdict. A plaintiff instituting a true processioning proceeding has the legal right to have the line ascertained and fixed by judicial decree, regardless of the sufficiency of his evidence to establish the line as contended for by him. Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 411, 251 S.E.2d 470 (1979), overruled on other grounds, Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

Motion for directed verdict is the only procedure by which a party can challenge the sufficiency of his adversary's evidence to go to the jury. Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972).

In a jury trial, the motion for a directed verdict is the only device by which the adverse party can challenge the sufficiency of the evidence to go to the jury. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Yeargin v. Spurr, 78 N.C. App. 243, 336 S.E.2d 680 (1985).

In a case tried to a jury, after a plaintiff has put on evidence and rested, a defendant who asserts that the evidence of the plaintiff is insufficient to permit a recovery is restricted to making a motion for a directed verdict under section (a) of this rule. Creasman v. First Fed. Sav. & Loan Ass'n, 10 N.C. App. 182, 177 S.E.2d 770 (1970), aff'd, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972).

When a case is tried by a jury a defendant may move for a directed verdict to test the sufficiency of the evidence to go to the jury. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Directed verdicts are appropriate only in jury cases. Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971); Town of Rolesville v. Perry, 21 N.C. App. 354, 204 S.E.2d 719 (1974); Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981).

A motion for directed verdict under section (a) of this rule is appropriate when trial is held before a jury. Aiken v. Collins, 16 N.C. App. 504, 192 S.E.2d 617 (1972); Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

A motion for directed verdict and a directed verdict are not proper where the trial is before the judge sitting without a jury. Porter Bros. v. Jones, 11 N.C. App. 215, 181 S.E.2d 177 (1971).

This rule has no application to trials before the judge without a jury. In actions tried before the judge without a jury a motion to dismiss is made pursuant to G.S. 1A-1, Rule 41(b). Crump v. Coffey, 59 N.C. App. 553, 297 S.E.2d 131 (1982).

Directed verdicts are appropriate only in jury cases. In nonjury civil cases the appropriate motion by which a defendant may test the sufficiency of the plaintiff's evidence to show a right to relief is a motion for involuntary dismissal under G.S. 1A-1, Rule 41(b). The distinction is more than one of mere nomenclature, as a different test is to be applied to determine the sufficiency of the evidence to withstand the motion when the case is tried before the court and jury than when the court alone is finder of facts. Mayo v. Mayo, 73 N.C. App. 406, 326 S.E.2d 283 (1985).

The purpose of a motion for directed verdict, made pursuant to section (a) of this rule, is to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for the nonmoving party. In passing upon the motion, the court must consider the evidence in the light most favorable to the nonmoving party, taking all evidence which tends to support his position as true, resolving all contradictions, conflicts and inconsistencies in his favor and giving him the benefit of all reasonable inferences. The motion may be granted only if the evidence is insufficient, as a matter of law, to support a verdict for the nonmoving party. The same test is apposite whether considering a section (a) motion directed at the plaintiff's claim or at the defendant's counterclaim. Eatman v. Bunn, 72 N.C. App. 504, 325 S.E.2d 50 (1985).

A motion for a directed verdict under section (a) of this rule presents substantially the same question as was formerly presented by motion for judgment of nonsuit. Harrell v. Clarke, 72 N.C. App. 516, 325 S.E.2d 33 (1985).

The appellate court would treat a motion for a directed verdict made pursuant to this section as a Rule 41(b) motion, because the motion was made in a bench trial, and would reverse the trial court's order dismissing the plaintiff's claim for unfair and deceptive trade practices because the court failed to make the required findings. Hill v. Lassiter, 135 N.C. App. 515, 520 S.E.2d 797, 1999 N.C. App. LEXIS 1148 (1999).

While Motions for Involuntary Dismissal Are Proper in Nonjury Cases. — A motion for a directed verdict under section (a) of this rule is proper when a trial is being held before a jury. Where a case is tried by the judge without a jury, the appropriate motion in such case is for involuntary dismissal under G.S. 1A-1, Rule 41(b). Bryant v. Kelly, 10 N.C. App. 208, 178 S.E.2d 113 (1970), rev'd on other grounds, 279 N.C. 123, 181 S.E.2d 438 (1971); Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972).

Directed verdicts are appropriate only in jury cases. In nonjury civil cases the appropriate motion by which a defendant may test the sufficiency of the plaintiff's evidence to show a right to relief is a motion for involuntary dismissal under G.S. 1A-1, Rule 41(b). Higgins v. Builders & Fin., Inc., 20 N.C. App. 1, 200 S.E.2d

397 (1973), cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1974); Tanglewood Land Co. v. Wood, 40 N.C. App. 133, 252 S.E.2d 546 (1979).

Motion for directed verdict under this rule and motion for involuntary dismissal under G.S. 1A-1, Rule 41(b) are to be distinguished; the former is proper when the case is tried before a jury, and the latter is appropriate where the court sits as trier of fact. McNeely v. Southern Ry., 19 N.C. App. 502, 199 S.E.2d 164, cert. denied, 284 N.C. 425, 200 S.E.2d 660 (1973).

Where a case is tried before a jury, the appropriate motion by which a defendant tests the sufficiency of plaintiff's evidence to permit a recovery is the motion for a directed verdict under section (a) of this rule. The motion for involuntary dismissal, made under G.S. 1A-1, Rule 41(b), performs a similar function in an action tried by the court without a jury. Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971).

A motion to dismiss under G.S. 1A-1, Rule 41(b) is properly made only in cases tried by a judge without a jury, while the proper motion in jury cases is for a directed verdict under section (a) of this rule. Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973); Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Different Tests for Sufficiency on Motions for Directed Verdict and Involuntary Dismissal. — The distinction between a motion for a directed verdict and a motion for an involuntary dismissal is more than one of mere nomenclature, as a different test is to be applied to determine the sufficiency of the evidence to withstand the motion when the case is tried before court and jury than when the court alone is finder of the facts. Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972).

Same Tests for Sufficiency on Motions for Directed Verdict and Demand for Jury Trial. — Following a compulsory reference, the test to determine a demand for jury trial is the same as that for a motion for directed verdict pursuant to this rule. Dockery v. Hocutt, 357 N.C. 210, 581 S.E.2d 431, 2003 N.C. LEXIS 596 (2003).

G.S. 1A-1, Rule 53(b)(2)(c) provides that if there is a trial by jury upon any issue referred, the trial will be only upon the evidence taken before the referee, so, when a trial court reviews a referee's order, the claimant has been put to the full burden of proof; the trial court had before it all the testimony, including cross-examination, not merely a forecast of the evidence, and, given the limitation imposed by Rule 53(b)(2)(c), the trial court, in ruling on a party's demand for jury trial following a compulsory reference, was in a position analogous to that of a trial judge in ruling on a motion for directed verdict pursuant to this rule at the close of all evidence. Dockery v. Hocutt, 357 N.C. 210, 581 S.E.2d 431, 2003 N.C. LEXIS 596 (2003).

Treatment of Involuntary Dismissal in Jury Trial as Directed Verdict. — Where judgment of involuntary dismissal in a trial before a jury was improperly entered under G.S. 1A-1, Rule 41(b), which is applicable only in a trial by the court without a jury, it may properly be treated as a motion for a directed verdict under this rule. Pergerson v. Williams, 9 N.C. App. 512, 176 S.E.2d 885 (1970).

Where a motion for dismissal is made pursuant to G.S. 1A-1, Rule 41(b) in a jury case, it may properly be treated as a motion for directed verdict. Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972).

It is permissible for motions made under G.S. 1A-1, Rule 41(b) at the close of plaintiff's evidence in jury trials to be treated as motions for directed verdict under section (a) of this rule. Sample v. Morgan, 311 N.C. 717, 319 S.E.2d 607 (1984).

Judgment entered upon a directed verdict is a final judgment on the merits. Taylor v. Tri-County Elec. Membership Corp., 17 N.C. App. 143, 193 S.E.2d 402 (1972).

A judgment entered upon a directed verdict is a judgment on the merits for res judicata purposes. Phipps v. Paley, 90 N.C. App. 170, 368 S.E.2d 21, cert. denied, 323 N.C. 175, 373 S.E.2d 114 (1988).

And Defendant Is Entitled to Judgment on Merits When Motion for Directed Verdict Is Granted. — When a motion for a directed verdict under this rule is granted, the defendant is entitled to a judgment on the merits. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Unless Court Permits Voluntary Dismissal Under § 1A-1, Rule 41(a)(2). — When a motion for a directed verdict under this rule is granted, the defendant is entitled to a judgment on the merits unless the court permits a voluntary dismissal of the action under G.S. 1A-1, Rule 41(a)(2). Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Taylor v. Tri-County Elec. Membership Corp., 17 N.C. App. 143, 193 S.E.2d 402 (1972).

Section 1A-1, Rule 41(b) has no application when considering a motion for a directed verdict in a jury trial. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

By offering evidence, defendant waives motion for directed verdict made at the close of plaintiff's evidence. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972);

Overman v. Gibson Prods. Co. of Thomasville, Inc., 30 N.C. App. 516, 227 S.E.2d 159 (1976).

However, he may renew the motion at the close of all the evidence. Overman v. Gibson Prods. Co. of Thomasville, Inc., 30 N.C. App. 516, 227 S.E.2d 159 (1976).

Power of Judge to Grant, Deny or Redeny Directed Verdict on Own Motion. — The trial judge on his own motion, within the time prescribed in subsection (b)(1) of this rule, may grant, deny, or redeny the motion for a directed verdict. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

Under subsection (b)(1) of this rule a trial judge, on his own motion, may enter a directed verdict within 10 days after the jury is discharged for failing to reach a verdict. Odell v. Lipscomb, 12 N.C. App. 318, 183 S.E.2d 299 (1971).

Any party may move for a directed verdict at the close of all the evidence. Snipes v. Snipes, 55 N.C. App. 498, 286 S.E.2d 591, aff'd, 306 N.C. 373, 293 S.E.2d 187 (1982).

Directed verdict is appealable, and operates with full res judicata effect. Taylor v. Tri-County Elec. Membership Corp., 17 N.C. App. 143, 193 S.E.2d 402 (1972).

As Considered in the Light Most Favorable to Nonmovant. — A motion under this rule is directed to the sufficiency of the evidence to justify a verdict for the plaintiff when considered in the light most favorable to him. Evans v. Carney, 29 N.C. App. 611, 225 S.E.2d 157 (1976); Oliver v. Royall, 36 N.C. App. 239, 243 S.E.2d 436 (1978).

In considering a motion for a directed verdict, the evidence must be viewed in the light most favorable to plaintiff. Naylor v. Naylor, 11 N.C. App. 384, 181 S.E.2d 222 (1971); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973); Brooks v. Boucher, 22 N.C. App. 676, 207 S.E.2d 282, cert. denied, 286 N.C. 211, 209 S.E.2d 319 (1974); Prevatte v. Cabble, 24 N.C. App. 524, 211 S.E.2d 528 (1975); Brewer v. Majors, 48 N.C. App. 202, 268 S.E.2d 229, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980); Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983); Douglas v. Parks, 68 N.C. App. 496, 315 S.E.2d 84, cert. denied, 311 N.C. 754, 321 S.E.2d 131 (1984); Allison v. Food Lion, Inc., 84 N.C. App. 251, 352 S.E.2d 256 (1987).

In passing upon a motion for a directed verdict, the court must consider the evidence in the light most favorable to the nonmovant. Summey v. Cauthen, 283 N.C. 640, 197 S.E.2d 549 (1973); Snider v. Dickens, 293 N.C. 356, 237 S.E.2d 832 (1977); Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 897 (1981); In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982); Myers v. Myers, 62 N.C. App. 291, 302 S.E.2d 476 (1983); Rice v. Wood, 82 N.C. App. 318, 346 S.E.2d 205, cert. denied, 318 N.C. 417, 349 S.E.2d 599 (1986); Britt v. Britt, 82 N.C. App. 303, 346 S.E.2d 259 (1986), aff'd in part and rev'd in part, 320 N.C. 573, 359 S.E.2d 467 (1987).

On a motion by a defendant for a directed verdict at the close of plaintiff's evidence in a jury case, the evidence must be taken as true and considered in the light most favorable to plaintiff. Farmer v. Chaney, 292 N.C. 451, 233 S.E.2d 582 (1977); Brown v. Brown, 38 N.C. App. 607, 248 S.E.2d 397 (1978); Tuttle v. Tuttle, 38 N.C. App. 651, 248 S.E.2d 896 (1978), cert. denied, 296 N.C. 589, 254 S.E.2d 32 (1979).

In considering the sufficiency of the evidence to withstand a motion for directed verdict, the appellate court must consider the evidence in the light most favorable to the nonmoving party. Wilson v. Bob Robinson's Auto Serv., Inc., 20 N.C. App. 47, 200 S.E.2d 393 (1973); McDonald v. Trustees of Fayetteville Technical Inst., 46 N.C. App. 77, 264 S.E.2d 123 (1980).

On a defendant's motion for a directed verdict, plaintiff's evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. Atlantic Tobacco Co. v. Honeycutt, 101 N.C. App. 160, 398 S.E.2d 641 (1990), discretionary review denied, 328 N.C. 569, 403 S.E.2d 506 (1991).

With Contradictions, Conflicts and Inconsistencies Resolved in Nonmovant's Favor. — Contradictions, conflicts and inconsistencies in the evidence must be resolved in plaintiff's favor in determining the sufficiency of the evidence to withstand a motion for directed verdict. Tripp v. Pate, 49 N.C. App. 329, 271 S.E.2d 407 (1980); Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984); Allison v. Food Lion, Inc., 49 N.C. App. 329, 352 S.E.2d 256 (1987).

On a motion by a defendant for directed verdict, any conflict in the evidence must be resolved in the plaintiff's favor. McAdams v. Union Sec. Life Ins. Co., 36 N.C. App. 463, 244 S.E.2d 692 (1978).

In ruling on a motion for directed verdict, the court must resolve any discrepancies in the evidence in favor of the party against whom the motion is made, and must give that party the benefit of every legitimate inference which may be reasonably drawn from the evidence. Odell v. Lipscomb, 12 N.C. App. 318, 183 S.E.2d 299 (1971).

In passing on plaintiff's motion for a directed verdict, insofar as the defendant's testimony creates a conflict in his testimony, it must be resolved in his favor. Coppley v. Carter, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

In determining whether the evidence is sufficient to withstand a motion for directed verdict, plaintiff's evidence must be taken as true and all the evidence must be viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, with conflicts, contradictions and inconsistencies being resolved in plaintiff's favor. Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 62 N.C. App. 419, 303 S.E.2d 332, cert. denied, 309 N.C. 461, 307 S.E.2d 364, 307 S.E.2d 365 (1983).

On defendants' motion for directed verdict, plaintiff's evidence is taken as true, along with all reasonable inferences therefrom, resolving all conflicts and inconsistencies in plaintiff's favor, and disregarding defendant's evidence unless favorable to plaintiff or tending to clarify plaintiff's case. Forsyth County v. Shelton, 74 N.C. App. 674, 329 S.E.2d 730, cert. denied and appeal dismissed, 314 N.C. 328, 333 S.E.2d 484 (1985).

In considering a motion for directed verdict, the nonmovant's evidence must be taken as true, and contradictions, inconsistencies and conflicts in the evidence must be resolved in favor of the nonmovant. Morris v. Bruney, 78 N.C. App. 668, 338 S.E.2d 561 (1986).

And Giving Nonmovant the Benefit of Every Reasonable Inference. — When a motion for directed verdict is made under this rule at the conclusion of the plaintiff's evidence, the trial judge must determine whether the evidence, taken in the light most favorable to the plaintiff and giving to it the benefit of every reasonable inference which can be drawn therefrom was sufficient to withstand defendant's motion for a directed verdict. Sawyer v. Shackleford, 8 N.C. App. 631, 175 S.E.2d 305 (1970); Riddick v. Whitaker, 13 N.C. App. 416, 185 S.E.2d 602, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972); Cook v. Export Leaf Tobacco Co., 50 N.C. App. 89, 272 S.E.2d 883 (1980), cert. denied, 302 N.C. 396, 279 S.E.2d 350 (1981); Scott v. Kiker, 59 N.C. App. 458, 297 S.E.2d 142 (1982); Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984).

Upon a motion for a directed verdict, all evidence which supports plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving to plaintiff the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. Pergerson v. Williams, 9 N.C. App. 512, 176 S.E.2d 885 (1970); Maness v. Fowler-Jones Constr. Co., 10 N.C. App. 592, 179 S.E.2d 816, cert. denied, 278 N.C. 522, 180 S.E.2d 610 (1971); Ingold v. Carolina Power & Light Co., 11 N.C. App. 253, 181 S.E.2d 173 (1971); Kinston Bldg. Supply Co. v. Murphy, 13 N.C. App. 351, 185 S.E.2d 440 (1971); Raynor v. Foster, 12 N.C. App. 193, 182 S.E.2d 806, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971); Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972); Rogers v. City of Asheville, 14 N.C. App. 514, 188 S.E.2d 656 (1972); Teachey v. Woolard, 16 N.C. App. 249, 191 S.E.2d 903, cert. denied, 282 N.C. 430, 192 S.E.2d 840 (1972); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978); Oliver v. Royall, 36 N.C. App. 239, 243 S.E.2d 436 (1978); Lyvere v. Ingles Mkts., Inc., 36 N.C. App. 560, 244 S.E.2d 437 (1978); Murphy v. Edwards & Warren, 36 N.C. App. 653, 245 S.E.2d 212, cert. denied, 295 N.C. 551, 248 S.E.2d 728 (1978); Weyerhaeuser Co. v. Godwin Bldg. Supply Co., 40 N.C. App. 743, 253 S.E.2d 625 (1979); Thompson v. Soles, 42 N.C. App. 462, 257 S.E.2d 59 (1979), aff'd in part and modified in part, 299 N.C. 484, 263 S.E.2d 599 (1980); Hart v. Warren, 46 N.C. App. 672, 266 S.E.2d 53, cert. denied, 301 N.C. 89, 273 S.E.2d 297 (1980); Sessoms v. Roberson, 47 N.C. App. 573, 268 S.E.2d 24 (1980); Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646, cert. denied, 300 N.C. 379, 267 S.E.2d 685 (1980), overruled on other grounds, Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Bone Int'l, Inc. v. Brooks, 51 N.C. App. 183, 275 S.E.2d 556, rev'd on other grounds, 304 N.C. 371, 283 S.E.2d 518 (1981); Bryant v. Nationwide Mut. Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985); Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986); Woodruff v. Shuford, 82 N.C. App. 260, 346 S.E.2d 173 (1986); Harshbarger v. Murphy, 90 N.C. App. 393, 368 S.E.2d 450 (1988).

In considering defendant's motion for a directed verdict, the court must view the evidence in the light most favorable to plaintiff, resolving all conflicts in his favor and giving the plaintiff the benefit of every inference that reasonably can be drawn in his favor. Husketh v. Convenient Sys., 295 N.C. 459, 245 S.E.2d 507 (1978), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Cantey v. Barnes, 51 N.C. App. 356, 276 S.E.2d 490 (1981); Sharpe v. Wyse, 317 N.C. 694, 346 S.E.2d 485 (1986); United Labs., Inc. v. Kuykendall, 322 N.C. 643, 370 S.E.2d 375 (1988).

Upon defendant's motion for a directed verdict, all of plaintiff's evidence must be taken as true and considered in the light most favorable to plaintiff, giving him the benefit of all reasonable inferences and resolving all inconsistencies in his favor. Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

On defendant's motion for a directed verdict, plaintiff's evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference to be drawn therefrom. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976); Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678

(1977); Mintz v. Foster, 35 N.C. App. 638, 242 S.E.2d 181 (1978); McAdams v. Union Sec. Life Ins. Co., 36 N.C. App. 463, 244 S.E.2d 692 (1978); Southern Ry. v. Jeffco Fibres, Inc., 41 N.C. App. 694, 255 S.E.2d 749, cert. denied, 298 N.C. 299, 259 S.E.2d 302 (1979); American Home Prods. Corp. v. Howell's Motor Freight, Inc., 46 N.C. App. 276, 264 S.E.2d 774, cert. denied, 300 N.C. 556, 270 S.E.2d 105 (1980); Brewer v. Majors, 48 N.C. App. 202, 268 S.E.2d 229, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980); E.F. Hutton & Co. v. Sexton, 48 N.C. App. 413, 269 S.E.2d 257 (1980); Norman v. Royal Crown Bottling Co., 49 N.C. App. 661, 272 S.E.2d 355 (1980); Jones v. Allred, 52 N.C. App. 38, 278 S.E.2d 521, aff'd, 304 N.C. 387, 283 S.E.2d 517 (1981); Koonce v. May, 59 N.C. App. 633, 298 S.E.2d 69 (1982); Phelps v. Duke Power Co., 78 N.C. App. 222, 332 S.E.2d 715, cert. denied, 314 N.C. 668, 336 S.E.2d 401 (1985); Hall v. Mabe, 77 N.C. App. 758, 336 S.E.2d 427 (1985).

On a motion for directed verdict, plaintiff's evidence is to be taken as true and all of the evidence must be considered in the light most favorable to plaintiff, giving him the benefit of every fact and inference of fact pertaining to the issues which may be reasonably deduced from the evidence. Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998).

In considering defendant's motion for a directed verdict, the evidence is to be considered in the light most favorable to plaintiff, and plaintiff is entitled to all reasonable inferences that can be drawn from that evidence. Tan v. Tan, 49 N.C. App. 516, 272 S.E.2d 11 (1980), cert. denied, 302 N.C. 402, 279 S.E.2d 356 (1981); Everhart v. LeBrun, 52 N.C. App. 139, 277 S.E.2d 816 (1981); Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983); Henderson v. Traditional Log Homes, Inc., 70 N.C. App. 303, 319 S.E.2d 290, cert. denied, 312 N.C. 623, 323 S.E.2d 923 (1984).

On motion for a directed verdict all the evidence which tends to support the nonmovant's case against it must be taken as true and considered in the light most favorable to the nonmovant, which is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence. Mann v. Virginia Dare Transp. Co., 283 N.C. 734, 198 S.E.2d 558 (1973).

On passing on a motion for a directed verdict, the evidence is to be taken in the light most favorable to the nonmoving party, and he is entitled to all reasonable inferences that can be drawn from it. Murray v. Murray, 296 N.C. 405, 250 S.E.2d 276 (1979).

In passing on a motion under section (a) of this rule, the trial judge must consider the evidence in the light most favorable to the nonmovant, and conflicts in the evidence together with inferences which may be drawn from it must be resolved in favor of the nonmovant. Arnold v. Sharpe, 296 N.C. 533, 251 S.E.2d 452 (1979); Stallings v. Purvis, 42 N.C. App. 690, 257 S.E.2d 664 (1979); Aarhus v. Wake Forest Univ., 57 N.C. App. 405, 291 S.E.2d 837 (1982); Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982); DeHart v. R/S Fin. Corp., 78 N.C. App. 93, 337 S.E.2d 94 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986).

The court must consider the evidence in the light most favorable to the nonmovant, deeming all evidence which tends to support his position to be true, resolving all evidentiary conflicts favorably to him and giving the nonmovant the benefit of all inferences reasonably to be drawn in his favor. Daughtry v. Turnage, 295 N.C. 543, 246 S.E.2d 788 (1978); McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 293 S.E.2d 632, aff'd, 307 N.C. 695, 300 S.E.2d 374 (1983); Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied and appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982); Wilkie v. Wilkie, 58 N.C. App. 624, 294 S.E.2d 230, cert. denied, 306 N.C. 752, 295 S.E.2d 764 (1982).

The evidence in favor of the nonmovant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor. Summey v. Cauthen, 283 N.C. 640, 197 S.E.2d 549 (1973); Snider v. Dickens, 293 N.C. 356, 237 S.E.2d 832 (1977); Snow v. Duke Power Co., 297 N.C. 591, 256 S.E.2d 227 (1979); Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979); Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 897 (1981); Bruegge v. Mastertemp, Inc., 83 N.C. App. 508, 350 S.E.2d 918 (1986); Atwater v. Castlebury, 84 N.C. App. 512, 353 S.E.2d 263 (1987).

The evidence must be considered in the light most favorable to the party opposing the motion, and the opponent is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence, and all conflicts in the evidence are resolved in favor of the opponent. Morrison v. Concord Kiwanis Club, 52 N.C. App. 454, 279 S.E.2d 96, cert. denied, 304 N.C. 196, 285 S.E.2d 100 (1981).

On appeal from the granting of a motion for directed verdict against the plaintiff, all the evidence tending to support plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which legitimately may be drawn therefrom, with contradictions, conflicts and inconsistencies therein being resolved in plaintiff's favor. Musgrave v. Mutual Sav. & Loan Ass'n, 8 N.C.

App. 385, 174 S.E.2d 820 (1970); Adler v. Lumber Mut. Fire Ins. Co., 10 N.C. App. 720, 179 S.E.2d 786, aff'd, 280 N.C. 146, 185 S.E.2d 144 (1971); Tate v. Bryant, 16 N.C. App. 132, 191 S.E.2d 433 (1972); Hawkins v. State Capital Ins. Co., 74 N.C. App. 499, 328 S.E.2d 793 (1985).

On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. The same factors are considered in determining if a judgment notwithstanding the verdict should be granted as in the directed verdict decision. Colony Assocs. v. Fred L. Clapp & Co., 60 N.C. App. 634, 300 S.E.2d 37 (1983).

In ruling on a motion for directed verdict, plaintiff's evidence must be taken as true and considered in the light most favorable to him. All conflicts must be resolved in plaintiff's favor, and he must be given the benefit of every reasonable inference. The same standard applies to a motion for judgment n.o.v. Shields v. Nationwide Mut. Fire Ins. Co., 61 N.C. App. 365, 301 S.E.2d 439 (1983).

Upon a motion for a directed verdict, the court must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor. It is only where the evidence, when so considered, is insufficient to support a verdict in the nonmovant's favor that the motion for directed verdict should be granted. West v. Slick, 313 N.C. 33, 326 S.E.2d 601 (1985).

When passing on a motion for a directed verdict, the plaintiff should be given the benefit of all reasonable inferences; the motion should be denied if there is a scintilla of evidence to support plaintiffs' prima facie case in all its constituent elements. These principles are equally applicable to defendants' counterclaim. Burris v. Shumate, 77 N.C. App. 209, 334 S.E.2d 514 (1985).

On a directed verdict motion, the record is viewed in the light most favorable to the nonmoving party, resolving all conflicts in its favor and giving it the benefit of every favorable inference. Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32 (1986).

On a motion for directed verdict, the evidence in favor of the nonmovant must be taken as true, resolving all conflicts in the nonmovant's favor and entitling him to the benefit of all reasonable inferences. Rice v. Wood, 82 N.C. App. 318, 346 S.E.2d 205, cert. denied, 318 N.C. 417, 349 S.E.2d 599 (1986).

Motion for a directed verdict under section (a) of this rule tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977); Byerly v. Byerly, 38 N.C. App. 551, 248 S.E.2d 433 (1978); McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 293 S.E.2d 632, aff'd, 307 N.C. 695, 300 S.E.2d 374 (1983); Koonce v. May, 59 N.C. App. 633, 298 S.E.2d 69 (1982); Harshbarger v. Murphy, 90 N.C. App. 393, 368 S.E.2d 450 (1988).

On a motion for a directed verdict, the trial court must consider whether the evidence presented is sufficient to go to the jury. Wilkie v. Wilkie, 58 N.C. App. 624, 294 S.E.2d 230, cert. denied, 306 N.C. 752, 295 S.E.2d 764 (1982).

A motion for directed verdict by a defendant tests the legal sufficiency of the evidence to go to the jury. Hall v. Mabe, 77 N.C. App. 758, 336 S.E.2d 427 (1985).

Question Presented by Motion for Directed Verdict. — The question presented by the defendant's motion for a directed verdict is whether the evidence, when considered in the light most favorable to plaintiff, is sufficient for submission to the jury. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Investment Properties of Asheville, Inc. v. Allen, 283 N.C. 277, 196 S.E.2d 262 (1973); Stone v. Paradise Park Homes, Inc., 37 N.C. App. 97, 245 S.E.2d 801, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978); Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979); Southern Ry. v. Jeffco Fibres, Inc., 41 N.C. App. 694, 255 S.E.2d 749, cert. denied, 298 N.C. 299, 259 S.E.2d 302 (1979); Hunt v. Montgomery Ward & Co., 49 N.C. App. 642, 272 S.E.2d 357 (1980); Helvy v. Sweat, 58 N.C. App. 197, 292 S.E.2d 733, cert. denied, 306 N.C. 741, 295 S.E.2d 477 (1982); Horne v. Trivette, 58 N.C. App. 77, 293 S.E.2d 290, cert. denied, 306 N.C. 741, 295 S.E.2d 759 (1982); Hong v. George Goodyear Co., 63 N.C. App. 741, 306 S.E.2d 157 (1983); Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 316 S.E.2d 256 (1984); Allison v. Food Lion, Inc., 84 N.C. App. 251, 352 S.E.2d 256 (1987).

A motion for a directed verdict under this rule presents the same question for both trial and appellate courts: Whether the evidence, taken in the light most favorable to plaintiff, was sufficient for submission to the jury. Helvy v. Sweat, 58 N.C. App. 197, 292 S.E.2d 733 (1982).

A motion for a directed verdict presents the question of whether, as a matter of law, the evidence offered by plaintiff, when considered in the light most favorable to the plaintiff, is sufficient to be submitted to the jury. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972); Penney v. Carpenter, 32 N.C. App. 147, 231 S.E.2d 171 (1977).

The defendant's motion for a directed verdict under this rule presents a question of law for decision by the court, namely, whether the evidence is sufficient to entitle the plaintiff to have the jury pass on it. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Odell v. Lipscomb, 12 N.C. App. 318, 183 S.E.2d 299 (1971); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973); Hunt v. Montgomery Ward & Co., 49 N.C. App. 642, 272 S.E.2d 357 (1980).

The question of law presented by defendant's motion for a directed verdict is whether plaintiff's evidence was sufficient for submission to the jury. Stewart v. Nation-Wide Check Corp., 279 N.C. 278, 182 S.E.2d 410 (1971); Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied and appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982).

A defendant's motion for a directed verdict presents the question whether the evidence is sufficient to entitle the plaintiff to have the jury pass on it. Maness v. Fowler-Jones Constr. Co., 10 N.C. App. 592, 179 S.E.2d 816, cert. denied, 278 N.C. 522, 180 S.E.2d 610 (1971); United Labs., Inc. v. Kuykendall, 322 N.C. 643, 370 S.E.2d 375 (1988).

A motion for directed verdict raises the question whether the evidence, considered in the light most favorable to the plaintiff, will justify a verdict in his favor. Rayfield v. Clark, 283 N.C. 362, 196 S.E.2d 197 (1973); Snow v. Duke Power Co., 297 N.C. 591, 256 S.E.2d 227 (1979); Colson v. Shaw, 46 N.C. App. 402, 265 S.E.2d 407 (1980), rev'd on other grounds, 301 N.C. 677, 273 S.E.2d 243 (1981); Thompson & Little, Inc. v. Colvin, 46 N.C. App. 774, 266 S.E.2d 46 (1980).

The question presented by a defendant's motion for a directed verdict is whether all the evidence which supports the plaintiff's claim, when taken as true, considered in the light most favorable to the plaintiff and given the benefit of every reasonable inference in the plaintiff's favor which may legitimately be drawn therefrom, is sufficient for submission to the jury. Tripp v. Pate, 49 N.C. App. 329, 271 S.E.2d 407 (1980).

The motion for a directed verdict in a jury trial presents the question whether the evidence, when considered in the light most favorable to the party against whom the motion is made, is sufficient for submission to the jury. Sink v. Sink, 11 N.C. App. 549, 181 S.E.2d 721 (1971); Thompson v. Soles, 42 N.C. App. 462, 257 S.E.2d 59 (1979), aff'd in part and modified in part, 299 N.C. 484, 263 S.E.2d 599 (1980); Sessoms v. Roberson, 47 N.C. App. 573, 268 S.E.2d 24 (1980).

A motion for a directed verdict presents the question of whether the evidence is sufficient to carry the case to the jury. Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981); Vance Trucking Co. v. Phillips, 51 N.C. App. 85, 275 S.E.2d 497, cert. denied, 303 N.C. 320, 281 S.E.2d 659, petition for reconsideration denied, 303 N.C. 550, 281 S.E.2d 661 (1981); Aarhus v. Wake Forest Univ., 57 N.C. App. 405, 291 S.E.2d 837 (1982).

A motion for directed verdict under this rule presents the question whether the evidence is sufficient to entitle the party against whom the motion is made to have a jury pass on it. Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

A motion for a directed verdict pursuant to section (a) of this rule presents the question of whether the evidence presented is sufficient to carry the case to the jury. In passing on this motion, the trial judge must consider the evidence in the light most favorable to the nonmovant, and conflicts in the evidence together with inferences which may be drawn from it must be resolved in favor of the nonmovant. The motion may be granted only if the evidence is insufficient to justify a verdict for the nonmovant as a matter of law. Satterfield v. Pappas, 67 N.C. App. 28, 312 S.E.2d 511, cert. denied, 311 N.C. 403, 319 S.E.2d 274 (1984).

A motion for a directed verdict presents the same question for both the trial and appellate courts: Whether the evidence, taken in the light most favorable to the nonmovant, and giving the nonmovant the benefit of every reasonable inference arising from the evidence, is sufficient for submission to the jury. Alston v. Herrick, 76 N.C. App. 246, 332 S.E.2d 720 (1985), aff'd, 315 N.C. 386, 337 S.E.2d 851 (1986).

The court may grant a motion for directed verdict only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified on other grounds, 321 N.C. 1, 361 S.E.2d 734 (1987).

Where Question Is Close, Better Practice Is to Reserve Decision and Submit Case to Jury. — Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. If the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided. If the jury finds for the nonmoving party, the judge may reconsider the motion and enter a judgment notwithstanding the verdict, provided he is convinced the evidence was insufficient. On appeal, if the motion proves to have been improperly granted, the appellate court then has the option of ordering entry of the judgment on the verdict, thereby eliminating the expense and delay involved in a retrial. Koonce v. May, 59 N.C. App. 633, 298 S.E.2d 69 (1982); Tice v. Hall, 63 N.C. App. 27, 303 S.E.2d

832 (1983), aff'd, 310 N.C. 589, 313 S.E.2d 565 (1984).

Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. Wallace v. Evans, 60 N.C. App. 145, 298 S.E.2d 193 (1982).

If There Is More Than a Scintilla of Evidence, Motion Should Be Denied. — The court should deny a motion for directed verdict when it finds any evidence more than a scintilla to support plaintiff's prima facie case in all its constituent elements. Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

The court should deny motion for directed verdict if there is more than a scintilla of evidence to support the plaintiff's prima facie case. Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984); Rice v. Wood, 82 N.C. App. 318, 346 S.E.2d 205, cert. denied, 318 N.C. 417, 349 S.E.2d 599 (1986).

If there is more than a scintilla of evidence supporting each element of nonmovant's case, the motion for directed verdict should be denied. Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32 (1986).

More than a scintilla of evidence existed from which the jury could find that defendant's trespass was accompanied by a reckless disregard for plaintiffs' rights and an element of intent after defendant discovered he had trespassed on plaintiffs' property and continued to trespass; therefore, the trial court properly denied defendant's motions for directed verdict and judgment notwithstanding the verdict on the issue of punitive damages. Lee v. Bir, 116 N.C. App. 584, 449 S.E.2d 34 (1994), cert. denied, 340 N.C. 113, 454 S.E.2d 652 (1995).

Where an apartment owner's original condominium plans included a six-foot fence along the adjacent owner's property, but after the condominium project was abandoned, purportedly as a result of the city counsel, of which the adjacent property owner was a member, and the fence grew to ten feet, the evidence was sufficient to be submitted to the jury as there was more than a scintilla of evidence supporting each element of the adjacent owner's claim that the apartment owner erected a spite fence. Austin v. Bald II, L.L.C., 189 N.C. App. 338, 658 S.E.2d 1, 2008 N.C. App. LEXIS 543 (2008).

On motion by plaintiff for a directed verdict on a counterclaim of defendant, the trial court must determine the preliminary question of whether all of the evidence which tends to support defendant's case on the counterclaim, taken as true and considered in the light most favorable to the defendant, giving him the benefit of every fact and inference of fact pertaining to the issue which may be reasonably deduced from the evidence, is sufficient to submit to the jury. Sloan v. Wells, 37 N.C. App. 177, 245 S.E.2d 529 (1978), rev'd on other grounds, 296 N.C. 570, 251 S.E.2d 449 (1979).

Motion for a directed verdict presents substantially the same question for sufficiency as did a motion for an involuntary nonsuit. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972), vacated on other grounds on rehearing, 283 N.C. 277, 196 S.E.2d 262 (1973); Younts v. State Farm Mut. Auto. Ins. Co., 281 N.C. 582, 189 S.E.2d 137 (1972); McCoy v. Dowdy, 16 N.C. App. 242, 192 S.E.2d 81 (1972); Robinson v. Whitley Moving & Storage, Inc., 37 N.C. App. 638, 246 S.E.2d 839 (1978).

A motion for a directed verdict presents substantially the same question as did a motion for judgment as of nonsuit. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972); City of Winston-Salem v. Rice, 16 N.C. App. 294, 192 S.E.2d 9, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974); Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Daughtry v. Turnage, 295 N.C. 543, 246 S.E.2d 788 (1978).

A motion for a directed verdict pursuant to section (a) of this rule presents the same question as did a motion for nonsuit prior to adoption of the new Rules of Civil Procedure. The question is whether the evidence presented is sufficient to carry the case to the jury. Arnold v. Sharpe, 296 N.C. 533, 251 S.E.2d 452 (1979); Stallings v. Purvis, 42 N.C. App. 690, 257 S.E.2d 664 (1979).

A defendant's motion made in a jury trial for a directed verdict presents substantially the same question as that formerly presented by a motion for judgment of involuntary nonsuit, namely, whether the evidence was sufficient to entitle the plaintiff to have the jury pass on it. Raynor v. Foster, 12 N.C. App. 193, 182 S.E.2d 806, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971); Sadler v. Purser, 12 N.C. App. 206, 182 S.E.2d 850 (1971); Summey v. Cauthen, 283 N.C. 640, 197 S.E.2d 549 (1973).

Motion for a directed verdict presents substantially the same question formerly presented by the motion for nonsuit, that is, whether the evidence considered in the light most favorable to the claimant will justify a verdict in his favor. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); American Personnel, Inc. v. Harbolick, 16 N.C. App. 107, 191 S.E.2d 412 (1972).

And Will Ordinarily Be Treated the Same. — A motion directed verdict produces virtually the same effect and ordinarily will be treated the same as a motion for nonsuit under the old rules in determining whether the evidence should be submitted to the jury. Aetna

Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

Applicability of Same Principles as Those Used on Motion for Nonsuit. — In determining the sufficiency of a plaintiff's evidence to withstand a defendant's motion for a directed verdict in a jury case, the trial court and the appellate court are guided by the same principles that prevailed under the former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit under former G.S. 1-183. Musgrave v. Mutual Sav. & Loan Ass'n, 8 N.C. App. 385, 174 S.E.2d 820 (1970); Pergerson v. Williams, 9 N.C. App. 512, 176 S.E.2d 885 (1970); Naylor v. Naylor, 11 N.C. App. 384, 181 S.E.2d 222 (1971); Byrd v. Potts, 12 N.C. App. 262, 182 S.E.2d 837 (1971); Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972); Tate v. Bryant, 16 N.C. App. 132, 191 S.E.2d 433 (1972).

Determination of the sufficiency of the evidence to withstand a motion for a directed verdict made by a defendant under the provisions of this rule is guided by the same principles that prevailed under the former procedure with respect to motion for nonsuit. Ingold v. Carolina Power & Light Co., 11 N.C. App. 253, 181 S.E.2d 173 (1971).

Objections Not Equivalent to Directed Verdict. — Plaintiff's objections to the issue of contributory negligence made at the conference on the jury instructions were not the equivalent of a motion for directed verdict made pursuant to subdivision (a) of this rule, as plaintiff could have made a proper motion at the close of evidence and plaintiff's objection during the jury instruction conference would not allow defendant a proper chance to correct any errors in its proof of contributory negligence. Thus, the trial court erred in holding that plaintiff's objection to the contributory negligence issue was the equivalent of a directed verdict. Enns v. Zayre Corp., 116 N.C. App. 687, 449 S.E.2d 478 (1994), cert. denied, 339 N.C. 737, 454 S.E.2d 649, aff'd, per curiam, 342 N.C. 406, 464 S.E.2d 298 (1995).

A verdict may never be directed when the facts are in dispute. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972); Bone Int'l, Inc. v. Brooks, 51 N.C. App. 183, 275 S.E.2d 556, rev'd on other grounds, 304 N.C. 371, 283 S.E.2d 518 (1981).

On the motion of a defendant for a directed verdict, if the evidence is of such character that reasonable men may form divergent opinions of its import, the issue is for the jury. Brewer v. Majors, 48 N.C. App. 202, 268 S.E.2d 229, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980).

A verdict may not be directed when the facts are in dispute, and the credibility of testimony is for the jury, not the trial judge. Population Planning Assocs. v. Mews, 65 N.C. App. 96, 308 S.E.2d 739 (1983).

A verdict may never be directed when there is conflicting evidence on contested issues of fact. Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 316 S.E.2d 256 (1984); DeHart v. R/S Fin. Corp., 78 N.C. App. 93, 337 S.E.2d 94 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986).

The judge may direct a verdict only when the issue submitted presents a question of law based on admitted facts. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

Trial Court Should Not Make Findings of Fact or State Conclusions of Law. — In resolving the question presented by a motion for directed verdict, it is neither required nor appropriate that the trial court make "findings of fact" and state "conclusions of law." Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Sink v. Sink, 11 N.C. App. 549, 181 S.E.2d 721 (1971).

Jury to Determine Issue Where More Than One Conclusion Possible. — Where more than one conclusion can reasonably be drawn, determination of the issue is properly for the jury. Maness v. Fowler-Jones Constr. Co., 10 N.C. App. 592, 179 S.E.2d 816, cert. denied, 278 N.C. 522, 180 S.E.2d 610 (1971).

Discrepancies and contradictions in the evidence are to be resolved by the jury and not by the court. Naylor v. Naylor, 11 N.C. App. 384, 181 S.E.2d 222 (1971).

Contradictions or discrepancies in the evidence on a motion for a directed verdict, even when arising from plaintiff's evidence, must be resolved by the jury rather than the trial judge. Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976).

Discrepancies and contradictions in the evidence, even though such occur in the evidence offered on behalf of the nonmovant, are to be resolved by the jury, not by the court. Murray v. Murray, 296 N.C. 405, 250 S.E.2d 276 (1979).

If there is conflicting testimony that permits different inferences, one of which is favorable to the nonmoving party, a directed verdict in favor of the party with the burden of proof is improper. United Labs., Inc. v. Kuykendall, 322 N.C. 643, 370 S.E.2d 375 (1988).

Defendant's denial of an alleged fact raises an issue as to its existence, even though he offers no evidence tending to contradict that offered by plaintiff. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Weeks Motor Co. v. Daniels, 18 N.C. App. 442, 197 S.E.2d 29 (1973).

Ordinarily Credibility Is a Jury Question. — The credibility of testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Price v. Conley, 21 N.C. App. 326, 204 S.E.2d 178 (1974).

The jury and not the judge passes on credibility. Hinson v. Sparrow, 21 N.C. App. 554, 204 S.E.2d 925 (1974).

Contributory Negligence Should Have Been a Jury Question. — Where evidence did not establish plaintiff's contributory negligence as a matter of law, that issue should have been resolved by the jury, and the directed verdict in favor of defendant was reversed. Crane v. Caldwell, 113 N.C. App. 362, 438 S.E.2d 449 (1994).

Whether "Genuine Issue of Fact" Exists Is Preliminary Question for Judge. Price v. Conley, 21 N.C. App. 326, 204 S.E.2d 178 (1974).

Sufficiency of evidence is a question of law to be determined by the court. Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977), rev'd on other grounds, 294 N.C. 146, 240 S.E.2d 360 (1978).

When the defendant has moved for a directed verdict, and the trial court considers all the evidence in the light most favorable to the plaintiff, whether this evidence is sufficient to create an issue of fact for the jury is solely a question of law to be determined by the court. Prevatte v. Cabble, 24 N.C. App. 524, 211 S.E.2d 528 (1975).

Motion for directed verdict may be granted only if the evidence is insufficient to justify a verdict for the nonmovant as a matter of law. Arnold v. Sharpe, 296 N.C. 533, 251 S.E.2d 452 (1979); Bost v. Riley, 44 N.C. App. 638, 262 S.E.2d 391, cert. denied, 300 N.C. 194, 269 S.E.2d 621 (1980); Cameron v. New Hanover Mem. Hosp., 58 N.C. App. 414, 293 S.E.2d 901, cert. denied and appeal dismissed, 307 N.C. 127, 297 S.E.2d 399 (1982); Colony Assocs. v. Fred L. Clapp & Co., 60 N.C. App. 634, 300 S.E.2d 37 (1983); Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

A motion for a directed verdict may be granted only if the evidence is insufficient, as a matter of law, to support a verdict for the plaintiff. Husketh v. Convenient Sys., 295 N.C. 459, 245 S.E.2d 507 (1978), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Wachovia Bank & Trust Co. v. Smith, 44 N.C. App. 685, 262 S.E.2d 646, cert. denied, 300 N.C. 379, 267 S.E.2d 685 (1980), overruled on other grounds, Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981); Russell v. Sam Solomon Co., 49 N.C. App. 126, 270 S.E.2d 518 (1980), cert. denied, 301 N.C. 722, 274 S.E.2d 231 (1981); Bone Int'l, Inc. v. Brooks, 51 N.C. App. 183, 275 S.E.2d 556, rev'd on other grounds, 304 N.C. 371, 283 S.E.2d 518 (1981); Cantey v. Barnes, 51 N.C. App. 356, 276 S.E.2d 490 (1981); Aarhus v. Wake Forest Univ., 57 N.C. App. 405, 291 S.E.2d 837 (1982); Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982); Henderson v. Traditional Log Homes, Inc., 70 N.C. App. 303, 319 S.E.2d 290 (1984), cert. denied, 312 N.C. 622, 323 S.E.2d 923 (1984); Morris v. Bruney, 78 N.C. App. 668, 338 S.E.2d 561 (1986); Woodruff v. Shuford, 82 N.C. App. 260, 346 S.E.2d 173 (1986); Moore v. North Carolina Farm Bureau Mut. Ins. Co., 82 N.C. App. 616, 347 S.E.2d 489 (1986), cert. denied, 318 N.C. 696, 351 S.E.2d 749 (1987).

On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Creasman v. First Fed. Sav. & Loan Ass'n, 279 N.C. 361, 183 S.E.2d 115 (1971), cert. denied, 405 U.S. 977, 92 S. Ct. 1204, 31 L. Ed. 2d 252 (1972); Stewart v. Nation-Wide Check Corp., 279 N.C. 278, 182 S.E.2d 410 (1971); Odell v. Lipscomb, 12 N.C. App. 318, 183 S.E.2d 299 (1971); Younts v. State Farm Mut. Auto. Ins. Co., 281 N.C. 582, 189 S.E.2d 137 (1972); McCoy v. Dowdy, 16 N.C. App. 242, 192 S.E.2d 81 (1972); Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974); Ward v. Thompson Heights Swimming Club, Inc., 27 N.C. App. 218, 219 S.E.2d 73 (1975); Denning v. Lee, 35 N.C. App. 565, 241 S.E.2d 706 (1978); Pearce v. Southern Bell Tel. & Tel. Co., 41 N.C. App. 62, 254 S.E.2d 243 (1979), rev'd on other grounds, 299 N.C. 64, 261 S.E.2d 176 (1980); Hecht Realty, Inc. v. Whisnant, 41 N.C. App. 702, 255 S.E.2d 647, cert. denied, 298 N.C. 299, 259 S.E.2d 912 (1979); American Home Prods. Corp. v. Howell's Motor Freight, Inc., 46 N.C. App. 276, 264 S.E.2d 774, cert. denied, 300 N.C. 556, 270 S.E.2d 105 (1980); Vickery v. Olin Hill Constr. Co., 47 N.C. App. 98, 266 S.E.2d 711, cert. denied, 301 N.C. 106, 273 S.E.2d 312 (1980); Wesley v. Greyhound Lines, 47 N.C. App. 680, 268 S.E.2d 855, cert. denied, 301 N.C. 239, 283 S.E.2d 136 (1980); Brewer v. Majors, 48 N.C. App. 202, 268 S.E.2d 229, cert. denied, 301 N.C. 400, 273 S.E.2d 445 (1980); E.F. Hutton & Co. v. Sexton, 48 N.C. App. 413, 269 S.E.2d 257 (1980); Burnett v. First Citizens Bank & Trust Co., 48 N.C. App. 585, 269 S.E.2d 317 (1980); Ward v. City of Charlotte, 48 N.C. App. 463, 269 S.E.2d 663, cert. denied, 301 N.C. 531, 273 S.E.2d 463 (1980); Dorsey v. Buchanan, 52 N.C. App. 597, 279 S.E.2d 92 (1981); Cooper v. Henderson, 55 N.C. App. 234, 284 S.E.2d 756 (1981); Meacham v. Montgomery County Bd. of Educ., 59 N.C. App. 381, 297 S.E.2d 192 (1982), cert. denied, 307 N.C. 577, 299 S.E.2d 651 (1983); John D.

Latimer & Assocs. v. Housing Auth., 59 N.C. App. 638, 297 S.E.2d 779 (1982); Colony Assocs. v. Fred L. Clapp & Co., 60 N.C. App. 634, 300 S.E.2d 37 (1983).

It is only when the evidence is insufficient to support a verdict in the nonmovant's favor that the motion should be granted. Snow v. Duke Power Co., 297 N.C. 591, 256 S.E.2d 227 (1979); Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 316 S.E.2d 256 (1984).

The standard for entry of a directed verdict is that the evidence, when viewed in the light most favorable to the nonmovant, must be insufficient as a matter of law to support a verdict in favor of the nonmovant. Oakley v. Oakley, 54 N.C. App. 161, 282 S.E.2d 589 (1981).

A directed verdict in favor of the party with the burden of proof is proper only when the proponent has established a clear and uncontradicted prima facie case and the credibility of his evidence is manifest as a matter of law. Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

And If Plaintiff Shows No Right to Relief. — When it is clear that the plaintiff has shown no right to relief, the judge will direct a verdict for the defendant at the close of plaintiff's evidence, just as he could formerly grant a motion for compulsory nonsuit. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

A directed verdict for defendant is not properly allowed unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977); Everhart v. LeBrun, 52 N.C. App. 139, 277 S.E.2d 816 (1981); Koonce v. May, 59 N.C. App. 633, 298 S.E.2d 69 (1982); Mitchell v. Parker, 68 N.C. App. 458, 315 S.E.2d 76, cert. denied, 311 N.C. 760, 321 S.E.2d 140, 321 S.E.2d 141 (1984); Willis v. Russell, 68 N.C. App. 424, 315 S.E.2d 91, cert. denied, 311 N.C. 770, 321 S.E.2d 159 (1984).

The scope of review of a trial court's decision granting the defendant's motion for a directed verdict is whether the evidence, when considered in the light most favorable to the plaintiff, is sufficient for submission to the jury; if the plaintiff fails to make a prima facie showing for relief, it is not entitled to have its case sent to the jury and the judge may rule on the issue as a matter of law. Air Traffic Conference of Am. v. Marina Travel, Inc., 69 N.C. App. 179, 316 S.E.2d 642 (1984).

A directed verdict is proper only if it appears that the nonmovant failed to show a right to recover upon any view of the facts which the evidence reasonably tends to establish. West v. Slick, 313 N.C. 33, 326 S.E.2d 601 (1985).

Only if plaintiff's uncontradicted evidence shows that physical facts irreconcilably conflict with plaintiff's evidence is a trial judge warranted in taking the case from the jury on a motion for directed verdict against plaintiff. McFetters v. McFetters, 98 N.C. App. 187, 390 S.E.2d 348, cert. denied, 327 N.C. 140, 394 S.E.2d 177 (1990).

Evidence which does no more than raise a possibility or conjecture of fact is not sufficient to withstand a motion by defendant for a directed verdict. Ingold v. Carolina Power & Light Co., 11 N.C. App. 253, 181 S.E.2d 173 (1971); Bruegge v. Mastertemp, Inc., 83 N.C. App. 508, 350 S.E.2d 918 (1986).

The court must consider even "incompetent" evidence in ruling on a motion for a directed verdict. Hart v. Warren, 46 N.C. App. 672, 266 S.E.2d 53, cert. denied, 301 N.C. 89 (1980).

The court must consider even incompetent evidence in ruling on a motion for a directed verdict. The reason for this rule is that the admission of incompetent evidence may have caused the plaintiff to omit competent evidence of the same import. Haney v. Alexander, 71 N.C. App. 731, 323 S.E.2d 430 (1984).

Illustrative Cases. — In an action regarding the purchase and sale of a business, the sellers were not entitled to a directed verdict as to the buyer's negligent misrepresentation claim, under G.S. 1A-1, Rule 50(a), as the buyer investigated the sellers' statements to the extent she was able and reasonably relied on them, and the sellers had a duty to provide the buyer with accurate financial information as they controlled that information and the buyer could not independently investigate it. Kindred of N.C., Inc. v. Bond, 160 N.C. App. 90, 584 S.E.2d 846, 2003 N.C. App. LEXIS 1765 (2003).

As to entry of directed verdict on basis of adverse testimony in deposition, see Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

What Evidence of Movant May Be Considered on Motion for Directed Verdict. — In passing upon motion for directed verdict made at the close of all the evidence, a defendant's evidence that tends to contradict or refute the plaintiff's evidence is not considered, but the other evidence presented by a defendant may be considered to the extent that it clarifies the plaintiff's case. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972); American Home Prods. Corp. v. Howell's Motor Freight, Inc., 46 N.C. App. 276, 264 S.E.2d 774, cert. denied, 300 N.C. 556, 270 S.E.2d 105 (1980); John D. Latimer & Assocs. v. Housing Auth., 59 N.C. App. 638, 297 S.E.2d 779 (1982); Koonce v. May, 59 N.C. App. 633, 298 S.E.2d 69 (1982); Henderson v. Traditional Log Homes, Inc., 70 N.C. App. 303, 319 S.E.2d 290, cert. denied, 312 N.C. 623, 323 S.E.2d 923 (1984).

In passing upon a motion for directed verdict made at the close of all the evidence, a defendant's evidence that tends to contradict or refute the plaintiff's evidence is not considered, but other evidence presented by a defendant which is not in conflict with that of the plaintiff may be considered in ascertaining whether the evidence is sufficient to raise an issue for the jury. Murphy v. Edwards & Warren, 36 N.C. App. 653, 245 S.E.2d 212, cert. denied, 295 N.C. 551, 248 S.E.2d 728 (1978).

Upon defendant's motion under this rule, his own evidence may not be considered unless it is favorable to the plaintiff or unless it is not in conflict with the plaintiff's evidence and explains or makes clear that which has been ordered by the plaintiff. Tate v. Bryant, 16 N.C. App. 132, 191 S.E.2d 433 (1972).

Affirmative Defenses. — Where a defendant establishes an affirmative defense as a matter of law, there are no issues to submit to a jury and a plaintiff has no right to recover. Directing a verdict for the defendant in such instance is appropriate. Goodwin v. Investors Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

Normally the motion for a directed verdict is made against the party who has the burden of proof. Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

And the court can direct a verdict against the party with the burden of proof if there is no evidence in his favor. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Or Where Evidence is Insufficient to Go to the Jury. — A directed verdict becomes proper against the defendants who have the burden on affirmative defenses if their evidence is insufficient to carry those defenses to the jury. Booker v. Everhart, 33 N.C. App. 1, 234 S.E.2d 46 (1977), rev'd on other grounds, 294 N.C. 146, 240 S.E.2d 360 (1978).

It is rarely appropriate to grant a directed verdict for a party bearing the burden of proof. Looney v. Community Bible Holiness Church, 103 N.C. App. 469, 405 S.E.2d 811 (1991).

Ordinarily, it is not permissible to direct a verdict in favor of a litigant on whom rests the burden of proof. Smith v. Burleson, 9 N.C. App. 611, 177 S.E.2d 451 (1970); Austin v. R.W. Raines Enters., Inc., 45 N.C. App. 709, 264 S.E.2d 121 (1980); Stutts v. Green Ford, Inc., 47 N.C. App. 503, 267 S.E.2d 919 (1980).

The party having the burden of proof on all the issues is not entitled to a directed verdict. Mull v. Mull, 13 N.C. App. 154, 185 S.E.2d 14 (1971).

Judge cannot direct a verdict upon any controverted issue in favor of the party having the burden of proof, even though the evidence is uncontradicted. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Little v. Poole, 11 N.C. App. 597, 182 S.E.2d 206 (1971).

As Where His Right to Recover Depends on Credibility. — Under this rule, the trial judge cannot direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971); Schell v. Rice, 37 N.C. App. 377, 246 S.E.2d 61, cert. denied, 295 N.C. 648, 248 S.E.2d 253 (1978); Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

The trial court cannot direct a verdict under this rule in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses, since it is the established policy of this State, declared in both the Constitution and the statutes, that the credibility of testimony is for the jury, not the court, and that a genuine issue of fact must be tried by the jury unless the right is waived. Fowler-Barham Ford, Inc. v. Indiana Lumbermens Mut. Ins. Co., 45 N.C. App. 625, 263 S.E.2d 825, cert. denied, 300 N.C. 372, 267 S.E.2d 675 (1980).

Direction of Verdict in Favor of Party with Burden Permissible When Facts Are Not Subject to Inquiry. — When facts are judicially admitted and are no longer a subject of inquiry, then directing a verdict in favor of a litigant on whom rests the burden of proof is not only permissible, but it is the duty of the judge to answer the issue. Smith v. Burleson, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

A directed verdict for the party with the burden of proof is not improper where his right to recover does not depend on the credibility of his witnesses and the pleadings, evidence, and stipulations show that there is no issue of genuine fact for jury consideration. Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

There is no constitutional or procedural impediment to granting a directed verdict in favor of the party with the burden of proof when the credibility of the movant's witnesses is manifest as a matter of law. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), rev'd in part on other grounds, 315 N.C. 523, 340 S.E.2d 408 (1986).

And Where No Other Reasonable Conclusion Is Possible. — After looking at all of the evidence, if no other reasonable conclusion is possible, then a directed verdict would be proper, even though such directed verdict is in favor of the litigant upon whom rests the burden of proof. Smith v. Burleson, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

As Where Credibility of Movants' Evidence Is Manifest. — There are neither constitutional nor procedural impediments to directing a verdict for the party with the burden of proof where the credibility of movant's evidence is manifest as a matter of law. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979); Snipes v. Snipes, 55 N.C. App. 498, 286 S.E.2d 591, aff'd, 306 N.C. 373, 293 S.E.2d 187 (1982).

Where, in view of facts which were stipulated before trial and admitted by defendant at trial, the issue presented only a question of law for the court, the general rule that the court cannot direct a verdict in favor of a party having the burden of proof does not apply. American Personnel, Inc. v. Harbolick, 16 N.C. App. 107, 191 S.E.2d 412 (1972).

A directed verdict cannot be granted for the party with the burden of proof when his right to recover depends on the credibility of his witnesses. However, there may be rare occasions in which credibility seems compelled as a matter of law. Murray v. Murray, 296 N.C. 405, 250 S.E.2d 276 (1979).

Where the moving party has the burden of proof, the courts generally will not direct a verdict if credibility remains an issue unless the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn. Snipes v. Snipes, 55 N.C. App. 498, 286 S.E.2d 591, aff'd, 306 N.C. 373, 293 S.E.2d 187 (1982).

A directed verdict or judgment n.o.v. can be granted for the party having the burden of proof only where the credibility of movant's evidence is manifest as a matter of law. Johnson v. Robert Dunlap & Racing, Inc., 53 N.C. App. 312, 280 S.E.2d 759 (1981), cert. denied, 305 N.C. 153, 289 S.E.2d 380 (1982).

The granting of a directed verdict for the party with the burden of proof is permissible when the only evidence is plaintiff's own evidence and defendant's burden is met for him by the plaintiff. Alligood v. Seaboard Coastline R.R., 21 N.C. App. 419, 204 S.E.2d 706 (1974).

A directed verdict or a judgment notwithstanding the verdict may be entered in favor of the party with the burden of proof where credibility is manifest as a matter of law. Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

Situations Where Credibility Is Manifest. — Review of the modern cases indicates three recurrent situations where credibility is manifest: (1) Where nonmovant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests; (2) Where the controlling evidence is documentary and nonmovant does not deny the authenticity or correctness of the documents; (3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has failed to point to specific areas of impeachment and contradictions. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979); Snipes v. Snipes, 55 N.C. App. 498, 286 S.E.2d 591, aff'd, 306 N.C. 373, 293 S.E.2d 187 (1982).

There are rare instances in which credibility may be established as a matter of law, as where the nonmovant admits the truth of the facts upon which movant's claim rests, where the controlling evidence is documentary and the nonmovant does not deny the authenticity of or correctness of the document, or where there are only latent doubts as to the credibility of oral testimony. Stutts v. Green Ford, Inc., 47 N.C. App. 503, 267 S.E.2d 919 (1980).

Where the plaintiffs fail to make a prima facie showing for relief, they are not entitled to have their case sent to the jury and the trial judge may rule on the issue as a matter of law. Hong v. George Goodyear Co., 63 N.C. App. 741, 306 S.E.2d 157 (1983).

Where Party With Burden of Proof Presents No Evidence. — Trial court properly placed on a corporation the burden of establishing whether a liquidated damages clause in a contract with a hotel was enforceable because the corporation was the party seeking to invalidate the liquidated damages provision; given that the corporation presented no evidence tending to show that the clause was unenforceable, the trial court was correct in entering a verdict against the corporation under G.S. 1A-1-50, even in the absence of any evidence from the hotel. Seven Seventeen HB Charlotte Corp. v. Shrine Bowl of the Carolinas, Inc., 182 N.C. App. 128, 641 S.E.2d 711, 2007 N.C. App. LEXIS 499 (2007).

Directed Verdict Not Necessarily Prevented by Prima Facie Case. — Nonmoving party's establishment of a prima facie case did not necessarily prevent the granting of a directed verdict in the moving party's favor. Goodwin v. Investors Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

Directed Verdict Granted Despite Establishment of Prima Facie Case. — Where insurer showed that the insured made representations which were material and false and, by so doing, fully overcame plaintiff's prima facie case, insurer was entitled to a directed verdict as a matter of law. Goodwin v. Investors Life Ins. Co. of N. Am., 332 N.C. 326, 419 S.E.2d 766 (1992).

The granting of a directed verdict in favor of the party with the burden of proof will be more closely scrutinized than otherwise. North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978), rev'd on other grounds, 297 N.C. 524, 256 S.E.2d 388 (1979).

A directed verdict is seldom appropriate in a negligence case. Alva v. Cloninger, 51 N.C. App. 602, 277 S.E.2d 535 (1981).

When Defendant Entitled to Directed Verdict in a Negligence Action. — Defendant was not entitled to a directed verdict or to judgment notwithstanding the verdict unless plaintiff failed as a matter of law to establish the elements of actionable negligence or unless the evidence, viewed in the light most favorable to plaintiff, showed contributory negligence as a matter of law. Everhart v. LeBrun, 52 N.C. App. 139, 277 S.E.2d 816 (1981); Thomas v. Dixson, 88 N.C. App. 337, 363 S.E.2d 209 (1988).

A defendant in a negligence action is not entitled to a directed verdict unless the plaintiff has failed, as matter of law to establish the elements of actionable negligence. McMurray v. Surety Fed. Sav. & Loan Ass'n, 82 N.C. App. 729, 348 S.E.2d 162 (1986), cert. denied, 318 N.C. 695, 351 S.E.2d 748 (1987).

A defendant is not entitled to a directed verdict in a negligence action unless the plaintiff has not established the elements of negligence as a matter of law. Felts v. Liberty Emergency Serv., 97 N.C. App. 381, 388 S.E.2d 619 (1990).

Directed verdict was properly granted to a store in a customer's suit against the store to recover for injuries sustained when he fell over a stock cart parked in a store aisle, and thus, the trial court improperly set aside its earlier order granting a directed verdict and, instead, granted the customer's motion for a new trial, because the customer presented no evidence regarding who left the stock cart in the position which caused the customer to fall, when it was placed there, or how long it remained; additionally, the customer did not present evidence that the store failed to correct a dangerous condition after it received actual or constructive notice of the condition. Herring v. Food Lion, LLC, 175 N.C. App. 22, 623 S.E.2d 281, 2005 N.C. App. LEXIS 2754 (2005), aff'd, 360 N.C. 472, 628 S.E.2d 761 (2006).

When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether plaintiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages. Mitchell v. Parker, 68 N.C. App. 458, 315 S.E.2d 76, cert. denied, 311 N.C. 760, 321 S.E.2d 140, 321 S.E.2d 141 (1984).

A directed verdict for defendant is improper unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. Felts v. Liberty Emergency Serv., 97 N.C. App. 381, 388 S.E.2d 619 (1990).

Directed Verdict in Personal Injury Actions. — To overcome a motion for a directed verdict in a personal injury action the plaintiff is required to offer evidence sufficient to establish, beyond mere speculation or conjecture, every essential element of negligence. Upon his failure to do so, a motion for a directed verdict is properly granted. Oliver v. Royall, 36 N.C. App. 239, 243 S.E.2d 436 (1978).

In an action for personal injury arising out of an automobile accident, the defendants' motion for a directed verdict should be allowed if the jury could draw no conclusion from the evidence but that either the collision was not proximately caused by the negligence of defendant, or that the contributory negligence of the plaintiff was a proximate cause of the collision. Shay v. Nixon, 45 N.C. App. 108, 262 S.E.2d 294 (1980).

If the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, even though the possibility of accident may arise on the evidence. Bruegge v. Mastertemp, Inc., 83 N.C. App. 508, 350 S.E.2d 918 (1986).

Evidence that defendant "lured" plaintiff's husband away was not required to overcome defendant's motion for a directed verdict under this section and to submit the issue of alienation of affection to the jury where the defendant was the effective cause of the alienation. Ward v. Beaton, 141 N.C. App. 44, 539 S.E.2d 30, 2000 N.C. App. LEXIS 1288 (2000), cert denied, 353 N.C. 398, 547 S.E.2d 431 (2001).

Evidence which raises only a conjecture of negligence may not properly be submitted to the jury. To hold that evidence that a defendant could have been negligent is sufficient to go to a jury, in the absence of any evidence, direct or circumstantial, that such a defendant actually was negligent, is to allow the jury to indulge in speculation and guesswork. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972).

Medical evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict and should not be left to the jury. Sharpe v. Pugh, 21 N.C. App. 110, 203 S.E.2d 330, aff'd, 286 N.C. 209, 209 S.E.2d 456 (1974).

Determination of Validity of Will. — Where appropriate, a trial court may direct a verdict for propounders of a will in a caveat proceeding at the close of all evidence. In re Will of Jarvis, 107 N.C. App. 34, 418 S.E.2d 520 (1992), aff'd in part, rev'd in part, 334 N.C. 140, 430 S.E.2d 922 (1993).

Only in exceptional cases is it proper to enter a directed verdict or a judgment n.o.v. against a plaintiff in a negligence case, since issues arising in negligence cases are ordinarily not susceptible of summary adjudication, because application of the prudent man test, or any other applicable standard of care, is generally for the jury. Taylor v. Walker, 320 N.C. 729, 360 S.E.2d 796 (1987).

Only in exceptional cases is it proper to enter a directed verdict against a plaintiff in a negligence case. Wiggins v. Paramount Motor Sales, Inc., 89 N.C. App. 119, 365 S.E.2d 192 (1988).

Directed Verdict When Plaintiff's Evidence Shows Contributory Negligence. — A directed verdict on the ground that plaintiff's evidence reveals contributory negligence as a matter of law is proper only when contributory negligence is so clearly established that no other conclusion can reasonably be reached. Naylor v. Naylor, 11 N.C. App. 384, 181 S.E.2d 222 (1971); Riddick v. Whitaker, 13 N.C. App. 416, 185 S.E.2d 602, cert. denied, 281 N.C. 154, 187 S.E.2d 585 (1972); Seaman v. McQueen, 51 N.C. App. 500, 277 S.E.2d 118 (1981).

A motion for directed verdict upon the ground of contributory negligence should be allowed only when plaintiff's evidence, considered in the light most favorable to him, together with inferences favorable to him that may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn. Peeler v. Southern Ry., 32 N.C. App. 759, 233 S.E.2d 685 (1977).

Directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence, taken in the light most favorable to plaintiff, establishes contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973); Clary v. Alexander County Bd. of Educ., 286 N.C. 525, 212 S.E.2d 160 (1975); Clark v. Bodycombe, 289 N.C. 246, 221 S.E.2d 506 (1976); Rappaport v. Days Inn of Am., Inc., 296 N.C. 382, 250 S.E.2d 245 (1979), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Flexlon Fabrics, Inc. v. Wicker Pick-Up & Delivery Serv., Inc., 39 N.C. App. 443, 250 S.E.2d 723 (1979); Harrington v. Collins, 40 N.C. App. 530, 253 S.E.2d 288, aff'd, 298 N.C. 535, 259 S.E.2d 275 (1979); Thomas v. Deloatch, 45 N.C. App. 322, 263 S.E.2d 615, cert. denied, 300 N.C. 379, 267 S.E.2d 685 (1980); Taylor v. Hudson, 49 N.C. App. 296, 271 S.E.2d 70 (1980); Hunt v. Montgomery Ward & Co., 49 N.C. App. 642, 272 S.E.2d 357 (1980); Davis v. Gamble, 55 N.C. App. 617, 286 S.E.2d 629 (1982); Helvy v. Sweat, 58 N.C. App. 197, 292 S.E.2d 733, cert. denied, 306 N.C. 741, 295 S.E.2d 477 (1982); Horne v. Trivette, 58 N.C. App. 77, 293 S.E.2d 290, cert. denied, 306 N.C. 741, 295 S.E.2d 759 (1982).

In order for a directed verdict to be granted for a defendant on the grounds of contributory negligence, it is required that the plaintiff establish his own negligence so clearly by his own evidence that no other reasonable inference or conclusion can be drawn therefrom. Beatty v. H.B. Owsley & Sons, 53 N.C. App. 178, 280 S.E.2d 484, cert. denied, 304 N.C. 192, 285 S.E.2d 95 (1981).

A directed verdict on the ground of contributory negligence should be granted only when this defense is so clearly established that no other reasonable inference can be drawn from the evidence. Daughtry v. Turnage, 295 N.C. 543, 246 S.E.2d 788 (1978); Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

A trial court should grant a directed verdict on the ground of contributory negligence when the evidence establishes the nonmovant's contributory negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Frye v. Anderson, 86 N.C. App. 94, 356 S.E.2d 370, cert. denied, 320 N.C. 791, 361 S.E.2d 74 (1987).

A directed verdict on the ground of contributory negligence should be granted only when this defense is so clearly established that no other reasonable inference can be drawn from the evidence. Williams v. Hall, 100 N.C. App. 655, 397 S.E.2d 767 (1990).

Ordinarily, the question of contributory negligence of a guest in an automobile is for the jury to determine in the light of the facts and circumstances of the case. Thus, whether a passenger's failure to take affirmative action for his own safety constitutes contributory negligence is for the jury where conflicting inferences may be drawn from the circumstances. Harrington v. Collins, 40 N.C. App. 530, 253 S.E.2d 288, aff'd, 298 N.C. 535, 259 S.E.2d 275 (1979).

As Is Question of Contributory Negligence of Child Between 7 and 14. — Whether the rebuttable presumption that a child between the ages of 7 and 14 is incapable of contributory negligence has been rebutted in a particular case is a question for the jury, and a directed verdict on the basis that a child between 7 and 14 was contributorily negligent is not proper. Johnson v. Clay, 38 N.C. App. 542, 248 S.E.2d 382 (1978).

Contributory Negligence Not Sufficient for Directed Verdict Where Defendant's Conduct Willful. — Although a plaintiff in a personal injury action may have been contributorily negligent as a matter of law, this is not a sufficient basis on which to direct a verdict against plaintiff where defendant's conduct is willful or wanton as a matter of law, or where there is sufficient evidence to submit the issue of whether his conduct was willful or wanton to the jury. Harrington v. Collins, 40 N.C. App. 530, 253 S.E.2d 288, aff'd, 298 N.C. 535, 259 S.E.2d 275 (1979).

When a defendant pleads as a defense the plaintiff's contributory negligence, the defendant has the burden of proof on the issue, and if the defendant offers no evidence, a directed verdict for the defendant based on plaintiff's contributory negligence is appropriate only when there are no genuine issues of fact, and the non-movant's contributory negligence is so clearly established that no other reasonable inference or conclusion may be drawn therefrom. Price v. Jack Eckerd Corp., 100 N.C. App. 732, 398 S.E.2d 49 (1990).

Directed verdict on issue of contributory negligence was improper where the plaintiff testified that he was not completely blinded by the oncoming headlights as he approached the tractor-trailer, the plaintiff could see much more than the edge of the road, and the plaintiff may have been keeping a proper lookout without realizing that he was partially blinded only as to the area beyond the tractor-trailer's headlights. In such a deceptive visual situation, the plaintiff may not have been knowingly driving into a blinded area, for it would have appeared as though he could see into the distant darkness. From the evidence there was insufficient evidence to establish that plaintiff was contributorily negligent as a matter of law. Williams v. Hall, 100 N.C. App. 655, 397 S.E.2d 767 (1990).

Trial court erred in directing verdict on issue of contributory negligence. — See Alston v. Herrick, 76 N.C. App. 246, 332 S.E.2d 720 (1985), aff'd, 315 N.C. 386, 337 S.E.2d 851 (1986).

Advisability of Reserving Ruling on Motion in Contributory Negligence Cases. — In light of the trend by the Supreme Court to place on a defendant in a negligence action a heavier burden in establishing contributory negligence as a matter of law, it may be advisable for the trial court, in cases where the line is not clear, to reserve its ruling on a motion for directed verdict until the jury has returned a verdict and then allow or deny a motion for a judgment notwithstanding that verdict under section (b) of this rule, which on appeal may obviate the need for a new trial if the appellate court reverses the judgment notwithstanding the verdict. Partin v. Carolina Power & Light Co., 40 N.C. App. 630, 253 S.E.2d 605, cert. denied, 297 N.C. 611, 257 S.E.2d 219 (1979).

Withholding of Ruling Until Return of Verdict Disapproved. — Procedure whereby trial judge withheld his ruling on a motion for a directed verdict until after the jury had returned its verdict is disapproved. It is preferable to rule upon a motion for a directed verdict prior to submission of a case to the jury. Hamel v. Young Spring & Wire Corp., 12 N.C. App. 199, 182 S.E.2d 839, cert. denied, 279 N.C. 511, 183 S.E.2d 687 (1971).

Movant for a motion under section (b) of this rule must make a motion for a directed verdict at the close of all evidence. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

By introducing evidence, defendants waived their motion for directed verdict made at the close of plaintiffs' evidence. Rice v. Wood, 82 N.C. App. 318, 346 S.E.2d 205, cert. denied, 318 N.C. 417, 349 S.E.2d 599 (1986).

Any error in the denial of neighbors' motion for a directed verdict at the close of the property owners' case was waived as the neighbors presented evidence. Boggess v. Spencer, 173 N.C. App. 614, 620 S.E.2d 10, 2005 N.C. App. LEXIS 2114 (2005).

Preservation of Motion in Record Necessary. — Having failed to preserve the record of any motion for directed verdict at the close of all evidence, defendant waived his right to assign error to either the trial judge's purported ruling on that motion or the ruling on the motion for judgment notwithstanding the verdict. Jansen v. Collins, 92 N.C. App. 516, 374 S.E.2d 641 (1988).

Failure to Show One Cause of Damages More Likely than Others. — Directed verdict was proper where plaintiff did not offer any testimony suggesting that one cause of his damages was more likely than the others. Such testimony as to causation, being speculative in nature, would have resulted in a verdict founded upon a series of mere possibilities; and reliance upon a choice of possibilities amounts to nothing more than guesswork. Southern Bell Tel. & Tel. Co. v. West, 100 N.C. App. 668, 397 S.E.2d 765 (1990).

Denial of Directed Verdict. — If there is more than a scintilla of evidence supporting each element of the nonmovant's case, the motion for directed verdict should be denied. Snead v. Holloman, 101 N.C. App. 462, 400 S.E.2d 91 (1991).

A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish; a motion for judgment notwithstanding the verdict is essentially a renewal of a motion for directed verdict and the rules regarding the sufficiency of the evidence to go to the jury are equally applicable. Kremer v. Food Lion, Inc., 102 N.C. App. 291, 401 S.E.2d 837 (1991).

Directed Verdict Improperly Denied on Causation Issue. — The defendant psychiatrist's alleged negligence in treating and diagnosing the plaintiff who suffered from schizophrenia was not the proximate cause of plaintiff's injuries (plaintiff was shot in the leg and confined to a mental institution after killing two people), and therefore he was entitled to a directed verdict and JNOV. Williamson v. Liptzin, 141 N.C. App. 1, 539 S.E.2d 313, 2000 N.C. App. LEXIS 1276 (2000).

Directed Verdict Improper Where Defendant Had Not Offered All His Evidence. — Trial judge erred in determining as a matter of law that a separation/property settlement agreement was unconscionable before defendant had the opportunity to offer all of his evidence concerning the validity of the agreement. Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988).

Or His Evidence Is Sufficient to Survive Motion. — Plaintiffs' evidence tending to establish a prescriptive easement was sufficient to survive defendants' motions for directed verdict and for judgment notwithstanding the verdict and the trial court properly dismissed defendants' counterclaim. Mecimore v. Cothren, 109 N.C. App. 650, 428 S.E.2d 470, cert. denied, 334 N.C. 621, 435 S.E.2d 336 (1993).

Testimony by clinical psychologist which indicated that conduct violated the standard of care as it related to clinical assistants in substance abuse hospitals in similar communities and which indicated that victim suffered severe emotional distress as a result was sufficient to withstand a directed verdict. Johnson v. Amethyst Corp., 120 N.C. App. 529, 463 S.E.2d 397 (1995), cert. granted, 467 S.E.2d 713 (1996).

Question Presented on Appeal of Directed Verdict. — On appeal of a motion granting directed verdict, the reviewing court is confronted with the identical task as the trial court, that is, to determine whether the evidence, when considered in the light most favorable to the nonmovant, was sufficient to have been submitted to the jury. Harshbarger v. Murphy, 90 N.C. App. 393, 368 S.E.2d 450 (1988).

Trial judge was held to have authority to direct verdict of his own initiative; however, mindful of the low evidentiary threshold necessary to take a case to the jury, and also of the detailed procedure outlined in this rule, which presumes the use of a motion before a verdict is directed, the court of appeals did not encourage the frequent use of this practice, and cautioned trial judges to use it sparingly. L. Harvey & Son Co. v. Jarman, 76 N.C. App. 191, 333 S.E.2d 47 (1985).

Motion for Directed Verdict Properly Granted. — Defendant presented ample evidence of plaintiffs' breach of fiduciary duty; accordingly, the trial court did not err in denying plaintiffs' motion for a directed verdict at the close of defendant's evidence. Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993), cert. denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

In an action for injuries arising from an automobile accident, a directed verdict was properly granted as the injured party's contributory negligence was shown without the necessity of submitting the question to a jury because, viewed most favorably to the injured party, the evidence showed he stopped at a stop sign and looked left and right, but failed to look at an exit ramp from which the motorist who struck him approached the intersection where the accident occurred, before entering the intersection. Williams v. Davis, 157 N.C. App. 696, 580 S.E.2d 85, 2003 N.C. App. LEXIS 936 (2003).

Where an employer's independent contractor assaulted victims after breaking into their house, but the contractor did not meet the victims as a result of his relationship with the employer, and the employer received no benefit from "meeting" between the contractor and the victims, the employer owed no duty to the victims, the victims' negligent hiring claim against the employer was not proven, and the trial court properly granted the employer's motion for a directed verdict. Little v. Omega Meats I, Inc., 171 N.C. App. 583, 615 S.E.2d 45, 2005 N.C. App. LEXIS 1318 (2005), aff'd, 360 N.C. 164, 622 S.E.2d 494 (2005).

Directed verdict in favor of a manufacturing plant, a maintenance company, and its successor on the issue of punitive damages was upheld on appeal, because plaintiff workers failed to demonstrate any willful or wanton misconduct with regard to their exposure to asbestos when they removed insulation. The trial court's reduction of the workers' compensatory damages awards was also upheld on appeal, because the workers received prior workers' compensation claim settlements and prior third-party settlement amounts and were entitled to only one recovery for their asbestos exposure. Schenk v. HNA Holdings, Inc., 170 N.C. App. 555, 613 S.E.2d 503, 2005 N.C. App. LEXIS 1067 (2005), cert. denied, — N.C. —, 626 S.E.2d 649 (2005).

Motion for Directed Verdict Improperly Granted. — See Calhoun v. Calhoun, 76 N.C. App. 305, 332 S.E.2d 734 (1985), cert. denied, 315 N.C. 586, 341 S.E.2d 23 (1986).

Even though defendant had pled guilty to manslaughter, evidence of his plea was only some evidence in civil proceeding, and did not justify a directed verdict for plaintiff on the issue of defendant's negligence. Young v. Warren, 95 N.C. App. 585, 383 S.E.2d 381 (1989).

Where driver ran into horse and rider who claimed not to have had time to get out of the way, the trial court improperly granted the defendant's motion for directed verdict as to the issues of contributory negligence and willful and wanton conduct. Wilburn v. Honeycutt, 135 N.C. App. 373, 519 S.E.2d 774 (1999).

Wife was not entitled to a directed verdict under Rule 50(a) in the husband's malicious prosecution claim; there was sufficient evidence of special damages to establish malicious prosecution where the wife had improperly sought and received an ex parte protective order against husband, as the order substantially interfered with husband's person and property. Alexander v. Alexander, 152 N.C. App. 169, 567 S.E.2d 211, 2002 N.C. App. LEXIS 898 (2002).

It was error to direct a verdict for a seller in an unfair and deceptive trade practices action because the buyers alleged that the seller committed an injurious unfair or deceptive act in or affecting commerce by changing the size of a subdivision lot that the buyers had purchased after the buyers relied upon the lot size as staked and were denied a plat record before signing a contract. Brotherton v. Point on Norman, LLC, 156 N.C. App. 577, 577 S.E.2d 361, 2003 N.C. App. LEXIS 241 (2003), cert. denied, 357 N.C. 249, 582 S.E.2d 28 (2003).

Trial court erred in granting a directed verdict to the seller on the buyers' fraud claim related to a real estate sale, as more than a scintilla of evidence existed to support the element that the buyers reasonably relied on the seller's alleged misrepresentations regarding the property, especially since the jury could find that the seller's misrepresentations would have led a reasonable person to have foregone any further investigation. Little v. Stogner, 162 N.C. App. 25, 592 S.E.2d 5, 2004 N.C. App. LEXIS 13 (2004).

Granting of a directed verdict under G.S. 1A-1, N.C. R. Civ. P. 50 in favor of a brokerage service in a broker's breach of contract action against it was improper because the broker presented sufficient evidence of a breach of contract for the case to be submitted to the jury. He offered evidence of the material terms of a commission agreement between the parties, evidence that he performed his obligations, and evidence that the brokerage service later brokered the sale of the property at issue and earned a sizeable commission that it failed to split with him. Maxwell v. Michael P. Doyle, Inc., 164 N.C. App. 319, 595 S.E.2d 759, 2004 N.C. App. LEXIS 822 (2004).

Appellate court held that North Carolina recognized a claim for wrongful discharge in violation of public policy even though the discharge was constructive, and it reversed the trial court's judgment granting an employer's motion for a directed verdict on a former employee's claim that the employer tolerated a hostile work environment and was responsible for her decision to quit her job. Whitt v. Harris Teeter, Inc., 165 N.C. App. 32, 598 S.E.2d 151, 2004 N.C. App. LEXIS 1160 (2004), cert. denied, 359 N.C. 75, 605 S.E.2d 151 (2004).

In a medical malpractice action based on the negligence of the labor and delivery nurses and the neonatal nurse practitioners, the hospital was not entitled to a directed verdict, as the hospital did not show, as a matter of law, that the neonatal nurses were the intervening cause of the infant's injuries due to their failure to timely order a blood transfusion, as the labor and delivery nurses did not tell neonatal nurses about blood loss. Pope v. Cumberland County Hosp. Sys., 171 N.C. App. 748, 615 S.E.2d 715, 2005 N.C. App. LEXIS 1357 (2005).

Caveators alleged a second will, the original of which was lost, revoked the testator's earlier will pursuant to G.S. 31-5.1, as they presented evidence that the testator was not responsible for the loss of the later will, and they rebutted the presumption that it was destroyed; therefore, the trial court erred in granting the propounder of the first will a directed verdict under G.S. 1A-1-50. In re Will of McFayden, 179 N.C. App. 595, 635 S.E.2d 65, 2006 N.C. App. LEXIS 2053 (2006).

Motion for Directed Verdict Properly Denied. — The trial court properly denied the plaintiffs' directed verdict motion where the record reflected that a truck suddenly crossed in front of the defendant's automobile, causing him to brake and swerve to his right to avoid colliding with it, whereupon he struck the plaintiffs' vehicle as she was turning into the driveway of her son's residence, and although plaintiffs presented conflicting evidence as to defendant's speed and opportunity to avoid the collision, defendant's showing permitted the inference that he was not negligent. Long v. Harris, 137 N.C. App. 461, 528 S.E.2d 633, 2000 N.C. App. LEXIS 415 (2000).

A directed verdict for defendant-grocery store was improper for procedural and substantive reasons; issues still existed for the jury to resolve as to whether the defendant was negligent and whether the slip-and-fall plaintiff was contributorily negligent. Stallings v. Food Lion, Inc., 141 N.C. App. 135, 539 S.E.2d 331, 2000 N.C. App. LEXIS 1281 (2000).

Trial court's denial of defendant's motions pursuant to this section and the court's order concluding the settlement between plaintiff patient and the defendant doctor and medical center was in good faith, and dismissing those defendants to the detriment of the defendant pharmacy was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637, 535 S.E.2d 55 (2000).

Trial court properly denied a motion for directed verdict in a trial involving ownership of real property as the party opposing the motion presented sufficient evidence of each element of their claim of adverse possession to survive the motion. Lancaster v. Maple St. Homeowners Ass'n, 156 N.C. App. 429, 577 S.E.2d 365, 2003 N.C. App. LEXIS 194 (2003), cert. denied, 357 N.C. 251, 582 S.E.2d 272 (2003).

Trial court properly denied one partner's motion for a directed verdict as the other partners presented sufficient evidence of the partner's breach of a partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices to withstand the motion. Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905, 2003 N.C. App. LEXIS 369 (2003).

Trial court did not err in denying the one business partner's motion to dismiss, for a directed verdict, or for judgment notwithstanding the verdict on the second business partner's counterclaim alleging constructive fraud and breach of contract, as the evidence the second business partner introduced at trial showed that the parties were business partners, which was a fiduciary relationship as a matter of law, and evidence that the one business partner breached his fiduciary duty to the second business partner showed that the one business partner committed constructive fraud. Marketplace Antique Mall, Inc. v. Lewis, 163 N.C. App. 596, 594 S.E.2d 121, 2004 N.C. App. LEXIS 415 (2004).

Trial court properly denied employers' motion for directed verdict because the employee proffered sufficient evidence to support his causes of action for breach of contract and violation of the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq. The evidence offered by the employee was that: (1) the employers' representative orally agreed to pay the employee an annual bonus as part of a contract; (2) the employers modified the employee's bonus formula without his consent; and (3) the employers failed to give the employee notice of the change in the bonus formula. Arndt v. First Union Nat'l Bank, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

Denial of neighbors' motion for a directed verdict at the close of all of the evidence was proper as: (1) the properties were severed from common ownership in 1943; (2) there was no evidence that the owners' predecessors had public road access to their parcel by means other than a gravel road over the neighbors' property; (3) the road over the neighbors' property had been used by all of the owners' predecessors as a means of ingress and egress; (4) the owners met their burden of showing that an easement by necessity arose upon the severance of their parcel from common ownership; and (5) the jury found that the common owners intended the owners' predecessors and their successors to have a right to use the road in the same manner and to the same extent as the owners' predecessors used it. Boggess v. Spencer, 173 N.C. App. 614, 620 S.E.2d 10, 2005 N.C. App. LEXIS 2114 (2005).

Where a mail carrier alleged negligence regarding a car accident that occurred while they were driving in opposite directions in a curve on a narrow road, the mail carrier's motion for a directed verdict was properly denied because there was sufficient evidence of the mail carrier's contributory negligence to submit the issue to the jury since a trooper's testimony tended to show that both vehicles skidded approximately the same distance before impact and that neither party exercised proper control of their vehicles. Seay v. Snyder, 181 N.C. App. 248, 638 S.E.2d 584, 2007 N.C. App. LEXIS 94 (2007).

Motion for Directed Verdict Improperly Denied. — Trial court incorrectly denied defendants' motions under subsection (a) of this rule: G.S. 20-71.1 merely provides prima facie evidence of motor vehicle ownership but does not remove the plaintiff's burden of proof as to agency which, in this case, he failed to carry as to the first defendant and which issue the court removed in error from the jury as to the second defendant. Winston v. Brodie, 134 N.C. App. 260, 517 S.E.2d 203 (1999).

Jury award to the victim of a dog bite was vacated as the trial court erred by not granting the defendants' motion for a directed verdict because the victim failed to establish that the defendants that the victim sued were the owners or the keepers of the dog that bit the victim, rather the evidence showed that it was the defendant's son and the son's girlfriend that owned the dog that bit the victim. Lee v. Rice, 154 N.C. App. 471, 572 S.E.2d 219, 2002 N.C. App. LEXIS 1446 (2002).

Evidence Sufficient to Put Issue to Jury. — Because the cohabitant provided numerous benefits to the property owner, as, inter alia, she improved his property by helping to build a home, she also assisted him in improving his garage, she worked alongside him in his business, kept up his home, raised his child and grandchild, and relied on his promise that she would share in the results of their mutual efforts in the business and property ownership, she presented sufficient evidence to infer that the parties conducted their daily lives as a partnership; thus, the property owner was not entitled to a directed verdict under N.C. R. Civ. P. 50. Rhue v. Rhue, 189 N.C. App. 299, 658 S.E.2d 52, 2008 N.C. App. LEXIS 542 (2008).

Directed Verdict. — Trial court erred in denying a county's motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, in an action by a retired police officer seeking continuation of insurance payments by the county; individual county commissioners did not have authority to bind the county to such payments pursuant to G.S. 153A-92 or G.S. 153A-11, and a county manager did not did not have authority pursuant to G.S. 153A-82 to bind the county to an agreement to pay the insurance premiums without an express delegation of power by the Board of County Commissioners. Denson v. Richmond County, 159 N.C. App. 408, 583 S.E.2d 318, 2003 N.C. App. LEXIS 1498 (2003).

An order denying a motion for directed

verdict following a mistrial is not appealable based on the reasoning that such orders are interlocutory and do not affect a substantial right of the movant. Samia v. A.J. Ballard, Jr. Tire & Oil Co., 25 N.C. App. 601, 214 S.E.2d 222 (1975).

Appellate Review of Motion. — Because defendant failed to assert the insufficiency of the evidence to support plaintiffs' action for trespass or an award of actual damages as grounds for his motion for a directed verdict, defendant waived his right to appellate review of these issues. Lee v. Bir, 116 N.C. App. 584, 449 S.E.2d 34 (1994), cert. denied, 340 N.C. 113, 454 S.E.2d 652 (1995).

Raising of Issues on Appeal. — When a specific ground for a directed verdict is not stated in the original motion, it cannot be raised on appeal; even the sufficiency of the evidence cannot be raised for the first time on appeal. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

Scope of Review on Appeal. — On review of a directed verdict, appellate review is usually limited to those grounds asserted by the movant upon making his motion before the trial judge. Warren v. Canal Indus., Inc., 61 N.C. App. 211, 300 S.E.2d 557 (1983).

Where a party moves for a directed verdict, the trial court must determine whether the evidence, when considered in the light most favorable to the nonmovant, is sufficient to take the case to the jury. Upon appeal, the scope of review is limited to those grounds asserted by the moving party before the trial court. Southern Bell Tel. & Tel. Co. v. West, 100 N.C. App. 668, 397 S.E.2d 765 (1990).

In reviewing a grant of directed verdict, an appellate court may consider all of the grounds specifically stated by the moving party in its motion to the trial court. Merrick v. Peterson, 143 N.C. App. 656, 548 S.E.2d 171, 2001 N.C. App. LEXIS 342 (2001).

The question presented on appeal of the granting of a motion for a directed verdict is whether the evidence, taken in the light most favorable to the appellant, is sufficient for submission of the case to the jury. Hitchcock v. Cullerton, 82 N.C. App. 296, 346 S.E.2d 215 (1986).

Appellate Court to Consider All Relevant Evidence. — All relevant evidence admitted by the trial court, whether competent or not, must be accorded its full probative force in determining the correctness of its ruling upon a motion for judgment as of nonsuit. Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972); Beal v. K.H. Stephenson Supply Co., 36 N.C. App. 505, 244 S.E.2d 463 (1978).

Without Regard to Trial Court's Purported "Findings" and "Conclusions." — To pass upon the single question of law presented, namely, the sufficiency of plaintiff's evidence to withstand defendant's motion for a directed verdict, the appellate court must look to the evidence and base its decision thereon, without regard to the trial court's "findings of fact" and "conclusions of law." Sink v. Sink, 11 N.C. App. 549, 181 S.E.2d 721 (1971).

But Must Accept Testimony of Plaintiff's Witnesses at Face Value. — In passing upon a motion for a judgment notwithstanding the verdict based upon it, the testimony of plaintiff's witnesses must be accepted as face value by the appellate court. Rayfield v. Clark, 283 N.C. 362, 196 S.E.2d 197 (1973); McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 293 S.E.2d 632 (1982), aff'd, 307 N.C. 695, 300 S.E.2d 374 (1983).

On defendant's motion for directed verdict, the testimony of the plaintiff's witnesses must be accepted at face value. McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 293 S.E.2d 632 (1982), aff'd, 307 N.C. 695, 300 S.E.2d 374 (1983).

All Evidence Given Full Probative Force. — On a motion for directed verdict, all evidence admitted, whether competent or not, must be given full probative force. McCollum v. Grove Mfg. Co., 58 N.C. App. 283, 293 S.E.2d 632 (1982), aff'd, 307 N.C. 695, 300 S.E.2d 374 (1983).

Effect of Voluntary Dismissal with Prejudice on Appeal. — In wrongful death action, plaintiffs' voluntary dismissal with prejudice of the issue of negligence, upon which all of their claims were based, rendered their appeal of directed verdict moot. Bailey v. Gitt, 135 N.C. App. 119, 518 S.E.2d 794 (1999).

B. Statement of Specific Grounds.

Subsection (a) requires that a motion for directed verdict state specific grounds for the motion; failure to state such grounds is not a basis for an automatic reversal of the directed verdict on appeal. In re Will of Jones, 114 N.C. App. 782, 443 S.E.2d 363, cert. denied, 337 N.C. 693, 448 S.E.2d 526 (1994).

A motion for directed verdict must state the grounds therefor; otherwise, error may not be urged on appeal. Hall v. Mabe, 77 N.C. App. 758, 336 S.E.2d 427 (1985).

Requirement That Specific Grounds Be Stated in Motion for Directed Verdict Is Mandatory. — The provision of this rule which requires that "specific grounds" shall be stated in a motion for a directed verdict is mandatory. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970); Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970); Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971); Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973); Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Clary v. Alexander County Bd. of Educ., 286 N.C. 525, 212 S.E.2d 160 (1975); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978); Byerly v. Byerly, 38 N.C. App. 551, 248 S.E.2d 433 (1978); Lindsey v. Clinic for Women, 40 N.C. App. 456, 253 S.E.2d 304 (1979); Jones v. Allred, 52 N.C. App. 38, 278 S.E.2d 521, aff'd, 304 N.C. 387, 283 S.E.2d 517 (1981).

Purpose of the rule that specific grounds for the motion be stated is to apprise the court and the adverse parties of movants' grounds for the motion. Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

The courts need not inflexibly enforce the rule as to stating specific grounds when the grounds for the motion are apparent to the court and the parties. Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Hodges v. Hodges, 37 N.C. App. 459, 246 S.E.2d 812 (1978); Lindsey v. Clinic for Women, 40 N.C. App. 456, 253 S.E.2d 304 (1979); Heist v. Heist, 46 N.C. App. 521, 265 S.E.2d 434 (1980); Humphrey v. Hill, 55 N.C. App. 359, 285 S.E.2d 293 (1982).

While the better practice is to state specific grounds for a motion for directed verdict, it is not necessary where the issue is identified and the grounds for the motion are apparent to the court and the parties. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), rev'd in part on other grounds, 315 N.C. 523, 340 S.E.2d 408 (1986).

The purpose of the "specific grounds" requirement of section (a) of this rule is to allow the adverse party to meet any defects with further proof and avoid the entry of a judgment notwithstanding the verdict at the close of the trial on a ground that could have been met with proof had it been suggested earlier. Byerly v. Byerly, 38 N.C. App. 551, 248 S.E.2d 433 (1978); Nelson v. Chin Yung Chang, 78 N.C. App. 471, 337 S.E.2d 650 (1985), cert. denied, 317 N.C. 335, 346 S.E.2d 501 (1986).

The better practice is to set forth the specific grounds in a written motion. If the movant relies upon an oral statement for such specific grounds, a transcript thereof must be incorporated in the case on appeal. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973); Burden Pallet Co. v. Ryder Truck Rental, Inc., 49 N.C. App. 286, 271 S.E.2d 96 (1980), cert. denied, 301 N.C. 722, 276 S.E.2d 282 (1981).

Citation to Earlier Case Not Approved Method of Complying with Requirement. — A motion for a directed verdict, "citing the case of Blake v. Mallard, decided by Justice Sharp in 1964," is certainly not an approved method of complying with the requirement that "a motion for a directed verdict shall state the specific grounds therefor." Grant v. Greene, 11 N.C. App. 537, 181 S.E.2d 770 (1971).

Failure to State Grounds as Sufficient Basis for Overruling Motion. — A defendant's failure to state the grounds for his motions for a directed verdict is sufficient basis for the court's overruling them. Dixon v. Shelton, 9 N.C. App. 392, 176 S.E.2d 390 (1970); Byerly v. Byerly, 38 N.C. App. 551, 248 S.E.2d 433 (1978).

Defendants' failure to restate specific grounds for their motion at the close of all the evidence would not be deemed fatal where it must have been apparent to the court and to the plaintiff that their motion was a renewal of the motion previously made, this time challenging the sufficiency of all the evidence on the grounds previously stated. Hodges v. Hodges, 37 N.C. App. 459, 246 S.E.2d 812 (1978).

Failure to Renew Motion Following Opponent's Additional Evidence Held Fatal to Appeal. — Where defendant failed to renew a motion for a directed verdict following plaintiff's additional evidence, the Court of Appeals would not pass upon the sufficiency of the evidence to survive a motion for a directed verdict. Gragg v. Burns, 9 N.C. App. 240, 175 S.E.2d 774 (1970).

Grounds Should Be Included in Record on Appeal. — Litigants would be well advised to include in the record the specific grounds stated in the motion for a directed verdict. A failure to do so could result in a dismissal of the appeal. Davis v. Peacock, 10 N.C. App. 256, 178 S.E.2d 133 (1970), cert. denied, 277 N.C. 725, 178 S.E.2d 832 (1971).

Appellant who fails to state specific grounds is not entitled upon appeal to question the insufficiency of the evidence to support the verdict. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970); Builders Supplies Co. v. Gainey, 10 N.C. App. 364, 178 S.E.2d 794, cert. denied, 278 N.C. 300, 180 S.E.2d 178 (1971).

If the court denies a motion for a directed verdict which fails to state the specific grounds for the motion, the moving party may not complain of the denial on appeal. Pergerson v. Williams, 9 N.C. App. 512, 176 S.E.2d 885 (1970).

A motion for directed verdict must state the grounds therefor, and grounds not asserted in the trial court may not be asserted on appeal. Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32 (1986).

Party Not Objecting Below to Failure to

State Grounds Precluded from Objecting on Appeal. — If the court grants a motion for a directed verdict which fails to state the specific grounds for the motion, the adverse party who did not object to failure of the motion to state specific grounds therefor cannot raise such objection in the appellate court. Pergerson v. Williams, 9 N.C. App. 512, 176 S.E.2d 885 (1970); Builders Supplies Co. v. Gainey, 10 N.C. App. 364, 178 S.E.2d 794, cert. denied, 278 N.C. 300, 180 S.E.2d 178 (1971); Byerly v. Byerly, 38 N.C. App. 551, 248 S.E.2d 433 (1978); Snipes v. Snipes, 55 N.C. App. 498, 286 S.E.2d 591, aff'd, 306 N.C. 373, 293 S.E.2d 187 (1982).

Upholding of Directed Verdict by Court of Appeals on Different Ground Improper. — The Court of Appeals erred in upholding a directed verdict for defendants on a ground different from that upon which the trial court reached its decision when the ground relied upon by the Court of Appeals was not stated in defendant's motion or argument on the motion in the trial court. Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Grounds Found Adequate. — Plaintiff's assignment of error to the trial court's refusal to submit an issue of punitive damages to the jury encompassed the trial court's grant, during the jury charge conference, of plaintiff's motion for a directed verdict on the issue of punitive damages and adequately preserved that issue for review. McNeill v. Holloway, 141 N.C. App. 109, 539 S.E.2d 309, 2000 N.C. App. LEXIS 1279 (2000).

III. JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL.

Editor's Note. — *See also the annotations appearing under Analysis line II, Directed Verdict, above.*

What Is Motion for Judgment N.O.V. — The motion for judgment n.o.v. is a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict actually returned by the jury. Summey v. Cauthen, 283 N.C. 640, 197 S.E.2d 549 (1973); Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974); Kaperonis v. Underwriters at Lloyd's, London, 25 N.C. App. 119, 212 S.E.2d 532 (1975); Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979); Johnson v. Robert Dunlap & Racing, Inc., 53 N.C. App. 312, 280 S.E.2d 759 (1981), cert. denied, 305 N.C. 153, 289 S.E.2d 380 (1982); Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 316 S.E.2d 256 (1984); DeHart v. R/S Fin. Corp., 78 N.C. App. 93, 337 S.E.2d 94 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986); Streeter v. Cotton, 133 N.C. App. 80, 514 S.E.2d 539 (1999).

A motion for judgment notwithstanding the verdict is technically a renewal of the motion for a directed verdict. Harvey v. Norfolk S. Ry., 60 N.C. App. 554, 299 S.E.2d 664 (1983); Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 316 S.E.2d 256 (1984); Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

A motion for judgment notwithstanding the verdict is essentially the renewal of prior motion for a directed verdict. Therefore, rules regarding the sufficiency of the evidence to go to the jury are equally applicable to a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict reached by the jury. Henderson v. Traditional Log Homes, Inc., 70 N.C. App. 303, 319 S.E.2d 290, cert. denied, 312 N.C. 623, 323 S.E.2d 923 (1984).

A motion for judgment notwithstanding the verdict, or judgment N.O.V., is in effect a directed verdict granted after the jury verdict. Bryant v. Nationwide Mut. Fire Ins. Co., 67 N.C. App. 616, 313 S.E.2d 803, aff'd in part and rev'd in part, 313 N.C. 362, 329 S.E.2d 333 (1985).

A motion under section (b) of this rule is essentially a renewal of an earlier motion for a directed verdict. Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985).

A motion for judgment pursuant to subdivision (b)(1) is essentially a renewal of an earlier motion for a directed verdict. Cook v. Wake County Hosp. Sys., 125 N.C. App. 618, 482 S.E.2d 546 (1997); Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

The purpose of the rule which makes a specific directed verdict motion a prerequisite for a judgment notwithstanding the verdict is to allow the adverse party to meet any defects in his case with further proof and thus avoid the entry of a judgment n.o.v. at the close of the trial on a ground that could have been met with proof had it been suggested earlier. Garrison v. Garrison, 87 N.C. App. 591, 361 S.E.2d 921 (1987).

The availability of a motion for a judgment notwithstanding the verdict constitutes an innovation in the civil procedure of this State. Formerly, a motion for nonsuit made under the provisions of former G.S. 1-183 could not be allowed after verdict for insufficiency of the evidence. Musgrave v. Mutual Sav. & Loan Ass'n, 8 N.C. App. 385, 174 S.E.2d 820 (1970).

When Subsection (b)(1) Is Applicable. — The language of subsection (b)(1) of this rule presupposes that its provisions are applicable only to situations in which the party moving for a directed verdict has his motion denied and the verdict of the jury is adverse to his position. Hathcock v. Lowder, 16 N.C. App. 255, 192 S.E.2d 124, cert. denied, 282 N.C. 426, 192 S.E.2d 836 (1972).

This rule contemplates that any party may move for a directed verdict at the close of all the evidence. When such motion is made by any party and denied, or for any reason not granted, and the jury returns a verdict for the nonmovant, the movant may make a motion for judgment notwithstanding the verdict. North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Subsection (b)(1) of this rule allows the grant of a judgment notwithstanding the verdict in favor of a party who has previously moved for a directed verdict. Colony Assocs. v. Fred L. Clapp & Co., 60 N.C. App. 634, 300 S.E.2d 37 (1983).

Section (b) of this rule authorizes a "reserved directed verdict" motion practice. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973); Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

If the judge denies, or simply does not grant, a motion for directed verdict made at the conclusion of all the evidence and a verdict is then either not returned or is returned against the movant, the judge may then entertain a motion by him for judgment "in accordance with his motion for directed verdict." Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

Reservation of final ruling on a motion for directed verdict affords the basis for the post-verdict motion for judgment n.o.v. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

Evidence Considered On JNOV Motion. — Proper procedure for considering a motion for a judgment notwithstanding the verdict at the close of the plaintiff's evidence is that the trial court may either rule on the motion or reserve its ruling on the motion; by offering evidence, however, a defendant waives its motion for directed verdict made at the close of the plaintiff's evidence. Accordingly, if a defendant offers evidence after making a motion for directed verdict, any subsequent ruling by the trial judge upon defendant's motion for directed verdict must be upon a renewal of the motion by the defendant at the close of all the evidence, and the judge's ruling must be based upon the evidence of both the plaintiff and the defendant. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

Motion for Judgment N.O.V. Proper After Submission of Case to Jury. — After a case has been submitted to a jury, the proper motion to be ruled upon at that time is a motion for judgment notwithstanding the verdict. Hamel v. Young Spring & Wire Corp., 12 N.C. App. 199, 182 S.E.2d 839, cert. denied, 279 N.C. 511, 183 S.E.2d 687 (1971).

Denial of a motion for directed verdict is not a bar to a motion for judgment notwithstanding the verdict. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972), vacated on other grounds on rehearing, 283 N.C. 277, 196 S.E.2d 262 (1973).

Where intervenor did not make a motion for directed verdict at the close of all the evidence, she could not make a motion for judgment notwithstanding the verdict under section (b) of this rule. State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989).

Motion for Directed Verdict Prerequisite to Motion for Judgment N.O.V. — The language of this rule is almost identical to the language of FRCP, Rule 50, and the well-recognized interpretation of this rule is that the making of an appropriate motion for a directed verdict is an absolute prerequisite for the motion for judgment notwithstanding the verdict. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

Motion for judgment n.o.v. must be preceded by a motion for a directed verdict. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

A motion for judgment n.o.v. may be entertained only if the movant has made a motion for a directed verdict at the close of all the evidence. Gibbs v. Duke, 32 N.C. App. 439, 232 S.E.2d 484, cert. denied, 292 N.C. 640, 235 S.E.2d 61 (1977); Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), rev'd in part on other grounds, 315 N.C. 523, 340 S.E.2d 408 (1986); Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985).

Plaintiffs have no standing after the verdict to move for judgment n.o.v. where they did not move for directed verdict at the close of their evidence or at the close of all the evidence. Graves v. Walston, 302 N.C. 332, 275 S.E.2d 485 (1981).

Where a party failed to move for a directed verdict at the close of all the evidence, the motion for judgment notwithstanding the verdict did not meet the requirement of subsection (b)(1) of this rule that a motion for judgment notwithstanding the verdict be supported by a timely motion for directed verdict. Dean v. Nash, 12 N.C. App. 661, 184 S.E.2d 521 (1971).

Where intervenor did not make a motion for directed verdict at the close of all the evidence, she could not make a motion for judgment notwithstanding the verdict under section (b) of this rule. State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989).

Where basis of plaintiff's motion for JNOV was that evidence clearly established that defendant's negligence was the proximate cause of his injuries, as proximate cause was not specifically raised by the plaintiff to support the directed verdict motion, JNOV on that basis would not be proper. Lassiter v. English, 126 N.C. App. 489, 485 S.E.2d 840 (1997), overruled in part on other grounds, In re Will of Buck, 350 N.C. 621, 516 S.E.2d 858 (1999).

Motion for Directed Verdict After Jury Has Returned Verdict Is Too Late. — A litigant's motion for directed verdict nunc pro tunc, which is made after the jury has returned its verdict in a case, comes too late to preserve right to move for judgment notwithstanding the verdict. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

This rule provides for a motion for a directed verdict at the close of plaintiff's evidence or at the close of all the evidence. It does not give a litigant the option of waiting until after the verdict is in to make the motion for a directed verdict to attempt to preserve his right to move for judgment notwithstanding the verdict. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

Grounds Not Asserted on Motion for Directed Verdict Not Available. — The motion for judgment notwithstanding the verdict is technically only a renewal of the motion for a directed verdict made at the close of all the evidence, and thus the movant cannot assert grounds not included in the motion for directed verdict. Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978); Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

Motion Must Be Argued with Particularity, Not Incorporation. — Defendant failed to advance an argument for why the trial court erred by denying his JNOV motion following jury verdict in a third trial, where his brief merely incorporated arguments directed to the trial court's denial of his JNOV motion at the second trial. Burchette v. Lynch, 139 N.C. App. 756, 535 S.E.2d 77, 2000 N.C. App. LEXIS 1025 (2000).

Movant Bears Heavy Burden. — Party moving for judgment notwithstanding the verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

A motion for judgment notwithstanding the verdict is cautiously and sparingly granted. Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985).

Standard is high for the party seeking a judgment notwithstanding the verdict; the motion should be denied if there is more than a scintilla of evidence to support the plaintiff's prima facie case; the evidence supporting the plaintiffs' claims must be taken as true, all conflicts and inconsistencies in the evidence must be resolved in the plaintiffs' favor, and the plaintiffs must receive the benefit of every reasonable inference. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

Standards for granting a motion for judgment n.o.v. are the same as those for granting a directed verdict. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972), vacated on other grounds on rehearing, 283 N.C. 277, 196 S.E.2d 262 (1973); Kaperonis v. Underwriters at Lloyd's, London, 25 N.C. App. 119, 212 S.E.2d 532 (1975); Brokers, Inc. v. High Point City Bd. of Educ., 33 N.C. App. 24, 234 S.E.2d 56, cert. denied, 293 N.C. 159, 236 S.E.2d 702 (1977); North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978), rev'd on other grounds, 297 N.C. 524, 256 S.E.2d 388 (1979); Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979); Weyerhaeuser Co. v. Godwin Bldg. Supply Co., 40 N.C. App. 743, 253 S.E.2d 625 (1979); State v. Moore, 315 N.C. 738, 340 S.E.2d 401 (1986).

The same test is to be applied on a motion under subsection (b)(1) of this rule for judgment notwithstanding the verdict as is applied on a motion under section (a) of this rule for a directed verdict. Snellings v. Roberts, 12 N.C. App. 476, 183 S.E.2d 872, cert. denied, 279 N.C. 727, 184 S.E.2d 886 (1971); DeHart v. R/S Fin. Corp., 78 N.C. App. 93, 337 S.E.2d 94 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986).

The same standard of sufficiency of evidence as that under the directed verdict motion is applied. Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

The propriety of granting a motion for judgment notwithstanding the verdict is determined by the same considerations as that of a motion for a directed verdict. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972), vacated on other grounds on rehearing, 283 N.C. 277, 196 S.E.2d 262 (1973); Summey v. Cauthen, 283 N.C. 640, 197 S.E.2d 549 (1973); Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974); North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979).

Since the motion for judgment notwithstanding the verdict under this rule is simply a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict reached by the jury, the same standard of sufficiency of the evidence must be utilized in reviewing both motions. Snider v. Dickens, 293 N.C. 356, 237 S.E.2d 832 (1977).

The test for determining the sufficiency of the evidence when ruling on a motion for judgment notwithstanding the verdict is the same as that applied when ruling on a motion for directed verdict. Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 316 S.E.2d 256 (1984).

A motion for judgment non obstante veredicto is essentially a renewal of a motion for directed verdict, and the same standards govern the trial court's consideration of it as govern a directed verdict motion. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), rev'd in part on other grounds, 315 N.C. 523, 340 S.E.2d 408 (1986).

If the motion for directed verdict could have been properly granted, then the subsequent motion for judgment notwithstanding the verdict should also be granted. Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985).

The same rules by which the sufficiency of the evidence is tested upon motion for a directed verdict pursuant to section (a) of this rule apply to the determination of a motion for judgment notwithstanding the verdict. Allen v. Pullen, 82 N.C. App. 61, 345 S.E.2d 469 (1986), cert. denied, 318 N.C. 691, 351 S.E.2d 738 (1987).

A motion for judgment notwithstanding the verdict, like a motion for a directed verdict, tests the legal sufficiency of the evidence to take the case to the jury. Taylor v. Walker, 84 N.C. App. 507, 353 S.E.2d 239, rev'd on other grounds, 320 N.C. 729, 360 S.E.2d 796 (1987).

The test for determining the sufficiency of the evidence when ruling on a motion for judgment is identical to that applied when ruling on a motion for directed verdict. Cook v. Wake County Hosp. Sys., 125 N.C. App. 618, 482 S.E.2d 546 (1997); Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Applicability of Principles Formerly Prevailing on Motion for Nonsuit. — In determining the sufficiency of the evidence upon a motion for judgment notwithstanding the verdict, the courts are guided by the same principles that prevailed under former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit. Snellings v. Roberts, 12 N.C. App. 476, 183 S.E.2d 872, cert. denied, 279 N.C. 727, 184 S.E.2d 886 (1971).

A motion for judgment non obstante veredicto presents substantially the same question as that presented by a motion for nonsuit under former G.S. 1-183. City of Winston-Salem v. Rice, 16 N.C. App. 294, 192 S.E.2d 9, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Anderson v. Butler, 284 N.C. 723, 202 S.E.2d 585 (1974), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998).

Sufficiency of Evidence Questioned on Motion for Judgment N.O.V. — Upon a motion for judgment non obstante veredicto, the sufficiency of the evidence upon which the jury based its verdict is drawn into question. Horton v. Iowa Mut. Ins. Co., 9 N.C. App. 140, 175 S.E.2d 725 (1970); Coppley v. Carter, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

A motion for judgment notwithstanding the verdict permits the judge to consider the sufficiency of the evidence after the jury has returned a verdict. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972), vacated on other grounds on rehearing, 283 N.C. 277, 196 S.E.2d 262 (1973).

A motion for judgment notwithstanding the verdict presents the question of whether the evidence was sufficient to entitle the plaintiff to have a jury pass on it. Morrison v. Concord Kiwanis Club, 52 N.C. App. 454, 279 S.E.2d 96, cert. denied, 304 N.C. 196, 285 S.E.2d 100 (1981).

Evidence Must Be Viewed in Light Most Favorable to Nonmovant. — When passing on a motion for judgment notwithstanding the verdict, the court must view the evidence in the light most favorable to the nonmovant. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972), vacated on other grounds on rehearing, 283 N.C. 277, 196 S.E.2d 262 (1973); Summey v. Cauthen, 283 N.C. 640, 197 S.E.2d 549 (1973); Kaperonis v. Underwriters at Lloyd's, London, 25 N.C. App. 119, 212 S.E.2d 532 (1975).

Insofar as the defendant's testimony creates a conflict in his testimony, it must be resolved in his favor in passing on the plaintiff's motion for judgment notwithstanding the verdict. Coppley v. Carter, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

In resolving the question of whether the evidence is sufficient to support the verdict, the evidence, of course, must be viewed in the light most favorable to the party who won the verdict. Dailey v. Integon Gen. Ins. Corp., 75 N.C. App. 387, 331 S.E.2d 148, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985); Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

In ruling on a motion for a directed verdict or for a judgment notwithstanding the verdict, the trial court must consider the evidence in the light most favorable to the nonmoving party, giving him the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in his favor. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Giving Nonmovant the Benefit of Every Inference and Resolving Contradictions in His Favor. — Upon defendant's motion for judgment non obstante veredicto, all the evidence which supports plaintiffs' claim must be taken as true and considered in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, with contradictions, conflicts and inconsistencies being resolved in plaintiffs' favor. Horton v. Iowa Mut. Ins. Co., 9 N.C. App. 140, 175 S.E.2d 725 (1970); Dickinson v. Pake, 19 N.C. App. 287, 198 S.E.2d 467 (1973), rev'd on other grounds, 284 N.C. 576, 201 S.E.2d 897 (1974); Wilson v. Miller, 20 N.C. App. 156, 201 S.E.2d 55 (1973); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978); North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978), rev'd on other grounds, 297 N.C. 524, 256 S.E.2d 388 (1979); Hart v. Warren, 46 N.C. App. 672, 266 S.E.2d 53, cert. denied, 301 N.C. 89 (1980); Seaman v. McQueen, 51 N.C. App. 500, 277 S.E.2d 118 (1981).

All of the evidence which supports the claim of the party opposing the motion must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor. Coppley v. Carter, 10 N.C. App. 512, 179 S.E.2d 118 (1971); Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979); Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985); Allen v. Pullen, 82 N.C. App. 61, 345 S.E.2d 469 (1986), cert. denied, 318 N.C. 691, 351 S.E.2d 738 (1987); Taylor v. Walker, 84 N.C. App. 507, 353 S.E.2d 239, rev'd on other grounds, 320 N.C. 729, 360 S.E.2d 796 (1987).

In passing on a motion for judgment notwithstanding the verdict, the evidence is to be taken in the light most favorable to the nonmoving party, and he is entitled to all reasonable inferences that can be drawn from it. Murray v. Murray, 296 N.C. 405, 250 S.E.2d 276 (1979).

A motion for judgment notwithstanding the verdict presents the question of whether the evidence was sufficient to entitle the plaintiff to have a jury pass on it. The evidence must be considered in the light most favorable to the party opposing the motion, and the opponent is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence, and all conflicts in the evidence are resolved in favor of the opponent. Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), rev'd in part on other grounds, 315 N.C. 523, 340 S.E.2d 408 (1986).

In considering a motion for judgment n.o.v., the trial court is to consider all evidence in the light most favorable to the party opposing the motion. The nonmovant is to be given the benefit of every reasonable inference that legitimately may be drawn from the evidence, and contradictions must be resolved in the nonmovant's favor. Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

Evidence Must Be Accorded its Full Probative Force. — In determining the correctness of a motion for a judgment notwithstanding the verdict, all relevant evidence admitted by the trial court, whether competent or not, must be accorded its full probative force. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

Motion for Judgment N.O.V. Proper Where Evidence Insufficient to Support Verdict. — When passing on a motion for judgment notwithstanding the verdict, the court must consider the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to support a verdict for plaintiff. Brokers, Inc. v. High Point City Bd. of Educ., 33 N.C. App. 24, 234 S.E.2d 56, cert. denied, 293 N.C. 159, 236 S.E.2d 702 (1977).

Judgment notwithstanding the verdict should be granted only when the evidence is insufficient as a matter of law to support the verdict. Where the evidence admitted at trial, taken in the light most favorable to the nonmoving party with all reasonable inferences drawn in his favor, is sufficient to support the verdict, it should not be set aside. Harvey v. Norfolk S. Ry., 60 N.C. App. 554, 299 S.E.2d 664 (1983).

A motion for a judgment notwithstanding the verdict, like a motion for a directed verdict, will be granted only if the evidence, considered in the light most favorable to the plaintiff, is insufficient as a matter of law to justify a verdict for the plaintiff. Perry v. Williams, 84 N.C. App. 527, 353 S.E.2d 226 (1987).

And Where Defendants Were Entitled to Judgment as a Matter of Law. — Where defendants were entitled to a judgment as a matter of law and a motion for directed verdict was made at the close of all the evidence, the judge's entry of a judgment notwithstanding the verdict was proper under subsection (b)(1) of this rule. Wolfe v. Eaker, 50 N.C. App. 144, 272 S.E.2d 781 (1980), cert. denied, 302 N.C. 222, 277 S.E.2d 69 (1981).

Trial court decision denying JNOV to a city, one of its police officers, and its police department was reversed on appeal because the plaintiff, an arrestee injured in a squad car, failed to prove gross negligence and only showed simple negligence by evidence that the police officer drove 30 to 35 miles above the legal speed limit although he knew that plaintiff was not wearing a seat belt and had to brake suddenly to avoid a collision causing plaintiff to propel into the metal screen in the squad car. Clayton v. Branson, 170 N.C. App. 438, 613 S.E.2d 259, 2005 N.C. App. LEXIS 1070 (2005), cert. denied, — N.C. —, 625 S.E.2d 785 (2005).

Grant of Judgment N.O.V. Erroneous

Where Case Was Sufficient to Go to Jury. — If the plaintiffs have made out a case sufficient to go to the jury, then it is error to enter a judgment setting aside the verdict and granting a judgment for the defendant notwithstanding the verdict. Horton v. Iowa Mut. Ins. Co., 9 N.C. App. 140, 175 S.E.2d 725 (1970); Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985); Kron Medical Corp. v. Collier Cobb & Assocs., 107 N.C. App. 331, 420 S.E.2d 192, cert. denied, appeal dismissed.

Where the evidence admitted at trial, taken in the light most favorable to the nonmoving party with all reasonable inferences drawn in his favor, is sufficient to support the verdict, it should not be set aside. Beal v. K.H. Stephenson Supply Co., 36 N.C. App. 505, 244 S.E.2d 463 (1978).

If More Than Scintilla of Evidence, Motion Should Be Denied. — The court should deny a motion for judgment notwithstanding the verdict when it finds any evidence more than a scintilla to support plaintiff's prima facie case in all its constituent elements. Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983); Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

Where defendant has the burden of proof on an affirmative defense, the granting of a directed verdict or judgment notwithstanding the verdict in his favor will be more closely scrutinized. Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985).

Trial tactics employed by defendant were not sufficient reason to order a new trial. Booe v. Shadrick, 322 N.C. 567, 369 S.E.2d 554, cert. denied, 323 N.C. 370, 373 S.E.2d 540 (1988).

Contributory Negligence as Grounds for Judgment N.O.V. — Judgment notwithstanding the verdict on the grounds of contributory negligence should be granted only when the evidence establishes plaintiff's negligence so clearly that no other reasonable inference can be drawn from the evidence. Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983); Taylor v. Walker, 84 N.C. App. 507, 353 S.E.2d 239, rev'd on other grounds, 320 N.C. 729, 360 S.E.2d 796 (1987).

Lack of Contributory Negligence as Grounds for Judgment N.O.V. — Trial court erred in denying driver's motion for judgment notwithstanding the verdict in her negligence action against a motorist, arising from a collision when the motorist went through a stop sign at an intersection; the fact that the motorist estimated that the driver was speeding, without more, was insufficient to allow the issue of contributory negligence to be considered by the jury pursuant to G.S. 1-139 because there was no causal connection established between the speeding and the accident. Ellis v. Whitaker, 156 N.C. App. 192, 576 S.E.2d 138, 2003 N.C. App. LEXIS 77 (2003).

Failure of Jury to Reach Verdict Irrelevant in Deciding Whether Evidence Was Sufficient. — In deciding whether the evidence was sufficient to entitle a plaintiff to have the jury pass on it, the court should give no consideration to the fact that the jury may have failed to reach a verdict, but should consider only the evidence in the case. Odell v. Lipscomb, 12 N.C. App. 318, 183 S.E.2d 299 (1971).

Inadequate Award of Damages. — In breach of contract action against university, trial court erred in denying professor's motion for judgment notwithstanding the verdict or for a new trial based upon a jury award of inadequate damages; the trial court's failure to instruct the jury on whether the professor was ready, willing, and able to perform the contract meant that the jury did not decide that issue, which was critical to determining whether the professor was entitled to nominal damages or substantial damages after the jury found that the university breached the agreement. Munn v. N.C. State Univ., 173 N.C. App. 144, 617 S.E.2d 335, 2005 N.C. App. LEXIS 1931 (2005), rev'd, review improvidently granted, 360 N.C. 353, 626 S.E.2d 270 (2006).

Entry of Judgment N.O.V. After Adjournment of Term. — The legislature, in delineating the precise time periods of section (b) of this rule and G.S. 1A-1, Rule 59(e), did not intend for these specific periods to be curtailed by the adjournment of the term of court at which judgment was rendered, as to attribute any such intent to the legislature would vitiate the purpose of both rules; thus a trial court may alter or amend a judgment pursuant to G.S. 1A-1, Rule 59 and a trial court may enter judgment n.o.v. pursuant to this rule (including the alteration of a judgment entered upon such a verdict) after the adjournment of the term during which the judgment was entered. Housing, Inc. v. Weaver, 305 N.C. 428, 290 S.E.2d 642 (1982).

Grant of a motion for judgment n.o.v. constitutes an adjudication on the merits of a case. Musgrave v. Mutual Sav. & Loan Ass'n, 8 N.C. App. 385, 174 S.E.2d 820 (1970).

Motion to Be Decided as Question of Law. — A motion to set a verdict aside and for a new trial pursuant to G.S. 1A-1, Rule 59 is directed to the discretion of the trial judge, while a motion for judgment notwithstanding the verdict pursuant to this rule is to be decided as a question of law. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Trial Judge to Rule on Alternative Motion for New Trial. — Where defendant makes a motion for judgment notwithstanding the verdict and joins with this motion an alternative motion for a new trial, in granting the motion for judgment notwithstanding the verdict the trial judge should also rule on the alternative motion for a new trial. Hoots v. Calaway, 282 N.C. 477, 193 S.E.2d 709 (1973).

When a motion for judgment n.o.v. is joined with a motion for a new trial, it is the duty of the trial court to rule on both motions. Graves v. Walston, 302 N.C. 332, 275 S.E.2d 485 (1981); Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985).

Under G.S. 1A-1, N.C. R. Civ. P. 50(c)(1), if a motion for a judgment notwithstanding the verdict is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

It is the defendants' obligation to ensure that they obtain a ruling on their motion for a conditional new trial; a party gaining judgment notwithstanding the verdict should also ask for a ruling pursuant to G.S. 1A-1, N.C. R. Civ. P. 50(c)(1), on the motion for a new trial if he wishes to allege any error in the trial or to preserve any question other than the sufficiency of the evidence for appellate review. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

Healthcare providers' alternative motion for a new trial under G.S. 1A-1, N.C. R. Civ. P. 59, could not be considered on appeal as the healthcare providers failed to obtain a formal trial court ruling on their motion for a new trial under G.S. 1A-1, N.C. R. Civ. P. 50(c)(1), after their motion for a judgment notwithstanding the verdict under Rule 50 was granted, and the healthcare providers did not make any cross-assignments of error as to the trial. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

Denial of a motion in the alternative for a new trial lies within the discretion of the trial judge, and an action of the trial judge as to a matter within his judicial discretion will not be disturbed unless a clear abuse of discretion is shown. Coppley v. Carter, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

The trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge. Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985).

A party must appeal conditionally from an adverse ruling on an alternative motion for a new trial. Hoots v. Calaway, 282 N.C. 477, 193 S.E.2d 709 (1973).

Motion to Set Aside Verdict Addressed to Discretion of Trial Court. — A motion to set aside the verdict as being contrary to the greater weight of the evidence is addressed to the discretion of the trial court. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976).

And Is Not Reviewable Absent Abuse. — The motion to set aside the verdict as being against the greater weight of the evidence is directed to the sound discretion of the presiding judge, whose ruling is not reviewable on appeal in the absence of abuse of discretion. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

The trial court's ruling on a motion to set aside the verdict as being contrary to the weight of the evidence will not be reviewed in the absence of a showing of abuse. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976).

Standard of Review. — On appeal, the standard of review for a judgment notwithstanding the verdict is whether the evidence was sufficient to go to the jury. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

Scope of Review. — A motion for judgment notwithstanding the verdict involves the same legal questions raised by the motion for directed verdict, and is therefore equally restricted as a basis for asserting error on appeal. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

Appellate review of the trial court's ruling on a motion for judgment notwithstanding the verdict is the same as that for a motion for directed verdict, i.e., whether the evidence, taken as true and considered in the light most favorable to non-movant, is sufficient to take the case to the jury and to support a verdict for the non-movant. Streeter v. Cotton, 133 N.C. App. 80, 514 S.E.2d 539 (1999).

Exceptions to Denial of Directed Verdict Preserved by Motion for Judgment N.O.V. — By proceeding after verdict under subsection (b)(1) of this rule with a motion for judgment notwithstanding the verdict, a party preserves for appellate review his exceptions to the denial of his motion for directed verdict made at the close of all the evidence. Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972).

Questions Other Than Sufficiency of Evidence Preserved by Motion for New Trial by Party Gaining Judgment N.O.V. — A party gaining judgment notwithstanding the verdict should also ask for a ruling pursuant to subsection (c)(1) of this rule on the motion for a new trial if he wishes to allege any error in the trial or to preserve any question other than the sufficiency of the evidence for appellate review. Beal v. K.H. Stephenson Supply Co., 36 N.C. App. 505, 244 S.E.2d 463 (1978).

Testimony of plaintiff's witnesses must be accepted at face value by the appellate court in passing on a motion for a directed verdict. Rayfield v. Clark, 283 N.C. 362, 196 S.E.2d 197 (1973).

But Not by the Trial Court. — In passing upon a motion to set aside a verdict as being against the greater weight of the evidence, the trial judge is not required to take the testimony of any witness at face value; if at any time he is convinced that the jury has been misled by unreliable testimony into returning an erroneous verdict, his is the responsibility for awarding a new trial for that reason. Rayfield v. Clark, 283 N.C. 362, 196 S.E.2d 197 (1973).

Subsection (b)(2) of this rule has no counterpart in FRCP, Rule 50(b). Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

Question presented to the reviewing court is whether the evidence, considered in the light most favorable to the plaintiff, was sufficient for submission to the jury. Meacham v. Montgomery County Bd. of Educ., 59 N.C. App. 381, 297 S.E.2d 192 (1982), cert. denied, 307 N.C. 577, 299 S.E.2d 651 (1983).

When Appellate Court May Direct Entry of Judgment. — Upon deciding that the trial court should have granted appellant's motion for a directed verdict made at the close of all the evidence, the Court of Appeals may appropriately direct entry of judgment in accordance with the appellant's motion, but only when the appellant also in apt time moved for judgment notwithstanding the verdict. Nichols v. C.J. Moss Real Estate, Inc., 10 N.C. App. 66, 177 S.E.2d 750 (1970).

Where the defendant made no post-verdict motion and where the trial judge after verdict did not of his own motion consider whether a directed verdict should have been entered, the Supreme Court may not direct entry of judgment in accordance with the motion by reason of the express terms of subsection (b)(2) of this rule. Hensley v. Ramsey, 283 N.C. 714, 199 S.E.2d 1 (1973).

A motion for directed verdict is appropriate only to a case tried before a jury. In non-jury trials, a motion for involuntary dismissal under G.S. 1A-1, Rule 41(b) provides a procedure whereby, at the close of the plaintiff's evidence, the judge can give judgment against the plaintiff, not only because his proof has failed to make out a case, but also on the basis of facts as the judge may determine them. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

Reinstatement of Verdict upon Failure to Move for New Trial. — Where a judgment entered for defendant notwithstanding the verdict was reversed, and defendant had not moved in the alternative for a new trial pursuant to subsection (c)(1) of this rule, it was ordered that the jury verdict be reinstated and that judgment be entered thereon. Snellings v. Roberts, 12 N.C. App. 476, 183 S.E.2d 872, cert. denied, 279 N.C. 727, 184 S.E.2d 886 (1971).

Reinstatement of Verdict upon Reversal of Grant of New Trial. — Where appellate court reverses grant of judgment n.o.v., and does nothing more, the new trial will proceed upon remand. But where the appellate court also reverses the grant of new trial, the judgment of the verdict winner must be reinstated. Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974).

Reinstatement of Verdict on Reversal of Judgment N.O.V. — Where plaintiff and third party defendant moved, alternatively to their motion for judgment notwithstanding the verdict, for a new trial, which motion was denied, and neither of them excepted to or brought forward as a cross-assignment of error the denial of the motion, on reversal of the judgment n.o.v. entered by the trial court, the verdict of the jury would be reinstated and judgment entered in accordance therewith. Allen v. Pullen, 82 N.C. App. 61, 345 S.E.2d 469 (1986), cert. denied, 318 N.C. 691, 351 S.E.2d 738 (1987).

When the trial court fails to comply with § 1A-1, Rule 59 and this rule in ordering a new trial, the general course is to reverse and remand for reinstatement of the verdict. Barnett v. Security Ins. Co., 84 N.C. App. 376, 352 S.E.2d 855 (1987).

In a personal injury case in which defendant was found negligent by the jury, defendant was not entitled to judgment notwithstanding the verdict unless plaintiff had failed as a matter of law to establish the elements of negligence, or unless the evidence established plaintiff's contributory negligence so clearly that no other reasonable inference could be drawn. Moon v. Bostian Heights Volunteer Fire Dep't, 97 N.C. App. 110, 387 S.E.2d 225 (1990).

JNOV for the defendants's was inappropriate on a breach of contract claim where the evidence contradicted the defendant's claim that his performance under the sale of land contracts was excused, such that no breach occurred, because plaintiffs were not "ready, willing, and able to perform their part of the contract" and where the record reflected that defendant did not obtain required quitclaim deeds until seven months after the closing date, that he entered into subsequent sales contracts with third parties regarding the lots subject to the contracts with plaintiffs, and that he terminated their contracts by means of a letter. Poor v. Hill, 138 N.C. App. 19, 530 S.E.2d 838, 2000 N.C. App. LEXIS 540 (2000).

Timely Filing of Motions Tolls Time for Appeal. — Under NCRAP Rule 3, timely filing of a motion for judgment notwithstanding the verdict or for a new trial pursuant to subsection (b) of this rule and G.S. 1A-1 Rule 59 tolls the period for filing and serving written notice of appeal in civil actions. The full time for appeal commences to run and is to be computed from the entry of the order granting or denying the motions under subsection (b) of this rule or G.S. 1A-1 Rule 59. Middleton v. Middleton, 98 N.C.

App. 217, 390 S.E.2d 453, cert. denied, 327 N.C. 637, 399 S.E.2d 124 (1990).

But Written Motions Following Denial of Oral Motions Would Not Toll Time for Appeal. — Plaintiffs, who entered their written notice of appeal within 10 days after the entry of a June 6 order denying their April 22 written motions for judgment notwithstanding the verdict and for a new trial, were not entitled to make these written motions or to a hearing on these motions, because they had previously made oral motions for judgment notwithstanding the verdict and for a new trial in open court on April 14, and were afforded an opportunity to be heard, which they declined. Their motions under section (b) of this rule and under G.S. 1A-1, Rule 59 having been denied in open court at that time, plaintiffs were not entitled to file written motions requesting the same relief and thereby toll the period for filing written notice of appeal. Since the June 13 written notice of appeal was not filed within 10 days of entry of judgment, which by the terms of the judgment was April 14, their appeal was untimely. Middleton v. Middleton, 98 N.C. App. 217, 390 S.E.2d 453, cert. denied, 327 N.C. 637, 399 S.E.2d 124 (1990).

Failure to Present Underlying Judgment. — Where, in notice of appeal, defendant designated only the order denying the motion for judgment n.o.v., but did not give notice of appeal from the judgment itself, the notice of appeal failed to properly present the underlying judgment for the court's review. Boger v. Gatton, 123 N.C. App. 635, 473 S.E.2d 672 (1996).

Grant of Motions for Judgement N.O.V. and New Trial Inconsistent. — The trial court's grant of the plaintiff's motion for judgment notwithstanding the verdict as well as plaintiff's motion for a new trial was inconsistent, where the Judgement N.O.V. for the plaintiff after the jury returned a verdict for the defendant in a rear-end collision suit determined the defendant's negligence as a matter of law, while the new trial reinstated the issue for a jury. Streeter v. Cotton, 133 N.C. App. 80, 514 S.E.2d 539 (1999).

Order which grants both a JNOV and a new trial is legally inconsistent and fails to conform to subsection (c)(1) of this rule, which requires that a new trial be granted if the JNOV is granted and thereafter vacated or reversed. Southern Furn. Hdwe., Inc. v. Branch Banking & Trust Co., 136 N.C. App. 695, 526 S.E.2d 197, 2000 N.C. App. LEXIS 143 (2000).

Motion Denied Based on Agency. — Trial court did not err in denying a motion for judgment notwithstanding the verdict in a medical malpractice action based on the death of the defendant surgeon's patient on whom the surgeon had performed an operation to remove the patient's gall bladder as the surgeon had created an apparent agency between himself and the surgeon who had assisted in the original surgery and in whose care the surgeon left the decedent when the surgeon went on vacation and the decedent and her family had justifiably relied on the representation of agency. Sweatt v. Wong, 145 N.C. App. 33, 549 S.E.2d 222, 2001 N.C. App. LEXIS 574 (2001).

Grant of Judgment N.O.V. Improper. — Trial court erred in granting the healthcare providers' motion for a judgment notwithstanding the verdict pursuant to G.S. 1A-1, N.C. R. Civ. P. 50, as the trial court improperly refused to consider the testimony of a patient's expert where: (1) the patient's expert testified that the healthcare providers had failed to meet the standard of care in Level 2 hospitals, (2) the healthcare providers' expert testified that the standard of care was the same across the nation, (3) both experts' testimony regarding Level 2 hospitals was sufficient to establish that the patient's expert's knowledge of practices in Reading, Pennsylvania qualified him to testify as to the standard in communities similar to Fayetteville, (4) given the healthcare providers' expert's testimony, the patient's expert's testimony, which defense counsel characterized on cross-examination as testimony regarding the national standard, was sufficient to support the jury's verdict under G.S. 90-21.12. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

Issue of whether an anesthesiology provider breached the applicable standard of care to a decedent was not conclusively established at trial, and thus the trial court erred in granting judgment N.O.V. and a new trial on the issue of causation and damages to the decedent's estate, because the statement of the provider's anesthesiologist involved in the case, to the effect that she did not comply with the applicable standard of care, was an evidential admission, not a judicial admission, as the anesthesiologist equivocated on whether she had breached the standard of care. Jones v. Durham Anesthesia Assocs., P.A., 185 N.C. App. 504, 648 S.E.2d 531, 2007 N.C. App. LEXIS 1806 (2007).

In a medical malpractice action, the grant of defendants' motion for judgment notwithstanding the verdict under N.C. R. Civ. P. 50(b) was erroneous because plaintiffs offered competent evidence of proximate causation where three experts testified that the patient would have had a better outcome if treated earlier and an MRI should have been ordered during the patient's first emergency room visit. Weaver v. Sheppa, 186 N.C. App. 412, 651 S.E.2d 395, 2007 N.C. App. LEXIS 2206 (2007).

It was error to grant the employer's motion for judgment notwithstanding the verdict as to punitive damages because there was sufficient evidence of malice, willful and wanton conduct, and manager participation to support the jury's punitive damages award to a terminated part-time department store employee based on, inter alia, the store manager's threat to "mess up" the employee's full-time job at a bank. Scarborough v. Dillard's Inc., 188 N.C. App. 430, 655 S.E.2d 875, 2008 N.C. App. LEXIS 226 (2008).

Denial of JNOV Upheld. — Where the parties did not stipulate to the issues of proximate cause and damages, the jury was not bound by the plaintiff's proof regarding medical costs, but could accept or reject any testimony regarding plaintiff's injuries, the reasonableness of her medical expenses, and the extent of her pain and suffering; thus, the trial court did not abuse its discretion in denying her motion for judgment notwithstanding the verdict. Blackmon v. Bumgardner, 135 N.C. App. 125, 519 S.E.2d 335 (1999).

The trial court properly denied defendant husband's motions for directed verdict and judgment notwithstanding the verdict on issue of constructive abandonment based on the sufficiency of the evidence where the defendant could not have actually abandoned the plaintiff because he was forcibly removed from the marital home pursuant to an emergency protective order, but where the fact that defendant did not voluntarily leave the residence did not preclude a verdict in favor of plaintiff on the issue of constructive abandonment. Walker v. Walker, 143 N.C. App. 414, 546 S.E.2d 625, 2001 N.C. App. LEXIS 295 (2001).

Trial court properly denied one partner's motion for judgment notwithstanding the verdict as the other partners presented sufficient evidence of the partner's breach of a partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices to withstand the motion. Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905, 2003 N.C. App. LEXIS 369 (2003).

In a product liability action stemming from a fire at a hosiery mill that was allegedly caused by faulty lighting made by the manufacturers, the trial court properly denied the manufacturers' motion for a directed verdict or judgment notwithstanding the verdict because the evidence was adequate to meet the Dewitt test for proving a products liability case by circumstantial evidence and the parties' sharp factual disagreement about the fire's cause warranted submission of the case to the jury. Red Hill Hosiery Mill, Inc. v. Magnetek, Inc., 159 N.C. App. 135, 582 S.E.2d 632, 2003 N.C. App. LEXIS 1441 (2003).

Testimony of the supervisor in charge of making repairs to the home buyers' house was sufficient to support the home buyers' claim that the home seller breached an express warranty, particularly with respect to the degradation of the walls and floor systems; a trial court's denial of the home sellers' motions for directed verdict and motion for judgment notwithstanding the verdict in a case alleging a breach of an express warranty was affirmed. Coates v. Niblock Dev. Corp., 161 N.C. App. 515, 588 S.E.2d 492, 2003 N.C. App. LEXIS 2191 (2003).

Trial court properly denied a passenger's motion for a judgment notwithstanding the verdict as the passenger failed to meet her heavy burden to show that one of the drivers involved in a car accident was negligent in causing the accident. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Trial court did not err in denying the one business partner's motion to dismiss, for a directed verdict, or for judgment notwithstanding the verdict on the second business partner's counterclaim alleging constructive fraud and breach of contract, as the evidence the second business partner introduced at trial showed that the parties were business partners, which was a fiduciary relationship as a matter of law, and evidence that the one business partner breached his fiduciary duty to the second business partner showed that the one business partner committed constructive fraud. Marketplace Antique Mall, Inc. v. Lewis, 163 N.C. App. 596, 594 S.E.2d 121, 2004 N.C. App. LEXIS 415 (2004).

Trial court properly denied employers' motion for judgment notwithstanding the verdict because the employee proffered sufficient evidence to support his causes of action for breach of contract and violation of the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq. The evidence offered by the employee was that: (1) the employers' representative orally agreed to pay the employee an annual bonus as part of a contract; (2) the employers modified the employee's bonus formula without his consent; and (3) the employers also failed to give the employee notice of the change in the bonus formula. Arndt v. First Union Nat'l Bank, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

Rule 51. Instructions to jury.

(a) *Judge to explain law but give no opinion on facts.* — In charging the jury in any action governed by these rules, a judge shall not give an opinion as to whether or not a fact is fully or sufficiently proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence. If the judge undertakes to state the contentions of the parties, he shall give equal stress to the contentions of each party.

(b) *Requests for special instructions.* — Requests for special instructions must be in writing, entitled in the cause, and signed by the counsel or party submitting them. Such requests for special instructions must be submitted to the judge before the judge's charge to the jury is begun. The judge may, in his discretion, consider such requests regardless of the time they are made. Written requests for special instructions shall, after their submission to the judge, be filed with the clerk as a part of the record.

(c) *Judge not to comment on verdict.* — The judge shall make no comment on any verdict in open court in the presence or hearing of any member of the jury panel; and if any judge shall make any comment as herein prohibited or shall praise or criticize any jury on account of its verdict, whether such praise, criticism or comment be made inadvertently or intentionally, such praise, criticism or comment by the judge shall for any party to any other action remaining to be tried constitute valid grounds as a matter of right for a continuance of any action to a time when all members of the jury panel are no longer serving. The provisions of this section shall not be applicable upon the hearing of motions for a new trial or for judgment notwithstanding the verdict. (1967, c. 954, s. 1; 1985, c. 537, s. 2.)

COMMENT

The effort here, except for minor changes, has been to carry forward the substance of the present law. The prohibition on comment by the judge has been retained. His duty to charge has been retained. The automatic exception to any errors in respect to the charge, formerly contained in § 1-206, subsection (c), has been retained in Rule 46.

Legal Periodicals. — For comment on the North Carolina jury charge, present practice and future proposals, see 6 Wake Forest Intra. L. Rev. 459 (1970).

For survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

For article discussing North Carolina jury instruction practice, see 52 N.C.L. Rev. 719 (1974).

For note on judges' remarks in the absence of a jury as a violation of former G.S. 1-180, see 13 Wake Forest L. Rev. 259 (1977).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For note on directed verdicts in favor of the party with the burden of proof, see 16 Wake Forest L. Rev. 607 (1980).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Rummaging Through a Wilderness of Verbiage: The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

For article, "Jury Instructions: A Persistent Failure to Communicate," see 67 N.C.L. Rev. 77 (1988).

CASE NOTES

I. In General.
II. Charge to the Jury.
  A. Generally.
  B. Decisions Under Prior Law.
III. Contentions of the Parties.
IV. Special Instructions.
V. Opinion of the Judge.

I. IN GENERAL.

Trial Court's Duty to Explain the Law. — Under G.S. 1A-1, N.C. R. Civ. P. 51(a), when charging the jury in a civil case, it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Appellate Review of Improper Remark. — Where plaintiff alleges that he has been deprived of right to a fair trial by improper remarks in the hearing of the jury, court will first determine whether the trial judge's remarks, in light of the circumstances under which they were made, were improper and then determine whether such remarks were prejudicial. Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Remark Regarding Need to Shorten Trial. — Trial judge did not commit prejudicial error in remarking to jury about need to shorten length of trial, which was not a statement of opinion. Ward v. McDonald, 100 N.C. App. 359, 396 S.E.2d 337 (1990).

Applied in Hoffman v. Brown, 9 N.C. App. 36, 175 S.E.2d 388 (1970); Peterson v. Taylor, 10 N.C. App. 297, 178 S.E.2d 227 (1971); Slocumb v. Metts, 12 N.C. App. 43, 182 S.E.2d 12 (1971); Spinella v. Pearce, 12 N.C. App. 121, 182 S.E.2d 620 (1971); Jernigan v. Atlantic Coast Line R.R., 12 N.C. App. 241, 182 S.E.2d 847 (1971); State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972); Freeman v. Hamilton, 14 N.C. App. 142, 187 S.E.2d 485 (1972); Bank of N.C. v. Barry, 14 N.C. App. 169, 187 S.E.2d 478 (1972); Braswell v. Purser, 16 N.C. App. 14, 190 S.E.2d 857 (1972); In re Will of Holland, 16 N.C. App. 398, 192 S.E.2d 98 (1972); Chance v. Jackson, 17 N.C. App. 638, 195 S.E.2d 321 (1973); Clouse v. Chairtown Motors, Inc., 17 N.C. App. 669, 195 S.E.2d 327 (1973); McIntosh v. McIntosh, 20 N.C. App. 742, 202 S.E.2d 804 (1974); Wyatt v. Haywood, 22 N.C. App. 267, 206 S.E.2d 260 (1974); Lawson v. Walker, 22 N.C. App. 295, 206 S.E.2d 325 (1974); Frazier v. Glasgow, 24 N.C. App. 641, 211 S.E.2d 852 (1975); Swaney v. Shaw, 27 N.C. App. 631, 219 S.E.2d 803 (1975); Lee v. Kellenberger, 28 N.C. App. 56, 220 S.E.2d 140 (1975); Berube v. Mobile Homes Sales & Serv., 28 N.C. App. 160, 220 S.E.2d 636 (1975); Lentz v. Gardin, 30 N.C. App. 379, 226 S.E.2d 839 (1976); Rodd v. W.H. King Drug Co., 30 N.C. App. 564, 228 S.E.2d 35 (1976); Owens v. Harnett Transf., Inc., 42 N.C. App. 532, 257 S.E.2d 136 (1979); Danjee, Inc. v. Addressograph Multigraph Corp., 44 N.C. App. 626, 262 S.E.2d 665 (1980); Thomas v. Deloatch, 45 N.C. App. 322, 263 S.E.2d 615 (1980); Morris v. Morris, 46 N.C. App. 701, 266 S.E.2d 381 (1980); Scallon v. Hooper, 49 N.C. App. 113, 270 S.E.2d 496 (1980); Zarn, Inc. v. Southern Ry., 50 N.C. App. 372, 274 S.E.2d 251 (1981); Cantey v. Barnes, 51 N.C. App. 356, 276 S.E.2d 490 (1981); Goble v. Helms, 64 N.C. App. 439, 307 S.E.2d 807 (1983); Sykes v. Floyd, 65 N.C. App. 172, 308 S.E.2d 498 (1983); In re Lee, 69 N.C. App. 277, 317 S.E.2d 75 (1984); Pittman v. First Protection Life Ins. Co., 72 N.C. App. 428, 325 S.E.2d 287 (1985); Rowan County Bd. of Educ. v. United States Gypsum Co., 103 N.C. App. 288, 407 S.E.2d 860 (1991); Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181 (1993).

Cited in McLamb v. Brown Constr. Co., 10 N.C. App. 688, 179 S.E.2d 895 (1971); Dean v. Nash, 12 N.C. App. 661, 184 S.E.2d 521 (1971); Ford v. Marshall, 16 N.C. App. 179, 191 S.E.2d 378 (1972); Foy v. Bremson, 20 N.C. App. 440, 201 S.E.2d 708 (1974); Town of Mars Hill v. Honeycutt, 32 N.C. App. 249, 232 S.E.2d 209 (1977); Dawson v. Sugg, 32 N.C. App. 650, 233 S.E.2d 639 (1977); In re Will of Johnson, 32 N.C. App. 704, 233 S.E.2d 643 (1977); State v. Wilkins, 34 N.C. App. 392, 238 S.E.2d 659 (1977); Board of Transp. v. Jones, 38 N.C. App. 337, 248 S.E.2d 108 (1978); State v. Coward, 296 N.C. 719, 252 S.E.2d 712 (1979); North Carolina Nat'l Bank v. Burnette, 297 N.C. 524, 256 S.E.2d 388 (1979); Fowler v. General Elec. Co., 40 N.C. App. 301, 252 S.E.2d 862 (1979); Rouse v. Maxwell, 40 N.C. App. 538, 253 S.E.2d 326 (1979); Chris v. Hill, 45 N.C. App. 287, 262 S.E.2d 716 (1980); Deal v. Christenbury, 50 N.C. App. 600, 274 S.E.2d 867 (1981); Cochran v. City of Charlotte, 53 N.C. App. 390, 281 S.E.2d 179 (1981); Furr v. Pinoca Volunteer Fire Dep't, 53 N.C. App. 458, 281 S.E.2d 174 (1981); Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521 (1981); Sugg v. Parrish, 51 N.C. App. 630, 277 S.E.2d 557 (1981); White v. Greer, 55 N.C. App. 450, 285 S.E.2d 848 (1982); Williams v. East Coast Sales, Inc., 59 N.C. App. 700, 298 S.E.2d 80 (1982); In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983); Wall v. Stout, 61 N.C. App. 576, 301 S.E.2d 467 (1983); Adams v. Mills, 68 N.C. App. 256, 314 S.E.2d 589 (1984); Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985); Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759 (1985); Dobson v. Honeycutt, 78 N.C. App. 709, 338 S.E.2d 605 (1986); Murrow v. Daniels, 85 N.C. App. 401, 355 S.E.2d 204 (1987); Robinson v. Seaboard Sys. R.R., 87 N.C. App. 512, 361 S.E.2d 909 (1987); Washburn v. Vandiver, 93 N.C. App. 657, 379 S.E.2d 65 (1989); Hassett v. Dixie Furn. Co., 104 N.C. App. 684, 411 S.E.2d 187 (1991); Bowden v. Bell, 116 N.C. App. 64, 446 S.E.2d 816 (1994); Cooke v. Grigg, 124 N.C. App. 770, 478 S.E.2d 663 (1996); Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997); Parker v. Barefoot, 130 N.C. App. 18, 502 S.E.2d 42 (1998); Maglione v. Aegis Family Health Ctrs., 168

N.C. App. 49, 607 S.E.2d 286 (2005); In re L.B., 184 N.C. App. 442, 646 S.E.2d 411, 2007 N.C. App. LEXIS 1476 (2007).

II. CHARGE TO THE JURY.

A. Generally.

The purpose of instructing the jury is to clarify the issues, summarize the relevant evidence, and state the law applicable thereto. McNeill v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987), rev'd in part on other grounds, 322 N.C. 425, 368 S.E.2d 619, rehearing denied, 322 N.C. 838, 371 S.E.2d 278 (1988).

It is the duty of the trial judge, without any special requests, to instruct the jury on the law as it applies to the substantive features of the case arising on the evidence. Millis Constr. Co. v. Fairfield Sapphire Valley, Inc., 86 N.C. App. 506, 358 S.E.2d 566 (1987).

Instruction as to Every Substantial Feature Required. — Though the trial court is no longer required to explain the application of the law to the evidence, it remains the duty of the court to instruct the jury upon the law with respect to every substantial feature of the case. Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 87 N.C. App. 438, 361 S.E.2d 608 (1987).

Duty of Judge Who Undertakes to Apply Law to Evidence. — Although the trial judge is no longer required to apply the law to the evidence, if the judge undertakes to do so he must instruct completely and without omission. York v. Northern Hosp. Dist., 88 N.C. App. 183, 362 S.E.2d 859 (1987).

Form and Number of Issues Submitted Are Within Discretion of Judge. — While the judge must submit to the jury such issues raised by the pleadings and evidence as are necessary to fairly adjudicate the controversy at bar, the form and number of the issues submitted is within the sound discretion of the trial judge. McNeill v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987), rev'd in part on other grounds, 322 N.C. 425, 368 S.E.2d 619, rehearing denied, 322 N.C. 838, 371 S.E.2d 278 (1988).

Failure of the trial court to declare and explain the law with respect to a substantial feature of the case was prejudicial error, entitling defendants to a new trial. Mosley & Mosley Bldrs., Inc. v. Landin Ltd., 87 N.C. App. 438, 361 S.E.2d 608 (1987), appeal dismissed, 322 N.C. 607, 370 S.E.2d 416 (1988).

Remand for a new trial was necessary where the trial court failed to adequately declare and explain the law to the jury in its instructions as to a constructive fraud claim, and failed to submit to the jury issues which properly framed the essential factual questions. Keener Lumber Co. v. Perry, 149 N.C. App. 19, 560 S.E.2d 817, 2002 N.C. App. LEXIS 128 (2002).

Peremptory Instruction Properly Denied. — Defendant's evidence regarding the composition of the roadway, the absence of warning signs, the locking of the wheel, the car's tendency to overturn, and evidence that he drove at or below the speed limit, all permitted more than the single inference that defendant was negligent; therefore, trial judge properly refused to give peremptory instruction on negligence. Hinnant v. Holland, 92 N.C. App. 142, 374 S.E.2d 152 (1988), cert. denied, 324 N.C. 335, 378 S.E.2d 792 (1989).

In a personal injury action where plaintiff failed to allege permanent injuries in her pleadings and did not amend her complaint to include permanent injuries, the trial court did not err by allowing testimony that plaintiff's injuries were permanent, nor by instructing the jury on the issue of permanency; defendant's objections were all general and failed to avail themselves of the opportunity to demonstrate prejudice or to obtain a continuance as provided by this rule. Smith v. Buckhram, 91 N.C. App. 355, 372 S.E.2d 90 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 236 (1989).

The absence of a jury instruction on spoliation of evidence entitled the plaintiff to a new trial on the issue of employer's ratification of the conduct of employee in committing a battery upon plaintiff. McLain v. Taco Bell Corp., 137 N.C. App. 179, 527 S.E.2d 712, 2000 N.C. App. LEXIS 330 (2000).

Court improperly instructed the jury on the aggravation of plaintiff's pre-existing condition where the evidence showed no aggravation of a pre-existing condition. Smith v. Buckhram, 91 N.C. App. 355, 372 S.E.2d 90 (1988), cert. denied, 324 N.C. 113, 377 S.E.2d 236 (1989).

Denial of Requested Instruction Upheld. — Trial court's denial of plaintiffs' request that the jury be instructed that collision furnished some evidence of negligence was not an abuse of discretion, since plaintiffs' requested instruction amounted to an application of the law to the evidence, which is not required. Smith v. Bohlen, 95 N.C. App. 347, 382 S.E.2d 812 (1989), aff'd sub nom. State v. Brewer, 328 N.C. 515, 402 S.E.2d 380 (1991).

Passenger did not meet her heavy burden to show that the jury was misled by the trial court's jury instructions as the trial court properly instructed the jury on the applicable North Carolina law and was not required to submit the passenger's proposed instruction which would have allowed the jury to presume negligence solely because an accident occurred; under North Carolina law, a defendant's negligence will not be presumed from the mere happening of an accident, but, on the contrary, in the absence of evidence on the question, freedom from negligence will be presumed. Griffis v. Lazarovich, 161 N.C. App. 434, 588

S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Charge to the Jury Upheld. — In an employee's causes of action against his employers for breach of contract and violation of the North Carolina Wage and Hour Act, G.S. 95-25.1 et seq., the trial court properly instructed the jury: (1) as to the existence of a contract; (2) that the employers were required to prove that the employee acquiesced to a change in his bonus formula; and (3) as to the spoliation of the evidence. Additionally, the trial court did not err by not instructing the jury as to estoppel because the trial court's instructions to the jury, when viewed in their entirety, sufficiently presented the employers' arguments to the jury. Arndt v. First Union Nat'l Bank, 170 N.C. App. 518, 613 S.E.2d 274, 2005 N.C. App. LEXIS 1080 (2005).

B. Decisions Under Prior Law.

***Editor's Note.** — The cases cited below were decided prior to the 1985 amendment rewriting section (a) of this rule, which formerly provided that the judge should declare and explain the law arising on the evidence, but give no opinion on whether a fact had been proved.*

Requirement of Former § 1-180 Continued by This Rule. — The requirement of this rule that the judge "shall declare and explain the law arising on the evidence given in the case" is a continuation of the requirement contained in former G.S. 1-180. Terry v. Jim Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970).

Civil cases are governed by section (a) of this rule, which incorporates the substance of former G.S. 1-180. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

The provisions of section (a) are identical to those of former G.S. 1-180, which formerly governed the trial of civil cases as well as criminal cases. Little v. Poole, 11 N.C. App. 597, 182 S.E.2d 206 (1971).

Former G.S. 1-180 is now embodied in substance within section (a) of this rule. Heath v. Swift Wings, Inc., 40 N.C. App. 158, 252 S.E.2d 526, cert. denied, 297 N.C. 453, 256 S.E.2d 806 (1979).

Although the provisions of G.S. 1-180 have been repealed and are now embodied in subsection (a) of this rule, the law remains, for all practical purposes, unchanged. Consolidated Sys. v. Granville Steel Corp., 63 N.C. App. 485, 305 S.E.2d 57 (1983).

This rule confers a substantial legal right, and imposes upon the trial judge a positive duty, so that his failure to charge on the substantial features of the case arising on the evidence is prejudicial error, even without a prayer for special instruction. Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

Not Dependent on Request for Special Instructions. — This rule confers a substantial legal right, not dependent on a request for special instructions, and failure to charge on the material features of a case is prejudicial error. Horne v. Wall, 27 N.C. App. 373, 219 S.E.2d 288 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976).

The trial court has a duty, without a request for special instruction, to explain the law and apply it to the evidence on all substantial features of the case. The failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. Stiles v. Charles M. Morgan Co., 64 N.C. App. 328, 307 S.E.2d 409 (1983).

This rule requires the trial judge to perform two positive acts: (1) To declare and explain the law arising on the evidence presented in the case; and (2) to review such evidence to the extent necessary to explain the application of that law to the particular facts and circumstances of the case. Bodenheimer v. Bodenheimer, 17 N.C. App. 434, 194 S.E.2d 375, cert. denied, 283 N.C. 392, 196 S.E.2d 274 (1973); Horne v. Wall, 27 N.C. App. 373, 219 S.E.2d 288 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 697 (1976); Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897, cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981).

The chief purpose of a charge is to aid the jury to clearly understand the case and arrive at a correct verdict. Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970); Warren v. Parks, 31 N.C. App. 609, 230 S.E.2d 684 (1976), cert. denied, 292 N.C. 269, 233 S.E.2d 396 (1977); Burns v. McElroy, 57 N.C. App. 299, 291 S.E.2d 278 (1982).

And to Eliminate Irrelevant Matters. — The purpose of the court's charge is to eliminate irrelevant matters so that the jury may understand and appreciate the facts which determine the case. Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897, cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981).

In applying the law to the evidence the jury must be given guidance as to what facts, if found by them to be true, would justify them in answering the issues submitted to them in the affirmative or the negative. Broadnax v. Deloatch, 20 N.C. App. 430, 201 S.E.2d 525, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

Where the jury is given no guidance as to what facts, if found by them to be true, would justify them in answering the sole issue submitted to them either in the affirmative or the negative, the trial judge has failed to comply with the mandate of section (a) of this rule. American Credit Co. v. Brown, 10 N.C. App. 382, 178 S.E.2d 649 (1971).

Judge Must Declare and Explain the Law Arising on the Evidence. — It is incumbent upon the judge to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect. Terry v. Jim Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970); Link v. Link, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971); Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Warren v. Parks, 31 N.C. App. 609, 230 S.E.2d 684 (1976), cert. denied, 292 N.C. 269, 233 S.E.2d 396 (1977); Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

The duty of the judge is to declare the law arising on the evidence and to explain the application of the law thereto. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

In charging the jury in any civil action, the judge shall declare and explain the law arising on the evidence given in the case. Watson v. White, 60 N.C. App. 106, 298 S.E.2d 174 (1982), rev'd on other grounds, 309 N.C. 498, 308 S.E.2d 268 (1983).

The provisions of this rule require that the trial judge in his charge to the jury shall declare and explain the law arising on the evidence in the case, and unless this mandatory provision of the statute is observed, there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence, without special request, and to apply the law to the various factual situations presented by the conflicting evidence. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971); Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Howell v. Howell, 24 N.C. App. 127, 210 S.E.2d 216 (1974); Martin v. Amusements of Am., Inc., 38 N.C. App. 130, 247 S.E.2d 639, cert. denied, 296 N.C. 106, 249 S.E.2d 804 (1978); Harris v. Bridges, 59 N.C. App. 195, 296 S.E.2d 299 (1982).

In every case the court has the duty to instruct the jury correctly on all substantive features of the case. Duke v. Mutual Life Ins. Co., 22 N.C. App. 392, 206 S.E.2d 796, rev'd on other grounds, 286 N.C. 244, 210 S.E.2d 187 (1974).

The law must be declared, explained and applied to the evidence bearing on the substantial and essential features of a case. Coble v. Martin Fireproofing Ga., Inc., 25 N.C. App. 671, 214 S.E.2d 239 (1975).

When charging the jury in a civil case it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action. Cockrell v. Cromartie Transp. Co., 295 N.C. 444, 245 S.E.2d 497 (1978).

This rule imposes upon the trial judge a duty to explain the law and to apply it to the evidence on all substantial features of the case. Federated Mut. Ins. Co. v. Hardin, 67 N.C. App. 487, 313 S.E.2d 801 (1984); Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

This rule imposes a positive duty on the trial judge to charge on the substantial features of the case as the evidence dictates. Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

The trial court has a duty to explain the law and apply it to the evidence on all substantial features of the case. Failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. Scher v. Antonucci, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

The trial court has wide discretion in presenting the issues to the jury, and no abuse of discretion will be found where the issues are sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause. Murrow v. Daniels, 321 N.C. 494, 364 S.E.2d 392 (1988), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998), decided under rule as it read prior to amendment.

A mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. Terry v. Jim Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970); Link v. Link, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971); Jones v. Bess, 26 N.C. App. 1, 214 S.E.2d 599 (1975).

This rule imposes upon the trial judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case; a mere declaration of the law in general terms and a statement of the contentions of the parties is not sufficient to satisfy the requirements of this rule. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972); Hunt v. Montgomery Ward & Co., 49 N.C. App. 642, 272 S.E.2d 357 (1980).

Charge given by trial court that merely recapitulated the evidence, stated the parties' contentions and recited certain general principles of contract law would not suffice. Coble v. Martin Fireproofing Ga., Inc., 25 N.C. App. 671, 214 S.E.2d 239 (1975).

As Is a Charge Which Fails to Apply the Law to the Evidence. — A charge which contains a general explanation of the law but fails to apply the law to the evidence given in the case then being tried is insufficient. Campbell v. Campbell, 18 N.C. App. 665, 197 S.E.2d 804 (1973).

Judge's duty is not to charge the jury by implication, but to declare and explain the law arising on the evidence given in the case. Harris v. Bridges, 59 N.C. App. 195, 296 S.E.2d 299 (1982).

What Issues to Be Submitted to Jury. — The judge must submit to the jury such issues as when answered by them will resolve all material controversies between the parties, as raised by the pleadings. Harrison v. McLear, 49 N.C. App. 121, 270 S.E.2d 577 (1980); Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

The judge must bring into view the relations of the particular evidence adduced to the particular issues involved. This is what is meant by the expression that the judge must apply the facts to the law for the enlightenment of the jury. Link v. Link, 9 N.C. App. 135, 175 S.E.2d 735 (1970), rev'd on other grounds, 278 N.C. 181, 179 S.E.2d 697 (1971).

Section (a) of this rule requires the judge to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. Panhorst v. Panhorst, 277 N.C. 664, 178 S.E.2d 387 (1971); Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972); Howell v. Howell, 24 N.C. App. 127, 210 S.E.2d 216 (1974).

In order for the trial court to discharge its duty under this rule, the court must give the jury a clear mandate as to what facts, for which there was support in the evidence, it would have to find in order to answer the issue either in the affirmative or in the negative. Deep Run Milling Co. v. Williams, 60 N.C. App. 160, 298 S.E.2d 205 (1982).

The trial judge must explain and apply the law to the specific facts pertinent to the issue involved. Harrison v. McLear, 49 N.C. App. 121, 270 S.E.2d 577 (1980); Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

And Relate the Law to the Variant Factual Situations Presented. — When charging the jury in a civil action the trial judge shall declare and explain the law arising on the evidence. He must relate and apply the law to the variant factual situations presented by some reasonable view of the evidence. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

The trial judge is not required to review all of the evidence. Maynard v. Pigford, 17 N.C. App. 129, 193 S.E.2d 293 (1972).

But he must summarize it sufficiently to permit him to explain the application of the law thereto. Maynard v. Pigford, 17 N.C. App. 129, 193 S.E.2d 293 (1972).

The judge is not required to state the evidence except to the extent necessary to explain how the law applies to the evidence presented in the case being tried. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

Summary of the material aspects of the evidence sufficient to bring into focus controlling legal principles is all that is required with respect to stating the evidence. Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

The judge is not required to declare and explain the law on a set of hypothetical facts. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Trial court is not required to read technical statutory language to the jury. Tuttle v. Tuttle, 38 N.C. App. 651, 248 S.E.2d 896 (1978), cert. denied, 296 N.C. 589, 254 S.E.2d 32 (1979).

Fact that some language of the complaint was used in declaring the law of the case is not error so long as the judge explains all the law arising from the evidence. Broadnax v. Deloatch, 20 N.C. App. 430, 201 S.E.2d 525, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

Where the trial court adequately instructs the jury as to the law on every material aspect of the case arising from the evidence and applies the law fairly to variant factual situations presented by the evidence, the charge is sufficient. Murrow v. Daniels, 321 N.C. 494, 364 S.E.2d 392 (1988), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998), decided under rule as it read prior to amendment.

It is error for the trial court to charge the jury upon an abstract principle of law which is not presented by the allegations and evidence. Huggins v. Kye, 10 N.C. App. 221, 178 S.E.2d 127 (1970).

Instructions on elements of damages are not proper if the evidence does not reveal a basis for such an award. Spears v. Service Distrib. Co., 27 N.C. App. 646, 219 S.E.2d 817 (1975).

Failure to explain the law and apply it to the evidence on all substantial features of the case constitutes prejudicial error for which the aggrieved party is entitled to a new trial. Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Clifford v. River Bend Plantation, Inc., 55 N.C. App. 514, 286 S.E.2d 352 (1982).

Where the jury was left to determine for itself, without adequate explanation from the court, what law arose on the evidence in the case and how that law should be applied to the evidence, defendant was entitled to a new trial. Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970).

Although defendant's trial counsel made no objection to the form of the issues which were submitted to the jury, defendant was entitled to have the issues decided by the jury under a charge from the court which correctly declared and explained the law arising on the evidence, and for errors in the charge there must be a new trial. Price v. Conley, 12 N.C. App. 636, 184 S.E.2d 405 (1971).

The trial judge's failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error. Turner v. Turner, 9 N.C. App. 336, 176 S.E.2d 24 (1970); Price v. Conley, 12 N.C. App. 636, 184 S.E.2d 405 (1971); Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

As Does Failure to Explain the Law as Applied to Evidence Susceptible of Several Interpretations. — When the evidence is susceptible of several interpretations, a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975); Williamson v. Vann, 42 N.C. App. 569, 257 S.E.2d 102 (1979).

The jury charge must be considered contextually as a whole, and when so considered, if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception that the instruction might have been better stated will not be sustained. Jones v. Satterfield Dev. Co., 16 N.C. App. 80, 191 S.E.2d 435, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972); Hanks v. Nationwide Mut. Fire Ins. Co., 47 N.C. App. 393, 267 S.E.2d 409 (1980).

In reviewing the charge of a trial court, the Court of Appeals must read and consider the charge as a whole. When a charge presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. State v. Wade, 49 N.C. App. 257, 271 S.E.2d 77 (1980), cert. denied, 315 N.C. 596, 341 S.E.2d 37 (1986).

But erroneous instructions on the burden of proof are not cured by contextual construction. Starkey Paint Co. v. Springfield Life Ins. Co., 24 N.C. App. 507, 211 S.E.2d 498 (1975).

Conflicting instructions on a material aspect of the case must be held prejudicial error, since it cannot be determined that the jury was not influenced by the incorrect portion of the charge. Cross v. Beckwith, 16 N.C. App. 361, 192 S.E.2d 64 (1972), rev'd on other grounds, 293 N.C. 224, 238 S.E.2d 130 (1977).

Conflicting instructions on the applicable law or on a substantive feature of the case, particularly on the burden of proof, entitle defendant to a new trial, since it must be assumed on appeal that the jury was influenced in coming to a verdict by that portion of the charge which was erroneous. State v. Jones, 20 N.C. App. 454, 201 S.E.2d 552 (1974).

When there are conflicting instructions to the jury upon a material point, the one correct and the other incorrect, a new trial must be granted because it will not be assumed that the jurors possessed such discriminating knowledge of the law as would enable them to disregard the erroneous and to accept the correct statement of the law as their guide. Starkey Paint Co. v. Springfield Life Ins. Co., 24 N.C. App. 507, 211 S.E.2d 498 (1975).

An instruction relating to a factual situation not properly supported by the evidence is erroneous. Superior Foods, Inc. v. Harris-Teeter Super Mkts., Inc., 288 N.C. 213, 217 S.E.2d 566 (1975).

Where the instructions of the court are based upon an assumption of facts which are not in evidence, they must be held for error. Clark v. Barber, 20 N.C. App. 603, 202 S.E.2d 347 (1974).

No Error in Failure to Instruct as to Contention Not Supported by Evidence. — There being no evidence to support a finding of ratification, there was no error prejudicial to the defendant in the failure of the trial court to instruct the jury as to the defendant's contention with respect thereto. Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971).

While it is the general rule that in a civil case the trial judge must declare and explain the law arising in the evidence, even in the absence of a special request such rule has certain accepted limits. The instruction must be based on evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted. In re Will of Cooley, 66 N.C. App. 411, 311 S.E.2d 613 (1984).

Submission of Defense. — When a party contends that certain acts constitute a defense, the trial court must submit the issue to the jury with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the defense asserted. Plymouth Pallet Co. v. Wood, 51 N.C. App. 702, 277 S.E.2d 462, cert. denied, 303 N.C. 545, 281 S.E.2d 393 (1981).

Specific Acts or Omissions Which Could Constitute Negligence or Contributory Negligence Must Be Stated. — Under this section the trial court must relate to the jury the specific acts or omissions which, under the pleadings and evidence, could constitute negligence or contributory negligence. Everhart v. LeBrun, 52 N.C. App. 139, 277 S.E.2d 816 (1981); Zach v. Surry-Yadkin Elec. Membership Corp., 57 N.C. App. 326, 291 S.E.2d 290 (1982).

In a personal injury action arising out of a collision, it is error for the court to fail to instruct the jury as to what effect a finding of plaintiff's intoxication at the time of the collision would have upon the issue of plaintiff's contributory negligence. Atkins v. Moye, 277

N.C. 179, 176 S.E.2d 789 (1970).

Where the judge failed to explain to the jury what bearing their findings as to the facts would have on the issue of defendant's negligence and the instructions gave the jury unlimited authority to find the defendant generally negligent for any reason the evidence might suggest to them, there was error. Redding v. F.W. Woolworth Co., 14 N.C. App. 12, 187 S.E.2d 445 (1972).

Where trial judge defined burden of proof, negligence, and proximate cause in general terms and then recapitulated the evidence and the contentions of the parties, and instructed as to the measure of damages, but failed to instruct the jury as to what facts if found by them to be true would constitute negligence, there was reversible error. Brady v. Smith, 18 N.C. App. 293, 196 S.E.2d 580 (1973).

Where the instructions to the jury on the issue of defendant's negligence consisted merely of a brief summary of the evidence, a statement of the issue, a statement on the burden of proof, and general definitions of negligence and proximate cause, and where the trial court failed to relate the principles of law set forth in its instructions to the evidence in this personal injury action, failed to specify the duties owed by defendant to plaintiff's decedent and the acts or omissions by defendant established by the evidence from which the jury could find a breach of those duties, and failed to relate the contentions of negligence supported by the evidence, such failure was inherently prejudicial under section (a) of this rule. Hunt v. Montgomery Ward & Co., 49 N.C. App. 642, 272 S.E.2d 357 (1980).

Where the court reviewed in detail evidence of plaintiff's injuries, the failure of the court to repeat such evidence in enunciating the rule for the measurement of damages for personal injury was not error. Love v. Hunt, 17 N.C. App. 673, 195 S.E.2d 135 (1973).

By alleging the existence of a pertinent city ordinance, introducing it in evidence and presenting testimony tending to show its violation by defendants, plaintiffs made the ordinance a substantial feature of the case, thereby imposing on the trial judge a positive duty to give appropriate jury instructions with respect to the ordinance. Pharo v. Pearson, 28 N.C. App. 171, 220 S.E.2d 359 (1975).

Where the question of whether time was of the essence was a substantial feature of a case, the trial judge was required, without a request, to declare and explain the law with respect thereto. Gelder & Assocs. v. Continental Ins. Co., 15 N.C. App. 686, 190 S.E.2d 674 (1972).

Paraphrase of Law in Condemnation Action Held Insufficient. — Where, in a highway condemnation action, plaintiff's witness, an expert real estate appraiser, testified that the value of defendant's land was increased by the taking because a roadway fronting the property was paved, a paraphrase of the law of benefits contained in the trial court's statement to the jury of the plaintiff's contentions was not adequate to satisfy the mandate of section (a) of this rule. North Carolina Bd. of Transp. v. Rand, 299 N.C. 476, 263 S.E.2d 565 (1980).

Trial judge properly refused to submit instruction on "proper control" of automobile. See Dunn v. Herring, 75 N.C. App. 308, 330 S.E.2d 834, cert. denied, 314 N.C. 538, 335 S.E.2d 16 (1985).

Instruction for Following Too Closely. — Where violation of G.S. 20-152(a) bore directly on the issue of defendant's negligence, which was a substantial feature of the case, the court should have declared and explained the section in its charge to the jury, and should also have explained that violation of this section was negligence per se. It has this duty irrespective of plaintiff's request for special instructions. Scher v. Antonucci, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

Instruction on Permanent Injury. — Where doctor testified that in his expert opinion plaintiff had an impairment rating to her neck of four percent (4%) as a result of her injury, an impairment rating to her "low" back of five percent (5%), and to her head (for headaches) of three percent (3%), resulting in a 12 percent (12%) impairment of her physical being, this evidence was sufficient to support an instruction on permanent injury. Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

The credibility of the witnesses and conflicts in the evidence are for the jury, not the court. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970); Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

Peremptory Instructions Not Abolished. — The new Rules of Civil Procedure have not abolished peremptory instructions in proper cases. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Peremptory instruction does not deprive the jury of right to reject evidence because of lack of credibility. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

When Peremptory Instruction May Be Given. — When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction to the effect that if the jury finds the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Defendant's denial of an alleged fact raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

The correct form of a peremptory instruction is that the jury should answer the issue as specified if the jury should find from the greater weight of the evidence that the facts are as all the evidence tends to show. The court should also charge that if the jury does not so find they should answer the issue in the opposite manner. In other words, the court must leave it to the jury to decide the issue. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Duty of Counsel to Point Out Misstatement of the Evidence. — When the court's statement of the evidence in condensed form does not correctly reflect the testimony of the witnesses in any particular respect, it is the duty of counsel to call attention thereto and request a correction. Clay v. Garner, 16 N.C. App. 510, 192 S.E.2d 672 (1972).

When Inadvertent Misstatement of Evidence Is Reversible Error. — An inadvertence by the court in recapitulating the evidence will not be grounds for reversible error unless it is called to the attention of the court in time for correction. Sims v. Virginia Homes Mfg. Corp., 32 N.C. App. 193, 231 S.E.2d 287 (1977).

A broadside assignment of error to the charge as a whole is ineffective to bring up any portion of the charge for review. Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972), vacated on other grounds, 283 N.C. 277, 196 S.E.2d 262 (1973).

Reversal Where Instruction Is Patently Erroneous. — Although where there is no evidence in the record on appeal the trial court's charge will be sustained, it is also true that where an instruction is patently or inherently erroneous to the prejudice of the appellant, the judgment will be reversed for new trial. Bodenheimer v. Bodenheimer, 17 N.C. App. 434, 194 S.E.2d 375, cert. denied, 283 N.C. 392, 196 S.E.2d 274 (1973).

III. CONTENTIONS OF THE PARTIES.

The trial court is not required to state the contentions of the parties, nor is it required that the court state the evidence or explain the application of the law thereto. York v. Northern Hosp. Dist., 88 N.C. App. 183, 362 S.E.2d 859 (1987), cert. denied, 322 N.C. 116, 367 S.E.2d 922 (1988).

Contentions of the Parties Must Be Given Equal Stress. — Section (a) of this rule requires that the judge give equal stress to the contentions of the various parties in recapitulating the evidence presented at the trial. He may not set forth one side's evidence fully and in detail while briefly glancing over the evidence produced by the other party. Searcy v. Justice, 20 N.C. App. 559, 202 S.E.2d 314, cert. denied, 285 N.C. 235, 204 S.E.2d 25 (1974).

The trial court is not required to state the contentions of the parties, but when it undertakes to state the contentions of one party upon a particular phase of the case, it is incumbent upon the court to give the opposing contentions of the adverse party upon the same aspect. Comer v. Cain, 8 N.C. App. 670, 175 S.E.2d 337 (1970); Rector v. James, 41 N.C. App. 267, 254 S.E.2d 633 (1979); Daniels v. Jones, 42 N.C. App. 555, 257 S.E.2d 120, cert. denied, 298 N.C. 567, 261 S.E.2d 120 (1979).

But Need Not Be Stated at Equal Length. — It is not required that the statement of contentions of the parties as stated by the court be of equal length. Comer v. Cain, 8 N.C. App. 670, 175 S.E.2d 337 (1970); Daniels v. Jones, 42 N.C. App. 555, 257 S.E.2d 120, cert. denied, 298 N.C. 567, 261 S.E.2d 120 (1979).

Nor Follow Any Precise Sequence. — Just as the length of the statement of contentions does not have to be exactly equal, the order of stating the contentions of each party does not have to follow any precise sequence. Rector v. James, 41 N.C. App. 267, 254 S.E.2d 633 (1979).

Contentions That Acts or Omissions Constitute Claims or Defenses. — If a party contends that certain acts or omissions constitute a claim for relief or a defense against another, the trial court must submit the issue with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted. Cockrell v. Cromartie Transp. Co., 295 N.C. 444, 245 S.E.2d 497 (1978).

Objections to the statement of contentions must ordinarily be brought to the attention of the court before verdict; otherwise they are deemed to be waived. Rector v. James, 41 N.C. App. 267, 254 S.E.2d 633 (1979).

But exceptions to an expression of opinion within the context of the summary of the contentions may be raised on appeal. Heath v. Swift Wings, Inc., 40 N.C. App. 158, 252 S.E.2d 526, cert. denied, 297 N.C. 453, 256 S.E.2d 806 (1979).

IV. SPECIAL INSTRUCTIONS.

Duty to Request Greater Elaboration or Instructions on Subordinate Features. — Where the court adequately charges the law on every material aspect of the case arising on the evidence and applies the law fairly to the various factual situations presented by the evidence, the charge is sufficient and will not be held error for failure of the court to give instructions on subordinate features of the case, since it is the duty of a party desiring instructions on a subordinate feature, or greater elaboration, to aptly tender a request therefor. Koutsis v. Waddel, 10 N.C. App. 731, 179 S.E.2d 797 (1971).

It is the duty of the party desiring instructions on a subordinate feature of the case or greater elaboration on a particular point to aptly tender request for special instructions. Hanks v. Nationwide Mut. Fire Ins. Co., 47 N.C. App. 393, 267 S.E.2d 409 (1980).

If a more thorough or more detailed charge is desired it is incumbent to request it. Prevette v. Bullis, 12 N.C. App. 552, 183 S.E.2d 810 (1971).

When the court has sufficiently instructed the jury, if the instructions are not as full as a party desires, he should submit a request for special instructions. Broadnax v. Deloatch, 20 N.C. App. 430, 201 S.E.2d 525, cert. denied, 285 N.C. 85, 203 S.E.2d 57 (1974).

Any party may make a written request for special jury instructions. Alston v. Monk, 92 N.C. App. 59, 373 S.E.2d 463 (1988), cert. denied, 324 N.C. 246, 378 S.E.2d 420 (1989).

Judge Has Discretion to Give or Refuse Instruction Not Signed or in Writing. — In a medical malpractice action, the trial court did not abuse its discretion by failing to instruct the jury on certain proposed jury instructions as the defending doctor and medical center did not submit a written proposed instruction. Swink v. Weintraub, — N.C. App. —, 672 S.E.2d 53, 2009 N.C. App. LEXIS 111 (2009).

Objection to Issues Submitted Precluded on Appeal Where Not Raised Below. — A party who is dissatisfied with the form of the issues or who desires an additional issue should raise the question at once, by objecting or by presenting the additional issue. If a party consents to the issues submitted, or does not object at the time or ask for a different or an additional issue, he cannot make the objection later on appeal. Hendrix v. All Am. Life & Cas. Co., 44 N.C. App. 464, 261 S.E.2d 270 (1980).

Failure to Instruct on Subordinate Features Not Error Absent Request. — Where the court has charged adequately on the material aspects of the case arising on the evidence and has fairly applied the law to the factual situation, the charge will not be held error for failure of the court to instruct on subordinate features absent a request. Hudson v. Hudson, 21 N.C. App. 412, 204 S.E.2d 697 (1974).

Failure to Give Proper Specific Instruction Aptly Tendered to Error. — When a party aptly tenders a written request for a specific instruction which is correct in itself and supported by the evidence, the failure of the court to give the instruction, at least in substance, is error. Faeber v. E.C.T. Corp., 16 N.C. App. 429, 192 S.E.2d 1 (1972); Property Shop, Inc. v. Mountain City Inv. Co., 56 N.C. App. 644, 290 S.E.2d 222 (1982); Millis Constr. Co. v. Fairfield Sapphire Valley, Inc., 86 N.C. App. 506, 358 S.E.2d 566 (1987); Williams v. Randolph, 94 N.C. App. 413, 380 S.E.2d 553, cert. denied, 325 N.C. 437, 384 S.E.2d 547 (1989); Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

Trial court committed error in refusing to give defendant's jury instruction that stated that defendant had to know the age of the victims in order to be convicted of aiding and abetting statutory rape. Since that offense involved an element of knowledge, the instruction should have been given because it was both a correct statement of the law and supported by the evidence, which meant defendant was entitled to give the instruction pursuant to G.S. 1A-1-51, N.C. R. Civ. P. 51(b) and G.S. 1-181. State v. Bowman, 188 N.C. App. 635, 656 S.E.2d 638, 2008 N.C. App. LEXIS 281 (2008).

Use of Exact Words Formulated by Litigant Not Required. — A litigant is not entitled to have the trial judge instruct the jury in the exact words formulated by the litigant, it being sufficient if the pertinent and applicable instructions requested are given substantially in the charge. Anderson v. Smith, 29 N.C. App. 72, 223 S.E.2d 402 (1976); Alston v. Monk, 92 N.C. App. 59, 373 S.E.2d 463 (1988), cert. denied, 324 N.C. 246, 378 S.E.2d 420 (1989); Williams v. Randolph, 94 N.C. App. 413, 380 S.E.2d 553, cert. denied, 325 N.C. 437, 384 S.E.2d 547 (1989).

Failure of Counsel to Sign Written Request Did Not Prevent Issue Preservation. — A written request for jury instructions was sufficient to preserve the plaintiff's objection to the instructions on appeal although it was not signed by plaintiff's counsel as required by this rule. Kinsey v. Spann, 139 N.C. App. 370, 533 S.E.2d 487, 2000 N.C. App. LEXIS 904 (2000).

Once contributory negligence becomes a question for the jury, the "reasonable person" objective standard comes into play. The trial court's refusal to give a special jury instruction requested under section (b) of this rule, phrased in terms of actual knowledge, the subjective standard, was proper. King v. Allred, 76 N.C. App. 427, 333 S.E.2d 758, cert. denied, 315 N.C. 184, 337 S.E.2d 857 (1985).

Trial judge did not err in failing to charge on the jury's right to consider the physical evidence, where the plaintiff had failed to submit a proposed instruction and had failed to submit her request to him in writing as required by section (b) of this rule. Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

Defendant was entitled to an instruction on accident but failed to show that he was prejudiced when it was not given where he presented evidence that child sustained injuries when he fell from a bed, possibly after being shoved by their dog, and that he simply placed the child onto the bed and then went to sleep next to him, which was not unlawful conduct, but where, in reaching its verdict convicting defendant of first-degree murder, the jury found that defendant had the specific intent to kill the child, and, necessarily, rejected the possibility that the killing was unintentional. State v. Moss, 139 N.C. App. 106, 532 S.E.2d 588, 2000 N.C. App. LEXIS 804 (2000).

Denial of Special Nuisance Instruction Was Proper. — Pursuant to G.S. 1A-1, N.C. R. Civ. P. 51(b), where neither the allegations of the complaint nor the evidence at trial supported liability under a theory of negligence in a suit against a developer for creating a private nuisance, the trial court properly declined to give a special instruction on nuisance that was requested by the developer, as the instruction essentially set forth a theory of contributory negligence. BNT Co. v. Baker Precythe Dev. Co., 151 N.C. App. 52, 564 S.E.2d 891, 2002 N.C. App. LEXIS 677 (2002), cert. denied, 356 N.C. 159, 569 S.E.2d 283 (2002).

Denial Proper. — When defendant was prosecuted under G.S. 14-269.2, the trial court was not required, under G.S. 1-181 and G.S. 1A-1, Rule 51(b), to give defendant's proffered special instruction on the defense of necessity, and did not err in instructing the jury that necessity was not a defense, as several alternatives were available to defendant, who was pursuing an armed fugitive into an elementary school, which did not require him to violate G.S. 14-269.2. State v. Haskins, 160 N.C. App. 349, 585 S.E.2d 766, 2003 N.C. App. LEXIS 1792 (2003), appeal dismissed sub nom. State v. Haskins, 357 N.C. 580, 589 S.E.2d 356 (2003).

The plaintiff was entitled to a new trial where the court failed to give a special jury instruction regarding proximate concurrent causation in a homeowner's insurance coverage determination suit; without it, the jury was not fully instructed in the law as they were not allowed to consider whether multiple factors combined to cause the damage to plaintiff's floor. Erie Ins. Exch. v. Bledsoe, 141 N.C. App. 331, 540 S.E.2d 57, 2000 N.C. App. LEXIS 1304 (2000), cert denied, 353 N.C. 371, 547 S.E.2d 442 (2001).

Failure to Properly Apply for Special Instructions Justified Refusal to Give Them. — The defendant, a former employee who misappropriated the plaintiff's cost information in order to underbid it, did not comply with the requirements of this section and, therefore, was not entitled to jury instructions with respect to the proof required for a finding of lost profits. Byrd's Lawn & Landscaping, Inc. v. Smith, 142 N.C. App. 371, 542 S.E.2d 689, 2001 N.C. App. LEXIS 99 (2001).

Trial court properly refused to give defendant's requested special instruction on the defense of justification of possession of a firearm by a felon because the request was not in writing. State v. Craig, 167 N.C. App. 793, 606 S.E.2d 387, 2005 N.C. App. LEXIS 6 (2005).

V. OPINION OF THE JUDGE.

Trial judge may not convey to the jury his opinion of the facts to be proven in any case. Brown v. Scism, 50 N.C. App. 619, 274 S.E.2d 897, cert. denied, 302 N.C. 396, 276 S.E.2d 919 (1981).

Subsection (a) of this Rule prohibits the trial judge from expressing an opinion on the weight to be given to particular evidence. Sherrod v. Nash Gen. Hosp., 126 N.C. App. 755, 487 S.E.2d 151 (1997), rev'd on other grounds, 348 N.C. 526, 500 S.E.2d 708 (1998).

In Any Manner at Any Stage of Trial. — While this rule refers to the judge's charge, the admonition has always been construed to forbid the judge to convey to the jury in any manner at any stage of the trial his opinion on the facts in evidence. State Hwy. Comm'n v. Ferry, 19 N.C. App. 332, 198 S.E.2d 773 (1973).

A trial judge is expressly forbidden to convey to the jury, in any manner, at any stage of the trial, his opinion as to whether a fact is fully or sufficiently proven. Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971).

The prohibition provided by section (a) of this rule does not apply to the charge alone, but prohibits a trial judge from asking questions or making comments at any time during the trial which amount to an expression of an opinion as to what has or has not been shown by the testimony. Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971); Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880, cert. denied, 306 N.C. 558, 294 S.E.2d 224 (1982).

Expressions of opinion in the presence of a jury are prohibited, and understandably so, since most juries lack the training needed to consider only relevant and competent evidence without guidance. In contrast, in a trial without a jury, the fact finder is also a highly trained legal expert, and thus the evil addressed by the statute is less likely to exist. Consolidated Sys. v. Granville Steel Corp., 63 N.C. App. 485, 305 S.E.2d 57 (1983).

The trial judge is prohibited from making comments at any time during the trial which amount to expressions of opinion as to what has or what has not been shown by the evidence. Russell v. Town of Morehead City, 90 N.C. App. 675, 370 S.E.2d 56 (1988).

Either Directly or by Implication. — Under section (a) of this rule the trial judge may not express an opinion, either directly or by implication, in favor of any party at any stage of the trial. Searcy v. Justice, 20 N.C. App. 559, 202 S.E.2d 314, cert. denied, 285 N.C. 235, 204 S.E.2d 25 (1974).

Whether prejudice resulted from trial judge's remarks is to be determined from the circumstances under which the remarks were made and the probable meaning of the language of the judge to the jury. Merchants Distribs., Inc. v. Hutchinson, 16 N.C. App. 655, 193 S.E.2d 436 (1972).

Probable Effect on Jury Determinative. — The probable effect upon the jury, and not the motive of the judge, determines whether a party's right to a fair trial has been impaired. In re Will of York, 18 N.C. App. 425, 197 S.E.2d 19, cert. denied, 283 N.C. 753, 198 S.E.2d 729 (1973).

The criterion for determining whether the trial judge deprived a litigant of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury. Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971); Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880, cert. denied, 306 N.C. 558, 294 S.E.2d 224 (1982).

The criterion for judging any improper comments by the trial judge is their effect upon the jury. Brenner v. Little Red Sch. House, Ltd., 59 N.C. App. 68, 295 S.E.2d 607, cert. denied, 307 N.C. 468, 299 S.E.2d 220 (1982).

Probable Effect of Judge's Remarks to Be Considered Irrespective of Motive. — To determine whether a party's right to a fair trial has been impaired by the remarks of the trial judge, the Court of Appeals must examine the probable effect of the remarks upon the jury, irrespective of the motives of the trial judge. This test requires an examination of the circumstances under which the remarks were made and the probable meaning of the remarks to the jury. Russell v. Town of Morehead City, 90 N.C. App. 675, 370 S.E.2d 56 (1988).

In explaining legal principles the trial judge's use of illustrations should be carefully guarded to avoid suggestions susceptible of inferences as to the facts beyond those intended. Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971).

Where in his charge the court used the phrases "as I understand it" and "I think he meant" in referring to his own understanding of certain testimony, but cautioned the jury not to take the facts or evidence from the court but only from their own recollection of the evidence, the court was simply interpreting and summarizing the evidence in order to declare and explain the law arising thereon, as required by section (a) of this rule as it read prior to amendment in 1985. Slate v. Shelton, 20 N.C. App. 644, 202 S.E.2d 292 (1974).

Remarks Discrediting Counsel. — Remarks by the trial judge in effect threatening to find defendants' counsel in contempt of court tended to discredit defendants' counsel, and hence defendants' cause, in the eyes of the jury, in violation of section (a) of this rule. Board of Transp. v. Wilder, 28 N.C. App. 105, 220 S.E.2d 183 (1975).

Instruction as to Counsel's Statements on Applicable Law. — It was not error for the trial judge to charge the jury that "It is absolutely necessary that you take the law as I give it to you and not as you think it is or you might like it to be. What plaintiff's counsel and defendant's counsel have told you is the law is not the law." The fact that the charge mentioned both counsel eliminated any prejudice. Brenner v. Little Red Sch. House, Ltd., 59 N.C. App. 68, 295 S.E.2d 607, cert. denied, 307 N.C. 468, 299 S.E.2d 220 (1982).

The trial judge must abstain from conduct or language which tends to discredit or prejudice a litigant or his cause with the jury. Worrell v. Hennis Credit Union, 12 N.C. App. 275, 182 S.E.2d 874 (1971); Saintsing v. Taylor, 57 N.C. App. 467, 291 S.E.2d 880, cert. denied, 306 N.C. 558, 294 S.E.2d 224 (1982).

Prejudice to Unsuccessful Party May Be Grounds for New Trial. — Any remark by the presiding judge made in the presence of the jury that tends to prejudice the jury against the unsuccessful party may be grounds for a new trial. Russell v. Town of Morehead City, 90 N.C. App. 675, 370 S.E.2d 56 (1988).

Instruction "I will not attempt to recall all of the evidence, but only so much of it as the court deems is important when you come to consider your verdict," was erroneous as an expression of opinion on the importance of the recapitulated evidence. Little v. Poole, 11 N.C. App. 597, 182 S.E.2d 206 (1971).

Emphasis on Type of Witnesses Appearing for Plaintiff. — Where, in the court's charge to the jury in a condemnation case, emphasis was placed upon the type of witnesses appearing on behalf of the Board of Transportation, as contrasted to the laymen who testified on behalf of the landowners, the court erred. State Hwy. Comm'n v. Ferry, 19 N.C. App. 332, 198 S.E.2d 773 (1973).

Expression of Opinion on Credibility of Witness. — In the trial of plaintiff's action to recover damages for defendant's alleged breach of contract in the design and manufacture of a wrapping machine and of defendant's action against plaintiff to recover the balance due for the wrapping machine, trial court's declaration in the presence of the jury that defendant's president and chief witness was an expert in the field of machine design constituted an expression of opinion on the credibility of the witness in violation of this rule. Rannbury-Kobee Corp. v. Miller Mach. Co., 49 N.C. App. 413, 271 S.E.2d 554 (1980).

Court's Daily Prayer. — Absent a showing of prejudice by appellants, it could not be concluded that the trial court's daily prayer amounted to an impermissible expression of opinion in violation of subsection (a) of this Rule. Hill v. Cox, 108 N.C. App. 454, 424 S.E.2d 201 (1993).

Informal Remarks Held Not Reversible Error. — Judge's remarks to jury on the opening of court for the second and third days of trial, to the effect that jurors should "sit back, relax and stay tuned for the next portion of the trial," may have been informal and even jocular but did not constitute reversible error. Lenins v. K-Mart Corp., 98 N.C. App. 590, 391 S.E.2d 843 (1990).

Remarks Not Reversible Error. — While remarks made after the verdict was returned by the court were perhaps not appropriate under a strict reading of this rule, they did not constitute reversible error. Haymore v. Thew Shovel Co., 116 N.C. App. 40, 446 S.E.2d 865 (1994).

Expert Witness. — Where the witness involved was not a party to the litigation and court's declaration of him as an expert in no way touched upon any question which the jury had to decide, there was no prejudicial error by virtue of the trial court's stating its ruling concerning such witness in the presence of the jury. In re Lee, 69 N.C. App. 277, 317 S.E.2d 75 (1984).

Declaration That Defendant Is Expert. — The trial court committed prejudicial error when it declared in the presence of the jury that the defendant was found by the court to be an expert in the field of general psychiatry, where his expertise was not simply a question of fact but one of the most critical questions to be decided by the jury, so that the trial court's legal ruling improperly set forth a conclusion of law that the jury was duty-bound to accept. Sherrod v. Nash Gen. Hosp., 348 N.C. 526, 500 S.E.2d 708 (1998).

Rule 52. Findings by the court.

(a) *Findings.* —

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

(2) Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b). Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party.

(3) If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

(b) *Amendment.* — Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

(c) *Review on appeal.* — When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings. (1967, c. 954, s. 1; 1969, c. 895, s. 12.)

COMMENT

Comment to this Rule as Originally Enacted. — This rule largely follows prior law, incorporating little of the federal rule. Former § 1-185 called for written findings and conclusions of law "upon trial of an issue of fact by the court." In respect to motions and provisional remedies, the Commission has been guided by the North Carolina case law. See Millhiser v. Balsley, 106 N.C. 433, 11 S.E. 314 (1890); Whitehead v. Hale, 118 N.C. 601, 24 S.E. 360 (1896). The reference to Rule 41(b) has to do with the situation when the trial judge is dismissing an action at the close of the plaintiff's evidence with the determination that the dismissal shall be on the merits. In this situation, both Rules 41 and 52 contemplate that the judge shall make written findings and conclusions.

Comment to the 1969 amendment. — (a) The amendment to Rule 52(a) and the addition of subsections (1) and (2) to section (a) merely assign numbers to the paragraphs. The other change is a matter of grammar.

The amendment added subsection (3) which is new. It provides that when findings are necessary by the court, it is sufficient if the findings of fact and conclusions of law appear in the decision or memorandum. The main purpose here is to make it clear that no particular form is required, and it is sufficient if the findings of fact and conclusions of law are distinguishable.

Legal Periodicals. — For article on legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For article, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

I. In General.
II. Findings and Conclusions, Generally.
III. Findings and Conclusions on Grant or Denial of Motions, Preliminary Injunctions, etc.
IV. Amendment.
V. Review on Appeal.
VI. Decisions under Prior Law.

I. IN GENERAL.

Applicability of Rule. — G.S. 1A-1, N.C. R. Civ. P. 52 was inapplicable in a proceeding regarding attorney's fees because G.S. 6-19.1 prescribed the procedure to be followed for awarding attorney fees in the very specific setting before the courts. Early v. County of Durham, Dep't of Soc. Servs., — N.C. App. —, 667 S.E.2d 512, 2008 N.C. App. LEXIS 1818 (2008).

This rule necessarily contemplates that facts be found before conclusions can be reached. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

Where an order's rationale is tainted by a process that violates this rule, a new trial of the issues is required. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

In cases where the trial judge sits as the trier of facts, he is required to (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly. Gilbert Eng'g Co. v. City of Asheville, 74 N.C. App. 350, 328 S.E.2d 849, cert. denied, 314 N.C. 329, 333 S.E.2d 485 (1985).

Issues Must Be Resolved by Trial Court Before Appellate Review. — In a trial without a jury, it is the duty of the trial judge to resolve all issues raised by the pleadings and the evidence by making findings of fact and drawing therefrom conclusions of law upon which to base a final order or judgment. When all issues are not so resolved by the trial court, an appellate court has no option other than to vacate the order and remand the cause to the trial court for completion. Small v. Small, 107 N.C. App. 474, 420 S.E.2d 678 (1992).

Presumption Where Trial Court Is Not Required to Find Facts. — When the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

Jurisdiction of Trial Court. — The trial court is not divested of jurisdiction to hear and rule on a motion under section (b) of this rule, even though notice of appeal has been given. York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

Where notice of appeal from default judgment for defendants with respect to plaintiff's claim and defendants' counter-claim against plaintiff was filed at the same time as plaintiff's motion under section (b) of this rule for amended and additional findings of fact and his motion under G.S. 1A-1, Rule 60(b) for relief from judgment, under the circumstances of the case the trial court had jurisdiction to rule on plaintiff's motion under G.S. 1A-1, Rule 60(b). York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

Remedy for failure of court's order to "direct the entry of an appropriate judgment" under subsection (a)(1) of this rule was not a new trial, but rather, a remand for entry of a proper judgment. Pitts v. Broyhill, 88 N.C. App. 651, 364 S.E.2d 738 (1988).

Requirement of Appropriately Detailed Findings. — The requirement of appropriately detailed findings is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. Mashburn v. First Investors Corp., 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Under this rule, the facts required to be found specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached. Guilford County Planning & Dev. Dep't v. Simmons, 102 N.C. App. 325, 401 S.E.2d 659, cert. denied, 329 N.C. 496, 407 S.E.2d 533 (1991).

No Findings Necessary Where Not Requested By Party. — Regarding a breach of contract action filed against an individual and his business entities, where there was no suggestion in the record that the individual asked for findings of fact or conclusions of law to be included in the trial court's order on his motion to strike entry of default, pursuant to G.S. 1A-1, Rule 52(a)(2), the trial court's failure to do so was not reversible error. Granville Med. Ctr. v. Tipton, 160 N.C. App. 484, 586 S.E.2d 791, 2003 N.C. App. LEXIS 1826 (2003).

Trial court properly denied defendants' N.C. R. Civ. P. 60(b) motion to set aside default judgment because defendants made no request for written findings of fact regarding the trial court's order denying their post-trial motions but rather requested the trial court to amend its findings under G.S. 1A-1, N.C. R. Civ. P. 52(b), and defendants could not make a Rule 52(b) request for amended findings of fact regarding a previous order applicable to a Rule 60(b) motion and subsequent order where there was no additional request for findings of fact; the trial court did not err in failing to make findings of fact and conclusions of law as to whether there was a showing of excusable neglect and meritorious defense because the issue of whether there was a showing of a meritorious defense was immaterial when there was sufficient evidence to support the trial court's conclusion that defendants failed to establish excusable neglect, Monaghan, M.D. v. Schilling, MD, — N.C. App. —, 677 S.E.2d 562, 2009 N.C. App. LEXIS 718 (2009).

Findings Held Insufficient. — Where the trial court's findings did not address the factual dispute with respect to either the necessity or the cost of "changes mandated" by the county's application of more stringent fire and building code requirements than anticipated by the contract, the findings did not support the court's conclusion that plaintiff contractor was entitled to recover damages of $36,000 from defendant owner. Mann Contractors v. Flair with Goldsmith Consultants-II, Inc., 135 N.C. App. 772, 522 S.E.2d 118, 1999 N.C. App. LEXIS 1244 (1999).

Case remanded for additional findings of fact regarding the evidence where the trial court made no findings in connection with the direct costs expended by the plaintiff; and as a result, the appellate court was unable to determine whether or not the trial court properly considered the evidence of the plaintiff's direct costs. RPR & Assocs. v. Univ. of North Carolina-Chapel Hill, 153 N.C. App. 342, 570 S.E.2d 510, 2002 N.C. App. LEXIS 1191 (2002), cert. dismissed, 357 N.C. 166, 579 S.E.2d 882 (2003), cert. denied, 357 N.C. 166, 579 S.E.2d 882 (2003).

Orders terminating a mother's parental rights to the mother's children were reversed because the trial court did not include adequate findings of fact in the orders, as required by G.S. 1A-1, N.C. R. Civ. P. 52(a)(1), specifically finding how the facts established by the evidence required termination of the mother's parental rights, as the orders (1) mainly quoted statutes without stating specific facts requiring termination of the mother's parental rights, (2) did not state if reunification efforts were undertaken, how the mother failed to comply with efforts to address the mother's problems, conditions leading to the children's removal, or how the mother did not make progress addressing these conditions, (3) referred to the mother's drug problems without giving details about the mother's drug use or any rehabilitation efforts, and (4) included no facts about the agency's case plan, the mother's family or work history, the mother's visitation with the children, or the mother's housing situation, so the orders did not allow meaningful appellate review. In re T.P., — N.C. App. —, 678 S.E.2d 781, 2009 N.C. App. LEXIS 1109 (July 7, 2009).

Rescission Offer. — Judgment that simply made the bare conclusion that an investment firm tendered a "valid" rescission offer and that, therefore, the investor was barred from bringing suit under the provisions of subdivision (g)(1) of G.S. 78A-56 did not rise to the level of separate findings of fact and conclusions of law; the judgment, therefore, did not comport with the requirements of G.S. 1A-1, Rule 41(b) and subsection (a) of this rule. Mashburn v. First Investors Corp., 102 N.C. App. 560, 402 S.E.2d 860 (1991).

Applied in Perry v. Suggs, 9 N.C. App. 128, 175 S.E.2d 696 (1970); Thorne v. Thorne, 10 N.C. App. 151, 178 S.E.2d 33 (1970); Ross v. Perry, 12 N.C. App. 47, 182 S.E.2d 655 (1971); Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Johnson v. Johnson, 14 N.C. App. 40, 187 S.E.2d 420 (1972); Hobson Constr. Co. v. Holiday Inns, Inc., 14 N.C. App. 475, 188 S.E.2d 617 (1972); Smith v. Smith, 15 N.C. App. 180, 189 S.E.2d 525 (1972); Medlin v. Medlin, 17 N.C. App. 582, 195 S.E.2d 65 (1973); Castle v. B.H. Yates Co., 18 N.C. App. 632, 197 S.E.2d 611 (1973); Trotter v. Hewitt, 19 N.C. App. 253, 198 S.E.2d 465 (1973); State v. Crews, 284 N.C. 427, 201 S.E.2d 840 (1974); Williamson v. Williamson, 20 N.C. App. 669, 202 S.E.2d 489 (1974); Brewer v. Davis, 21 N.C. App. 309, 204 S.E.2d 242 (1974); Reid v. Midgett, 25 N.C. App. 456, 213 S.E.2d 379 (1975); Lowe's of Winston-Salem, Inc. v. Thompson, 26 N.C. App. 198, 214 S.E.2d 813 (1975); Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975); Fitch v. Fitch, 26 N.C. App. 570, 216 S.E.2d 734 (1975); Traber v. Crawford, 28 N.C. App. 694, 222 S.E.2d 713 (1976); Inland Bridge Co. v. North Carolina State Hwy. Comm'n, 30 N.C. App. 535, 227 S.E.2d 648 (1976); Powell v. Bost, 32 N.C. App. 292, 232 S.E.2d 3 (1977); Texas W. Fin. Corp. v. Mann, 36 N.C. App. 346, 243 S.E.2d 904 (1978); Telerent Leasing Corp. v. Equity Assocs., 36 N.C. App. 713, 245 S.E.2d 229 (1978); In re Hill, 36 N.C. App. 765, 245 S.E.2d 378 (1978); O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979); Holt v. Holt, 41 N.C. App. 344, 255 S.E.2d 407 (1979); Georgia R.R. Bank & Trust Co. v. Eways, 46 N.C. App. 466, 265 S.E.2d 637 (1980); State v. Rakina, 49 N.C. App. 537, 272 S.E.2d 3 (1980); Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230 (1983); Parker v. Barefoot, 61 N.C. App. 232, 300 S.E.2d 571 (1983); Turner v. Turner, 64 N.C. App. 342, 307 S.E.2d 407 (1983); African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983); In re Lowery, 65 N.C. App. 320, 309 S.E.2d 469 (1983); Gates v. Gates, 69 N.C. App. 421, 317 S.E.2d 402 (1984); Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984); Chloride, Inc. v. Honeycutt, 71 N.C. App. 805, 323 S.E.2d 368 (1984); J.M. Thompson Co. v. Doral Mfg. Co., 72 N.C. App. 419, 324 S.E.2d 909 (1985); Glesner v. Dembrosky, 73 N.C. App. 594, 327 S.E.2d 60 (1985); Rowe v. Rowe, 74 N.C. App. 54, 327 S.E.2d 624 (1985); McKnight v. Cagle, 76 N.C. App. 59, 331 S.E.2d 707 (1985); Gebb v. Gebb, 77 N.C. App. 309, 335 S.E.2d 221 (1985); Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985); Olschesky v. Houston, 84 N.C. App. 415, 352 S.E.2d 884 (1987); North Carolina State Bar v. Shuping, 86 N.C. App. 496, 358 S.E.2d 534 (1987); Holley v. Hercules, Inc., 86 N.C. App. 624, 359 S.E.2d 47 (1987); Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 321 N.C. 260, 362 S.E.2d 273 (1987); Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988); Lea Co. v. North Carolina Bd. of Transp., 323 N.C. 691, 374 S.E.2d 868 (1989); G & S Bus. Servs., Inc. v. Fast Fare, Inc., 94 N.C. App. 483, 380 S.E.2d 792 (1989); Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991); Mashburn v. First Investors Corp., 111 N.C. App. 398, 432 S.E.2d 869 (1993); Brower v. Killens, 122 N.C. App. 685, 472 S.E.2d 33 (1996); Avant v. Sandhills Ctr. for Mental Health, Dev. Disabilities & Substance Abuse Servs., 132 N.C. App. 542, 513 S.E.2d 79 (1999); Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 611 S.E.2d 179, 2005 N.C. App. LEXIS 799 (2005); Currituck Assocs.-Residential P'ship v. Hollowell, 170 N.C. App. 399, 612 S.E.2d 386, 2005 N.C. App. LEXIS 1000 (2005); Greene v. Royster, 187 N.C. App. 71, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007); Pierce v. Pierce, 188 N.C. App. 488, 655 S.E.2d 863, 2008 N.C. App. LEXIS 229 (2008); Dailey v. Popma, 191 N.C. App. 64, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (2008); Rossetto United States, Inc. v. Greensky Fin., LLC, 191 N.C. App. 196, 662 S.E.2d 909, 2008 N.C. App. LEXIS 1227 (2008); Smart v. State, — N.C. App. —, 678 S.E.2d 720, 2009 N.C. App. LEXIS 1056 (July 7, 2009).

Cited in Fox v. Miller, 8 N.C. App. 29, 173 S.E.2d 607 (1970); Sawyer v. Shackleford, 8 N.C. App. 631, 175 S.E.2d 305 (1970); Walker v. Pless, 11 N.C. App. 198, 180 S.E.2d 471 (1971); Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972); Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56 (1972); Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972); Haddock v. Waters, 19 N.C. App. 81, 198 S.E.2d 21 (1973); United Artists Records, Inc. v. Eastern Tape Corp., 19 N.C. App. 207, 198 S.E.2d 452 (1973); Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974); Markham v. Swails, 29 N.C. App. 205, 223 S.E.2d 920 (1976); Board of Transp. v. Williams, 31 N.C. App. 125, 229 S.E.2d 37 (1976); Gunkel v. Kimbrell, 29 N.C. App. 586, 225 S.E.2d 127 (1976); Ponder v. Ponder, 32 N.C. App. 150, 230 S.E.2d 786 (1977); In re Williamson, 32 N.C. App. 616, 233 S.E.2d 677 (1977); Smathers v. Smathers, 34 N.C. App. 724, 239 S.E.2d 637 (1977); Sanders v. Walker, 39 N.C. App. 355, 250 S.E.2d 84 (1979); Joyner v. Thomas, 40 N.C. App. 63, 251 S.E.2d 906 (1979); Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325 (1979); Black v. Standard Guar. Ins. Co., 42 N.C. App. 50, 255 S.E.2d 782 (1979); In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979); Stone v. Hicks, 45 N.C. App. 66, 262 S.E.2d 318 (1980); Macon v. Edinger, 49 N.C. App. 624, 272 S.E.2d 411 (1980); In re Pierce, 53 N.C. App. 373, 281 S.E.2d 198 (1981); Shuford v. K.K. Kawamura Cycle Co., 649 F.2d 261 (4th Cir. 1981); Eller v.

Coca-Cola Co., 53 N.C. App. 500, 281 S.E.2d 81 (1981); Young v. Kuehne Chem. Co., 53 N.C. App. 806, 281 S.E.2d 742 (1981); Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981); Church v. Mickler, 55 N.C. App. 724, 287 S.E.2d 131 (1982); United Leasing Corp. v. Miller, 60 N.C. App. 40, 298 S.E.2d 409 (1982); Four Seasons Homeowners Ass'n v. Sellers, 62 N.C. App. 205, 302 S.E.2d 848 (1983); Roberts v. Roberts, 68 N.C. App. 163, 314 S.E.2d 781 (1984); Barnhill v. Barnhill, 68 N.C. App. 697, 315 S.E.2d 548 (1984); Vaglio v. Town & Campus Int'l, Inc., 71 N.C. App. 250, 322 S.E.2d 3 (1984); Edge v. Metropolitan Life Ins. Co., 78 N.C. App. 624, 337 S.E.2d 672 (1985); Stonewall Ins. Co. v. Fortress Reinsurers Managers, Inc., 83 N.C. App. 263, 350 S.E.2d 131 (1986); In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588 (1986); In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986); Aetna Cas. & Sur. Co. v. Younts, 84 N.C. App. 399, 352 S.E.2d 850 (1987); Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987); Joyner v. Adams, 87 N.C. App. 570, 361 S.E.2d 902 (1987); Patel v. Mid S.W. Elec., 88 N.C. App. 146, 362 S.E.2d 577 (1987); First Union Nat'l Bank v. Rolfe, 90 N.C. App. 85, 367 S.E.2d 367 (1988); Andrews v. Peters, 89 N.C. App. 315, 365 S.E.2d 709 (1988); In re Brooks, 93 N.C. App. 86, 376 S.E.2d 250 (1989); State v. White, 93 N.C. App. 773, 379 S.E.2d 269 (1989); Haywood v. Haywood, 95 N.C. App. 426, 382 S.E.2d 798 (1989); Kirby Bldg. Sys. v. McNiel, 327 N.C. 234, 393 S.E.2d 827 (1990); Kirkhart v. Saieed, 98 N.C. App. 49, 389 S.E.2d 837 (1990); Blalock Elec. Co. v. Grassy Creek Dev. Corp., 99 N.C. App. 440, 393 S.E.2d 354 (1990); Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990); Provident Finance Co. v. Rowe, 101 N.C. App. 367, 399 S.E.2d 368 (1991); Oglesby v. S.E. Nichols, Inc., 101 N.C. App. 676, 401 S.E.2d 92 (1991); Institution Food House, Inc. v. Circus Hall of Cream, Inc., 107 N.C. App. 552, 421 S.E.2d 370 (1992); Grant v. Cox, 106 N.C. App. 122, 415 S.E.2d 378 (1992); Thacker v. Thacker, 107 N.C. App. 479, 420 S.E.2d 479 (1992); Statesville Stained Glass, Inc. v. T.E. Lane Constr. & Supply Co., 110 N.C. App. 592, 430 S.E.2d 437 (1993); Lowry v. Duke Univ. Medical Ctr., 109 N.C. App. 83, 425 S.E.2d 739 (1993); Wiggins v. Triesler Co., 115 N.C. App. 368, 444 S.E.2d 245 (1994); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Ward v. Ward, 116 N.C. App. 643, 448 S.E.2d 862 (1994); Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994); In re Hawkins, 120 N.C. App. 585, 463 S.E.2d 268 (1995); Chicago Title Ins. Co. v. Wetherington, 127 N.C. App. 457, 490 S.E.2d 593 (1997); O'Brien v. O'Brien, 131 N.C. App. 411, 508 S.E.2d 300 (1998); Collins v. Talley, 135 N.C. App. 758, 522 S.E.2d 794, 1999 N.C. App. LEXIS 1228 (1999); Condellone v. Condellone, 137 N.C. App. 547, 528 S.E.2d 639, 2000 N.C. App. LEXIS 427 (2000); Norris v. Sattler, 139 N.C. App. 409, 533 S.E.2d 483, 2000 N.C. App. LEXIS 894 (2000); Evans v. United Servs. Auto. Ass'n, 142 N.C. App. 18, 541 S.E.2d 782, 2001 N.C. App. LEXIS 48 (2001); State v. Robinson, 145 N.C. App. 658, 551 S.E.2d 460, 2001 N.C. App. LEXIS 728 (2001); Dunevant v. Dunevant, 142 N.C. App. 169, 542 S.E.2d 242, 2001 N.C. App. LEXIS 47 (2001); Lagies v. Myers, 142 N.C. App. 267, 542 S.E.2d 336, 2001 N.C. App. LEXIS 90 (2001); Gibson v. Mena, 144 N.C. App. 125, 548 S.E.2d 745, 2001 N.C. App. LEXIS 332 (2001); Staton v. Russell, 151 N.C. App. 1, 565 S.E.2d 103, 2002 N.C. App. LEXIS 688 (2002); In re Faircloth, 153 N.C. App. 565, 571 S.E.2d 65, 2002 N.C. App. LEXIS 1273 (2002); Smith v. State Farm Mut. Auto. Ins. Co., 157 N.C. App. 596, 580 S.E.2d 46, 2003 N.C. App. LEXIS 933 (2003); State v. Parker, 183 N.C. App. 1, 644 S.E.2d 235, 2007 N.C. App. LEXIS 835 (2007); In re J.L., 183 N.C. App. 126, 643 S.E.2d 604, 2007 N.C. App. LEXIS 840 (2007); State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 188 N.C. App. 302, 655 S.E.2d 446, 2008 N.C. App. LEXIS 89 (2008); McQuillin v. Perez, 189 N.C. App. 394, 657 S.E.2d 924, 2008 N.C. App. LEXIS 532 (2008); Crouse v. Mineo, 189 N.C. App. 232, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (2008).

II. FINDINGS AND CONCLUSIONS, GENERALLY.

Federal Interpretation of Rule May Be Used for Guidance. — Subsection (a)(1) of this rule is similar to FRCP, Rule 52(a) and therefore the federal courts' interpretations of the rule may be used for guidance. Harris v. North Carolina Farm Bureau Mut. Ins. Co., 91 N.C. App. 147, 370 S.E.2d 700 (1988).

Timeliness of Request. — A request for findings and conclusions under subsection (a)(2) of this rule is untimely if made after the entry of a trial court's order. Nobles v. First Carolina Communications, Inc., 108 N.C. App. 127, 423 S.E.2d 312 (1992), cert. denied, 333 N.C. 463, 427 S.E.2d 623 (1993).

In actions tried upon the facts without a jury, the court must make its own determination as to what pertinent facts are established by the evidence, rather than merely reciting what the evidence may tend to show. Lee v. Lee, 78 N.C. App. 632, 337 S.E.2d 690 (1985).

Subsection (a)(1) of this rule requires, in nonjury cases, that the trial judge make specific findings of ultimate facts established by the evidence, state the conclusions of law thereon, and direct entry of the appropriate judgment. City of Statesville v. Roth, 77 N.C. App. 803, 336 S.E.2d 142 (1985).

Under G.S. 1A-1-52(a)(2), a trial court was not required to make any specific findings of fact in its order allowing judgment in the absence of a motion or request; a trial court did not err in entering judgment despite the absence of specific findings of fact. Couch v. Bradley, — N.C. App. —, 635 S.E.2d 492, 2006 N.C. App. LEXIS 2129 (2006).

The trial judge becomes both judge and juror on waiver of jury trial. Beasley-Kelso Assocs. v. Tenney, 30 N.C. App. 708, 228 S.E.2d 620, cert. denied, 291 N.C. 323, 230 S.E.2d 675 (1976); General Specialties Co. v. Nello L. Teer Co., 41 N.C. App. 273, 254 S.E.2d 658 (1979).

And Must Consider and Weigh all Competent Evidence. — When trial by jury is waived and issues of facts are tried by the court, the trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. Laughter v. Lambert, 11 N.C. App. 133, 180 S.E.2d 450 (1971).

And Evaluate the Credibility of Witnesses. — The trial judge passes upon the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn therefrom. Laughter v. Lambert, 11 N.C. App. 133, 180 S.E.2d 450 (1971); General Specialties Co. v. Nello L. Teer Co., 41 N.C. App. 273, 254 S.E.2d 658 (1979).

The trial judge determines which inferences shall be drawn and which shall be rejected if different inferences may be drawn from the evidence. Laughter v. Lambert, 11 N.C. App. 133, 180 S.E.2d 450 (1971).

Findings Must Be Supported by Evidence Determinative of Issues. — Section (a) of this rule requires that findings of fact be established by evidence, admissions, and stipulations determinative of the issues involved in the action. Hollerbach v. Hollerbach, 90 N.C. App. 384, 368 S.E.2d 413 (1988).

Although a fact finder was not precluded from including evidentiary findings of fact in a decision, G.S. 1A-1-52(a) did require specific findings of the ultimate facts established by the evidence, admissions and stipulations which were determinative of the questions involved in the action and essential to support the conclusions of law reached. Overcash v. N.C. Dep't of Env't & Natural Res., — N.C. App. —, 635 S.E.2d 442, 2006 N.C. App. LEXIS 2168 (2006).

Findings Held Supported by Evidence. — Trial court's findings that conveyances of property to church were not voluntary and were not done with the intent to defraud creditors was sufficiently supported by the evidence. Washington v. Mitchell, 146 N.C. App. 720, 553 S.E.2d 919, 2001 N.C. App. LEXIS 1074 (2001), cert. denied, 355 N.C. 223, 560 S.E.2d 367 (2002).

Court's findings of fact that a mother had demonstrated behavior inconsistent with caring for a child by running away from child placements, violating established curfews, and failing to develop a connection or demonstrate a willingness to provide any parenting skills to her oldest child that would have assisted her with the supervision and control of her second child were supported by competent evidence as required under G.S. 1A-1, N.C. R. Civ. P. 52(a)(1), because the findings were based on testimony from two child placement workers, a child protective service investigator, and the mother. In re E.N.S., 164 N.C. App. 146, 595 S.E.2d 167, 2004 N.C. App. LEXIS 706 (2004), cert. denied, 359 N.C. 189, 606 S.E.2d 903 (2004).

Findings Held Insufficient. — Trial court's findings in abuse and neglect case against mother which recited little more than a recitation of the allegations that the county social services department made against her and restated some testimony given at a related hearing were not proper "ultimate findings of fact," and, thus, a remand of the case from the appellate court was required so that the proper findings could be made. In re O.W., 164 N.C. App. 699, 596 S.E.2d 851, 2004 N.C. App. LEXIS 971 (2004).

In the landlord-tenant case, the trial court did not violate G.S. 1A-1, N.C. R. Civ. P. 52(a)(1) by failing to make certain findings of fact and conclusions of law; the trial court was only required to find the ultimate facts, and, as required, the trial court made detailed findings of ultimate fact and conclusions of law support its decision. Kroger Ltd. P'ship I v. Guastello, 177 N.C. App. 386, 628 S.E.2d 841, 2006 N.C. App. LEXIS 967 (2006).

Findings of Fact and Conclusions of Law Essential to Decision Making Process. — Under the rules, where a case is tried before a court without a jury, findings of fact and conclusions of law sufficient to support a judgment are essential parts of the decision-making process. Girard Trust Bank v. Easton, 12 N.C. App. 153, 182 S.E.2d 645, cert. denied, 279 N.C. 393, 183 S.E.2d 245 (1971).

Force and Effect of Findings. — Findings of fact by the court have the force and effect of a verdict by a jury. Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772, cert. denied, 307 N.C. 269, 299 S.E.2d 214 (1982).

Findings Required on Award of Permanent Alimony. — Under subsection (a)(1) of this rule, findings of fact are required to support the amount of permanent alimony awarded by a trial judge. Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982), overruling statement in Eudy v. Eudy, 288 N.C. 71, 215 S.E.2d 782 (1975).

Failure to Make Proper Findings Concerning Cohabitation. — Trial court erred in finding that a husband did not breach a separation agreement; trial court improperly found that the wife had cohabited pursuant to the terms of G.S. 50-16.9(b), because the trial court failed to make adequate findings of fact as required by G.S. 1A-1, Rule 52(a)(1), and therefore the trial court erred in finding that the husband was no longer obligated to pay alimony. Long v. Long, 160 N.C. App. 664, 588 S.E.2d 1, 2003 N.C. App. LEXIS 1925 (2003).

Under G.S. 1A-1, Rule 60(b), the trial court is not required to make findings of fact, etc. unless requested to do so by a party. Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d 852 (1993).

Appellate court declined to reverse a trial court's decision to deny a motion for relief from judgment for excusable neglect based on a failure to make findings of fact because neither party made such a request. Brown v. Foremost Affiliated Ins. Servs., 158 N.C. App. 727, 582 S.E.2d 335, 2003 N.C. App. LEXIS 1222 (2003).

Duty of Judge to Find Facts and State Conclusions of Law Separately. — Where the judge tries a case without a jury, it is his duty to find the facts specially and state separately his conclusions of law and thereby resolve all controversies between the parties raised by the pleadings and the evidence. Heating & Air Conditioning Assocs. v. Myerly, 29 N.C. App. 85, 223 S.E.2d 545, appeal dismissed, 290 N.C. 94, 225 S.E.2d 323 (1976); Rosenthal's Bootery, Inc. v. Shavitz, 48 N.C. App. 170, 268 S.E.2d 250 (1980).

The mandate of subsection (a)(1) of this rule requires that the trial judge "find the facts specially"; and, in lieu of giving instructions to a jury relevant to issues arising upon the pleadings, that he "state separately" his conclusions of law. Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974).

It is the duty of the trial judge to make findings of fact determinative of the issues raised by the pleadings and the evidence. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

This rule governs findings by the court in nonjury proceedings. It requires the trial court in such proceedings to do three things: (1) find facts on all issues of fact joined on the pleadings, (2) declare conclusions of law arising on the facts found, and (3) enter judgment accordingly. This is because when a trial judge sits as both judge and juror, as he or she does in a nonjury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom. In re Whisnant, 71 N.C. App. 439, 322 S.E.2d 434 (1984).

To comport with subsection (a)(1) of this rule, the trial court must make a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment. Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 65 N.C. App. 242, 310 S.E.2d 33 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689, cert. denied, 469 U.S. 835, 105 S. Ct. 128, 83 L. Ed. 2d 69 (1984).

When issues of fact are tried by the trial court, it must state its findings and conclusions separately. Hollerbach v. Hollerbach, 90 N.C. App. 384, 368 S.E.2d 413 (1988).

At the close of all the evidence in a bench trial, the trial court must make findings of fact and state separate conclusions of law to assist the appellate court in understanding the basis for the trial court's decision; a conclusion of law is a statement of the law arising on the specific facts of a case which determines the issues between the parties. In re Everette, 133 N.C. App. 84, 514 S.E.2d 523 (1999).

Trial court erred in issuing mixed findings of fact and conclusions of law in rendering a decision regarding a laborer's North Carolina Retaliatory Discrimination Act claims; pursuant to the mandatory language of Rule 52(a)(1), the trial court should have stated its findings of fact separately from its conclusions of law. Pineda-Lopez v. N.C. Growers Ass'n, 151 N.C. App. 587, 566 S.E.2d 162 (2002).

Trial court's issuance of one mixed finding of fact and conclusion of law regarding landowners' adverse possession claim was not sufficient to comply with the civil procedure rules and provided an inadequate basis for the reviewing court to review that claim. DOT v. Byerly, 154 N.C. App. 454, 573 S.E.2d 522, 2002 N.C. App. LEXIS 1448 (2002).

So as to Render Them Distinguishable. — The judge must state his findings of fact and conclusions of law separately. The judge complies with this requirement if he separates the findings and the conclusions in such a manner as to render them distinguishable, no matter how the separation is effected. Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

This rule requiring that the findings of fact be stated separately from the conclusions of law is satisfied when the separation is made in such a manner as to render the findings of fact readily distinguishable from the conclusions of law. Jackson v. Collins, 9 N.C. App. 548, 176 S.E.2d 878 (1970).

The judge complies with subsection (a)(1) of this rule if he separates the findings and conclusions in such a manner as to render them distinguishable, no matter how the separation is effected. Highway Church of Christ, Inc. v. Barber, 72 N.C. App. 481, 325 S.E.2d 305 (1985).

Subsection (a)(1) of this rule requires only that the trial court's findings of fact be distinguishable from its conclusions of law. Mitchell v. Lowery, 90 N.C. App. 177, 368 S.E.2d 7, cert. denied, 323 N.C. 365, 373 S.E.2d 547 (1988).

And to Enter Judgment Accordingly. — In cases in which the trial court passes on the facts, the court is required to do three things in writing: (1) to find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) To enter judgment accordingly. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972); Littlejohn v. Hamrick, 15 N.C. App. 461, 190 S.E.2d 299 (1972); Luther v. Hauser, 24 N.C. App. 71, 210 S.E.2d 218 (1974).

Where a jury trial is waived by the parties to a civil action, the judge who tries the case is required to do three things: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising upon the facts found; and (3) to enter judgment accordingly. Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

When trial by jury is waived and issues of facts are tried by the court, the court is required to find the facts specially and state separately its conclusions of law thereon and direct entry of the appropriate judgment. Laughter v. Lambert, 11 N.C. App. 133, 180 S.E.2d 450 (1971); Conrad v. Jones, 31 N.C. App. 75, 228 S.E.2d 618 (1976).

Trial judge has the duty to find facts, state separately his conclusions of law and enter judgment. General Specialties Co. v. Nello L. Teer Co., 41 N.C. App. 273, 254 S.E.2d 658 (1979).

There are two kinds of facts, ultimate facts and evidentiary facts. Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

Ultimate facts are the final facts required to establish plaintiff's cause of action or defendant's defense. Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975); Farmers Bank v. Michael T. Brown Distribs., Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Farmers Bank v. Michael T. Brown Distribs., Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. Farmers Bank v. Michael T. Brown Distribs., Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. In re City of Durham Annexation Ordinance Numbered 5991 for Area A, 69 N.C. App. 77, 316 S.E.2d 649, appeal dismissed, 312 N.C. 493, 322 S.E.2d 553 (1984).

Evidentiary facts are those subsidiary facts required to prove the ultimate facts. Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975); Farmers Bank v. Michael T. Brown Distribs., Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

The trial judge is required to find and state the ultimate facts only. Williams v. Pilot Life Ins. Co., 288 N.C. 338, 218 S.E.2d 368 (1975).

While section (a) of this rule does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached. Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982); Farmers Bank v. Michael T. Brown Distribs., Inc., 307 N.C. 342, 298 S.E.2d 357 (1983); Plott v. Plott, 313 N.C. 63, 326 S.E.2d 863 (1985).

The facts required to be specially found by this rule are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached. Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

Subsection (a)(1) of this rule does not require recitation of evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached. Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 65 N.C. App. 242, 310 S.E.2d 33 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689, cert. denied, 469 U.S. 835, 105 S. Ct. 128, 83 L. Ed. 2d 69 (1984).

A finding of such essential facts as may lay a basis for the decision is sufficient under section (a) of this rule. Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984).

The general rule is that in making findings of fact, the trial court is required only to make brief, pertinent and definite findings and conclusions about the matters in issue, but need not make a finding on every issue requested. Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984).

The facts required to be found are the ultimate facts established by the evidence which are determinative of the questions involved in the action and are essential to support the conclusions of law reached. Gilbert Eng'g Co. v. City of Asheville, 74 N.C. App. 350, 328 S.E.2d 849, cert. denied, 314 N.C. 329, 333 S.E.2d 485 (1985).

In actions tried upon the facts without a jury, the trial court need not recite in its order every evidentiary fact presented at hearing, but must only make specific findings on the ultimate facts established by the evidence, admissions, and stipulations that are determinative of the questions raised in the action and essential to support the conclusions of law reached. Mitchell v. Lowery, 90 N.C. App. 177, 368 S.E.2d 7, cert. denied, 323 N.C. 365, 373 S.E.2d 547 (1988).

When findings are required, they must be made with sufficient specificity to allow meaningful appellate review. Andrews v. Peters, 318 N.C. 133, 347 S.E.2d 409 (1986).

A "conclusion of law" is the court's statement of the law which is determinative of the matter at issue between the parties. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977); Appalachian Poster Adv. Co. v. Harrington, 89 N.C. App. 476, 366 S.E.2d 705 (1988).

A conclusion of law is reached by an application of fixed rules of law. Farmers Bank v. Michael T. Brown Distribs., Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

A conclusion of law must be based on the facts found by the court and must be stated separately. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

Declaratory judgment addressing the division of a decedent's estate under a will was reversed, and the case was remanded, where the judgment made no fact findings as to the decedent's intent or the circumstances attendant to the will, and thus contained insufficient findings of fact to support the trial court's conclusions of law. Woodring v. Woodring, 164 N.C. App. 588, 596 S.E.2d 370, 2004 N.C. App. LEXIS 1000 (2004).

Trial court did not err by concluding that a Missouri divorce decree the decedent obtained from his first wife was valid, even though the first wife contested the adequacy of the service upon her, because the trial court's findings of fact were supported by competent evidence, and those findings of fact in turn supported the conclusions of law; however, the trial court in its findings of fact stated that both of the decedent's wives announced in open court that they voluntarily dismissed their claims, but the transcript confirmed that both wives dismissed only their claims against the mortuary. Wiseman Mortuary v. Burrell, 185 N.C. App. 693, 649 S.E.2d 439, 2007 N.C. App. LEXIS 1944 (2007).

What Conclusions Must Be Stated. — The conclusions of law necessary to be stated are the conclusions which, under the facts found, are required by the law and from which the judgment is to result. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

A bare conclusion unaccompanied by the supporting grounds for that conclusion does not comply with subsection (a)(1) of this rule. Appalachian Poster Adv. Co. v. Harrington, 89 N.C. App. 476, 366 S.E.2d 705 (1988).

Purpose of requiring findings of fact and conclusions of law is to allow meaningful review by the appellate courts. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Necessity for the finding of facts and the entry thereof, and for the drawing of conclusions of law from the facts, is to allow review by the appellate courts. Without such findings and conclusions, it cannot be determined whether or not the judge correctly found the facts or applied the law thereto. Jones v. Murdock, 20 N.C. App. 746, 203 S.E.2d 102 (1974); Rosenthal's Bootery, Inc. v. Shavitz, 48 N.C. App. 170, 268 S.E.2d 250 (1980).

Requirement of appropriate findings of fact and conclusions of law is not designed to encourage ritualistic recitations by the trial court. The requirement is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. Without such findings and conclusions, it cannot be determined whether or not the judge correctly found the facts or applied the law thereto. Montgomery v. Montgomery, 32 N.C. App. 154, 231 S.E.2d 26 (1977).

A purpose of subsection (a)(1) of this rule is to assist the appellate courts in determining whether or not the trial court correctly found the facts and applied the law to them. O'Grady v. First Union Nat'l Bank, 35 N.C. App. 315, 241 S.E.2d 375, rev'd on other grounds, 296 N.C. 212, 250 S.E.2d 587 (1978).

The requirement that facts be found specially is intended to provide a basis for appellate review. Poag v. Powell, 39 N.C. App. 363, 250 S.E.2d 93, cert. denied, 296 N.C. 736, 254 S.E.2d 178 (1979).

The requirement for appropriately detailed findings is not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. Coble v. Coble, 300 N.C. 708, 268 S.E.2d 185 (1980).

The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment, and the legal conclusions which underlie it, represent a correct application of the law. Coble v. Coble, 300 N.C. 708, 268 S.E.2d 185 (1980); Farmers

Bank v. Michael T. Brown Distribs., Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

Under this rule, the trial judge is required to find the facts specially and state separately his conclusions of law thereon. The purpose of this requirement is to allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law. In re Jones, 62 N.C. App. 103, 302 S.E.2d 259 (1983).

The purpose of detailed findings of specific fact is to allow a reviewing court to determine from the record whether the judgment and the underlying legal conclusions represent a correct application of the law. Waynick Constr., Inc. v. York, 70 N.C. App. 287, 319 S.E.2d 304, cert. denied, 312 N.C. 624, 323 S.E.2d 926 (1984); Gilbert Eng'g Co. v. City of Asheville, 74 N.C. App. 350, 328 S.E.2d 849, cert. denied, 314 N.C. 329, 333 S.E.2d 485 (1985).

The purpose for requiring conclusions of law to be stated separately is to enable the reviewing court to determine what law the court applied to the facts found. Waynick Constr., Inc. v. York, 70 N.C. App. 287, 319 S.E.2d 304, cert. denied, 312 N.C. 624, 323 S.E.2d 926 (1984).

The requirement that where the trial judge sits as the trier of facts, he must find facts upon all issues raised by the pleadings and evidence and declare the conclusions of law arising on the facts found is designed to dispose of the issues raised and to permit a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law. Wohlfahrt v. Schneider, 82 N.C. App. 69, 345 S.E.2d 448 (1986).

Requirement for appropriately detailed findings is not a mere formality or a rule of empty ritual; it is designed instead "to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." Farmers Bank v. Michael T. Brown Distribs., Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

Purpose for requiring conclusions of law to be stated separately is to enable appellate courts to determine what law the trial court applied in directing the entry of judgment in favor of one of the parties. Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975).

This rule requires a judge presiding over a non-jury trial to: (1) make findings of fact, (2) state conclusions of law arising on the facts found, and (3) enter judgment accordingly; these requirements are not met when the presiding judge simply announces his decision in open court without ever reducing that decision to writing and filing it. In re Savage, 163 N.C. App. 195, 592 S.E.2d 610, 2004 N.C. App. LEXIS 296 (2004).

This rule does not require or contemplate that the court submit to itself issues of fact in the manner in which issues of fact are submitted to a jury. Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974).

The posing and answering of issues by the court when it sits without a jury is not approved. Nor is the entry of a verdict by the trial court, sitting without a jury, based on issues of fact answered by the court. Gibson v. Jones, 7 N.C. App. 534, 173 S.E.2d 57 (1970).

Findings Not Required If Not Requested. — Trial court did not err in failing to enter findings of fact or conclusions of law in its orders denying motions to compel, as neither party asked for such findings or conclusions. Barringer v. Wake Forest Univ. Baptist Med. Ctr., — N.C. App. —, 677 S.E.2d 465, 2009 N.C. App. LEXIS 673 (2009).

When an action is tried upon the facts without a jury, there is no charge. Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974).

Compliance with Subsection (a)(1) Held Sufficient. — Trial judge, after denying defendant's motion to dismiss, properly complied with the requirements of subsection (a)(1) of this rule by entering judgment in which the court found the facts specially. Higgins v. Builders & Fin., Inc., 20 N.C. App. 1, 200 S.E.2d 397, cert. denied, 284 N.C. 616, 201 S.E.2d 689 (1973).

In the termination of parental rights proceeding, where the mother argued that the trial court erred by failing to make findings of fact but by simply reciting the testimony of witnesses at the hearing and making findings that were contradictory, the trial court did not violate G.S. 1A-1-52(a)(1); while the trial court included findings of fact that summarized the testimony, the trial court made the necessary findings of fact, as there was nothing impermissible about describing testimony as long as the trial court ultimately made its own findings resolving any material disputes. In re C.L.C., 171 N.C. App. 438, 615 S.E.2d 704, 2005 N.C. App. LEXIS 1316 (2005), aff'd, 360 N.C. 475, 628 S.E.2d 760 (2006).

Compliance Held Insufficient. — An action to enforce restrictive covenants would be remanded so that proper findings of fact could be entered based upon sufficient evidence where the record contained insufficient evidence to support all of the proper findings of fact, and the facts found did not support the conclusions of law and the judgment. Littlejohn v. Hamrick, 15 N.C. App. 461, 190 S.E.2d 299 (1972).

Mere assertion that plaintiff is not entitled to the relief prayed for by her, without stating the grounds for such a bare legal conclusion, does not comply with the requirements of subsection (a)(1) of this rule. Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975).

Where no evidence was introduced, and the stipulations were insufficient to support all the necessary findings of fact, it was necessary that case be remanded so that proper findings of fact could be entered based upon sufficient evidence. Littlejohn v. Hamrick, 15 N.C. App. 461, 190 S.E.2d 299 (1972).

Where deputy commissioner's order that was modified and adopted by the full Industrial Commission was devoid of any findings of fact on the claims of liability and negligence, the opinion was vacated. Parker v. State DOT, 122 N.C. App. 279, 468 S.E.2d 589 (1996).

Findings of fact which were mainly only recitations of the evidence, and set forth, sometimes verbatim, the contents of letters exchanged between petitioner and respondent, did not reflect the "processes of logical reasoning" required by subsection (a)(1) of this rule. Appalachian Poster Adv. Co. v. Harrington, 89 N.C. App. 476, 366 S.E.2d 705 (1988).

Where, instead of stating separately his conclusions of law, the trial judge answered issues of negligence and contributory negligence, these answers were treated as the equivalent of stated conclusions of law (1) that plaintiff was damaged by the negligence of defendant, and (2) that plaintiff did not by his own negligence contribute to his own damage. Blackwell v. Butts, 278 N.C. 615, 180 S.E.2d 835 (1971).

Oral Statements on Issues Neither Findings Nor Verdict. — Where, at the conclusion of the evidence in an action tried before the court without a jury, the trial judge orally indicated answers in favor of plaintiff to issues which had been prepared by counsel for defendant in anticipation of a jury trial, and instructed plaintiff's counsel to submit a proposed judgment containing appropriate findings of fact and conclusions of law, the issues and the court's answers thereto constituted neither a verdict nor findings of fact and conclusions of law which would permit a substitute judge to proceed under Rule 63 to enter judgment in the case. Girard Trust Bank v. Easton, 12 N.C. App. 153, 182 S.E.2d 645, cert. denied, 279 N.C. 393, 183 S.E.2d 245 (1971).

Findings on Discretionary Rulings. — When requested, findings of fact and conclusions of law must be made even on rulings resting within the trial court's discretion. Andrews v. Peters, 318 N.C. 133, 347 S.E.2d 409 (1986).

When a trial court denied a surety's motion for relief from a bond forfeiture, the record did not support the surety's claim, on appeal, that the trial court "ignored" evidence that the district attorney had agreed to extradite the fugitive as to whom the bond was forfeited because the trial court specifically found that the surety stated that the surety entered into an agreement with the district attorney whereby the district attorney would extradite the fugitive if the surety paid the associated costs, and that no payment was forthcoming from the surety to the district attorney, nor were other arrangements for extradition made. State v. Bakri, 186 N.C. App. 467, 651 S.E.2d 266, 2007 N.C. App. LEXIS 2187 (2007).

Findings on Setting Aside Verdict on Damages. — Findings, when requested, should be made in support of the ultimate conclusion that the damages appear to have been given under the influence of passion or prejudice in order to facilitate meaningful appellate review of an order setting aside the verdict on damages. Andrews v. Peters, 318 N.C. 133, 347 S.E.2d 409 (1986).

Findings and Conclusions in Trial De Novo on Appeal From Small Claims Court. — In a trial de novo on appeal to the district court from a small claims money judgment, the district court had the statutory authority under G.S. 7A-229 to decide the case on the pleadings and, since the informal procedures of the small claims court carried over to the appeal, the district court was not required to give the separate, detailed legal conclusions that were required by N.C. R. Civ. P. 52. Jones v. Ratley, 168 N.C. App. 126, 607 S.E.2d 38, 2005 N.C. App. LEXIS 147 (2005).

Findings and Conclusions on Alimony Award. — Because an alimony award is determined by a trial court without a jury, section (a) of this rule requires the trial court to find facts specially and state conclusions of law separately. Perkins v. Perkins, 85 N.C. App. 660, 355 S.E.2d 848, cert. denied, 320 N.C. 633, 360 S.E.2d 92 (1987).

Findings and Conclusions Not Required for Child Consent Judgments. — While this rule and G.S. 50-13.2 mandate findings of fact and conclusions when a court adjudicates child custody, child consent judgments need not contain such findings of fact and conclusions of law, and consenting parties waive their right to have the court adjudicate the merits of the case. Buckingham v. Buckingham, 134 N.C. App. 82, 516 S.E.2d 869, 1999 N.C. App. LEXIS 657 (1999), cert. denied, 351 N.C. 100, 540 S.E.2d 353 (1999).

Findings Not Required in Hearing on Attorney's Fees. — Trial court properly denied a member's request for attorney's fees in relation to an action seeking to inspect the business records of a club, as there was no statutory grounds for fees under G.S. 55-16-04, a fee provision of the parties consent order could not authorize fees in the absence of statutory authority, and the trial court was not required by G.S. 1A-1, N.C. R. Civ. P. 52(a)(1) to make findings of fact regarding the fee award. Carswell v. Hendersonville Country Club, Inc., 169 N.C. App. 227, 609 S.E.2d 460, 2005 N.C. App. LEXIS 538 (2005).

Trial court's conclusions that statutory grounds existed for termination of parental rights were inadequate because they did not provide specific findings of facts established by the evidence, admissions, and stipulations. In re Anderson, 151 N.C. App. 94, 564 S.E.2d 599, 2002 N.C. App. LEXIS 657 (2002).

Findings of Fact Are Required if Father is to be Denied All Contact With His Daughter. — Where the court merely recited the testimony of witnesses and did not make the required findings of fact, further findings of fact and a determination of the father's parental fitness was needed if he was to be denied all contact with his daughter. Moore v. Moore, 160 N.C. App. 569, 587 S.E.2d 74, 2003 N.C. App. LEXIS 1827 (2003).

If no findings of fact are required, the findings which support the trial judge's ruling are deemed implicit in the ruling. Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986).

Findings of fact which resolve conflicts in the evidence are binding on appellate courts. Lane v. Honeycutt, 14 N.C. App. 436, 188 S.E.2d 604, cert. denied, 281 N.C. 622, 190 S.E.2d 466 (1972).

Trial court's findings of fact are conclusive if they are supported by competent evidence, even though there may be evidence to the contrary. Heating & Air Conditioning Assocs. v. Myerly, 29 N.C. App. 85, 223 S.E.2d 545, appeal dismissed, 290 N.C. 94, 225 S.E.2d 323 (1976); Cox v. Cox, 33 N.C. App. 73, 234 S.E.2d 189 (1977); Gilbert Eng'g Co. v. City of Asheville, 74 N.C. App. 350, 328 S.E.2d 849, cert. denied, 314 N.C. 329, 333 S.E.2d 485 (1985); City of Statesville v. Roth, 77 N.C. App. 803, 336 S.E.2d 142 (1985).

The trial court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence contra, or even though some incompetent evidence may also have been admitted. Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970); Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971).

Where facts are found by the court, if supported by competent evidence, such facts are as conclusive on appeal as the verdict of a jury. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971); Littlejohn v. Hamrick, 15 N.C. App. 461, 190 S.E.2d 299 (1972).

When a jury trial is waived, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. Blackwell v. Butts, 278 N.C. 615, 180 S.E.2d 835 (1971); Laughter v. Lambert, 11 N.C. App. 133, 180 S.E.2d 450 (1971); Lane v. Honeycutt, 14 N.C. App. 436, 188 S.E.2d 604, cert. denied, 281 N.C. 622, 190 S.E.2d 466 (1972); Rose v. Vulcan Materials Co., 282 N.C. 643, 194 S.E.2d 521 (1973); Beasley-Kelso Assocs. v. Tenney, 30 N.C. App. 708, 228 S.E.2d 620, cert. denied, 291 N.C. 323, 230 S.E.2d 675 (1976); Wurlitzer Distrib. Corp. v. Schofield, 44 N.C. App. 520, 261 S.E.2d 688 (1980); Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984).

If supported by competent evidence, findings of fact made by the trial judge sitting without a jury are conclusive upon review in an appellate court, the weight and credibility of the evidence being for the trial judge. Waters v. Humphrey, 33 N.C. App. 185, 234 S.E.2d 462, appeal dismissed, 293 N.C. 163, 236 S.E.2d 707 (1977).

Although the question of the sufficiency of the evidence to support the findings may be raised on appeal, the appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

The appellate courts are bound by the trial court's findings of fact so long as there is some evidence to support those findings, even though the evidence could sustain findings to the contrary. Lyerly v. Malpass, 82 N.C. App. 224, 346 S.E.2d 254 (1986), cert. denied, 318 N.C. 695, 351 S.E.2d 748 (1987).

And Will Not Be Disturbed. — When the trial judge sits as the trier of facts, his judgment will not be disturbed on the theory that the evidence did not support his findings of fact if there be any evidence to support the judgment. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

But Sufficiency of Evidence to Support Judge's Findings May Be Questioned on Appeal. — The question of the sufficiency of the evidence to support the trial court's findings of fact may be raised on appeal. Little v. Little, 9 N.C. App. 361, 176 S.E.2d 521 (1970); Wurlitzer Distrib. Corp. v. Schofield, 44 N.C. App. 520, 261 S.E.2d 688 (1980).

Notice of appeal and exception to the entry of a judgment after denial of motions for dismissal and judgment presents the face of the record for review including the question of whether the facts found support the judgment and whether the judgment is regular in form. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Where plaintiffs have not assigned error to the judge's findings, those findings are conclusive on appeal, and the Supreme Court is only required to determine whether the findings support the trial judge's conclusions and the entry of judgment. Sharpe v. Park Newspapers of Lumberton, Inc., 317 N.C. 579, 347 S.E.2d 25 (1986).

And Erroneous Legal Conclusions May

Be Shown. — Although the presumption is that the court on proper evidence found facts to support its order, the record may clearly reveal that the court erroneously drew legal conclusions from these facts. H.V. Allen Co. v. Quip-Matic, Inc., 47 N.C. App. 40, 266 S.E.2d 768, cert. denied, 301 N.C. 85, 273 S.E.2d 298 (1980).

In cases involving a higher evidentiary standard, the appellate court must review the evidence in order to determine whether the findings are supported by clear, cogent and convincing evidence and support the conclusions of law. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

Failure to except to the court's findings does not necessarily preclude appellate review on the question of whether the evidence supported the findings of fact, but appellant must assign error so as to outline his objections on appeal. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Judge's Findings Are Conclusive in Action for Permanent Restraining Order. — When the purpose of an action is a permanent restraining order, the trial court's findings of fact are binding on appeal if supported by the evidence. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

Trial judge's findings of fact in custody orders are binding on the appellate courts if supported by competent evidence. Hassell v. Means, 42 N.C. App. 524, 257 S.E.2d 123, cert. denied, 298 N.C. 568, 261 S.E.2d 122 (1979).

Where trial court failed to explicitly label findings of fact and conclusions of law, but sufficiently distinguished findings of fact from the conclusions of law so that the appellate court was able to determine how it applied the law to the facts, there was no prejudicial error. Freer v. Weinstein, 91 N.C. App. 138, 370 S.E.2d 860, cert. denied, 323 N.C. 476, 373 S.E.2d 863 (1988).

Findings and Conclusions Held Sufficiently Distinguishable. — Where trial court adopted clerk's very specific findings of fact and set forth its conclusions in a single paragraph, the court's findings of fact were distinguishable from its conclusions of law for the purposes of this rule. In re Estate of Francis, 94 N.C. App. 744, 381 S.E.2d 484, cert. denied, 325 N.C. 708, 388 S.E.2d 456 (1989), rev'd on other grounds, 327 N.C. 101, 394 S.E.2d 150 (1990).

Bare Conclusions Insufficient. — Although this rule requires that in all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law, a bare conclusion such as the one in this case does not meet the requirements of subdivision (a)(1). Chapel Hill-Carrboro City Sch. Sys. v. Chavioux, 116 N.C. App. 131, 446 S.E.2d 612 (1994).

Finding of Ultimate Fact. — Trial court's finding that petitioner willfully refused without just cause or excuse to submit to a chemical analysis upon the request of the charging officer was an ultimate fact finding indicating that the trial court rejected all opposing inferences raised by petitioner's evidence that the refusal was not willful or was excused, and as such, the court's finding permitted adequate appellate review of the ultimate fact at issue. Tolbert v. Hiatt, 95 N.C. App. 380, 382 S.E.2d 453 (1989).

Order Setting Bond. — Where order setting an injunction bond at $20,000 contained no findings of fact or conclusions of law relating to the amount of the bond, and facts were in dispute, remand was necessary for proper determination of the amount of the security bond. Iverson v. TM One, Inc., 92 N.C. App. 161, 374 S.E.2d 160 (1988).

This rule does not require the manual drafting of judgment or oral dictation thereof. Johnson v. Johnson, 67 N.C. App. 250, 313 S.E.2d 162 (1984).

Findings on De Novo Review of Final Agency Decision. — Although a review of a final agency decision is de novo, the trial court is limited by G.S. 136-134.1 in the scope of its review. However, this does not circumvent the requirements of subsection (a)(1) of this rule. Thus, although G.S. 136-134.1 limits the scope of the findings of fact and conclusions of law which can be made, it does not limit the requirements for properly setting forth such findings and conclusions. Appalachian Poster Adv. Co. v. Harrington, 89 N.C. App. 476, 366 S.E.2d 705 (1988).

When the court's conclusions of law are unsupported by determinative facts, the case must be remanded to the trial court for further findings. Curd v. Winecoff, 88 N.C. App. 720, 364 S.E.2d 730 (1988).

The findings recited by the Disciplinary Committee in its order were inadequate to support its conclusion that the defendant's letter was threatening, because the Committee made no findings as to the exact nature of that threat nor as to the specific relationship between the defendant's "threatening letter" and the administration of justice. Thus the Committee's findings failed to conform to subdivision (a)(1) of this rule. North Carolina State Bar v. Beaman, 100 N.C. App. 677, 398 S.E.2d 68 (1990).

Deletion of Finding Without Reconsidering Conclusion Prejudicial to Defendant. — Where a judge initially found that defendant had committed adultery and then deleted that finding without reconsidering his conclusions, including the conclusion that plaintiff was entitled to permanent alimony, that process violated the sequence required by this rule to the prejudice of the defendant. Baker v. Baker, 102 N.C. App. 792, 404 S.E.2d 20 (1991).

III. FINDINGS AND CONCLUSIONS ON GRANT OR DENIAL OF MOTIONS, PRELIMINARY INJUNCTIONS, ETC.

Difference between this rule and the federal rule is that FRCP, Rule 52(a) specifically requires that in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Pruitt v. Williams, 25 N.C. App. 376, 213 S.E.2d 369, appeal dismissed, 288 N.C. 368, 218 S.E.2d 348 (1975).

Findings Not Required For Declaratory Judgment. — Trial court properly entered a declaration pursuant to G.S. 1-253 that two house plans submitted by a builder to a homeowner's association satisfied a restrictive covenant; the trial court was not required to make additional findings of fact pursuant to subdivision (a)(1) of this rule, and the covenant language allowed a minimum area requirement to be satisfied by rooms on multiple floors of the home. Cumberland Homes, Inc. v. Carolina Lakes Prop. Owners' Ass'n, 158 N.C. App. 518, 581 S.E.2d 94, 2003 N.C. App. LEXIS 1190 (2003).

Findings Not Required For Directed Verdict. — Because a trial court issued a directed verdict in a case, pursuant to G.S. 1A-1-52, findings of fact and conclusions of law were neither necessary nor appropriate. Seven Seventeen HB Charlotte Corp. v. Shrine Bowl of the Carolinas, Inc., 182 N.C. App. 128, 641 S.E.2d 711, 2007 N.C. App. LEXIS 499 (2007).

Findings and Conclusions Generally Not Required on Motions Absent Request. — If no request is made by the parties to a hearing on a motion, the trial judge is not required to find the facts upon which he bases his ruling, and in such case, it will be presumed that the judge, upon proper evidence, found facts sufficient to support his judgment. Allen v. Wachovia Bank & Trust Co., 35 N.C. App. 267, 241 S.E.2d 123 (1978); Kolendo v. Kolendo, 36 N.C. App. 385, 243 S.E.2d 907 (1978); Brown v. Brown, 47 N.C. App. 323, 267 S.E.2d 345 (1980); City of Salisbury v. Kirk Realty Co., 48 N.C. App. 427, 268 S.E.2d 873 (1980).

Where no request was made that the trial judge make findings to support the denial of its motion, it was presumed that the judge made the determination based upon proper evidence. House Healers Restorations, Inc. v. Ball, 112 N.C. App. 783, 437 S.E.2d 383 (1993).

Trial court was not required to make findings of fact and conclusions of law explaining its judgment granting plaintiffs' motion to disqualify defendant's attorney because neither plaintiffs nor defendant asked it to make those findings and findings were not required by G.S. 1A-1, Rule 41(b). Cunningham v. Sams, 161 N.C. App. 295, 588 S.E.2d 484, 2003 N.C. App. LEXIS 2038 (2003).

Where neither party requested the trial court to render findings of fact or conclusions of law in support of its decision on a motion to disqualify counsel, there was no merit to the client's argument that the order should have been vacated for want of findings of fact. Robinson & Lawing, L.L.P. v. Sams, 161 N.C. App. 338, 587 S.E.2d 923, 2003 N.C. App. LEXIS 2056 (2003).

Where the record did not reveal any request by former wife that the trial court make findings of fact and conclusions of law, the former wife's assignment of error asserting that the trial court failed to make those findings and conclusions in dismissing her action was overruled. Elliott v. Estate of Elliott, 163 N.C. App. 577, 596 S.E.2d 819, 2004 N.C. App. LEXIS 512 (2004), cert. denied, 358 N.C. 731, 601 S.E.2d 530 (2004).

Trial court did not err by failing to make findings of fact that the costs that the court taxed upon an accident victim were reasonable and necessary because such findings of fact were not requested by either party. Vaden v. Dombrowski, 187 N.C. App. 433, 653 S.E.2d 543, 2007 N.C. App. LEXIS 2451 (2007).

Because there was no indication in the record that either party requested findings by the trial judge, it was proper that the trial court made no findings of fact when issuing the order denying defendant seller's motion to dismiss. Baker v. Lanier Marine Liquidators, Inc., 187 N.C. App. 711, 654 S.E.2d 41, 2007 N.C. App. LEXIS 2571 (2007).

Unless Required by Rule § 1A-1, 41(b). — Under subsection (a)(2) of this rule, the trial judge need not make findings of fact and conclusions of law when making a decision on a motion unless they are requested by a party or required by G.S. 1A-1, Rule 41(b). Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521, cert. denied, 303 N.C. 314, 281 S.E.2d 651 (1981).

On a motion to dismiss a defendant's counterclaim under G.S. 1A-1, Rule 41(b), where all the evidence is in, it is incumbent upon the judge to consider and weigh it all and render judgment on the merits of the claim and counterclaim in the form directed by section (a) of this rule. Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973).

Trial court's compliance with party's motion under subsection (a)(2) of this rule is mandatory. Andrews v. Peters, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985), aff'd, 318 N.C. 133, 347 S.E.2d 409 (1986).

Discretion of Trial Judge Under Subsection (a)(2). — Under subsection (a)(2) of this rule, it is left to the discretion of the trial judge whether to make a finding of fact on the decision of a motion if a party does not choose to compel a finding through the simple mechanism of so requesting. Watkins v. Hellings, 321 N.C. 78, 361 S.E.2d 568 (1987).

Discretion of Court. — A court is not required to make findings of fact and conclusions of law when ruling on preliminary motions, but it has the discretion to do so; however, if a court does enter conclusions of law, they must be supported by adequate findings. Epps v. Duke Univ., Inc., 116 N.C. App. 305, 447 S.E.2d 444 (1994).

When Findings and Conclusions Are Required on Motion to Dismiss. — The trial court is required to make findings of fact and conclusions of law on a motion to dismiss only when required by statute or requested by a party. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976).

When a trial court in a bench trial grants a motion to dismiss under G.S. 1A-1-41(b), the judge must make detailed findings of fact and separate conclusions of law in accordance with G.S. 1A-1-52(a); the trial court's findings of fact are conclusive on appeal if they are supported by competent evidence, even if there is evidence to the contrary. Hammonds v. Lumbee River Elec. Mbrshp. Corp., 178 N.C. App. 1, 631 S.E.2d 1, 2006 N.C. App. LEXIS 1301 (2006).

Trial court did not err by declining to draft findings of fact and conclusions of law explaining its decision to dismiss a former employee's complaint pursuant to N.C.R. Civ. P. Rule 12(b)(6) because the trial court's decision was based only on the employee's pleadings under Rule 12(b)(6); because the court of appeals reviewed a dismissal for failure to state a claim de novo, it would have disregarded any findings of fact or conclusions of law drafted by the trial court. Helm v. Appalachian State Univ., — N.C. App. —, 670 S.E.2d 571, 2008 N.C. App. LEXIS 2251 (2008).

Additional Findings of Fact Necessary. — Given the defendant's motion specifically asking for findings of fact and conclusions of law on the decision of the plaintiff's motion for a new trial, the insufficient findings of fact in the order granting the motion, and the conflicting evidence in the record, additional findings of fact were essential to provide the appellate court with a basis for a meaningful review. Andrews v. Peters, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985), aff'd, 318 N.C. 133, 347 S.E.2d 409 (1986).

In a hearing involving a motion for declaration of compliance, in which neither side requested findings of fact, the court did not have to find the facts specially. Horne v. Flack, 68 N.C. App. 749, 315 S.E.2d 539 (1984).

Trial judge is not required to make findings and conclusions with respect to an interlocutory order that is not appealable, such as is the case with the denial of a motion to dismiss under G.S. 1A-1, Rule 12(b)(6). O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Nor on Denial or Issuance of Preliminary Injunction. — There is no statute that requires the court to make findings of fact and conclusions of law in granting or denying a preliminary injunction under G.S. 1A-1, Rule 65. Hence, absent a request by a party that the court make findings of fact and conclusions of law, the court is required to state only the reasons for its issuance. Pruitt v. Williams, 25 N.C. App. 376, 213 S.E.2d 369, appeal dismissed, 288 N.C. 368, 218 S.E.2d 348 (1975).

It is not part of the function of the court on a motion for summary judgment to make findings of fact and conclusions of law, etc. Marshall v. Keaveny, 38 N.C. App. 644, 248 S.E.2d 750 (1978).

A trial judge is not required to make finding of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. Mosley v. National Fin. Co., 36 N.C. App. 109, 243 S.E.2d 145, cert. denied, 295 N.C. 467, 246 S.E.2d 9 (1978), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987); White v. Town of Emerald Isle, 82 N.C. App. 392, 346 S.E.2d 176, cert. denied, 318 N.C. 511, 349 S.E.2d 874 (1986).

The making of additional specific findings and separate conclusions on a motion for summary judgment is ill advised, since it would carry an unwarranted implication that a fact question was presented. Garrison v. Blakeney, 37 N.C. App. 73, 246 S.E.2d 144, cert. denied, 295 N.C. 646, 248 S.E.2d 251 (1978).

Subsection (a)(2) of this rule does not apply to the decision on a summary judgment motion, because if findings of fact are necessary to resolve an issue, summary judgment is improper. Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760, cert. denied, 301 N.C. 105 (1980).

In a trial court's dismissal of a litigant's action against a newspaper staff writer and related defendants by way of summary judgment, there was no error where the trial court did not enter findings of fact and conclusions of law but instead carefully and in detail stated the legal basis for each of its rulings. Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003).

Trial court fulfilled its obligations under N.C. R. Civ. P. 52(a)(1) when it made specific findings of fact that a bonding company's efforts resulted in locating the defendant, but that the district attorney was ultimately responsible for returning the defendant to Union County. State v. Escobar, 187 N.C. App. 267, 652 S.E.2d 694, 2007 N.C. App. LEXIS 2324 (2007).

Trial court was not required under G.S. 1A-1, N.C. R. Civ. P. 52(a) to make findings of fact in support of its summary judgment order, as Rule 52(a)(2) did not apply to a decision on a summary judgment motion because, if findings of fact were necessary to resolve an issue, summary judgment was improper. Cameron v. Bissette, 190 N.C. App. 614, 661 S.E.2d 32, 2008 N.C. App. LEXIS 1017 (2008).

But Findings and Conclusions Do Not Invalidate Summary Judgment. — Subsection (a)(2) of this rule does not apply to the decision on a summary judgment motion, because if findings of fact are necessary to resolve an issue, summary judgment is improper. However, such findings and conclusions do not render a summary judgment void or voidable and may be helpful, if the facts are not at issue and support the judgment. Mosley v. National Fin. Co., 36 N.C. App. 109, 243 S.E.2d 145, cert. denied, 295 N.C. 467, 246 S.E.2d 9 (1978), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987); White v. Town of Emerald Isle, 82 N.C. App. 392, 346 S.E.2d 176, cert. denied, 318 N.C. 511, 349 S.E.2d 874 (1986).

Consent Judgment. — A consent judgment is merely a recital of the parties' agreement and not an adjudication of rights. This type of judgment need not contain findings of fact and conclusions of law because the judge merely sanctions the agreement of the parties. In re Estate of Peebles, 118 N.C. App. 296, 454 S.E.2d 854 (1995).

Findings Not Required Under § 1A-1, Rule 37(c). — Section 1A-1, Rule 37(c), relating to expenses on failure to make admissions on discovery, does not require the trial court to make negative findings of fact with respect to the four exceptions therein, and where neither party made such a request of the trial judge, under this rule it would be presumed that the court on proper evidence found facts to support its judgment. Watkins v. Hellings, 321 N.C. 78, 361 S.E.2d 568 (1987).

In ruling on a motion for a new trial under § 1A-1, Rule 59(a), absent a specific request made pursuant to subsection (a)(2) of this rule, a trial court is not required to either state the reasons for its decision or make findings of fact showing those reasons. Strickland v. Jacobs, 88 N.C. App. 397, 363 S.E.2d 229 (1988).

When the trial court grants or denies a motion for a new trial without making findings of fact, appellate review is limited to determining whether the record indicates that the ruling amounts to a manifest abuse of discretion. Strickland v. Jacobs, 88 N.C. App. 397, 363 S.E.2d 229 (1988).

There may be cases where it would be helpful for the court to set out in summary judgment undisputed facts upon which judgment is based, but this procedure would rarely be helpful or necessary and should be used sparingly. When used, the court should be careful to note that it is stating the undisputed facts. They should not be referred to as findings. Garrison v. Blakeney, 37 N.C. App. 73, 246 S.E.2d 144, cert. denied, 295 N.C. 646, 248 S.E.2d 251 (1978).

Findings in Action Involving Temporary Restraining Order Not Binding on Review. — In cases involving a temporary rather than a permanent restraining order, the court's findings of fact are not binding on the appellate court, which may make its own findings. Coggins v. City of Asheville, 278 N.C. 428, 180 S.E.2d 149 (1971).

Presumption Applicable When Findings and Conclusions Are Not Required. — When the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment. Sherwood v. Sherwood, 29 N.C. App. 112, 223 S.E.2d 509 (1976); Hankins v. Somers, 39 N.C. App. 617, 251 S.E.2d 640, cert. denied, 297 N.C. 300, 254 S.E.2d 920 (1979); Fungaroli v. Fungaroli, 51 N.C. App. 363, 276 S.E.2d 521, cert. denied, 303 N.C. 314, 281 S.E.2d 651 (1981).

This rule does not apply in awarding alimony pendente lite. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

And Findings of Fact Are Required upon Application for Alimony Pendente Lite. — The provision of subsection (a)(2) of this rule that the trial judge is not required to make findings of fact unless requested to do so by a party does not abrogate the specific requirement of G.S. 50-16.8, prior to the 1995 amendment, that the trial judge shall make findings of fact upon an application for alimony pendent lite, since the Rules of Civil Procedure are of general application and do not abrogate the requirements of a statute of more specificity. Hatcher v. Hatcher, 7 N.C. App. 562, 173 S.E.2d 33 (1970).

While it is true that section (a) of this rule does not apply in proceedings to determine the amount of alimony pendent lite, the fact-finding requirements of G.S. 50-16.8, prior to the 1995 amendment, are no less stringent than those required by section (a) of this rule. Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982).

Findings Sufficient to Support Driver's License Revocation. — Although the evidence before a superior court was conflicting, the findings of fact 24 and 30 complied with G.S. 1A-1, N.C. R. Civ. P. 52(a). and were the ultimate findings of fact required to support a conclusion that a driver's refusal to submit to chemical analysis was willful as defined in G.S. 20-16.2. The officers asserted that the driver was marked as a refusal after refusing the test because he was innocent, and he testified that he refused the test because his right to have a witness present was violated; however, the driver conceded through finding of fact 30 that he did not know whether or not his witness was present, and therefore did not know that his rights had been violated. Powers v. Tatum, — N.C. App. —, 676 S.E.2d 89, 2009 N.C. App. LEXIS 527 (2009).

Court's Decision Held Judgment on Merits Rather Than Dismissal. — Although the court allowed defendant's motion to dismiss, where it made findings of fact in its judgment as provided in this rule, and concluded and adjudged that plaintiffs were not entitled to recover anything from the defendants, the effect of the court's action was to enter judgment on the merits rather than to dismiss the case. Gurtis v. City of Sanford, 18 N.C. App. 543, 197 S.E.2d 584 (1973).

Additional Findings of Fact Necessary. — Given the defendant's motion specifically asking for findings of fact and conclusions of law on the decision of the plaintiff's motion for a new trial, the insufficient findings of fact in the order granting the motion, and the conflicting evidence in the record, additional findings of fact were essential to provide the appellate court with a basis for a meaningful review. Andrews v. Peters, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985), aff'd, 318 N.C. 133, 347 S.E.2d 409 (1986).

Motion for New Trial. — Plaintiff's motion for a new trial pursuant to G.S. 1A-1-59(a)(7) and (8) presented questions of law that received de novo review on appeal, and accordingly findings of fact and conclusions of law would not aid appellate review and thus were not required; because the trial court's rulings under Rule 59(a)(5), (6), and (9) were evaluated for an abuse of discretion, however, findings of fact and conclusions of law were necessary to effectuate meaningful appellate review, and therefore the trial court erred in failing to make findings and conclusions as requested by plaintiff. N.C. Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

Presumed Findings Supported Equitable Tolling of Statute of Limitations. — Although the trial court did not state the reason for its order equitably tolling the statute of limitations for an employee's Federal Employers' Liability Act (FELA), 45 U.S.C.S. §§ 51-60 claim or make findings of fact, evidence supported the presumed findings needed for equitable tolling of the FELA statute of limitations while the suit was pending in North Carolina; the employee did not "sit on his rights," but filed his FELA claim in Virginia within two years of when he was diagnosed with osteoarthritis caused by his job, promptly refiled his case following dismissal for improper venue, and did not seek a voluntary dismissal in response to an unsuccessful attempt to continue the case. Indeed, it was the railroad's dismissal motions that delayed the resolution of the employee's claim, the effect of railroad's last minute dismissal motion in Virginia was to provide it with ammunition for a later summary judgment motion, and there was no indication that equitable tolling of the statute of limitations prejudiced the railroad. Carlisle v. CSX Transp., Inc., — N.C. App. —, 668 S.E.2d 98, 2008 N.C. App. LEXIS 1977 (2008).

Decision Properly Rested Solely Upon Declarations and Conclusions of Law. — In an action filed by the North Carolina Department of Correction, its secretary, and a warden, seeking an injunction prohibiting the North Caroline Medial Board from disciplining physicians for participating in an execution and a declaratory judgment delineating the parties' rights with regards to executions, the trial court did not erroneously decide a question of fact or a mixed question of law and fact because the trial court's order stated no findings of fact, and its decision did not determine or rest upon any disputed facts but solely upon declarations and conclusions of law. N.C. Dep't of Corr. v. N.C. Med. Bd., 363 N.C. 189, 675 S.E.2d 641, 2009 N.C. LEXIS 349 (2009).

IV. AMENDMENT.

The primary purpose of section (b) of this rule is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court. Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978).

Section (b) of this rule mirrors FRCP, Rule 52(b); thus federal court decisions are pertinent. Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978).

Section (b) Motion Not Barred by Notice of Appeal. — Although the general rule has been that a timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court, a notice of appeal will not bar a party from making a timely motion pursuant to section (b) of this rule. Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978).

As Defendant Is Not Prejudiced Thereby. — The rule that a timely motion under section (b) of this rule will be allowed despite a prior notice of appeal does not prejudice a defendant because he does not lose his right of appeal, as N.C.R.A.P., Rule 3(c), provides that a motion pursuant to section (b) of this rule tolls the 10-day period for notice of appeal. Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978).

Section (b) Inapplicable to Interlocutory Orders. — Section (b) of this rule concerns amendments to the findings and conclusions relating to a final judgment, and has no application with respect to interlocutory orders where findings and conclusions are neither made nor required. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Jurisdiction of Trial Court. — The trial court is not divested of jurisdiction to hear and rule on a motion under section (b) of this rule, even though notice of appeal has been given. York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

Where notice of appeal from default judgment for defendants with respect to plaintiff's claim and defendants' counter-claim against plaintiff was filed at the same time as plaintiff's motion under section (b) of this rule for amended and additional findings of fact and his Rule 60(b) motion for relief from judgment under G.S. 1A-1, Rule 60(b), under the circumstances of the case the trial court had jurisdiction to rule on plaintiff's motion under G.S. 1A-1, Rule 60(b). York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

Refusal to Consider Affidavit After Hearing on Motion to Amend. — In action for modification of child custody and child support, the trial court did not abuse its discretion in refusing to consider the affidavit of the child, where the affidavit was offered after defendant's motion to amend the judgment under section (b) of this section had been heard and without notice to plaintiff, and defendant sought only to amend the judgment based on the insufficiency of the evidence already offered and errors of law which occurred during trial under G.S. 1A-1, Rule 59(a)(7) and (a)(8). Payne v. Payne, 91 N.C. App. 71, 370 S.E.2d 428 (1988).

Trial court did not err by denying a motion to amend the findings of fact, make additional findings of fact, and amend its order because the trial court made 27 findings of fact and 9 conclusions of law supporting the trial court's determination that a landower did not dedicate a right-of-way to the public. DOT v. Elm Land Co., 163 N.C. App. 257, 593 S.E.2d 131, 2004 N.C. App. LEXIS 383 (2004), cert. denied, 358 N.C. 542, 599 S.E.2d 42 (2004).

V. REVIEW ON APPEAL.

Section (c) of this rule is nearly identical to FRCP, Rule 52(b), and the court may therefore turn to the federal courts' interpretation of that rule for guidance. Whitaker v. Earnhardt, 289 N.C. 260, 221 S.E.2d 316 (1976).

Standard of Review. — Where a trial court sitting without a jury makes findings of fact, the sufficiency of those facts to support the judgment may be raised on appeal. The standard of review for those findings is whether any competent evidence exists in the record to support them. Hollerbach v. Hollerback, 90 N.C. App. 384, 368 S.E.2d 413 (1988).

Findings of fact made pursuant to a G.S. 1A-1, N.C. R. Civ. P. 52(a)(2) motion need only be sufficiently detailed to allow for meaningful appellate review, so when an appellate court examines a trial court's decision concerning whether to award attorney's fees, it requires more than mere recitation by the trial court that it has considered all the required factors. However, the trial court is not required to make detailed findings of fact as to each factor and it is required only to make the additional findings necessary to preserve its ruling on appeal. House v. Stone, 163 N.C. App. 520, 594 S.E.2d 130, 2004 N.C. App. LEXIS 507 (2004).

Review Without Excepting to Findings at Trial. — Section (c) of this rule allows a party to seek appellate review on the question of whether the evidence supported the findings of fact without excepting at trial to the judge's findings, but in the record on appeal it is incumbent upon appellant to assign error so as to outline his objections on appeal. Sharpe v. Park Newspapers of Lumberton, Inc., 317 N.C. 579, 347 S.E.2d 25 (1986).

Review Even Where Defendant Failed to Request Specific Findings. — The court's failure to make specific findings and any miscalculation in the findings were reviewable under this rule on appeal despite failure of defendant to request specific or different findings. Davis v. Taylor, 81 N.C. App. 42, 344 S.E.2d 19, cert. denied, 318 N.C. 414, 349 S.E.2d 593 (1986).

Foreign judgment that the judgment creditor obtained in New York was entitled to a presumption that the judgment was entitled to full faith and credit, as the judgment creditor met its burden of showing that entitlement by filing a properly authenticated judgment; however, the general contractor timely moved for relief from the foreign judgment by raising the defense that the New York trial court that entered it did not have personal jurisdiction over the general contractor, and because the trial court did not make any findings of fact or conclusions of law regarding the motion to enforce the judgment, the conclusion that the foreign judgment was enforceable in North Carolina was not supported by competent evidence and the case had to be remanded to the trial court for further proceedings. Quantum Corp. Funding, Ltd. v. B.H. Bryan Bldg. Co., 175 N.C. App. 483, 623 S.E.2d 793, 2006 N.C. App. LEXIS 187 (2006).

Facts Justifying Reversal Not Found. — Finding of the trial court that an attorney was negligent in failing to mail notices of a sale of land to all co-tenants who owned the land after the lawyer sold the land as a commissioner of the court in a partition action would not be reversed on appeal as sufficient evidence supported the findings. Goodson v. Goodson, 145

N.C. App. 356, 551 S.E.2d 200, 2001 N.C. App. LEXIS 656 (2001).

Conclusory Findings Were Insufficient. — Judgment granting a summary judgment divorce was vacated as a conclusory finding was made that a wife had been properly served and that the trial court had jurisdiction over her, without making the findings necessary to support the conclusions, despite the facts that: (1) the husband attempted to serve the complaints on the wife at two different addresses, (2) the husband's affidavit of service by publication failed to state that the husband mailed a notice of service by publication to the wife before the first publication, and (3) the husband mailed the notice of hearing to the wife at a different address than he used during the second attempt at service of the complaint; no findings were made as to the use of service by publication by the husband or his due diligence in attempting to serve the wife, or that the husband was not required to mail notice of the service by publication to the wife before the first publication. Agbemavor v. Keteku, 177 N.C. App. 546, 629 S.E.2d 337, 2006 N.C. App. LEXIS 1074 (2006).

VI. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-184 and 1-185.*

Guardian ad litem and his attorney may waive jury trial. Blades v. Spitzer, 252 N.C. 207, 113 S.E.2d 315 (1960).

Waiver by Consent to Pay Additur. — While it may be suggested that the practice of additur deprives a defendant of his constitutional right to a jury trial, guaranteed by N.C. Const., Art. I, § 19, the obvious answer is that the defendant can waive that right, which he does when he consents to pay the additur, since in this State the parties to a civil action have a right to waive a jury trial. Caudle v. Swanson, 248 N.C. 249, 103 S.E.2d 357 (1958).

Waiver of trial by jury invests the trial judge with the dual capacity of judge and juror. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962). See also, Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

Waiver of a jury trial invests the trial judge with the dual capacity of judge and juror, and it is his duty to weigh the evidence, find the facts, and upon the conflicting inferences of causation of plaintiff's injuries, to draw the inferences; the ultimate issue is for him. Taney v. Brown, 262 N.C. 438, 137 S.E.2d 827 (1964).

Effect of submission to the judge is to invest him with the dual capacity of judge and juror. He is to hear the evidence and pass upon its competency and admissibility as judge, and determine its weight and sufficiency as juror. Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

Order Determining Issue of Fact Held Improper Absent Waiver of Jury Trial. — Where there was nothing in the record to indicate that petitioner and respondent waived their constitutional and statutory right to have the issue of fact joined on the pleadings tried by a jury, and there was no question of reference, judge had no authority to enter an order affirming the order of the assistant clerk of the superior court, which in effect was a determination by the judge of the issue of fact raised by the pleadings and a finding by him that money deposited in the office of the clerk of the superior court belonged to a decedent and that said money be distributed to the administrator c.t.a. of her last will and testament. In re Estate of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).

The judge who tries an issue of fact is required to do three things: (1) To find the facts on the issue of fact submitted to him; (2) to declare the conclusions of law arising on the facts found by him; and (3) to adjudicate the rights of the parties accordingly. Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951); Bradham v. Robinson, 236 N.C. 589, 73 S.E.2d 555 (1952); Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957); Morehead v. Harris, 255 N.C. 130, 120 S.E.2d 425 (1961).

Where a jury trial is waived by the parties to a civil action, the judge who tries the case is required to do three things: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising upon the facts found; and (3) to enter judgment accordingly. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

It is the duty of the trial judge to consider and weigh all competent evidence before him. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

When trial by jury is waived, it is the trial judge's right and duty to consider and weigh all the competent evidence before him, giving to it such probative value as in his sound discretion and opinion it is entitled to. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

And to Draw Reasonable Inferences. — When a trial by jury is waived, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

The trial judge determines which inferences shall be drawn and which shall be rejected if different inferences may be drawn from the evidence. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

The trial judge passes upon the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn therefrom. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

When trial by jury is waived, it is the trial judge's province to determine the credibility of the witnesses, the weight to be attached to their testimony, and the inferences legitimately to be drawn therefrom, in exactly the same sense that a jury should do in the trial of a case. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

There are two kinds of facts, ultimate facts and evidentiary facts. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

Evidentiary facts are those subsidiary facts required to prove the ultimate facts. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

The trial judge is required to find and state the ultimate facts only. Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense, while evidentiary facts are those subsidiary facts required to prove the ultimate facts. The trial judge is required to find and state the ultimate facts only. Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951). See also, St. George v. Hanson, 239 N.C. 259, 78 S.E.2d 885 (1954); Reid v. Johnston, 241 N.C. 201, 85 S.E.2d 114 (1954).

The trial judge is required to find and state the ultimate facts only, and not the evidentiary or subsidiary facts required to prove the ultimate facts. Bridges v. Jackson, 255 N.C. 333, 121 S.E.2d 542 (1961).

In a trial by the court under agreement of the parties, the court is required to find and state only the ultimate facts. McCallum v. Old Republic Life Ins. Co., 262 N.C. 375, 137 S.E.2d 164 (1964).

Findings of Fact and Conclusions of Law to Be Stated Separately. — When trial by jury is waived and issues of fact are tried by the court, the court is required to give its decision with its findings of fact and conclusions of law stated separately. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968); Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

A judge of the superior court, in passing upon a mixed question of law and fact, should state the facts found and the conclusions of law separately. Foushee v. Pattershall, 67 N.C. 453 (1872); Walker v. Walker, 204 N.C. 210, 167 S.E. 818 (1933). See also, Harrison v. Brown, 222 N.C. 610, 24 S.E.2d 470 (1943); Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951); Bradham v. Robinson, 236 N.C. 589, 73 S.E.2d 555 (1952).

Where the parties waive jury trial and agree to trial by the court, it is preferable that the court make separate findings of fact and conclusions of law rather than render a verdict on issues submitted to itself. Wynne v. Allen, 245 N.C. 421, 96 S.E.2d 422 (1957).

In Such a Manner as to Render Them Distinguishable. — The judge complies with the requirement that he state his findings of fact and conclusions of law separately if he separates the findings and the conclusions in such a manner as to render them distinguishable, no matter how the separation is effected. Woodard v. Mordecai, 234 N.C. 463, 67 S.E.2d 639 (1951); Watts v. Superintendent of Bldg. Inspection, 1 N.C. App. 292, 161 S.E.2d 210 (1968).

Judgment of Nonsuit as Sufficient Finding of Fact. — Where a cause was heard by the court by consent, its written judgment granting defendant's motion as of nonsuit was equivalent to a finding that all the evidence, considered in the light most favorable to plaintiffs, was insufficient to show facts entitling plaintiffs to recover on any issue raised by the pleadings, and was a sufficient finding of facts by the court. Home Real Estate Loan & Ins. Co. v. Town of Carolina Beach, 216 N.C. 778, 7 S.E.2d 13 (1940); Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957).

Compliance Sufficient. — Where the court fully and completely set out the facts found by him and rendered judgment thereon, an exception that the court did not state his findings of fact and conclusions of law separately could not be sustained, since the judgment constituted the court's conclusion of law on the facts found. Dailey v. Washington Nat'l Ins. Co., 208 N.C. 817, 182 S.E. 332 (1935).

The decision of the judge in writing, with a separate statement of his findings of fact and conclusions of law, is sufficient. Eley v. Atlantic Coast Line R.R., 165 N.C. 78, 80 S.E. 1064 (1914).

For case holding statements of facts found by court insufficient, see Jamison v. City of Charlotte, 239 N.C. 423, 79 S.E.2d 797 (1954).

Where the court does nothing more than indicate from what source facts may be gleaned, this is not a sufficient compliance with the requirement that the court's decision shall contain a statement of the facts found. Shore v. Norfolk Nat'l Bank of Commerce, 207 N.C. 798, 178 S.E. 572 (1935).

Verdict on Issues Submitted by Court to Itself. — Except in a small claim action, it is irregular for the court, in a trial by the court under agreement of the parties, to render a verdict on issues submitted to itself. Anderson

v. Cashion, 265 N.C. 555, 144 S.E.2d 583 (1965).

Unless the action is a small claim, it is irregular for the court to render a verdict on issues submitted to itself. Sherrill v. Boyce, 265 N.C. 560, 144 S.E.2d 596 (1965).

Where jury trial is waived and the court acts both as judge and jury, it is irregular for the court to render a verdict on issues submitted to itself, but in the absence of objection and exception, a new trial will not be ordered for this cause if from the judgment it can be determined what the court found the ultimate facts to be and what the legal basis of the judgment was. Daniels v. Nationwide Mut. Ins. Co., 258 N.C. 660, 129 S.E.2d 314 (1963).

Failure of judge to sign his findings of fact and incorporate them into the formal judgment rendered in the cause did not render judgment void where there was a substantial compliance with the statute. Bradham v. Robinson, 236 N.C. 589, 73 S.E.2d 555 (1952).

Dictation of Findings to Court Reporter. — Where the judge dictated his findings to the court reporter and caused the reporter to transcribe them, this amounted to a finding of the facts by the judge in writing. Bradham v. Robinson, 236 N.C. 589, 73 S.E.2d 555 (1952).

As to trial of a case on an agreed statement of facts, see U Drive It Auto Co. v. Atlantic Fire Ins. Co., 239 N.C. 416, 80 S.E.2d 35 (1954); Competitor Liaison Bureau of NASCAR, Inc. v. Midkiff, 246 N.C. 409, 98 S.E.2d 468 (1957).

Court's Findings of Fact Have the Effect of a Jury Verdict. — Upon waiver of jury trial, the court's findings of fact have the force and effect of a verdict by jury. State Trust Co. v. M & J Fin. Corp., 238 N.C. 478, 78 S.E.2d 327 (1953); Textile Ins. Co. v. Lambeth, 250 N.C. 1, 108 S.E.2d 36 (1959); Sherrill v. Boyce, 265 N.C. 560, 144 S.E.2d 596 (1965); Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

And Are Conclusive If Supported by Competent Evidence. — Where the parties consent to trial by the court without a jury, the findings of the court are as conclusive as a verdict of the jury if supported by competent evidence. Poole v. Gentry, 229 N.C. 266, 49 S.E.2d 464 (1948); Town of Burnsville v. Boone, 231 N.C. 577, 58 S.E.2d 351 (1950); Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957); Everette v. D.O. Briggs Lumber Co., 250 N.C. 688, 110 S.E.2d 288 (1959).

When a trial by jury has been waived by the parties, the judge's findings of fact are conclusive on appeal if there is evidence to support them. Yarborough v. Moore, 151 N.C. 116, 65 S.E. 763 (1909); Eley v. Atlantic Coast Line R.R., 165 N.C. 78, 80 S.E. 1064 (1914). See Fish v. Hanson, 223 N.C. 143, 25 S.E.2d 461 (1943); State Trust Co. v. M & J Fin. Corp., 238 N.C. 478, 78 S.E.2d 327 (1953); Priddy v. Kernersville Lumber Co., 258 N.C. 653, 129 S.E.2d 256 (1963).

Findings of fact by the court are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29 (1968).

And Will Not Be Disturbed on Appeal. — Findings of fact by the court, when a jury trial has been waived by consent, will not be disturbed on appeal, if based upon competent evidence. Fish v. Hanson, 223 N.C. 143, 25 S.E.2d 461 (1943); Turnage Co. v. Morton, 240 N.C. 94, 81 S.E.2d 135 (1954); Reid v. Johnston, 241 N.C. 201, 85 S.E.2d 114 (1954).

Presumption That Findings Are Supported by Competent Evidence. — Where the parties waive a jury trial and there are no exceptions to the findings of fact by the judge, it will be presumed that they are supported by competent evidence, and they will be binding on appeal. Tanner v. Ervin, 250 N.C. 602, 109 S.E.2d 460 (1959), cert. denied, 361 U.S. 948, 80 S. Ct. 401, 4 L. Ed. 2d 381 (1960).

What Question Presented on Exception to Judgment Only. — An exception to a judgment rendered in a trial by the court, without exception to the evidence or the court's findings of fact, presents the sole question of whether the facts found support the judgment. Best v. Garris, 211 N.C. 305, 190 S.E. 221 (1937).

Question on Appeal of Judgment of Nonsuit. — Where, upon waiver of jury trial, the court made no specific findings of fact, but entered judgment of involuntary nonsuit, the only question presented was whether the evidence, taken in the light most favorable to plaintiff, would support findings of fact upon which plaintiff could recover. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); DeBruhl v. L. Harvey & Son Co., 250 N.C. 161, 108 S.E.2d 469 (1959); Oldham & Worth, Inc. v. Bratton, 263 N.C. 307, 139 S.E.2d 653 (1965).

Affirmation of Judgment on Failure to Except. — Where the court simply responded formally to the issues and directed judgment, to which no exception was taken, and no assignment of error was made, the judgment would be affirmed. Parks v. Davis, 98 N.C. 481, 4 S.E. 202 (1887).

Rule 53. Referees.

(a) *Kinds of reference.* —

(1) By Consent. — Any or all of the issues in an action may be referred upon the written consent of the parties except in actions to annul a marriage, actions for divorce, actions for divorce from bed and board, actions for alimony without the divorce or actions in which a ground of annulment or divorce is in issue.

(2) Compulsory. — Where the parties do not consent to a reference, the court may, upon the application of any party or on its own motion, order a reference in the following cases:

a. Where the trial of an issue requires the examination of a long or complicated account; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.

b. Where the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

c. Where the case involves a complicated question of boundary, or requires a personal view of the premises.

d. Where a question of fact arises outside the pleadings, upon motion or otherwise, at any stage of the action.

(b) *Jury trial.* —

(1) Where the reference is by consent, the parties waive the right to have any of the issues within the scope of the reference passed on by a jury.

(2) A compulsory reference does not deprive any party of his right to a trial by jury, which right he may preserve by

a. Objecting to the order of compulsory reference at the time it is made, and

b. By filing specific exceptions to particular findings of fact made by the referee within 30 days after the referee files his report with the clerk of the court in which the action is pending, and

c. By formulating appropriate issues based upon the exceptions taken and demanding a jury trial upon such issues. Such issues shall be tendered at the same time the exceptions to the referee's report are filed. If there is a trial by jury upon any issue referred, the trial shall be only upon the evidence taken before the referee.

(c) *Appointment.* — The parties may agree in writing upon one or more persons not exceeding three, and a reference shall be ordered to such person or persons in appropriate cases. If the parties do not agree, the court shall appoint one or more referees, not exceeding three, but no person shall be appointed referee to whom all parties in the action object.

(d) *Compensation.* — The compensation to be allowed a referee shall be fixed by the court and charged in the bill of costs. After appointment of a referee, the court may from time to time order advancements by one or more of the parties of sums to be applied to the referee's compensation. Such advancements may be apportioned between the parties in such manner as the court sees fit. Advancements so made shall be taken into account in the final fixing of costs and such adjustments made as the court then deems proper.

(e) *Powers.* — The order of reference to the referee may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the referee's report. Subject to the specifications and limitations stated in the order, every referee has power to administer oaths in any proceeding before him, and has generally the power vested in a referee by law. The referee shall have the same power to grant adjournments and to allow amendments to pleadings and to the summons as the judge and upon the same terms and with like effect. The referee shall have the same power as the judge to preserve order and punish all violations thereof, to compel the attendance of witnesses before him by attachment, and to punish them as for contempt for nonattendance or for refusal to be sworn or to testify. The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in Rule 45.

(f) *Proceedings.* —

(1) Meetings. — When a reference is made, the clerk shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the referee to proceed with all reasonable diligence. Any party, on notice to all other parties and the referee, may apply to the court for an order requiring the referee to expedite the proceedings and to make his report. If a party fails to appear at the time and place appointed, the referee may proceed ex parte, or, in his discretion, may adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Statement of Accounts. — When matters of accounting are in issue before the referee, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant or other qualified accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished, or the accounts of specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(3) Testimony Reduced to Writing. — The testimony of all witnesses must be reduced to writing by the referee, or by someone acting under his direction and shall be filed in the cause and constitute a part of the record.

(g) *Report.* —

(1) Contents and Filing. — The referee shall prepare a report upon the matters submitted to him by the order of reference and shall include therein his decision on all matters so submitted. If required to make findings of fact and conclusions of law, he shall set them forth separately in the report. He shall file the report with the clerk of the court in which the action is pending and unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. Before filing his report a referee may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions. The clerk shall forthwith mail to all parties notice of the filing.

(2) Exceptions and Review. — All or any part of the report may be excepted to by any party within 30 days from the filing of the report. Thereafter, and upon 10 days' notice to the other parties, any party may apply to the judge for action on the report. The judge after hearing may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions. No judgment may be rendered on any reference except by the judge. (1967, c. 954, s. 1; 1969, c. 895, s. 13.)

COMMENT

Comment to this Rule as Originally Enacted. — Generally, the rules leave the reference practice as it was. But some changes are made.

Section (a). — The Commission has included all of the grounds for compulsory reference found in former § 1-189 except that providing for reference in actions "of which the courts of equity . . . had exclusive jurisdiction" prior to 1868.

Section (b). — In keeping with prior practice, the rule affirms the right of jury trial in compulsory reference cases. It goes further, and spells out, as former §§ 1-188 to 1-195 did not, just how the right of jury trial is to be preserved. The method of preserving jury trial is essentially the same as that required by the case law. See Bartlett v. Hopkins, 235 N.C. 165, 69 S.E.2d 236 (1952).

Section (c). — This section essentially makes no change.

Section (d). — The Commission thought it would be useful to include, as former §§ 1-188 to 1-195 did not, some details in respect to the compensation of referees.

Section (e). — The first sentence specifying the allowable flexibility in the order of reference is new. So far as the powers of the referee are concerned, they remain essentially unchanged except as enlarged by section (f).

Section (f). — Former §§ 1-188 to 1-195 contained no equivalent to subsection (2) but the Commission believes the new authority will be useful.

Section (g). — Here, for purposes of clarity, the rules goes into more detail than did former §§ 1-188 to 1-195 but the main outlines of the prior practice are retained.

Comment to the 1969 amendment. — *Section (a).* — Rule 53(a) previously provided that all issues in an action may be referred upon the written consent of the parties except in actions to annul a marriage, and actions for divorce and separation.

There being no such action as an "action for divorce and separation," this ground has been deleted. The 1969 amendment added to the list: actions for divorce, actions for divorce from bed and board, actions for alimony without the divorce or actions in which a ground of annulment or divorce is in issue. This language now conforms to previous rules concerning reference in domestic relations cases.

Legal Periodicals. — For article on legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For survey of 1982 family law, see 61 N.C.L. Rev. 1155 (1983).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For note, "Rent-A-Judges and the Cost of Selling Justice," see 44 Duke L.J. 166.

CASE NOTES

I. In General.
II. Jury Trial.
III. Decisions under Prior Law.
  A. In General.
  B. Jury Trial.

I. IN GENERAL.

The word "may," as used in section (a) of this rule, connotes permissive and not mandatory power in the court to grant a reference. Green Hi-Win Farm, Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

To Whom Reference Is "Compulsory". — Once a court orders a reference, whether upon application by any party or on its own motion, it is "compulsory" only as to the parties to the processioning action. Green Hi-Win Farm, Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

The ordering of a reference is within the sound discretion of the court. Livermon v. Bridgett, 77 N.C. App. 533, 335 S.E.2d 753 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

The ordering or refusal to order a compulsory reference is a matter within the discretion of the trial judge. Vick v. Vick, 80 N.C. App. 697, 343 S.E.2d 245, cert. denied, 317 N.C. 341, 346 S.E.2d 149 (1986).

Ordering Reference in Boundary Dispute Case. — Where the pleadings showed a potentially complicated boundary dispute in which one side claimed the boundaries were not as stated in the deeds but were marked by known and visible boundaries on the ground, and a view of the premises would, therefore, be helpful, there was no abuse of discretion by the trial court in ordering the reference. Livermon v. Bridgett, 77 N.C. App. 533, 335 S.E.2d 753 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

Reference in Adverse Possession Case. — Possessor was not prejudiced by the trial court's compulsory reference of the adverse possession case pursuant to G.S. 1A-1, N.C. R. Civ. P. 53(a)(2); on appeal of the referee's decision, the trial court made an independent assessment of the evidence that was presented to the referee. Dockery v. Hocutt, 153 N.C. App. 744, 571 S.E.2d 81, 2002 N.C. App. LEXIS 1267 (2002).

Trial court's reference of an adverse possession matter was not error because it could be said that the matter involved a complicated boundary question or require a personal view, as the irregularly shaped disputed parcel was surrounded by no less than 12 discrete lots, and the location of known and visible lines and boundaries marking the land adversely possessed was the complicated question of boundary required by subdivision (a)(2)(c) of this rule as a basis for reference. Dockery v. Hocutt, 357 N.C. 210, 581 S.E.2d 431, 2003 N.C. LEXIS 596 (2003).

The duty and powers of the referee are not inherent but are determined by the order of the judge. Godwin v. Clark, Godwin, Harris & Li, 40 N.C. App. 710, 253 S.E.2d 598, cert. denied and appeal dismissed, 297 N.C. 698, 259 S.E.2d 295 (1979).

Generally, the powers of a referee are governed by the order of reference. Davis v. Davis, 58 N.C. App. 25, 293 S.E.2d 268, cert. denied, 307 N.C. 127, 297 S.E.2d 399 (1982).

The referee has authority to resolve issues not contained in the pleadings at any stage of the action. Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

Referee Not Required to Conduct Hearings, etc. — This rule does not require that the referee conduct hearings, examine witnesses under oath, admit exhibits into evidence, prepare a record, make definite findings of fact or conduct an audit before making the valuation. Godwin v. Clark, Godwin, Harris & Li, 40 N.C. App. 710, 253 S.E.2d 598, cert. denied and appeal dismissed, 297 N.C. 698, 259 S.E.2d 295 (1979).

Consent Generally Necessary to Vacate Reference by Consent. — Once a reference has been ordered with the consent of both parties, the trial court may not revoke it absent the consent of all parties. Reeves v. Musgrove, 39 N.C. App. 43, 249 S.E.2d 455 (1978).

Either party has a right to have the order carried into effect and complied with by a full report of the referee, and further action by the court can only be had upon such report. Reeves v. Musgrove, 39 N.C. App. 43, 249 S.E.2d 455 (1978).

Trial of Issues on Failure of Report to Determine Them. — If the issues are presented to the referee, but his report does not determine them, the trial court may properly choose not to again submit the issues to a referee. It then becomes incumbent upon the trial court to try these issues. Reeves v. Musgrove, 39 N.C. App. 43, 249 S.E.2d 455 (1978).

Where the trial of an issue requires the examination of a complicated account the trial court may, upon its own motion, order a reference. Porter Bros. v. Jones, 11 N.C. App. 215, 181 S.E.2d 177 (1971).

What Constitutes a "Long Account". — There is no statutory or judicial definition of a long account. It is clear, however, that the exact words of the statute do not characterize a case for compulsory reference, and that a long account does not restrict the reference to an action on an account. Synco, Inc. v. Headen, 47 N.C. App. 109, 266 S.E.2d 715, cert. denied, 301 N.C. 238, 283 S.E.2d 135 (1980).

The referee in a compulsory reference is required to file a transcript of the evidence with his report, and the referee's notes summarizing the testimony of the witnesses in the hearing before him are not a proper substitute for the transcript of the evidence. Synco, Inc. v. Headen, 47 N.C. App. 109, 266 S.E.2d 715, cert. denied, 301 N.C. 238, 283 S.E.2d 135 (1980).

The parties were entitled to have all appropriate issues determined by the jury upon the report of the referee with the transcript of the evidence, unless the parties agreed that the report would be accompanied by the referee's notes without a transcript of the evidence. Synco, Inc. v. Headen, 47 N.C. App. 109, 266 S.E.2d 715, cert. denied, 301 N.C. 238, 283 S.E.2d 135 (1980).

Costs of Transcript. — It is the duty of the referee in a compulsory reference, with the assistance of the trial court if needed, to have the reporter who recorded the hearing testimony submit a copy or copies of the transcript of evidence at the hearing, and any controversy as to the cost of the transcript was not a private matter between the parties to the action but was a question for determination by the referee and the trial court. Synco, Inc. v. Headen, 47 N.C. App. 109, 266 S.E.2d 715, cert. denied, 301 N.C. 238, 283 S.E.2d 135 (1980).

In the absence of exceptions to the factual findings of a referee, such findings

are conclusive, and where no exceptions are filed, the case is to be determined upon the facts as found by the referee. State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 233 (1981); State ex rel. Gilchrist v. Cogdill, 74 N.C. App. 133, 327 S.E.2d 647 (1985).

Review of Referee's Findings and Conclusions. — The unambiguous wording of subsection (g)(2) of this rule reveals the options available to a judge with respect to a report filed after a hearing; there is nothing in the plain language thereof which could infer a mandatory review of the referee's findings of fact and conclusions of law. However, when exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. Quate v. Caudle, 95 N.C. App. 80, 381 S.E.2d 842, cert. denied, 325 N.C. 709, 388 S.E.2d 462 (1989).

Where court affirmed in part and modified in part the referee's report, the modification clearly established that the presiding judge made a review of the referee's findings pursuant to subsection (g)(2) of this rule; therefore, defendant's argument to the contrary was without merit. Quate v. Caudle, 95 N.C. App. 80, 381 S.E.2d 842, cert. denied, 325 N.C. 709, 388 S.E.2d 462 (1989).

Arguments Before Trial Court. — In a contract action, when the matter was referred to a referee, the trial court erred, under G.S. 1A-1, N.C. R. Civ. P. 53(g)(2), when, in considering the referee's report, it did not consider the evidence submitted to the referee and, instead, relied on the parties' arguments before the trial court. Gaynor v. Melvin, 155 N.C. App. 618, 573 S.E.2d 763, 2002 N.C. App. LEXIS 1586 (2002).

Only Judge Has Authority to Enter Judgment upon Reference. — Where the referee made findings of fact and conclusions of law and purported to enter a judgment against defendant, and the superior court judge confirmed the referee's report but did not enter a judgment on the approved findings and conclusions, the cause would be remanded to the superior court for entry of a proper judgment, since only the judge, and not the referee, has authority to enter judgment upon a reference. Rouse v. Wheeler, 17 N.C. App. 422, 194 S.E.2d 555 (1973).

Adoption of Referee's Report. — In the context of a compulsory reference under subdivision (g)(2) of this rule, a trial court cannot adopt in full a referee's report containing findings of fact requiring assessment of witnesses' credibility, however, the trial court must evaluate the evidence to determine if, taken in the light most favorable to the party demanding jury trial, the evidence is sufficient to support that party's claim, and, if the evidence is insufficient as a matter of law to support the party's claim, the trial court may modify the report by striking the offending findings of fact and making its own conclusions, adopt the report in part exclusive of those findings of fact and make its own conclusions, or reject the report and then enter judgment. Dockery v. Hocutt, 357 N.C. 210, 581 S.E.2d 431, 2003 N.C. LEXIS 596 (2003).

When an appellate court finds a referee's report to be faulty and remands the case, the trial court may again order a reference or make its own findings. Reeves v. Musgrove, 39 N.C. App. 43, 249 S.E.2d 455 (1978).

Applied in Davis v. Hall, 80 N.C. App. 532, 342 S.E.2d 576 (1986).

Cited in Dawson v. Sugg, 32 N.C. App. 650, 233 S.E.2d 639 (1977); Crutchley v. Crutchley, 301 N.C. 518, 293 S.E.2d 793 (1982); Brown v. Brown, 112 N.C. App. 15, 434 S.E.2d 873 (1993); Sharp v. Gulley, 120 N.C. App. 878, 463 S.E.2d 577 (1995).

II. JURY TRIAL.

A compulsory reference does not deprive one of the right to trial by jury. — Resort Dev. Co. v. Phillips, 9 N.C. App. 158, 175 S.E.2d 782 (1970), modified on other grounds, 278 N.C. 69, 178 S.E.2d 813 (1971).

A compulsory reference, under provisions of former G.S. 1-189, did not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial was only upon the written evidence taken before the referee. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Subsection (b)(2) of this rule provides that a reference does not deprive a party of a jury trial and sets out the steps to be followed to preserve the right. Porter Bros. v. Jones, 11 N.C. App. 215, 181 S.E.2d 177 (1971).

Test to Determine Demand for Jury Trial. — Following a compulsory reference, the test to determine a demand for jury trial is the same as that for a motion for directed verdict pursuant to G.S. 1A-1, Rule 50. Dockery v. Hocutt, 357 N.C. 210, 581 S.E.2d 431, 2003 N.C. LEXIS 596 (2003).

Preservation of Right to Jury Trial. — When the referee's report is adverse to a party, that party may preserve his right to jury trial pursuant to section (b) of this rule. Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

Waiver of Right to Jury Trial. — In a contract action, an employee waived his right to a jury trial when the matter was referred to a referee and the employee did not object to the order of reference, under G.S. 1A-1, N.C. R. Civ. P. 53(b)(2). Gaynor v. Melvin, 155 N.C. App. 618, 573 S.E.2d 763, 2002 N.C. App. LEXIS 1586 (2002).

Right to Jury Trial Only If Evidence Raises Fact Issue. — Although when a court orders a compulsory reference, a party preserves his right to trial by complying with the procedural steps outlined in this rule, the party is entitled to trial by jury only if the evidence before the referee was sufficient to raise an issue of fact. Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

Only Evidence Taken Before Referee to be Used in Jury Trial. — Subdivision (b)(2)(c) provides that if there is a trial by jury upon any issue referred, the trial will be only upon the evidence taken before the referee, so, when a trial court reviews a referee's order, the claimant has been put to the full burden of proof; and the trial court had before it all the testimony, including cross-examination, not merely a forecast of the evidence, and, given the limitation imposed by subdivision (b)(2)(c), the trial court, in ruling on a party's demand for jury trial following a compulsory reference, is in a position analogous to that of a trial judge in ruling on a motion for directed verdict pursuant to G.S. 1A-1, Rule 50 at the close of all evidence. Dockery v. Hocutt, 357 N.C. 210, 581 S.E.2d 431, 2003 N.C. LEXIS 596 (2003).

Right to Jury Trial in Quiet Title Action. — In an action to quiet title to 48.7 acres of land, where evidence taken by referee raised factual issues regarding the respective parties' actual possession of the disputed land, which issues were material to a resolution of the case, it was for the jury to decide, under proper instructions, whether the acts shown by the evidence constituted open, notorious and adverse possession. Federal Paper Bd. Co. v. Hartsfield, 87 N.C. App. 667, 362 S.E.2d 169 (1987).

Failure to Formulate Appropriate Issues Based on Exceptions as Waiver of Jury Trial. — Having failed to formulate appropriate issues based upon the exceptions taken, defendants waived their right to jury trial. Porter Bros. v. Jones, 11 N.C. App. 215, 181 S.E.2d 177 (1971).

Defendants did not waive their right to jury trial on the true boundary line between the lands of the parties by failing to make exceptions to specified findings of fact by the referee where exceptions which defendants did make were sufficient to give plaintiff notice and to present the issue in dispute to the court. Mathias v. Brumsey, 27 N.C. App. 558, 219 S.E.2d 646 (1975), cert. denied, 289 N.C. 140, 220 S.E.2d 798 (1976).

III. DECISIONS UNDER PRIOR LAW.

A. In General.

Editor's Note. *— The cases cited below were decided under former G.S. 1-188 through 1-190, 1-192 and 1-195.*

Effect on Common-Law Arbitration. — The provisions of the Code of Civil Procedure did not repeal the common-law practice of reference to arbitrators. Keener v. Goodson, 89 N.C. 273 (1883).

When Order of Reference Permitted. — No order of reference, either by consent or otherwise, should be permitted by the court until the pleadings are in and the parties are at issue. Crew v. Thompson, 266 N.C. 476, 146 S.E.2d 471 (1966).

Reference Does Not Deprive Court of Jurisdiction. — Sending a case to be tried by a referee does not deprive the court of its jurisdiction, and it can make any and all necessary orders therein pending trial before the referee. McNeill v. Lawton, 97 N.C. 16, 1 S.E. 493 (1887).

A referee has no inherent or original powers and can only do those things expressly enumerated, and such as he is authorized to do by the court which sends him the case. Jones v. Beaman, 117 N.C. 259, 23 S.E. 248 (1895).

Referee May Allow Amendments and Make New Parties. — The authority of the referee to allow amendments to pleadings and to make new parties was expressly given by former G.S. 1-192. Sheffield v. Alexander, 194 N.C. 744, 140 S.E. 726 (1927), citing Koonce v. Pelletier, 115 N.C. 233, 20 S.E. 391 (1894); Blanton v. Bostic, 126 N.C. 418, 35 S.E. 1035 (1900); Rosenbacher & Bro. v. Martin, 170 N.C. 236, 86 S.E. 785 (1915).

A referee has power to admit new parties to an action. Perkins v. Berry, 103 N.C. 131, 9 S.E. 621 (1889).

But May Not Allow Filing of Answer Absent Consent. — While a referee may allow amendments to pleadings, he is not authorized to allow a defendant who has not previously done so to file an answer, except by consent. Jones v. Beaman, 117 N.C. 259, 23 S.E. 248 (1895).

Notice Held Ineffective to Bring Surety into Court. — A notice issued by a referee and served upon a surety on an administrator's bond to appear before him, no order having been made to make such surety a party, was not a legal process effective to bring him into court. Koonce v. Pelletier, 115 N.C. 233, 20 S.E. 391 (1894).

To review the action of the referee in permitting amendments to pleadings and the making of new parties, and to contend successfully on appeal that there was a misjoinder of parties and causes of action, it is required that the appellant should have excepted in apt time and have preserved his exceptions or they will not be considered on appeal. Sheffield v. Alexander, 194 N.C. 744, 140 S.E. 726 (1927).

Power to Enforce Rulings. — The referee has power to enforce obedience to the rulings on the trial of the issues before him, just as the court would have upon the trial before it. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

What May Be Referred by Consent. — All or any of the issues in an action may be referred by consent of the parties. Lusk v. Clayton, 70 N.C. 184 (1874).

No Appeal from Decision as to Issues Referred by Consent. — Upon a consent reference to try a cause, the question as to whether all the issues raised by the pleadings are to be considered depends upon the extent of the agreement of the parties, and the finding of the trial court is conclusive. Barrett v. Henry, 85 N.C. 321 (1881).

Judge May Disregard Agreement to Refer. — The trial judge, in the exercise of a sound discretion, may disregard the agreement of parties that a reference shall be made. J. L. Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N.C. 431, 49 S.E. 946 (1905).

Order of reference by consent entered of record is a sufficient compliance with the requirement that the consent be in writing. And when entered it must stand until a full report is made. White v. Utley, 86 N.C. 415 (1882).

The referee selected by the parties must remain in the discharge of his duties, unless with like consent another is substituted in his place, until the order has been fully executed and the final report made. Perry v. Tupper, 77 N.C. 413 (1877).

Setting Aside of Report Does Not Revoke Reference. — When for cause the referee's report is set aside, the order of reference is not thereby revoked; it continues, and a second trial may be had before the same referee, although a party may not consent to such a second trial. Flemming v. Roberts, 77 N.C. 415 (1877).

Consent Generally Necessary to Vacate Reference by Consent. — Where an action is once referred, the order of reference cannot be annulled except by the consent of all parties. Morisey v. Swinson, 104 N.C. 555, 10 S.E. 754 (1889), modified on rehearing, 106 N.C. 221, 10 S.E. 1103 (1890); Keystone Driller Co. v. Worth, 117 N.C. 515, 23 S.E. 427 (1895).

When the parties agree upon a reference, the consent continues until the order is complied with by a full report, and the judge cannot revoke it without the consent of both parties. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Unless a sufficient cause therefor is made to appear. Patrick v. Richmond & D.R.R., 101 N.C. 602, 8 S.E. 172 (1888).

Motion for Compulsory Reference Must Be Timely. — A motion for a compulsory reference should be made in an action before the jury has been empaneled, or the rights of a party thereto will be considered as waived. Peyton v. Hamilton-Brown Shoe Co., 167 N.C. 250, 167 N.C. 280, 83 S.E. 487, 83 S.E. 487 (1914).

It is not error to refuse a compulsory reference, when the motion to refer is not made until after the close of the evidence. Hughes v. Boone, 102 N.C. 137, 9 S.E. 286 (1889).

The right of a party to move for compulsory reference is waived unless made before the jury has been empaneled, but the rule does not apply where reference is ordered by the court of its own motion. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

The court has discretionary power to grant or refuse a compulsory reference, and while movant has the right to insist that the judge exercise his discretionary power and act on the motion, he has no legal right to demand that the court direct a reference. Veazey v. City of Durham, 231 N.C. 354, 57 S.E.2d 375 (1950).

The ordering or refusal to order a compulsory reference in an action which the court has authority to refer is a matter within the sound discretion of the court. Long v. Honeycutt, 268 N.C. 33, 149 S.E.2d 579 (1966).

Order of Reference Not to Be Set Aside Without Good Cause. — Once the order of reference is made, and particularly after the report has been filed, it cannot be set aside except for good and sufficient cause assigned and made to appear to the court. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

In order for one superior court judge to set aside an order of compulsory reference entered by another, the motion would have to go to the validity and regularity of the proceeding or some subsequent change of circumstances affecting the status of the case. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Even when a report is set aside for cause, the order of reference is not thereby revoked; it continues. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Court Held Without Authority to Set Aside Order of Reference. — Where the trial judge ordered a compulsory reference upon the ground that the complaint stated a long and involved account, and no exception was taken to the order by either party, the court was without authority to set aside the order of reference and submit the case to the jury when upon his rulings the referee committed error in excluding certain evidence materially bearing upon the controversy. American Trust Co. v. Jenkins, 196 N.C. 428, 146 S.E. 68 (1929).

Reference of Both Fact and Law Issues. — Under the provisions of former G.S. 1-172, judge was authorized to order a compulsory reference as to all of the issues, both of fact and of law. Resort Dev. Co. v. Phillips, 3 N.C. App. 295, 164 S.E.2d 516 (1968).

Reference on All Issues Precedes Adjudication of Liability. — A compulsory reference to hear and determine all matters in controversy precedes any adjudication by the court of the liability of the parties. Governor ex rel. Trustees v. Lassiter, 83 N.C. 38 (1880).

But Complete Defense Should Be Decided First. Sloan v. McMahon, 85 N.C. 296 (1881); Commissioners of Iredell County v. White, 123 N.C. 534, 31 S.E. 670 (1898); Bank of Tarboro v. Fidelity & Deposit Co., 126 N.C. 320, 35 S.E. 588 (1900); Reynolds v. Morton, 205 N.C. 491, 171 S.E.2d 781 (1933); Graves v. Pritchett, 207 N.C. 518, 177 S.E. 641 (1934); Grimes v. County of Beaufort, 218 N.C. 164, 10 S.E.2d 640 (1940); Grady v. Parker, 230 N.C. 166, 52 S.E.2d 273 (1949).

Incomplete Defense Does Not Bar Reference. — A party to an action may not successfully object to a compulsory reference when the same is allowed by statute and the complaint states a good cause of action and no complete plea in bar to the entire cause is set up by him. Murchison Nat'l Bank v. McCormick, 192 N.C. 42, 133 S.E. 183 (1926).

Compulsory Reference Improvidently Entered Where Complete Bar Alleged. — Where a suit to set aside a deed to lands, an action for possession, and a petition for dower were consolidated, an allegation of the wife's adultery was in bar of the wife's right, and whether the compulsory order of reference was treated as one of consolidation and reference of the consolidated action or as a reference of each action and proceeding under one form, it was improvidently entered. Lee v. Thornton, 176 N.C. 208, 97 S.E. 23 (1918).

Waiver of Challenge to Order of Reference Entered Before Plea in Bar Passed On. — Defendants, by not excepting to the order of compulsory reference when made and by proceeding with trial before the referee, did not preserve the right to challenge the order upon the ground that it should not have been entered before an alleged plea of accord and satisfaction had been passed on, or any other plea in bar they may have alleged. Farmers Coop. Exch. v. Scott, 260 N.C. 81, 132 S.E.2d 161 (1963).

Compulsory Reference of One Cause of Action. — Although where several causes of action arising out of the same transaction or series of transactions are properly joined in the complaint, the court may not ordinarily order that one of them be referred to a referee, court's order of compulsory reference of one cause of action would be upheld where it appeared that the action involved a long account and that the controversy was so involved that it could not be readily presented to a jury, former G.S. 1-189 being liberally construed to afford the salutary procedure therein provided. Fry v. Pomona Mills, Inc., 206 N.C. 768, 175 S.E. 156 (1934).

Direction of Mistrial and Ordering of Reference Upheld. — Where, in an action to impeach a former decree, it appeared that alleged expenditures for the benefit of a ward should be ascertained before final judgment, it was held not to be error in the court to direct a mistrial and order a reference. Sutton v. Schonwald, 80 N.C. 20 (1879).

Action on Administration Bond. — A plea in an answer to a complaint on an administration bond of "performance of the condition of the bond by payment to the next of kin" was good in substance, and an issue taken upon it could be the subject of a compulsory reference. Flack v. Dawson, 69 N.C. 42 (1873).

Suit by Creditor Against Executor. — In an action by a creditor against an executor, where the defendant denied the debt and also denied that he had assets, the issue as to the debt would be tried in the ordinary way; and if the debt was established, a reference would be had to ascertain the amount of the debts and their several classes, and upon the coming in of the report a judgment would be entered in favor of all the creditors who had proved their debts for such part of the fund as they might be entitled to. Heilig v. Foard, 64 N.C. 710 (1870).

Suit on Confessed Judgment. — A compulsory reference could not be ordered by the court in a suit on a judgment confessed by the defendants as executors before the Civil War, where the only matters of defense were payments made by them in Confederate currency during the war and alleged counterclaims for notes due from the plaintiffs to them as executors. Hall v. Craige, 65 N.C. 51 (1871).

Location of Dividing Line. — A compulsory reference may be ordered by the trial judge in an action involving the true location of a dividing line between the owners of adjoining lands, in an action of trespass and the wrongful cutting of timber, where the location of the line is complicated or requires a personal view of the premises. Waller v. Dudley, 194 N.C. 139, 138 S.E. 595 (1927).

A case involving a complicated question of boundary which required a personal view of the premises was a proper case for a compulsory reference. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Processioning Proceeding. — A controversy by stipulation of the parties that boundary only was involved became, in effect, a processioning proceeding and was properly referred. Harrill v. Taylor, 247 N.C. 748, 102 S.E.2d 223 (1958).

Contract for Rent. — Where the question involved in an action was the amount of rent due under a contract placing the rental at not less than a certain monthly sum, with obligation of the lessee to pay more in accordance with what other tenants were paying in the locality for other stores, etc., of the same rental value, the question to be determined by the jury did not require a view of the premises entitling the party requesting it to a compulsory reference. Kearns v. Huff, 191 N.C. 593, 132 S.E. 566 (1926).

Action on Conditional Sales Contract. — In an action to recover a specified sum and interest alleged to be due and owing to plaintiff as the holder in due course of a conditional sales contract alleged to have been executed and delivered by defendant, in which action no equitable relief was sought, the lower court had no power to authorize a compulsory reference. Coin Mach. Acceptance Corp. v. Pillman, 235 N.C. 295, 69 S.E.2d 563 (1952).

Suit to Sell Corporation Assets. — Where a stockholder sued to compel corporation to sell certain lands and distribute the proceeds among the stockholders, and the corporation claimed that such lands should have been included in a conveyance previously made by it to another corporation but that they were omitted by mistake, the action was a proper case for a reference. Pinchback v. Bessemer Mining & Mfg. Co., 137 N.C. 171, 49 S.E. 106 (1904).

Action in ejectment in which defendants pleaded statutes of limitation was not subject to compulsory reference. Williams v. Robertson, 233 N.C. 309, 63 S.E.2d 632 (1951).

The taking of an account must be necessary, and the accounting taken should have some direct relation to the ultimate disposition of the case. Harrell v. Harrell, 253 N.C. 758, 117 S.E.2d 728 (1961).

What constitutes a "long account" must be determined upon the facts of each particular case, it not being necessary that the action be for an accounting, but sufficient if a long account is directly and not merely collaterally involved in the action. Fry v. Pomona Mills, Inc., 206 N.C. 768, 175 S.E. 156 (1934).

There is no statutory or judicial definition of a "long account," but a correct conclusion as to whether an account was "long" would depend upon the facts and circumstances of a given case. Dayton Rubber Mfg. Co. v. Horn, 203 N.C. 732, 167 S.E. 42 (1932).

Examination of Long Account Required. — Where the verdict of the jury established that plaintiff was entitled to commissions on the gross receipts of defendant store and a bonus on the increase of the total gross receipts over those of the same period of the preceding year, as extra compensation under his contract of employment, ascertainment of the amount required an examination of a long account, and the court was empowered to order a compulsory reference to determine such amount. Parker v. Helms, 231 N.C. 334, 56 S.E.2d 659 (1949).

Where action was instituted to recover for services rendered defendant county by plaintiff as an attorney, plaintiff alleging as a basis of recovery services rendered in a certain civil action and services rendered relating to 21 different transactions extending over a period of more than a year subsequent to the termination of the civil action, it could not be said as a matter of law that the cause of action did not require the consideration of a long account, and defendants' exception to the order of compulsory reference on this ground could not be sustained. Grimes v. County of Beaufort, 218 N.C. 164, 10 S.E.2d 640 (1940).

Where an action involved purchases on account over a period of years, it could not be said that the action did not require the examination of a long account. Farmers Coop. Exch. v. Scott, 260 N.C. 81, 132 S.E.2d 161 (1963).

To hear evidence requiring the examination of a long account involving the books and records of the defendant corporation, numerous calculations of interest, an examination of numerous exhibits, and the determination of the fair value of the stock of the corporation would be the equivalent of the examination of a long account which would justify the order of reference. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

Long Account Not Involved. — A compulsory reference was not authorized on the ground that the trial required the examination of long accounts in an action instituted to recover on a promissory note or an account where the receipt of each and every payment alleged to have been made thereon was admitted. Where numerous payments on an indebtedness have been made, the case involves only a matter of computation of figures and has none of the elements of a long account with charges and discharges, as contemplated in the statute. Commercial Fin. Co. v. Culler, 236 N.C. 758, 73 S.E.2d 780 (1953). See also, Coin Mach. Acceptance Corp. v. Pillman, 235 N.C. 295, 69 S.E.2d 563 (1952).

An action on a note given to finance an automobile, in which all payments alleged by defendant were admitted by plaintiff, did not involve a long account with charges and discharges and was not subject to compulsory reference, notwithstanding further counterclaims for usury and damage for the mortgagee's alleged breach of his agreement to procure insurance on the car. Commercial Fin. Co. v. Culler, 236 N.C. 758, 73 S.E.2d 780 (1953).

Judgment Not Disturbed for Failure to Refer Long Account. — Where controversy involved the taking of a long account, it should have been referred, but where it was otherwise tried, without error or prejudice to the appellant, the judgment of the trial court would not be disturbed. Ragland v. Lassiter-Ragland, Inc., 174 N.C. 579, 94 S.E. 100 (1917).

Appointment of Referee by Court. — Where the parties fail to agree upon a referee, the court may appoint a referee, and such appointment will not be disturbed when only one of the parties objects. Shute v. Fisher, 270 N.C. 247, 154 S.E.2d 75 (1967).

Referee Cannot Be Appointed to Attend and Determine Rights at Meeting. — It is not contemplated that a referee be appointed to attend a meeting, such as the annual meeting of the members of an association, and there make determinations relating to the respective rights of contesting parties during the progress of such meeting. Crew v. Thompson, 266 N.C. 476, 146 S.E.2d 471 (1966).

When Nonsuit Allowed. — A plaintiff may take a nonsuit while the case is pending before a referee, if the case is one in which he is entitled to do so. McNeill v. Lawton, 97 N.C. 16, 1 S.E. 493 (1887).

In cases purely equitable in nature, if a reference for an account has been ordered and a report made, the plaintiff will not be allowed to take judgment of nonsuit. Boyle v. Stallings, 140 N.C. 524, 53 S.E. 346 (1906).

Referee's Duty to State Findings and Conclusions. — It is the duty of a referee to state positively and definitely all the facts constituting the grounds of action or defense, and not to leave to inference what is the precise fact intended to be found. Conclusions of law and fact must be stated separately; otherwise the appellate court cannot review the referee's conclusions of law, and the report of the referee will be set aside as being defective. State ex rel. Klutts v. McKenzie, 65 N.C. 102 (1871); Earp v. Richardson, 75 N.C. 84 (1876).

The referee should ordinarily enter his rulings on each objection to the evidence taken before him; but where the exceptions are very numerous and relate to a single ground of objection, it is a sufficient compliance with this rule if the referee incorporates in his report a general statement of his rulings sufficient to give the parties and the reviewing judge full opportunity to consider the referee's rulings on and findings from the evidence reported. Pack v. Katzin, 215 N.C. 233, 1 S.E.2d 566 (1939).

Remedy for Failure of Referee to Send Up Evidence. — Fact that the referee has not reported all the evidence is not a ground of exception. If all the evidence is not sent up, the remedy of the prejudiced party is by application to the judge for an order directing the referee to send up that which has been omitted. Perkins v. Berry, 103 N.C. 131, 9 S.E. 621 (1889).

It is error for the judge to pass upon exceptions to an unfinished report. White v. Utley, 86 N.C. 415 (1882).

Additional Matters Incorporated in Report Held Not Prejudicial. — The fact that the referee, in an action to determine title to land, in addition to entering findings of fact, conclusions of law and his decision, also incorporated in his report an analysis of the statement of contentions of the parties, a summary of the evidence relating to each contention, and his view of the law, was not prejudicial. McCormick v. Smith, 246 N.C. 425, 98 S.E.2d 448 (1957).

The referee's findings of fact and conclusions of law are not competent as evidence on trial of the issue raised by exceptions to the report. Cherry v. Andrews, 231 N.C. 261, 56 S.E.2d 703 (1949).

When Findings of Referee Are Conclusive. — On a reference without objection, the findings of the referee, when approved by the trial court, are conclusive on appeal, unless there is no evidence to support them or some error of law has been committed in the hearing of the cause. Williamson v. Spivey, 224 N.C. 311, 30 S.E.2d 46 (1944).

The findings of fact by a referee, adopted by the trial judge, are conclusive. Joyner v. Stancil, 108 N.C. 153, 12 S.E. 912 (1891). See also, Battle v. Mayo, 102 N.C. 413, 9 S.E. 384 (1889).

The findings of fact of the referee, approved by the judge, are conclusive on appeal if there is any competent evidence to support them. Morpul, Inc. v. Mayo Knitting Mill, 265 N.C. 257, 143 S.E.2d 707 (1965).

On a consent reference, findings of fact made by a referee, in the absence of exceptions thereto, are conclusive on the hearings in the superior court as they are on appeal to the Supreme Court. The findings to which no exceptions are entered become in effect facts agreed. Keith v. Silvia, 233 N.C. 328, 64 S.E.2d 178 (1951).

The findings of fact reported by a referee are presumed to be right unless shown to be wrong. If there is no evidence to support them, they will not be sustained. Green v. Jones, 78 N.C. 265 (1878).

Where reference is by consent, the referee's report has the effect of a special verdict. Battle v. Mayo, 102 N.C. 413, 9 S.E. 384 (1889).

Subject, however, to the right of either party, on notice, to move the court to review his report, to set it aside, to modify it or to confirm it. Barrett v. Henry, 85 N.C. 321 (1881).

A party moving for a reference to report the facts is not bound by the findings of the report as if a special verdict, and he is entitled to except to the report of the referee. Hardaway Contracting Co. v. Western Carolina Power Co., 195 N.C. 649, 143 S.E. 241 (1928).

Continuance of the case and allowance of time to file exceptions to the referee's report are matters within the discretion of the court. White v. Price, 237 N.C. 347, 75 S.E.2d 244 (1953).

Purpose of Exceptions Where Reference Is by Consent. — If the reference is by consent, the purpose of the exceptions is to bring the controversy into focus for the trial judge, who, in the exercise of his supervisory power may affirm, amend, modify, set aside, make additional findings, and confirm, in whole or in part, or disaffirm the report of a referee. This he may do, however, only in passing upon exceptions, for in the absence of exceptions to the factual findings of a referee, such findings are conclusive, and where no exceptions are filed, the case is to be determined upon the facts as found by the referee. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

The judge cannot affirm the report of the referee prior to the time for filing exceptions where there has been no waiver of the right to file them. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Supervisory power of the trial judge over the referee's report is broad and comprehensive. Dumas v. Morrison, 175 N.C. 431, 95 S.E. 775 (1918).

In the exercise of its power the trial judge may recommit the report for 'the correction of errors and irregularities, or for more definite statement of facts or conclusions of law, and such order recommitting the report for such purpose is not appealable. Mills v. Apex Ins. & Realty Co., 196 N.C. 223, 145 S.E. 26 (1928), citing State ex rel. Commissioners v. Magnin, 85 N.C. 114 (1881); Lutz v. Cline, 89 N.C. 186 (1883); State ex rel. Robertson v. Jackson, 183 N.C. 695, 110 S.E. 593 (1922); Coleman v. McCullough, 190 N.C. 590, 130 S.E. 508 (1925); Carolina Mineral Co. v. Young, 211 N.C. 387, 190 S.E. 520 (1937).

Reference to Another Referee After Filing of Report Not Authorized. — Where a compulsory reference is made, and a report is filed containing findings of fact and conclusions of law, the trial judge may not refer the case to another referee with partial approval thereof for action upon the unapproved parts. Mills v. Apex Ins. & Realty Co., 196 N.C. 223, 145 S.E. 26 (1928).

The judge, in his discretion, may set aside a reference after the report is filed and proceed to try the case. Cummings v. Swepson, 124 N.C. 579, 32 S.E. 966 (1899).

The decision of the judge in revising the report of a referee is available as to questions of law, but not as to the findings of fact. Vaughan v. Lewellyn, 94 N.C. 472 (1886).

Judge has a wide latitude of discretion over the report of a referee, with power to review, modify, confirm in whole or in part, or set aside the report. Keith v. Silvia, 236 N.C. 293, 72 S.E.2d 686 (1952).

The report of the referee is under the control of the court, and the power of review is a broad one, as the court may set aside, modify, or confirm it in whole or in part. Terrell v. Terrell, 271 N.C. 95, 155 S.E.2d 511 (1967).

When an action came on to be heard on exceptions to a referee's report, the judge of the superior court had authority to affirm in whole or in part, amend, modify, or set aside the report of the referee, or he could make additional findings of fact and enter judgment on the report as amended by him. Hall v. City of Fayetteville, 248 N.C. 474, 103 S.E.2d 815 (1958).

The superior court, on exceptions taken to the referee's report, may affirm, set aside, make additional findings, modify, or disaffirm the report. Wallace v. Benner, 200 N.C. 124, 156 S.E. 795 (1931).

Upon appeal in a consent reference, the superior court has the power to confirm the findings of the referee in whole or in part, to set aside the findings in whole or part and to substitute other findings supported by the evidence. Ramsey v. Nebel, 226 N.C. 590, 39 S.E.2d 616 (1946).

But the judge does not have the power ex mero motu to vacate a report upon which no attack had been made by any of the parties; the authority must be exercised, if at all, in an orderly manner in accord with recognized rules of procedure. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

The judge of the superior court may affirm, amend, modify, set aside, confirm in whole or in part, or disaffirm the report of a referee, or he may make additional findings of fact and enter judgment on the report as thus amended. But this does not mean that the judge may, ex mero motu, vacate a report upon which no attack has been made by any of the parties. The authority must be exercised, if at all, in an orderly manner in accord with recognized rules of procedure. Keith v. Silvia, 233 N.C. 328, 64 S.E.2d 178 (1951).

Duty of Judge When Exceptions Are Taken to Referee's Report. — When exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases, using his own faculties in ascertaining the truth, and forming his judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible error on his part, but because he cannot review the referee's findings in any other way. Terrell v. Terrell, 271 N.C. 95, 155 S.E.2d 511 (1967).

Filing of Exceptions Not Precluded by Motion for Voluntary Nonsuit. — Motion by plaintiff for voluntary nonsuit before the referee appointed to hear the cause did not preclude her from filing exceptions to the referee's report. Crowley v. McDougald, 241 N.C. 404, 85 S.E.2d 377 (1955).

Where a motion to remove the referee was made prior to the time his report was filed, and an appeal was taken from the granting of the motion, the superior court, upon the certification of the decision of the Supreme Court reversing the judgment, had discretionary power to allow the filing of exceptions to the report, even though the report was filed prior to the hearing of the motion for removal. Keith v. Silvia, 236 N.C. 293, 72 S.E.2d 686 (1952).

Premature Entry of Judgment. — Where the record disclosed that judgment confirming the report of a referee was entered at a term of court convening before the expiration of the 30-day period for filing exceptions, and the record disclosed no waiver of the right to file exceptions at any time during the 30-day period, the premature entry of judgment of confirmation was error appearing on the face of the record. Crowley v. McDougald, 241 N.C. 404, 85 S.E.2d 377 (1955).

Appeal Held Premature. — Where the jury found that a partnership existed, an appeal from the order of reference before judgment upon the report thereon was premature and had to be dismissed. The defendant should have noted his exception and upon the coming in of the report and exceptions thereto should have brought up his appeal from the final judgment. Leroy v. Saliba, 182 N.C. 757, 108 S.E. 303 (1921).

There is no ground for exception on appeal unless the judge's action is not supported by sufficient evidence, or error has been committed in receiving or rejecting testimony upon which it is based. Caudell v. Blair, 254 N.C. 438, 119 S.E.2d 172 (1961).

Exceptions to the Action of the Trial Court. — Where an appeal is taken from the action of the trial court in passing upon exceptions to the report of a referee, exceptions should be taken and stated in the record to the rulings of the court which it is sought to have reviewed, and the case ought not to be sent to the appellate court to be heard only on the exceptions taken to the ruling of the referee. Traders' Nat'l Bank v. Lawrence Mfg. Co., 96 N.C. 298, 3 S.E. 363 (1887).

No Appeal Available from Order Recommitting Report. — Where the court orders a compulsory reference, an appeal does not lie from an order recommitting the report of the referee for the correction of errors and irregularities. State ex rel. Comm'rs v. Magnin, 85 N.C. 114 (1881).

The findings of fact of a referee approved by the trial judge cannot be reviewed upon appeal if supported by any competent evidence. Cummings v. Swepson, 124 N.C. 579, 32 S.E. 966 (1899); Anderson v. McRae, 211 N.C. 197, 189 S.E. 639 (1937); Dent v. English Mica Co., 212 N.C. 241, 193 S.E. 165 (1937); Holder v. Home Mtg. Co., 214 N.C. 128, 198 S.E. 589 (1938).

The appellate court has no power to review the conclusions of fact as found by the referee and sustained by the judge, unless it appears that such findings have no evidence to support them. Boyle v. Stallings, 140 N.C. 524, 53 S.E. 346 (1906); Lindsay v. Brawley, 226 N.C. 468, 38 S.E.2d 528 (1946).

Court's Action Not Ordinarily Disturbed on Appeal. — Upon the filing of the report of the referee in a consent reference, as well as in a compulsory one, the trial court has the power to affirm, amend, modify, set aside, make additional findings and confirm, in whole or in part, or disaffirm the report of the referee, and where the court has made additional findings and there is evidence to sustain them, the action of the court will be given the effect of a verdict of a jury and will not ordinarily be disturbed on appeal. Thigpen v. Farmers' Banking & Trust Co., 203 N.C. 291, 165 S.E. 720 (1932).

Absent Abuse. — The court retains the cause and its jurisdiction in every case of reference, with power to review and reverse the conclusions of law of the referee, and a discretion to modify or set aside the report, and its ruling in the latter respect is not reviewable unless it appears that such discretion has been abused. Cummings v. Swepson, 124 N.C. 579, 32 S.E. 966 (1899).

B. Jury Trial.

Reference by consent is a waiver of the right of trial by jury. Green v. Castlebury, 70 N.C. 20 (1874); In re Parker, 209 N.C. 693, 184 S.E. 532 (1936); Anderson v. McRae, 211 N.C. 197, 189 S.E. 639 (1937).

But Jury Trial Is Not Waived by Compulsory Reference. — By a compulsory reference the parties waive nothing, and are still entitled to a trial by jury on the issues as if no reference had been made. Green v. Castlebury, 70 N.C. 20 (1874); State ex rel. Carr v. Askew, 94 N.C. 194 (1886).

Compulsory reference does not deprive a party of the right to trial by jury. Resort Dev. Co. v. Phillips, 3 N.C. App. 295, 164 S.E.2d 516 (1968).

A compulsory reference does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial is only upon the written evidence taken before the referee. And the report of the referee, consisting of his findings of fact and conclusions of law, is incompetent as evidence before the jury. Moore v. Whitley, 234 N.C. 150, 66 S.E.2d 785 (1951). See also, Solon Lodge No. 9 Knights of Phythias Co. v. Ionic

Lodge Free Ancient & Accepted Masons No. 72 Co., 245 N.C. 281, 95 S.E.2d 921 (1957).

And Either Party May Demand Jury Trial of the Issues. — In a case of a compulsory reference either party may, at some stage of the proceedings to be determined by the court, demand a trial by jury of the issues arising in the report of the referee. State ex rel. Armfield v. Brown, 70 N.C. 27 (1874).

Where a reference is by consent, the parties waive the right to have any of the issues of fact passed on by a jury. Where the reference is compulsory, either party has the right to have all issues of fact which arise on the pleadings submitted to a jury, but not the questions of fact which arise on exceptions to the findings of fact by the referee. State ex rel. Armfield v. Brown, 70 N.C. 27 (1874); State ex rel. Carr v. Askew, 94 N.C. 194 (1886).

Unless He Waives Such Right. — While a compulsory reference does not deprive either party of his constitutional right to trial by jury on the issues of fact arising on the pleadings, such right is waived by failure to follow the appropriate procedure. Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949).

A party to a compulsory reference waives his right to a jury trial by failing to take the proper steps to save it. Bartlett v. Hopkins, 235 N.C. 165, 69 S.E.2d 236 (1952).

In order to preserve the right to trial by jury in a compulsory reference, a party must object to the order of reference at the time it is made, file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out by the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. Booker v. Highlands, 198 N.C. 282, 151 S.E. 635 (1930); Marshville Cotton Mills v. Maslin, 200 N.C. 328, 156 S.E. 484 (1931); Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949); Better Home Furn. Co. v. Baron, 243 N.C. 502, 91 S.E.2d 236 (1956).

In order to preserve his right to a jury trial in a compulsory reference where the referee's report is adverse to him, a party must comply with each of the following procedural requirements: 1) He must object to the order of compulsory reference at the time it is made; 2) he must file specific exceptions to particular findings of fact made by the referee within 30 days after the referee delivers his report to the clerk of the court in which the action is pending; 3) he must formulate appropriate issues of fact raised by the pleadings and based on the facts pointed out in his exceptions, and tender such issues with his exceptions to the referee's report; and 4) he must set forth in his exceptions to the referee's report a definite demand for a jury trial on each issue so tendered. Bartlett v. Hopkins, 235 N.C. 165, 69 S.E.2d 236 (1952).

A party duly and aptly excepting to an order of reference, and also to the admissions of evidence before the referee, and submitting issues, secures his right thereby to a trial by jury upon the issues presented by him. Brown v. Buchanan, 194 N.C. 675, 140 S.E. 749 (1927).

By objecting to the order of compulsory reference when entered, and by filing in apt time exceptions to particular findings of fact made by the referee, tendering issues and demanding a jury trial on each issue tendered, defendants complied with procedural requirements to preserve their right to a jury trial. Farmers Coop. Exch. v. Scott, 260 N.C. 81, 132 S.E.2d 161 (1963).

Where a party objects to a compulsory reference, makes proper exceptions to the findings of fact and conclusions of law of the referee, and tenders the issue of title raised by the pleadings, he has preserved his right to trial by jury. Moore v. Whitley, 234 N.C. 150, 66 S.E.2d 785 (1951).

By excepting to an order of court referring to a long account between the parties as determinative, a party may preserve his right to a trial by jury upon the evidence thus taken, unless he waives his right during the progress of the reference; and while an issue determinative of the action should first be tried before a reference is ordered, a party excepting to the order may not successfully insist thereon when the issue is to be determined solely by the reference. Green Sea Lumber Co. v. Pemberton, 188 N.C. 532, 125 S.E. 119 (1924).

In case of a compulsory reference a litigant can renew his demand for a jury trial by excepting to the report of the referee and pointing out the findings so excepted to as a basis for the issues. State ex rel. Wilson v. Featherstone, 120 N.C. 446, 27 S.E. 124 (1897).

An exception to the report of a referee must be specific. Battle v. Mayo, 102 N.C. 413, 9 S.E. 384 (1889).

An exception to the admission of evidence by a referee which is not specific, but is vague and indefinite in form, will not be considered. Perkins v. Berry, 103 N.C. 131, 9 S.E. 621 (1889).

Exceptions to a referee's report made the basis of a demand for a trial by jury should be explicit enough for the opposing party to see clearly what the issue will be, so as to prepare to meet it with his evidence. State ex rel. Wilson v. Featherstone, 120 N.C. 446, 27 S.E. 124 (1897).

An exception, "The plaintiff excepts to such rulings adverse to it and appeals," is too general to be considered. Commissioners v. Erwin, 140 N.C. 193, 52 S.E. 785 (1905).

Controverted Facts Should Be Designated by Timely Exceptions. — To avail himself of the right to jury trial a litigant should, by exceptions made in apt time, distinctly designate the controverted facts that he demands shall thus be determined. Yelverton v.

Coley, 101 N.C. 248, 7 S.E. 672 (1888).

Where a case is one properly subject to a compulsory reference, a party excepting to the order of reference is not entitled to have issues tendered upon the hearing of exceptions to the referee's report submitted to the jury when the issues do not arise upon the exceptions. Atlantic Joint Stock Land Bank v. Fisher, 206 N.C. 412, 173 S.E. 907 (1934).

Failure to object to an order of reference at the time it is made is a waiver of the right to a trial by jury. Belvin v. Raleigh Paper Co., 123 N.C. 138, 31 S.E. 655 (1898).

As Is Failure to Except to Referee's Findings. — The right to trial by jury in civil cases may be waived, and in reference cases the failure to except to the findings of the referee or properly to preserve the right to jury trial has been uniformly held to constitute a waiver. Chesson v. Kieckhefer Container Co., 223 N.C. 378, 26 S.E.2d 904 (1943).

With Sufficient Specificity. — Although a party has his objection to a compulsory reference entered in apt time, he may waive his right to a trial by jury by failing to assert it definitely and specifically in each exception to the referee's report. Keystone Driller Co. v. Worth, 117 N.C. 515, 23 S.E. 427 (1895).

Waiver by Failure to Demand Jury Trial in Excepting to Referee's Report. — Where a party makes no demand in his exceptions to the referee's report for a jury trial on the issues tendered by him, he waives his constitutional right to have a jury determine the controverted issues of fact. Bartlett v. Hopkins, 235 N.C. 165, 69 S.E.2d 236 (1952).

When Exception to Refusal of Jury Trial Untenable. — Even though a party to a compulsory reference by proper exceptions and tender of issues preserves his right to jury trial upon the written evidence taken before the referee, if such evidence is insufficient to raise issues of fact, exception to the refusal of a jury trial is untenable. Nantahala Power & Light Co. v. Horton, 249 N.C. 300, 106 S.E.2d 461 (1959).

Purpose of Reference and Exceptions Where Right to Jury Trial Is Reserved. — When the reference is compulsory and the parties have reserved their rights to a jury trial, the practical purpose of the reference and exceptions is to develop and specifically delimit the issues to be determined by a jury. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Trial judge must act upon the report even in a compulsory reference where right to jury trial has been preserved. Coburn v. Roanoke Land & Timber Corp., 257 N.C. 222, 125 S.E.2d 593 (1962).

Submission of Issues to Jury in Passing on Exceptions. — It is not the duty of a judge, in passing on exceptions to a referee's report, to decide all questions of fact without a jury, but on the contrary, if the facts depend upon doubtful and conflicting testimony, he may cause issues to be framed and submitted to a jury for information. Maxwell v. Maxwell, 67 N.C. 383 (1872).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

(a) *Definition.* — A judgment is either interlocutory or the final determination of the rights of the parties.

(b) *Judgment upon multiple claims or involving multiple parties.* — When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) *Demand for judgment.* — A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. (1967, c. 954, s. 1.)

COMMENT

Section (a). — This section carries forward the definition of a judgment formerly contained in § 1-208.

Section (b). — These rules, with their liberalized provisions for expanding the size of a lawsuit, make it highly desirable in the multi-party and multi-claim lawsuit that there be provision for expediting appeals, in certain instances, from rulings terminating the litigation in respect to fewer than all the parties or all the claims. Otherwise, it may well be, if the aggrieved party must delay his appeal until all parties and claims have been disposed of, that the delay will be intolerable. On the other hand, there may be cases which should be presented in their entirety to the appellate court even at the price of delaying one party or another.

In considering this section, it should be remembered that § 1-277 was left intact except as it is modified by this section. In other words, appeals will continue to lie only when a "party aggrieved" has been deprived of a "substantial right," or from a final judgment. The modification here is that when there is no just reason for delay and when there is an express determination to that effect, the unit to which the finality concept shall be applied is by this rule made a smaller one. Thus, if two claims are presented to the trial court and one of them is the subject of a disputed ruling, an appeal will lie if the ruling would have been appealable in an action involving that claim alone and if the judge makes the requisite determination.

Conversely, in the absence of a determination by the trial judge, it is clear that there can be no appellate review irrespective of the nature of the ruling of the trial court, unless elsewhere expressly authorized. Section 1-277 is not such an express authorization. Thus, it will be seen that in the absence of a determination by the trial judge, a lawyer can safely delay in prosecuting his appeal. When there is such a determination, the situation will not be as clear. There must be in addition either a final judgment or a ruling affecting a "substantial right" for an appeal to lie. When these conditions obtain has not heretofore been altogether clear, and will not be under these rules. The only course of safety will be to press for review.

Section (c). — This section is a restatement of prior law.

Legal Periodicals. — For article on the general scope and philosophy of the new rules, see 5 Wake Forest Intra. L. Rev. 1 (1969).

For note discussing trial court discretion under section (b) of this rule, see 54 N.C.L. Rev. 1265 (1976).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

For article, "The Substantial Right Doctrine and Interlocutory Appeals," see 17 Campbell L. Rev. 71 (1995).

For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

I. In General.
II. Judgment on Multiple Claims or Involving Multiple Parties.
III. Decisions under Prior Law.

I. IN GENERAL.

Purpose. — The purpose of subsection (c) is to provide plaintiff with whatever relief is supported by the complaint's factual allegations and proof at trial. Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 452 S.E.2d 233 (1994).

This Section Did Not Overrule Nuckles. — To the extent that Ingle v. Allen suggests that N.C. State Highway Comm'n v. Nuckles was overruled by the enactment of Rule 54 of the North Carolina Rules of Civil Procedure, Ingle and its progeny are hereby overruled. DOT v. Rowe, 351 N.C. 172, 521 S.E.2d 707 (1999).

Final Judgment Defined. — A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. Hinson v. Hinson, 17 N.C. App. 505, 195 S.E.2d 98 (1973); Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979); Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980); Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981); Beam v. Morrow, 77 N.C. App. 800, 336 S.E.2d 106 (1985), cert. denied, 316 N.C. 192, 341 S.E.2d 575 (1986).

Under G.S. 1A-1, N.C. R. Civ. P. 54(a), a judgment is either interlocutory or a final determination of the rights of the parties, and a final judgment is one which disposes of the cause as to all parties, leaving nothing to be judicially determined between them in the trial court; generally, there is no right of immediate appeal from interlocutory orders and judgments. State v. Sanchez, 175 N.C. App. 214, 623 S.E.2d 780, 2005 N.C. App. LEXIS 2705 (2005).

Failure to Certify. — Although a trial court's entry of summary judgment in favor of a real estate transferee failed to dispose of the cause as to all the parties, and the trial court did not certify the order under N.C. R. Civ. P. 54(b), since the interlocutory order concerned title to the real estate, it involved substantial rights adversely affected and was appealable. Watson v. Millers Creek Lumber Co., 178 N.C. App. 552, 631 S.E.2d 839, 2006 N.C. App. LEXIS 1563 (2006).

Three orders entered by a trial court that were not certified pursuant to G.S. 1A-1, N.C. R. Civ. P. 54(b) were immediately appealable. The trial court's finding that the production of biodiesel by a farmer on farm premises for agricultural purposes was a bona fide farm use and exempt from county zoning ordinances rendered a challenge of the rezoning of the applicant's property moot; a substantial right was affected and would have worked an injury to plaintiffs if not corrected before an appeal from the final judgment. N. Iredell Neighbors for Rural Life v. Iredell County, — N.C. App. —, 674 S.E.2d 436, 2009 N.C. App. LEXIS 370 (2009).

A trial court cannot confer appeal status under subsection (b) by denominating its decision a "final judgment" if its ruling is not indeed such a judgment; the trial court's order denying insurance company's motion for summary judgment did not constitute a "final" judgment and was therefore not appealable. Cagle v. Teachy, 111 N.C. App. 244, 431 S.E.2d 801 (1993).

The denial of a motion for summary judgment is not a final judgment and is generally not immediately appealable even if the trial court has attempted to certify it for appeal under subsection (b). Knighten v. Barnhill Contracting Co., 122 N.C. App. 109, 468 S.E.2d 564 (1996).

Partial Summary Judgment Not a Final Judgment. — Notwithstanding the trial court's certification of the matter for immediate review under G.S. 1A-1, R. Civ. P. 54(b), the partial grant of summary judgment in a defamation action brought against a labor union and its representative neither constituted a final judgment nor affected a substantial right because the trial judge's order of partial summary judgment essentially left in tact the union members' defamation allegations based on the statement by the union representative that they "stood by" while the non-union member was hired. Priest v. Sobeck, 153 N.C. App. 662, 571 S.E.2d 75, 2002 N.C. App. LEXIS 1269 (2002).

Voluntary Dismissal by Plaintiff After Grant of Partial Summary Judgment by Defendant. — Because defendants were granted partial summary judgment as to plaintiffs' personal injury claims, dismissal of plaintiffs' appeal was not warranted, as the appeal from the entry of partial summary judgment was no longer interlocutory following plaintiffs' voluntary dismissal of their remaining claims. Curl v. Am. Multimedia, Inc., 187 N.C. App. 649, 654 S.E.2d 76, 2007 N.C. App. LEXIS 2558 (2007).

Finality. — This rule indicates that finality with respect to parties and claims is a key aspect of a judgment as it relates to its entry and appealability. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

The importance of finality to the timing of entry of judgment is apparent more from the interrelationship between this rule and G.S. 1A-1, Rule 58 than from the express language of Rule 58 itself. The principal concern regarding finality is that all matters for determination be resolved. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

State administrative agency's appeal was not interlocutory because the appellate court's decision was to be the final disposition in the matter. Early v. County of Durham, Dep't of

Soc. Servs., — N.C. App. —, 667 S.E.2d 512, 2008 N.C. App. LEXIS 1818 (2008).

Requirements of Rule. — This rule imposes three requirements on the court sitting as finder of fact: it must (1) find the facts on all issues joining the pleadings; (2) declare the conclusions of law arising from the facts found; and (3) enter judgment accordingly. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Substantive Versus Procedural Challenges. — The right to immediate appellate review under the substantial right doctrine applies only to a substantive, rather than a merely procedural, jurisdictional challenge; thus, defendants who were neither named in motion requesting nor order granting an extension of the statute of limitations and were not served with notice of that extension could not immediately appeal, and the trial court's certification under subsection (b) of this rule was made in error. Howze v. Hughs, 134 N.C. App. 493, 518 S.E.2d 198 (1999).

Interlocutory Order Defined. — An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. Hinson v. Hinson, 17 N.C. App. 505, 195 S.E.2d 98 (1973); Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979); Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980); Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981).

Order requiring party to take actions "pending further orders of this court," was an interlocutory order, since it was made during the pendency of the action and did not dispose of the case in a final manner. Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148, 437 S.E.2d 699 (1993).

Trial court's order granting a partial new trial and its judgment fixing the issue of liability were interlocutory and they were not appealable under G.S. 1A-1, Rule 54(b), G.S. 1-277(a), or G.S. 7A-27(d), where the exceptions allowed by the trial court did not certify either the order granting a partial new trial or the underlying judgment for immediate review, and where defendant failed to argue why the order and judgment appealed affected a substantial right. Loy v. Martin, 144 N.C. App. 414, 547 S.E.2d 843, 2001 N.C. App. LEXIS 424 (2001).

Immediate Appeal from Interlocutory Orders Is Improper. — Appeal of an order denying certification of an interlocutory order was dismissed as an immediate appeal was not one of the proper methods for appealing an interlocutory order. Van Engen v. Que Scientific, Inc., 151 N.C. App. 683, 567 S.E.2d 179, 2002 N.C. App. LEXIS 871 (2002).

Ruling on interlocutory nature of appeals is properly a matter for the appellate division, not the trial court. Since this often requires consideration of the merits, motions to dismiss appeals as being interlocutory should properly be filed after the record on appeal is filed in the appellate court. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

The appellate division possesses sufficient authority to dispose of interlocutory appeals which do not affect a substantial right by dismissal. It has express authority to do so on motion of the parties if the appeal is frivolous or taken solely for purposes of delay. Or it may exercise its general authority in response to motions filed under the general motions provision. Or the appellate division may dismiss upon its own motion as part of its general duty to apply the laws governing the right to appeal. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Where the physical well being of a child was at issue, an interlocutory custody order was subject to appeal. McConnell v. McConnell, 151 N.C. App. 622, 566 S.E.2d 801, 2002 N.C. App. LEXIS 879 (2002).

Appeal Dismissed as Interlocutory. — Appellate court dismissed an insurer's appeal as interlocutory where the trial court's order merely disposed of one of the various defenses, not a claim, raised by the insurer in its answer to a complaint. Yordy v. N.C. Farm Bureau Mut. Ins. Co., 149 N.C. App. 230, 560 S.E.2d 384, 2002 N.C. App. LEXIS 126 (2002).

Court of appeals held that where a trial court dismissed a company's contract claims, but stayed the tort claims: (1) this was an interlocutory order; (2) there was no certification; and (3) the company failed to show a substantial right at stake on appeal; the court of appeals dismissed the appeal as interlocutory. Mitsubishi Elec. & Elecs. USA, Inc. v. Duke Power Co., 155 N.C. App. 555, 573 S.E.2d 742, 2002 N.C. App. LEXIS 1602 (2002).

Court of appeals found that deciding if operating video games in arcade was a substantial right was not necessary where a trial court's denial of a preliminary injunction did not strip the operators of a substantial right and the operators' appeal was interlocutory. Bessemer City Express, Inc. v. City of Kings Mt., 155 N.C. App. 637, 573 S.E.2d 712, 2002 N.C. App. LEXIS 1605 (2002), cert. denied, 357 N.C. 61, 579 S.E.2d 384 (2003).

In an action by car purchasers against car dealerships and manufacturers for negligence and unfair and deceptive trade practices, an appeal from a trial court's pre-trial orders was dismissed as interlocutory and not affecting a substantial right. Alexander v. DaimlerChrysler Corp., 158 N.C. App. 637, 582 S.E.2d 57, 2003 N.C. App. LEXIS 1220 (2003).

Because a trial court's order on a motion in limine was interlocutory and was not immediately appealable, the court dismissed the appeal even though the trial court had certified the issue for appeal under G.S. 1A-1-54(b); that certification could not bind the court to review a non-appealable interlocutory order. DOT v. Olinger, 172 N.C. App. 848, 616 S.E.2d 672, 2005 N.C. App. LEXIS 1807 (2005).

Because the trial court did not rule on the merits of an employee's claim for unemployment benefits, but found that the Employment Security Commission's order did not address all of the relevant issues raised by the record, and the findings were incomplete and failed to set out the sequence of events regarding the timing and notification of the employee's discharge, the order was clearly interlocutory; hence, without evidence that the employee's substantial rights were affected, or that any criteria for an immediate appeal was required, the employee's appeal was dismissed. Reeves v. Yellow Transp., Inc., 170 N.C. App. 610, 613 S.E.2d 350, 2005 N.C. App. LEXIS 1076 (2005), review denied, — N.C. —, 619 S.E.2d 511 (2005).

Order allowing estates to amend their complaint in medical malpractice suit was not immediately appealable where issues of hospital's claimed loss of substantial rights were not brought before the trial court, and no substantial right was lost by failure to allow immediate review; estates were also entitled to sanctions against the hospital. Estate of Spell v. Ghanem, 175 N.C. App. 191, 622 S.E.2d 725, 2005 N.C. App. LEXIS 2717 (2005).

Where the trial court did not certify the order denying construction company's motion to dismiss an action brought by homeowners association as immediately appealable pursuant to G.S. 1A-1, Rule 54, and the construction company did not appear to be deprived of any substantial right which could not be protected by timely appeal from the ultimate disposition of the controversy on its merits, the appeal was dismissed. Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co., 175 N.C. App. 380, 623 S.E.2d 620, 2006 N.C. App. LEXIS 71 (2006).

Interlocutory appeal that was not certified under G.S. 1A-1-54(b) was dismissed because the state arts school and its dean did not establish that they possessed a substantial right warranting immediate review of their interlocutory appeal. McClennahan v. N.C. Sch. of the Arts, 177 N.C. App. 806, 630 S.E.2d 197, 2006 N.C. App. LEXIS 1175 (2006).

Because a G.S. 136-108 hearing did not finally resolve all issues, and because the department of transportation (DOT) failed to identify what right was at issue or why any substantial right would be jeopardized without immediate review of the trial court's order, its appeal of a finding of inverse condemnation under G.S. 136-111 was dismissed as interlocutory under G.S. 1A-1, Rule 54(a). Wilfong v. N.C. DOT, — N.C. App. —, 670 S.E.2d 331, 2009 N.C. App. LEXIS 31 (2009).

Plaintiff in Unfair Trade Practices action had no right of immediate appeal from an interlocutory order dismissing her claim for treble damages. Simmons v. C.W. Myers Trading Post, Inc., 68 N.C. App. 511, 315 S.E.2d 75, cert. denied, 312 N.C. 85, 321 S.E.2d 898 (1984).

Interlocutory Order Concerning Sovereign Immunity. — Appeal of interlocutory order warranted immediate appellate review where state Department of Transportation asserted that sovereign immunity barred condemned landowners' affirmative defenses and counterclaims. DOT v. Blue, 147 N.C. App. 596, 556 S.E.2d 609, 2001 N.C. App. LEXIS 1235 (2001).

When individual taxpayers sued the state for a tax refund on behalf of themselves and others similarly situated, and the trial court certified a class of taxpayers, the interlocutory certification order was immediately appealable under G.S. 1A-1-54(a) because, inter alia: (1) the substantial rights the state sought to protect through immediate appellate review were the preservation of sovereign immunity and the protection of the fiscal stability of the state; and, (2) the state said these rights would be adversely affected if an immediate appeal was not allowed, including potential injury to the state's inability to avoid a budget exigency. Dunn v. State, — N.C. App. —, 635 S.E.2d 604, 2006 N.C. App. LEXIS 2163 (2006).

When Summary Judgment Is Immediately Appealable. — Where dismissal of an appeal of a summary judgment could result in two different trials on the same issues, thereby creating the possibility of inconsistent verdicts, a substantial right is prejudiced and the summary judgment is immediately appealable. Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429, cert. denied, 333 N.C. 795, 431 S.E.2d 30 (1993).

There are two avenues by which a party may immediately appeal an interlocutory order of judgment. First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to this rule an immediate appeal may lie. Second, an appeal is permitted under G.S. 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. Tinch v. Video Indus. Servs., Inc., 124 N.C. App. 391, 477 S.E.2d 193 (1996), rev'd on other grounds, 347 N.C. 380, 493 S.E.2d 426 (1997).

There are two avenues by which an interlocutory judgment or order can be immediately appealed. First, if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal, and second, an interlocutory order can be immediately appealed under G.S. 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. Bartlett v. Jacobs, 124 N.C. App. 521, 477 S.E.2d 693 (1996); Romig v. Jefferson-Pilot Life Ins. Co., 132 N.C. App. 682, 513 S.E.2d 598, 1999 N.C. App. LEXIS 285 (1999), cert. denied, 350 N.C. 836, 539 S.E.2d 294 (1999), aff'd, 351 N.C. 349, 524 S.E.2d 804 (2000).

Interlocutory order was immediately appealable due to the following: (1) the order from which plaintiff appealed was final as to plaintiff's claims since the trial court entered summary judgment in favor of defendants and dismissed plaintiff's complaint with prejudice; and (2) the trial court certified that there was no reason to delay plaintiff's appeal. Currin & Currin Constr., Inc. v. Lingerfelt, 158 N.C. App. 711, 582 S.E.2d 321 (2003).

Even though the court of appeals was not bound by a trial court's certification of partners' appeal of an order granting a widow's motion for summary judgment as immediately appealable, the court of appeals reviewed the interlocutory appeal in its discretion because there was no just reason for delay, and its review would avoid piece-meal litigation. Wiggs v. Peedin, — N.C. App. —, 669 S.E.2d 844, 2008 N.C. App. LEXIS 2243 (2008).

Interlocutory Discovery Order With Sanctions Appealable. — Order imposing sanctions for discovery violations and ordering the production of documents was an interlocutory order that was appealable because of the portion of the order that imposed sanctions pursuant to G.S. 1A-1, Rule 37(b). Such an appeal tests the validity of both the discovery order and the sanctions imposed. In re Pedestrian Walkway Failure, 173 N.C. App. 254, 618 S.E.2d 796, 2005 N.C. App. LEXIS 2022 (2005).

Relief under section (c) of this rule is always proper when it does not operate to the substantial prejudice of the opposing party. Such relief should, therefore, be denied when the relief demanded was not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial. North Carolina Nat'l Bank v. Carter, 71 N.C. App. 118, 322 S.E.2d 180 (1984).

The order of an appellate court dismissing an appeal upon denying a petition for review is not a judgment; it is not a ruling on the merits of the rights or obligations of the parties, but is purely procedural in nature. Hunter v. City of Asheville, 80 N.C. App. 325, 341 S.E.2d 743 (1986).

The effective date of an annexation ordinance was July 11, 1983, the date the judgment of the Court of Appeals holding the ordinance to be valid was certified, and not December 6, 1983, the date of the Supreme Court's order dismissing plaintiffs' appeal and denying discretionary review of the judgment of the Court of Appeals, as the final judgment in the annexation case was the judgment of the Court of Appeals. Hunter v. City of Asheville, 80 N.C. App. 325, 341 S.E.2d 743 (1986).

Alternative Method to Appeal Interlocutory Orders. — An interlocutory order not appealable under subsection (b) may nevertheless be appealed pursuant to G.S. 1-277 and G.S. 7A-27(d) of the Rules of Civil Procedure which permit an appeal of an interlocutory order which (1) affects a substantial right, or (2) in effect determines the action and prevents a judgment from which appeal might be taken, or (3) discontinues the action, or (4) grants or refuses a new trial. Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Review of Interlocutory Order by Writ of Certiorari. — Court denied an estate administrator's motion to dismiss the healthcare providers' appeal from a denial of their motion to dismiss a wrongful death complaint because, even if the notice of appeal was untimely filed, the healthcare providers petitioned for a writ of certiorari that was granted. Reid v. Cole, 187 N.C. App. 299, 653 S.E.2d 164, 2007 N.C. App. LEXIS 2321 (2007).

Questions Affecting Title to Property Immediately Reviewable. — Possible existence of an easement, the basis upon which a trial court ordered joinder of individual unit owners in a townhome development, was a question affecting title, and thus the trial court's joinder order in a suit seeking a condemnation of a homeowners' association's common area was subject to immediate review. N.C. DOT v. Stagecoach Vill., 360 N.C. 46, 619 S.E.2d 495, 2005 N.C. LEXIS 996 (2005).

Substantial Right. — Court addressed plaintiffs' appeal, which was not certified pursuant to subsection (b) of this rule, finding that plaintiffs had a substantial right to have the liability of all defendants determined in one proceeding. Camp v. Leonard, 133 N.C. App. 554, 515 S.E.2d 909 (1999).

Where insured homeowners were awarded a partial summary judgment as to the replacement cash value of their severely damaged home by the trial court, which was a reversal of the insurance appraiser's determination that the actual cash value applied as the appropriate damage award, a substantial right of the insurer was affected allowing an appeal of that interlocutory order pursuant to G.S. 1-277. Gilbert v. N.C. Farm Bur. Mut. Ins. Cos., 155 N.C. App. 400, 574 S.E.2d 115, 2002 N.C. App. LEXIS 1608 (2002), aff'd, 357 N.C. 244, 580 S.E.2d 691 (2003).

Where an order did not resolve the parties' claims for equitable distribution and attorney's fees and did not rule on wife's claim for alimony, the appeal was interlocutory and, as nothing affected a substantial right, immediate appeal was improper and dismissed. Evans v. Evans, 158 N.C. App. 533, 581 S.E.2d 464, 2003 N.C. App. LEXIS 1177 (2003).

Although a substantial right was affected and immediately appealable under G.S. 1A-1, Rule 54(b), where undue delay or prejudice would have resulted, a trial court did not abuse its discretion in denying a custodian's G.S. 1A-1, Rule 15(a) motion to add two defendants to a complaint. Carter v. Rockingham County Bd. of Educ., 158 N.C. App. 687, 582 S.E.2d 69, 2003 N.C. App. LEXIS 1279 (2003).

Interlocutory appeal of the denial of defendants' motion for summary judgment in a constructive trust action was allowed; the basis of the motion for summary judgment was that res judicata barred the constructive trust action and in such a case, the failure to allow an appeal might affect a substantial right in that the possibility existed that without an immediate appeal, they would be required to twice defend against the same claim by plaintiffs. Tiber Holding Corp. v. DiLoreto, 170 N.C. App. 662, 613 S.E.2d 346, 2005 N.C. App. LEXIS 1081 (2005), cert. denied, — N.C. —, 623 S.E.2d 263 (2005).

Because a corporation asserted that ordered documents were protected from discovery under G.S. 90-21.22A, and that assertion was not frivolous or insubstantial, the discovery order compelling production of the documents affected a substantial right and the appeal fell under an exception to the rule that there was no right to appeal from an interlocutory order. Windman v. Britthaven, Inc., 173 N.C. App. 630, 619 S.E.2d 522, 2005 N.C. App. LEXIS 2113 (2005).

Denial of non-owners' motion to dismiss a declaratory judgment action relating to easement rights was interlocutory and not subject to appeal because the non-owners' claim that, after the trial court determined the parties' rights, a future tribunal in a hypothetical future proceeding might have ruled differently did not create possibility of inconsistent verdicts on same fact issue but merely a reflection of the fact that one's rights in a given situation were often determined by reference to more than one statute, rule, or other legal source of rights. Newcomb v. County of Carteret, 183 N.C. App. 142, 643 S.E.2d 669, 2007 N.C. App. LEXIS 832 (2007).

In a consumer's suit against a manufacturer and a repair company for carbon monoxide poisoning from a home gas heater, although a ruling granting summary judgment in favor of the manufacturer and denying summary judgment for the company was an interlocutory order, appeal of the ruling was proper under G.S. 1A-1-54(b) because it affected the substantial rights of both the consumer and the company. Edmondson v. Macclesfield L-P Gas Co., 182 N.C. App. 381, 642 S.E.2d 265, 2007 N.C. App. LEXIS 693 (2007).

Though there was no G.S. 1A-1-54(b) certification in the record before the court, an anesthesiology provider was entitled to pursue an appeal from the trial court's order granting judgment N.O.V. and a new trial to a decedent's estate in the estate's wrongful death suit against the provider because the trial court's order deprived the provider of a substantial right that would be lost if the court dismissed the appeal; the provider had already gone through one trial on the issue of liability and damages and was now being forced to undergo a second trial on the same issues, and thus the trial court's order was immediately appealable. Jones v. Durham Anesthesia Assocs., P.A., 185 N.C. App. 504, 648 S.E.2d 531, 2007 N.C. App. LEXIS 1806 (2007).

Because the trial court did not certify a judgment pursuant to G.S. 1A-1-54(b), the appellate court had to first determine whether an appeal following the granting of a motion to dismiss affected a substantial right to determine whether the plaintiff's appeal was interlocutory and whether it was properly before the appellate court; the court found that the appeal was properly before the court because it affected a substantial right as the plaintiff faced the possibility of having to undergo two trials on the same issue. State ex rel. Cooper v. Ridgeway Brands Mfg., LLC, 184 N.C. App. 613, 646 S.E.2d 790, 2007 N.C. App. LEXIS 1613 (2007), aff'd in part, rev'd in part, 362 N.C. 431, 666 S.E.2d 107 (2008).

Although the trial court's judgments denying the former employee and former employer's motions for partial summary judgment were interlocutory orders pursuant to G.S. 1A-1, N.C. R. Civ. P, 54(b), the parties could immediately appeal those rulings. Since the appeals arose out of the same common facts surrounding the former employer's termination of the employment of the former employer, an immediate appeal was necessary to preserve the substantial right of avoiding the possibility of multiple trials on the same issue and in fostering the interests of judicial economy. Panos v. Timco Engine Ctr., Inc., — N.C. App. —, 677 S.E.2d 868, 2009 N.C. App. LEXIS 743 (2009).

Executor's attempt to bring an equitable subrogation claim against a beneficiary for the first time on appeal pursuant to G.S. 1A-1, N.C. R. Civ. P. 54(c) was rejected, as the executor's reliance on said rule was misplaced. Horry v. Woodbury, 189 N.C. App. 669, 659 S.E.2d 88, 2008 N.C. App. LEXIS 706 (2008), rev'd, 363 N.C. 7, 673 S.E.2d 127 (2009).

Trial court's denial of a motion to enforce a settlement did not resolve the underlying personal injury claim, and the

order of denial was therefore interlocutory; since the trial court did not certify that there was no just reason to delay the appeal, and the denial did not affect a substantial right, there was no right to an immediate appeal since an appeal of the denial was still allowed once there was a final judgment. Milton v. Thompson, 170 N.C. App. 176, 611 S.E.2d 474, 2005 N.C. App. LEXIS 903 (2005).

Interlocutory Denial of Motion to Dismiss Reviewed Pursuant to Writ of Certiorari. — Motion to dismiss an interlocutory appeal of the denial of healthcare providers' motion to dismiss an administrator's wrongful death complaint was denied because the healthcare providers' petition for a writ of certiorari was granted. Reid v. Cole, 187 N.C. App. 261, 652 S.E.2d 718, 2007 N.C. App. LEXIS 2355 (2007).

Applied in Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56 (1972); Siders v. Gibbs, 26 N.C. App. 333, 215 S.E.2d 813 (1975); Christopher v. Bruce-Terminix Co., 26 N.C. App. 520, 216 S.E.2d 375 (1975); Hall v. Hall, 28 N.C. App. 217, 220 S.E.2d 158 (1975); North Carolina Nat'l Bank v. Gillespie, 28 N.C. App. 237, 220 S.E.2d 862 (1976); Beck v. Beck, 28 N.C. App. 488, 221 S.E.2d 763 (1976); McRae v. Moore, 29 N.C. App. 507, 224 S.E.2d 696 (1976); J.F. Wilkerson Contracting Co. v. Rowland, 29 N.C. App. 722, 225 S.E.2d 840 (1976); Reid v. Reid, 29 N.C. App. 754, 225 S.E.2d 649 (1976); Tifco, Inc. v. Insurance Designers Underwriters Group, Inc., 30 N.C. App. 641, 228 S.E.2d 60 (1976); Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977); North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co., 32 N.C. App. 400, 232 S.E.2d 846 (1977); Nugent v. Beckham, 37 N.C. App. 557, 246 S.E.2d 541 (1978); Harris v. Ashley, 38 N.C. App. 494, 248 S.E.2d 393 (1978); Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Western Auto Supply Co. v. Vick, 303 N.C. 30, 277 S.E.2d 360 (1981); Boyce v. Boyce, 51 N.C. App. 422, 276 S.E.2d 494 (1981); Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981); Harris v. Jim Stacy Racing, Inc., 53 N.C. App. 597, 281 S.E.2d 455 (1981); Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982); Peters v. Elmore, 59 N.C. App. 404, 297 S.E.2d 154 (1982); Swindell v. Overton, 62 N.C. App. 160, 302 S.E.2d 841 (1983); Terry's Floor Fashions, Inc. v. Murray, 61 N.C. App. 569, 300 S.E.2d 888 (1983); Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983); Payne v. North Carolina Farm Bureau Mut. Ins. Co., 67 N.C. App. 692, 313 S.E.2d 912 (1984); Perry v. Aycock, 68 N.C. App. 705, 315 S.E.2d 791 (1984); International Harvester Credit Corp. v. Bowman, 69 N.C. App. 217, 316 S.E.2d 619 (1984); In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984); Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984); Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984); Miller v. Henderson, 71 N.C. App. 366, 322 S.E.2d 594 (1984); Garrison v. Garrison, 71 N.C. App. 618, 322 S.E.2d 824 (1984); Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984); Alford v. Shaw, 72 N.C. App. 537, 324 S.E.2d 878 (1985); Case v. Case, 73 N.C. App. 76, 325 S.E.2d 661 (1985); Abner Corp. v. City Roofing & Sheetmetal Co., 73 N.C. App. 470, 326 S.E.2d 632 (1985); Kirkman v. Wilson, 86 N.C. App. 561, 358 S.E.2d 550 (1987); Buchanan v. Hunter Douglas, Inc., 87 N.C. App. 84, 359 S.E.2d 271 (1987); Hoke v. E.F. Hutton & Co., 91 N.C. App. 159, 370 S.E.2d 857 (1988); Davidson v. Knauff Ins. Agency, Inc., 93 N.C. App. 20, 376 S.E.2d 488 (1989); Wilson Heights Church of God v. Autry, 94 N.C. App. 111, 379 S.E.2d 691 (1989); DeHaven v. Hoskins, 95 N.C. App. 397, 382 S.E.2d 856 (1989); Butt v. Goforth Properties, Inc., 95 N.C. App. 615, 383 S.E.2d 387 (1989); Smith v. 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II. JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

For history and background of section (b) of this rule, see Oestreicher v. American

Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

There is a significant difference between section (b) of this rule and FRCP, Rule 54(b), as there is no exception in the federal rule for a right to appeal under "other statutes." Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

This rule should be seen as a companion to other rules of procedure permitting liberal joinder of claims and parties, particularly G.S. 1A-1, Rules 13, 14 and 17 through 24. Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979).

Need for section (b) of this rule arose from increased opportunity for liberal joinder of claims and parties which the new Rules of Civil Procedure provided. Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974), disapproved on other grounds in Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

One of the purposes of this rule is to minimize fragmentary appeals. Wachovia Realty Invs. v. Housing, Inc., 28 N.C. App. 385, 221 S.E.2d 381 (1976), rev'd on other grounds, 292 N.C. 93, 232 S.E.2d 667 (1977).

The reason for G.S. 1-277, 7A-27 and this rule is to prevent fragmentary, premature and unnecessary appeals, by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. Blue Ridge Sportcycle Co. v. Schroader, 53 N.C. App. 354, 280 S.E.2d 799 (1981).

Section (b) of this rule modifies the traditional notion that a case could not be appealed until the trial court had finally and entirely disposed of it all. Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979).

The limitation under section (b) of this rule on appealability is not applicable where other statutes expressly provide otherwise. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

"Other Statutes" Refers Particularly to §§ 1-277 and 7A-27(d). — Section (b) of this rule, where it refers to "other statutes," is speaking in particular of G.S. 1-277 and 7A-27(d). Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

The General Assembly in section (b) of this rule used the words "as expressly provided by these rules or other statutes" in order to avoid any conflict between section (b) and G.S. 1-277(a) and 7A-27(d). Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

The addition of the language "except as expressly provided by these rules or other statutes" in section (b) of this rule was clearly intended to except from the prohibition of review of nonfinal partial adjudications those orders or judgments which by virtue of G.S. 1-277 and 7A-27(d) are reviewable despite their interlocutory nature. Newton v. Standard Fire Ins. Co., 291 N.C. 105, 229 S.E.2d 297 (1976).

The "other statutes" referred to by subsection (b) of this rule are G.S. 1-227 and G.S. 7A-27(d), which allow an immediate appeal from a judicial determination which deprives appellant of a substantial right which he would lose if the ruling is not reviewed on appeal before final judgment. Beam v. Morrow, 77 N.C. App. 800, 336 S.E.2d 106 (1985), cert. denied, 316 N.C. 192, 341 S.E.2d 575 (1986).

Section (b) of this rule and § 7A-27(c) do not absolutely bar appeals from other than final judgments. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Right of Appeal Under §§ 1-277 and 7A-27(d) Not Restricted by Section (b) Requirements. — The 1967 General Assembly did not restrict the right of appeal provided by G.S. 1-277 and 7A-27(d) by engrafting the requirements of section (b) of this rule upon them. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

Where a party has a statutory right of appeal pursuant to G.S. 1-277 or 7A-27, even from an interlocutory order, section (b) of this rule will never bar appeal, even though the order appealed from fails to find "no just reason for delay." Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

Section (b) of this rule cannot limit an appellant's right to appeal when the decree is appealable under other statutory provisions, namely G.S. 1-277 and 7A-27(d). Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979); Bacon v. Leatherwood, 52 N.C. App. 587, 279 S.E.2d 86 (1981).

The Right to Appeal Is Available Through Two Channels. — This rule allows appeal if there has been a final judgment as to all of the claims and parties, or if the specific action of the trial court from which appeal is taken is final and the trial judge expressly determines that there is no just reason for delaying the appeal. The second channel to an appeal is by way of G.S. 1-277 or 7A-27; an appeal will be permitted under these statutes if a substantial right would be affected by not allowing appeal before final judgment. Brown v. Brown, 77 N.C. App. 206, 334 S.E.2d 506 (1985), cert. denied, 315 N.C. 389, 338 S.E.2d 878 (1986).

An interlocutory order can be immediately appealed under this rule if the order is final as to some but not all of the claims or if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review. First Atl. Mgt. Corp. v.

Dunlea Realty Co., 131 N.C. App. 242, 507 S.E.2d 56 (1998).

An appeal of right from an interlocutory order lies: (1) where the order represents a final judgment as to one or more but fewer than all of the claims or parties and the trial court certifies in the judgment that there is no just reason to delay the appeal; and (2) where delaying the appeal will irreparably impair a substantial right of the party. Hudson-Cole Dev. Corp. v. Beemer, 132 N.C. App. 341, 511 S.E.2d 309 (1999).

Determination of Fundamental Claim Immediately Appealable. — By ordering a former employee to assign a patent, the trial court effectively decided ownership of the patented process, and where this determination was fundamental to the disposition of the remaining claims, grant of summary judgment on the ownership claim was immediately appealable as affecting a substantial right. Liggett Group, Inc. v. Sunas, 113 N.C. App. 19, 437 S.E.2d 674 (1993).

Appeal Is Permitted Where a Substantial Right Would Be Affected. — Where the right to appeal is conferred by statute, i.e., where a substantial right of the parties would be affected if immediate appeal were not permitted under G.S. 1-277 or 7A-27, the judgment is appealable whether it is final or interlocutory in nature. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

To the extent that judgments as to one or more but fewer than all parties are determined by the appellate courts of this State to affect a "substantial right" of one of the litigants under G.S. 1-277 and 7A-27(d), the procedure for trial court certification of such judgments as appealable, established in section (b) of this rule, is bypassed, and the appellate court is substituted as the true dispatcher of appeals. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240, cert. denied and appeal dismissed, 301 N.C. 92 (1980).

Actions by the trial court, if not final or if final but not properly certified by the trial judge pursuant to section (b) of this rule, are nonetheless immediately appealable if the denial of an immediate appeal would affect a substantial right and work an injury to the appellant. Harris v. DePencier, 52 N.C. App. 161, 278 S.E.2d 759 (1981).

Orders which are technically interlocutory may properly be appealed, regardless of lack of certification under section (b) of this rule, if they affect a substantial right. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

No hard and fast rules exist for determining which appeals affect a substantial right. Rather, such decisions usually require consideration of the facts of the particular case. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Where a distinct possibility of inconsistent verdicts in separate trials had arisen, and the trial court's order allowing summary judgment therefore affected a substantial right, the denial of which would work an injury to the plaintiff if not corrected before an appeal from a final judgment, plaintiff's appeal was properly before the Court of Appeals. Perry v. Aycock, 68 N.C. App. 705, 315 S.E.2d 791 (1984).

Orders which are technically interlocutory may properly be appealed, regardless of lack of certification under section (b) of this rule, if they affect a substantial right. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Summary judgement orders affected a substantial right and were immediately appealable because there was a potential for inconsistent verdicts. Coastal Plains Utils., Inc. v. New Hanover County, 166 N.C. App. 333, 601 S.E.2d 915, 2004 N.C. App. LEXIS 1745 (2004).

Where a trial court granted plaintiff summary judgment as to liability on a criminal conversation claim, and granted defendant summary judgment as to an alienation of affections claim, though no final judgment was entered as to the issue of damages for the criminal conversation claim, nor was certification granted under G.S. 1A-1, N.C. R. Civ. P. 54(b) as to the alienation of affections claim, the appeal affected a substantial right that would be lost absent immediate review, because the elements of damages were so closely related that they did not support separate awards for each tort. McCutchen v. McCutchen, 170 N.C. App. 1, 612 S.E.2d 162, 2005 N.C. App. LEXIS 904 (2005).

While an order granting summary judgment was interlocutory, it was appealable because the cause of action for criminal conversation, which was still before the trial court, was so connected with the claim for alienation of affections that only one issue of damages should be submitted to the jury, and thus, a substantial right was at stake to have the same jury hear the wife's two claims. McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006).

Appellate jurisdiction existed to review a trial court's interlocutory order under G.S. 1A-1-54(b) because the administratrix sufficiently demonstrated the existence of a substantial right that would have been lost if the appellate court waited to review the trial court's denial of the administratrix's defenses of res judicata and collateral estoppel until after a final judgment. Gregory v. Penland, 179 N.C. App. 505, 634 S.E.2d 625, 2006 N.C. App. LEXIS 1981 (2006).

Even though an order dismissing a backseat passenger as a defendant in a negligence action did not contain a certification under G.S. 1A-1-

54(b) that there was no just reason for delay for the entry of final judgment, the order was reviewable under G.S. 1-277 because all of the claims of negligence arose from the same accident and the order of dismissal affected plaintiffs' substantial right to have their claims of joint and concurrent negligence heard in a single proceeding. Harris v. DaimlerChrysler Corp., 180 N.C. App. 551, 638 S.E.2d 260, 2006 N.C. App. LEXIS 2500 (2006).

Under circumstances in which a patient's suit alleged multiple, overlapping acts of medical malpractice resulting in harm, it was best that one jury hear the case to avoid inconsistent verdicts; accordingly, a summary judgment in favor of a radiologist affected a substantial right and the appeal from the summary judgment was considered, despite the fact that the summary judgment was granted as to one but not all of the defendants and the trial court did not certify that there was "no just reason for delay." Burgess v. Campbell, 182 N.C. App. 480, 642 S.E.2d 478, 2007 N.C. App. LEXIS 692 (2007).

Trial court's partial summary judgment order that two insurers were obligated to defend an insured in an underlying litigation was immediately appealable under G.S. 1-277 and 7A-27(d) and G.S. 1-1, N.C. R. Civ. P. 54(b) because the judgment affected a substantial right that might have been lost absent an immediate appeal. Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield L.L.C., 190 N.C. App. 28, 664 S.E.2d 317, 2008 N.C. App. LEXIS 873 (2008).

Order denying a taxpayer's motion to dismiss an administrative summons requesting documents was appealable because it was an intermediate order that involved the merits and affected the final judgment in that if the motion had been granted, the trial court would not have issued the order to comply with the summons. Even if the appeal was not from a final judgment, the appeal of a discovery order asserting a statutory or a common-law privilege affected a substantial right. In re Summons Issued to Ernst & Young, LLP, 191 N.C. App. 668, 663 S.E.2d 921, 2008 N.C. App. LEXIS 1472 (2008).

In determining the appealability of interlocutory orders a substantial right is a right which will be lost or irremediably adversely affected if the order is not reviewable before the final judgment. Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985).

Burden of Proof on Appellant. — Where defendant presented neither argument nor citation to show the appeals court that it had the right to appeal trial court's interlocutory order, it was not the duty of the court to construct arguments for or find support for defendant's right to appeal; instead, the defendant had the burden of showing the appeals court that the order deprived the defendant of a substantial right. Russell v. State Farm Ins. Co., 136 N.C. App. 798, 526 S.E.2d 494, 2000 N.C. App. LEXIS 152 (2000).

Interlocutory summary judgments in favor of third-party and fourth-party defendants in a negligence action were appealable as to the question of negligence, which presented common factual issues with the remaining claim of plaintiff against defendant, but not as to the issue of indemnity, which did not. Britt v. American Hoist & Derrick Co., 97 N.C. App. 442, 388 S.E.2d 613 (1990).

Trial judge's order that denial of immediate appeal would affect substantial right of plaintiffs was tantamount to certification that there was no just reason for delay, and accordingly the appeal was effectively certified and was therefore properly before the Court of Appeals. Smock v. Brantley, 76 N.C. App. 73, 331 S.E.2d 714 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 30 (1986).

Limitation on Substantial Right Exception to Certification. — The "substantial right" exception to certification under section (b) of this rule has been limited by the court to those situations where the substance of an appealing party's claim or defense would be reduced, or where the appealing party would incur some other direct injury, if the appeal were not heard prior to entry of a final judgment disposing of all of the claims of all of the parties. Nichols v. State Employees' Credit Union, 46 N.C. App. 294, 264 S.E.2d 793 (1980).

Finding That Ruling Affects Substantial Right Not Enough. — Court's ruling on a separation/property settlement agreement did not dispose of plaintiff's claims for equitable distribution and alimony, but only disposed of defendant's plea in bar to those claims; the court's ruling was thus interlocutory, and although the court's order stated that its ruling affected a substantial right and was a proper subject of immediate appeal, the court's order could not be certified as a final appealable order under section (b) of this rule. Garris v. Garris, 92 N.C. App. 467, 374 S.E.2d 638 (1988).

Section (b) of this rule does not purport to define a final judgment. It simply provides for (1) the entry of such a judgment as to fewer than all of the claims in a multiple claim or multiple party lawsuit, and (2) a procedure whereby such final judgments on one or more but fewer than all of the claims or parties are immediately appealable. Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979).

Determining Whether Appeal Lies Absent Statutory Right Thereto. — Where there is no statutory right to appeal, the question is whether the judgment is in effect final as to all of the claims and parties. If so, the judgment is immediately appealable. If not, the next question must be whether the specific action of the trial court from which appeal is taken is final or interlocutory. If the court's action is interlocutory, no appeal will lie whether or not certified for appeal by the trial court. If the action is final as to fewer than all claims or the rights and liabilities of fewer than all parties, but has not been certified for appeal by the trial court under section (b) of this rule, no appeal will lie. On the other hand, an appeal from such a final judgment or order will be allowed if it is properly certified under the rule. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240, cert. denied and appeal dismissed, 301 N.C. 92 (1980).

Section (b) of this rule establishes the trial court as the "dispatcher" of appeals to the appellate division. Green v. Duke Power Co., 50 N.C. App. 646, 274 S.E.2d 889 (1981), aff'd, 305 N.C. 603, 290 S.E.2d 593 (1982). See also, Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974), disapproved on other grounds in Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

Finding of No Just Reason for Delay as Certification That Judgment Is Final and Appealable. — By making the express determination in a judgment adjudicating fewer than all the claims or the rights and liabilities of fewer than all the parties that there is "no just reason for delay," the trial judge in effect certifies that the judgment is a final judgment under section (b) of this rule and subject to immediate appeal. Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974), disapproved on other grounds in Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976); Raynor v. Mutual of Omaha, 24 N.C. App. 573, 211 S.E.2d 458 (1975).

In a wrongful death action against a city and a railroad arising from a motorist's death after being struck by a train at a railroad crossing, the appellate court had jurisdiction to hear an appeal from the trial court's grant of the city's summary judgment motion where the trial court certified, under Rule 54(b), that there was no just reason for delay in the entry of a final judgment dismissing the claims against the city. Wilkerson v. Norfolk S. Ry., 151 N.C. App. 332, 566 S.E.2d 104, 2002 N.C. App. LEXIS 744 (2002).

When a patient sued a pharmacy for negligence, breach of implied warranties, liability under G.S. 99B-6, and to pierce the pharmacy's corporate veil and hold its president liable, and the warranty claim and claim to pierce the corporate veil were dismissed, and the trial court orally certified that there was no just reason to delay an appeal of the dismissal when there was no written order in the appellate record reflecting the trial court's oral certification, the patient's interlocutory appeal of the dismissal was reviewed for whether the patient would lose a substantial right absent an immediate appeal. Rauch v. Urgent Care Pharm., Inc., 178 N.C. App. 510, 632 S.E.2d 211, 2006 N.C. App. LEXIS 1566 (2006).

Trial judge cannot by denominating a decree a "final judgment" make it immediately appealable if it is not such a judgment. Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979).

Certification under this rule by the trial court is reviewable by the appellate court because the trial court's denomination of its decree as a final judgment does not make it so. First Atl. Mgt. Corp. v. Dunlea Realty Co., 131 N.C. App. 242, 507 S.E.2d 56 (1998).

Appeal of the denial of the motion to compel discovery and the order quashing the subpoena of the decedent's former attorney was interlocutory and could not be appealed pursuant to subsection (b) of this rule, despite the fact that the issue was certified for appeal; an order denying a motion to compel was clearly not a final judgment and certification was therefore inappropriate. In re Will of Johnston, 157 N.C. App. 258, 578 S.E.2d 635, 2003 N.C. App. LEXIS 642 (2003).

Signing of Appeal Entry Not Sufficient. — The signing of an appeal entry by the trial court cannot, in and of itself, be held to satisfy the affirmative act of certification required by section (b) of this rule. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240, cert. denied and appeal dismissed, 301 N.C. 92 (1980); Pasour v. Pierce, 46 N.C. App. 636, 265 S.E.2d 652 (1980).

Appeal from Judgment Adjudicating Fewer Than All Claims, Rights or Liabilities. — An appeal is subject to dismissal when the judgment from which the appeal is taken purportedly adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties and the trial court does not find that there was "no just reason for delay." Equitable Leasing Corp. v. Kingsmen Prods., Inc., 27 N.C. App. 661, 220 S.E.2d 95 (1975).

Attempted appeal from an order dismissing fewer than all of plaintiffs' claims is premature where the trial court did not find that there was no just reason for delay. Mozingo v. North Carolina Nat'l Bank, 27 N.C. App. 196, 218 S.E.2d 506 (1975).

Although the defendants' appeal was from an order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, and was thus premature, the Court of Appeals chose to exercise its discretion to pass on the merits of the defendants' appeal. International Harvester Credit Corp. v. Bowman, 69 N.C. App. 217, 316 S.E.2d 619, cert. denied, 312 N.C. 493, 322 S.E.2d 556 (1984).

The fact that plaintiff waived her right to appeal the order granting summary judgment to one of three defendants in no way affected her statutory right to appeal from the final judgment, since although she could have appealed the entry of summary judgment as to that defendant, she was not required to do so. Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984), cert. denied, 313 N.C. 508, 329 S.E.2d 391 (1985).

Under section (b) of this rule, in the absence of a determination by the trial judge that there is no just reason for delay, there can be no appellate review of an order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties. Thompson v. Newman, 74 N.C. App. 597, 328 S.E.2d 597 (1985).

Entry of summary judgment for fewer than all defendants was not a final judgment and was not immediately appealable as no substantial right was involved and the trial court did not certify the appeal under subdivision (b) of this rule. Long v. Giles, 123 N.C. App. 150, 472 S.E.2d 374 (1996).

Appellate court, on its own motion, dismissed a wife's interlocutory appeal from a divorce from bed and board because the trial court judgment did not determine remaining contested custody and support matters. Washington v. Washington, 148 N.C. App. 206, 557 S.E.2d 648, 2001 N.C. App. LEXIS 1291 (2001).

In contractor's breach of contract action against the state, the trial court properly made a finding of fact and conclusion of law, under G.S. 1A-1, N.C. R. Civ. P. 54(b), that its grant of the state's summary judgment motion was final as to the contractor's claims against the state and certified that there was no just reason for delay, even though counterclaims and third-party claims had not been adjudicated. N.C. Monroe Constr. Co. v. State, 155 N.C. App. 320, 574 S.E.2d 482, 2002 N.C. App. LEXIS 1612 (2002), cert. denied, cert. dismissed, 357 N.C. 165, 580 S.E.2d 370 (2003).

Appeal of a judgment setting aside an execution sale of certain real property was interlocutory because, while the record contained an entry of default as to the property's owners, it did not contain a default judgment against them, and no claims against the materialman whose lien resulted in the execution sale were addressed; thus, the record did not establish that all claims against all parties had been resolved, and an appeal was not permissible because the trial court did not certify its order for immediate interlocutory appeal under G.S. 1A-1, N.C. R. Civ. P. 54, nor was it shown that a substantial right was at issue. Beneficial Mortg. Co. v. Peterson, 163 N.C. App. 73, 592 S.E.2d 724, 2004 N.C. App. LEXIS 292 (2004).

As the trial court granted summary judgment only to a town, not the other defendants, and did not certify the court's order under N.C. R. Civ. P. 54(b), and plaintiff did not voluntarily dismiss her claims against the other defendants or argue that her appeal affected a substantial right, she was not entitled to appeal the trial court's interlocutory order under G.S. 7A-27(b). Hyatt v. Town of Lake Lure, 191 N.C. App. 386, 663 S.E.2d 320, 2008 N.C. App. LEXIS 1322 (2008).

Finding of No Reason for Delay Not Enough. — While the trial judge found that there was no reason for delay in obtaining appellate review, a trial judge cannot by denominating his decree a "final judgment" make it immediately appealable under section (b) of this rule if it is not such a judgment. A finding that there is no just reason for delay under section (b) is not enough. The judgment must also be final. Pelican Watch v. United States Fire Ins. Co., 90 N.C. App. 140, 367 S.E.2d 351 (1988), rev'd on other grounds, 323 N.C. 700, 375 S.E.2d 161 (1989).

A judgment which creates the possibility of inconsistent verdicts on the same issue in different trials affects a substantial right. New Bern Assocs. v. Celotex Corp., 87 N.C. App. 65, 359 S.E.2d 481, cert. denied, 321 N.C. 297, 362 S.E.2d 782 (1987).

Avoiding separate trials of different issues does not qualify as a substantial right, but preventing separate trials of the same factual issues does constitute a substantial right. Hudson-Cole Dev. Corp. v. Beemer, 132 N.C. App. 341, 511 S.E.2d 309 (1999).

Factors for Immediate Appealability of Judgment. — In order for a judgment in a multiple claim or multiple party action to be immediately appealable, the judgment must be (1) in effect final as to one or more of the claims or parties; and (2) certified for appeal by the trial judge. If the judgment is final as to one or more of the claims or parties but has not been certified for appeal by the trial court, no appeal will lie unless an immediate appeal is authorized by some other rule or statute, such as G.S. 1-277 or G.S. 7A-27. North Carolina R.R. v. City of Charlotte, 112 N.C. App. 762, 437 S.E.2d 393 (1993), appeal dismissed, review denied, 336 N.C. 608, 447 S.E.2d 397 (1994), cert. denied, 515 U.S. 1130, 115 S. Ct. 2554, 132 L. Ed. 2d 808 (1995).

Judgment Held Appealable. — Trial court's judgment dismissing plaintiffs' claims of punitive damages against all defendants and dismissing claims against former law partners for the acts of individual defendant in his capacity as executor of decedent's estate was immediately appealable, as plaintiffs had a substantial right to have all of their claims for relief tried at the same time before the same judge and jury. Shelton v. Fairley, 86 N.C. App. 147, 356 S.E.2d 917, cert. denied, 320 N.C. 634, 360 S.E.2d 94 (1987).

Where a bank, as third-party defendant, not only had an opportunity to participate in, but in fact did fully participate in the determination of third-party plaintiff's liability, and was bound by the judgment in favor of plaintiff entered against defendants as third-party plaintiffs, since the bank was bound by a judgment which affected its substantial rights, it was clearly an aggrieved party within the meaning of G.S. 1-271. Barker v. Agee, 326 N.C. 470, 389 S.E.2d 803 (1990).

A partial summary judgment was appealable under this section, where the trial court granted summary judgment as to the plaintiff's claim for unfair and deceptive trade practices and certified that there was no "just reason for delay in entering this order or the appeal therefrom." DKH Corp. v. Rankin-Patterson Oil Co., 348 N.C. 583, 500 S.E.2d 666 (1998).

Case was not dismissed because the employee's appeal was from a final judgment and was not interlocutory; the employee voluntarily dismissed the remaining claims as part of a settlement agreement. Tarrant v. Freeway Foods of Greensboro, Inc., 163 N.C. App. 504, 593 S.E.2d 808, 2004 N.C. App. LEXIS 409 (2004), cert. denied, 358 N.C. 739, 603 S.E.2d 126 (2004).

Dismissal of a partner's claims against an attorney under G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) as the statute of limitations had passed was immediately appealable. Carlisle v. Keith, 169 N.C. App. 674, 614 S.E.2d 542, 2005 N.C. App. LEXIS 800 (2005).

Because the appeal was final as to the appealing defendants, and the trial court certified the appeal, the appellate court was required to review plaintiff's appeal on the merits. James River Equip., Inc v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006), review denied, appeal dismissed, 361 N.C. 167, 639 S.E.2d 651 (2006).

In a business dispute involving asserted allegations of breach of a non-competition agreement and other claims, given the prolonged procedural history of the case, the number of claims and counterclaims, and the same set of operative facts underlying the entire case, an appellate court agreed with the trial court's determination that the claims that had been dismissed and those that remained were factually and legally intertwined such that proceeding to trial could have resulted in verdicts inconsistent with the earlier dismissals. Therefore, the trial court properly certified the case to the appellate court under N.C. R. Civ. P. 54(b). Kinesis Adver., Inc. v. Hill, 187 N.C. App. 1, 652 S.E.2d 284, 2007 N.C. App. LEXIS 2251 (2007), review denied, appeal dismissed, 362 N.C. 177, 658 S.E.2d 485 (2008).

Trial court's order dismissing only some of a client's claims against an attorney was not interlocutory, and the client's appeal of the order was properly before the court of appeals because the client voluntarily dismissed all of the claims that survived the trial court's order; therefore, the client's claims were no longer interlocutory, and any rationale for dismissing the appeal as interlocutory failed. Goodman v. Holmes & McLaurin, — N.C. App. —, 665 S.E.2d 526, 2008 N.C. App. LEXIS 1622 (2008).

Judgments Held Nonappealable. — Where judgment adjudicated the rights and liabilities of fewer than all the parties and contained no determination by the trial judge that there was no just reason for delay, and although the claims of the respective defendants against each other did not seem to affect the plaintiff's rights, the judgment was interlocutory and not appealable. Nytco Leasing, Inc. v. Dan-Cleve Corp., 25 N.C. App. 18, 212 S.E.2d 41, cert. denied, 288 N.C. 241, 216 S.E.2d 910 (1975).

Where order dismissing plaintiffs' claim against defendants and dismissing by consent counterclaim of defendants against plaintiffs adjudicated fewer than all the claims of all the parties and did not contain a determination by the trial judge that there was no just reason for delay in entering such order, the order was interlocutory and not appealable. Durham v. Creech, 25 N.C. App. 721, 214 S.E.2d 612 (1975).

Judgment dismissing plaintiff's claim, which adjudicated the rights and liabilities of fewer than all the parties and expressly retained jurisdiction for the purpose of adjudication with respect to defendants' counterclaim without providing "no just reason for delay," was interlocutory and not appealable. Rorie v. Blackwelder, 26 N.C. App. 195, 215 S.E.2d 397, cert. denied, 288 N.C. 243, 217 S.E.2d 666 (1975).

Where summary judgment dismissing the action as to two defendants adjudicated the rights and liabilities of fewer than all the parties and contained no determination by the trial judge that there was no just reason for delay, it was not a final judgment and therefore not appealable. Beach & Adams Bldrs., Inc. v. Felton, 27 N.C. App. 334, 219 S.E.2d 287 (1975). But see Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

Partial summary judgment orders, which established the negligence of defendant-administrator's decedent and the absence of contributory negligence or assumption of risk on the part of plaintiff, had the effect of fixing liability and retaining the cause for determination solely on the issue of damages, and were not immediately appealable, despite the trial court's recital that this was a final judgment and that there was no just reason for delay. Schuch v. Hoke, 82 N.C. App. 445, 346 S.E.2d 313 (1986).

There were no factual issues common to the claims determined by summary judgments or the claims remaining, so that no substantial right was affected and plaintiff was not entitled to interlocutory appeal of summary judgments, since plaintiff did not present identical factual issues creating the possibility of two trials on the same issue. Jarrell v. Coastal Emergency Servs. of Carolinas, Inc., 121 N.C. App. 198, 464 S.E.2d 720 (1995).

The denial of defendant's motion for stay did not dispose of any of the claims or parties, the trial court did not certify the case for immediate appeal under this rule, and defendants did not show that the trial court's decision deprived them of a substantial right which would be lost absent immediate review. Howerton v. Grace Hosp., 124 N.C. App. 199, 476 S.E.2d 440 (1996).

Trial court's order for partial summary judgment in favor of plaintiff employee, who sued for payment of a commission, as to defendant employer's four counterclaims—wrongful attachment, negligence, breach of contract, and breach of fiduciary duty—was interlocutory where no overlapping factual issues existed between plaintiff's complaint and defendant's counterclaims, and the order appealed from did not deprive defendant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits. Murphy v. Coastal Physician Group, 139 N.C. App. 290, 533 S.E.2d 817, 2000 N.C. App. LEXIS 893 (2000).

Defendant-husband's appeal from an equitable distribution order that explicitly left open the related issue of alimony was interlocutory in nature; no substantial right of defendant's would be lost without immediate review. Embler v. Embler, 143 N.C. App. 162, 545 S.E.2d 259, 2001 N.C. App. LEXIS 225 (2001).

Corporation's appeal was dismissed as interlocutory in that it concerned only one claim against one defendant in a suit involving multiple claims against multiple defendants; the trial court's off-hand comment that "the way to get rid of what (the court had) done (was) to appeal" did not meet the "no just reason for delay" certification requirements of G.S. 1A-1, N.C. R. Civ. P. 54(b) and was not binding on the appellate court. White v. Carver, 175 N.C. App. 136, 622 S.E.2d 718, 2005 N.C. App. LEXIS 2744 (2005).

Corporation's interlocutory appeal was dismissed as: (1) its claim that an order subjected every action taken by the corporation since its inception to legal challenge did not identify a substantial right for purposes of the substantial right exception, (2) the identification of any substantial right would be speculative as the order required the corporation to hold an organizational meeting, in which the executor was to be appointed a director and allowed to participate and provided that the claims against the corporation were to be dismissed upon organization of the corporation, and the corporation appealed before conducting the organizational meeting, and (3) that the parties "did not like each other" did not require that the appeal be entertained under the substantial right exception. White v. Carver, 175 N.C. App. 136, 622 S.E.2d 718, 2005 N.C. App. LEXIS 2744 (2005).

In personal injury plaintiffs' action against an intoxicated driver who caused a traffic accident by driving a van across a highway median, and against a company that owned the van and against the occupants of a house who allegedly negligently entrusted the van to the driver, the company and the occupants were dismissed with prejudice following summary judgment in their favor; plaintiffs then entered a consent order dismissing, without prejudice, their remaining claims against the driver, thereby resolving all claims against all remaining defendants. The summary judgment order was not a final appealable order and the consent order against the driver did not render the dismissal order resulting from that summary judgment a final judgment as contemplated by G.S. 1A-1, N.C. R. Civ. P. 54; the court dismissed plaintiffs appeal of that dismissal order on the reasoning that G.S. 1A-1, N.C. R. Civ. P. 41(a)(1), allowed plaintiffs to take one voluntary dismissal against the driver without finally resolving the claims against the driver, so there was no final judgment that would allow an appeal of the summary judgment in favor of the company and the occupants. Hill v. West, 177 N.C. App. 132, 627 S.E.2d 662, 2006 N.C. App. LEXIS 692 (2006).

Appeal of a trial court's denial of clients' G.S. 1A-1, N.C. R. Civ. P. 60(b) motion for relief from judgment in a collateral matter was dismissed as interlocutory because the order did not dispose of the entire case and was thus interlocutory, but the trial court's order did not contain an G.S. 1A-1, N.C. R. Civ. P. 54 certification and the clients failed to address (1) why there was no just reason to delay the appeal, or (2) what substantial right would have been lost absent an immediate appeal; further, the appeal was a transparent attempt to re-litigate prior orders from several trial courts, prior opinions of the appellate court, and an order denying the clients' previous petition for discretionary review by the Supreme Court of North Carolina, and the same theory posited by the clients in the case sub judice already had been vetted and held to be unpersuasive and incorrect. The lawyers were thus entitled to sanctions pursuant to N.C. R. App. P. 34(c). Pigg v. Massagee, — N.C. App. —, 674 S.E.2d 686, 2009 N.C. App. LEXIS 356 (2009).

Judgment awarding a wife permanent alimony was nonappealable because, inasmuch as the wife's claim for attorney's fees had not been disposed of by the trial court, the order was interlocutory, the order had not been certified by the trial court pursuant to G.S. 1A-1, N.C. R. Civ. P. 54(b), and the husband did not identify any substantial right that might have been lost without immediate appeal, as required by N.C. R. App. P. 28(b)(4). Webb v. Webb, — N.C. App. —, 677 S.E.2d 462, 2009 N.C. App. LEXIS 518 (2009).

Judgment awarding consumers damages pursuant to the consumers' claim under G.S. 75-1.1, but not ruling on the consumers' request for attorney's fees, under G.S. 75-16.1, could not be appealed, despite the trial court's certification, under G.S. 1A-1, N.C. R. Civ. P. 54(b), that the judgment was final, because the judgment was interlocutory, as the issue of attorney's fees had not been resolved. Bumpers v. Cmty. Bank of N. Va., — N.C. App. —, 675 S.E.2d 697, 2009 N.C. App. LEXIS 516 (2009).

Trial court did not enter a final judgment as to fewer than all of the claims or parties in an action; therefore the trial court's certification of its denial of a motion to dismiss had no effect. Meherrin Indian Tribe v. Lewis, — N.C. App. —, 677 S.E.2d 203, 2009 N.C. App. LEXIS 661 (2009).

Buyer's appeal of summary judgment in favor of some, but not all, of owners in the buyer's suit seeking, inter alia, specific performance of an alleged real estate contract was dismissed because there was no G.S. 1A-1, N.C. R. Civ. P. 54(b) certification, and the summary judgment did not affect a substantial right of the buyer; even assuming arguendo that there had been actual or apparent authority to sell the property to the buyer, the specific performance claim would have failed because the property was subject to existing and contingent life estates, and remaindermen, but no special proceeding pursuant to G.S. 41-11 was brought as was required. Further, one of the remaindermen was a minor child, and minors could not have been compelled to specifically perform a contract as long as they remained under 18. FMB, Inc. v. Creech, — N.C. App. —, 679 S.E.2d 410, 2009 N.C. App. LEXIS 1105 (July 7, 2009).

Certification Appropriate. — Although defendants' counterclaims and third-party claims remained pending, plaintiffs' appeal was properly before the appeals court based on the trial court's G.S. 1A-1, N.C. R. Civ. P. 54(b) certification because the trial court entered final judgment as to plaintiff's claims and found that there was no just reason for delaying the appeal. RD&J Props. v. Lauralea-Dilton Enters., LLC, 165 N.C. App. 737, 600 S.E.2d 492, 2004 N.C. App. LEXIS 1517 (2004).

Certification Not Appropriate. — Where only the issue of damages remained, no final judgment had been made and no substantial right was affected, the appellate court found the trial court's certification ineffective and saw no impediment to the trial court's sorting out various claims and affirmative defenses intertwined with the damages issue. CBP Resources, Inc. v. Mountaire Farms of N.C., Inc., 134 N.C. App. 169, 517 S.E.2d 151 (1999).

Denial of summary judgment in case where the only appellate issues were whether plaintiff's action was barred by a general release and whether plaintiff could compel defendant to participate as a named defendant was not a final judgment and therefore was not properly certified under this rule. Anderson v. Atlantic Cas. Ins. Co., 134 N.C. App. 724, 518 S.E.2d 786 (1999).

Judgments Held Nonappealable. — Interlocutory order was not immediately appealable, in part, because the trial court did not certify the appeal pursuant to G.S. 1A-1, N.C. R. Civ. P. 54(b). Myers v. Mutton, 155 N.C. App. 213, 574 S.E.2d 73, 2002 N.C. App. LEXIS 1576 (2002).

Order Denying Release of Escrow Funds Held Not Appealable. — The effect of an order denying the release of the funds held in escrow under G.S. 58-36-25 was temporary and not permanent where the Commissioner's order only determined that the funds are not to be released now, and did not purport to determine who is entitled to the money; for these reasons, an appeal of the order was interlocutory and was not immediately appealable under either this rule or G.S. 1-277 and 7A-27(d). State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 102 N.C. App. 809, 403 S.E.2d 597 (1991).

Judgment Held Appealable. — Order of partial summary judgment on the issue of whether an insurer has a duty to defend a defendant in an underlying action, affects a substantial right that might be lost absent immediate appeal. Lambe Realty Inv., Inc. v. Allstate Ins. Co., 137 N.C. App. 1, 527 S.E.2d 38, 2000 N.C. App. LEXIS 261 (2000).

Application of Section (b) in Case Involving Only Two Parties. — In a case involving only two parties it is important in applying section (b) of this rule to distinguish the true multiple claim case from the case in which only a single claim based on a single factual occurrence is asserted but in which various kinds of remedies may be sought. Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979).

While a default judgment on a cross-claim may be reviewed immediately under § 1-277, it is not a "final judgment" until all claims made in the action are adjudicated, unless the court makes findings pursuant to section (b) of this rule that there is no just reason for delay and that the severed claim should be granted final judgment. American Imports, Inc. v. G.E. Employees W. Region Fed.

Credit Union, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Joinder and restraining orders are in the nature of interlocutory orders, and are generally nonappealable unless some substantial right will be affected if the appeal is not immediately perfected. Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975).

Grant of Summary Judgment Appealable Where Substantial Right Affected. — There is a right of appeal under G.S. 1-277 from an order granting summary judgment, notwithstanding the failure to meet the requirements for appeal under section (b) of this rule, where a substantial right is affected. Jones v. Clark, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

Where summary judgment is allowed for fewer than all the defendants and the judgment does not contain a certification pursuant to section (b) of this rule that there is no just reason for delay, a plaintiff's appeal will be premature unless the order allowing summary judgment affects a substantial right. Clevenger v. Pride Trimble Corp., 96 N.C. App. 631, 386 S.E.2d 594 (1989).

Entry of summary judgment for a monetary sum against one of two defendants affected a "substantial right" of that defendant, and such judgment was therefore immediately appealable under G.S. 1-277 and 7A-27, notwithstanding the absence of an express determination by the trial judge that there was "no just reason for delay." Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240, cert. denied and appeal dismissed, 301 N.C. 92 (1980).

Entry of Summary Judgment on Two of Three Claims. — Where plaintiff's complaint alleged three causes of action, namely, breach of contract, punitive damages based on continuing fraud involved in the breach of contract, and anticipatory breach of contract, and defendant's summary judgment motion was allowed regarding plaintiff's claims for relief for punitive damages and for anticipatory breach of contract, but overruled as to breach of contract, plaintiff had a "substantial right" to have all three cases tried at the same time by the same judge and jury if the causes were not subject to summary judgment, and hence his appeal of the summary judgment should not have been dismissed. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

Denial of Summary Judgment Only Appealable If Substantial Right Affected. — Denial of summary judgment is interlocutory in nature and not appealable under G.S. 1-277 and 7A-27 unless a substantial right of one of the parties would be affected if the appeal were not heard prior to final judgment. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240, cert. denied and appeal dismissed, 301 N.C. 92 (1980).

Fact that the trial court makes the finding required under section (b) of this rule before a final judgment can be entered, i.e., that there is no just reason for delay of entry of a final judgment, does not make the denial of summary judgment immediately appealable, because it is not a final judgment. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1963).

The denial of a motion for summary judgment is not a final judgment, and is generally not immediately appealable, even if the trial court has attempted to certify it for appeal under subsection (b) of this rule. Henderson v. LeBauer, 101 N.C. App. 255, 399 S.E.2d 142, cert. denied, 328 N.C. 731, 404 S.E.2d 868 (1991).

Under circumstances in which a patient sued a doctor and other defendants, alleging improper access and exposure of her medical records, and only the complaint against the doctor was dismissed and claims remained against the other defendants, although the trial court made no certification, the claim against the doctor was factually similar to the claims against the other defendants, and the dismissal of the claim against doctor raised the possibility of inconsistent verdicts in later proceedings; the appellate court therefore reviewed the dismissal of the claim against the doctor under the substantial right exception to the general rule prohibiting interlocutory appeals. Acosta v. Byrum, 180 N.C. App. 562, 638 S.E.2d 246, 2006 N.C. App. LEXIS 2503 (2006).

Partial Summary Judgment was not appealable under section (b) of this rule, even if the court's finding that third party defendant was entitled to appeal the judgment to the Court of Appeals constituted a finding that there was no just reason for delay, since the judgment was not final as to any of the parties. Cook v. Export Leaf Tobacco Co., 47 N.C. App. 187, 266 S.E.2d 754 (1980).

In an action challenging a self-help repossession, the trial court properly certified its partial summary judgment finding in the creditor's favor on the debtor's claims of wrongful conversion and/or repossession and declining to find the relevant statute unconstitutional, as final, under G.S. 1A-1, Rule 54(b). Giles v. First Va. Credit Servs., Inc., 149 N.C. App. 89, 560 S.E.2d 557, 2002 N.C. App. LEXIS 127 (2002), cert denied, 355 N.C. 491, 563 S.E.2d 568 (2002).

In an action seeking to quiet title to property which the plaintiffs, the original owners, alleged was secured by two of the defendants by fraud or by mutual mistake and conveyed to the other defendant, the current owner, by general warranty deed, summary judgment in favor of the current owner precluded the plaintiffs from obtaining reformation of the deed and reconveyance of the property, thereby affecting a substantial right; and, therefore, the interlocutory order was appealable. Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985).

In action by discharged employee seeking to recover accumulated vacation leave, "substantial right" of the plaintiff was affected by the granting of summary judgment for the defendant, so that the order granting the motion for summary judgment was appealable, despite the defendant's pending counterclaim for wrongful conversion of company funds, and despite the absence of a determination by the trial judge under section (b) of this rule that "there was no just reason for delay." Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Dismissal of One Claim. — Appellate court could properly consider employees' appeal of the trial court's dismissal of one of their claims, even though other claims remained unresolved, as there was a final determination as to that claim, and the trial court certified, under G.S. 1A-1, Rule 54(b), that there was no just reason to delay the appeal. Alford v. Catalytica Pharms., Inc., 150 N.C. App. 489, 564 S.E.2d 267, 2002 N.C. App. LEXIS 587 (2002).

Judgment dismissing plaintiff's punitive damage claim against defendant was immediately appealable, as plaintiff had a substantial right to have all of her claims for relief tried at the same time before the same judge and jury. Byrne v. Bordeaux, 85 N.C. App. 262, 354 S.E.2d 277 (1987).

Dismissal of One Defendant. — Dismissal of Count II of plaintiff's amended complaint, resulting in dismissal of plaintiff's claim against defendant professional corporation, affected her substantial right to have determined in a single proceeding the issues of whether she had been damaged by the actions of one, some or all of the defendants, especially since her claims against all of them arose upon the same series of transactions. Therefore, her appeal therefrom was not premature. Fox v. Wilson, 85 N.C. App. 292, 354 S.E.2d 737 (1987).

Order Dismissing Complaint Against City. — Plaintiff's appeal from trial court's order dismissing complaint against defendant city was premature, where the granting of the city's motion to dismiss disposed of the rights and liabilities of fewer than all the parties, and nowhere in the trial court's order did it certify that there was no just reason for delay. Pasour v. Pierce, 46 N.C. App. 636, 265 S.E.2d 652 (1980).

Order denying defendant's motion to dismiss plaintiff's claim for punitive damages is not immediately appealable. Williams v. East Coast Sales, Inc., 50 N.C. App. 565, 274 S.E.2d 276 (1981).

Judgment of absolute divorce upon a counterclaim to an action for alimony without divorce, rendered prior to final determination of all the issues, was interlocutory and subject to the provisions of section (b) of this rule for purposes of determining its finality. Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399 (1978), aff'd, 296 N.C. 574, 251 S.E.2d 441 (1979).

Orders for child support which are entered in conjunction with orders awarding alimony pendente lite are not appealable until entry of a final order on the plaintiff's claim for permanent alimony. To hold otherwise would allow appeal from an order which adjudicates fewer than all claims in violation of this rule. Fliehr v. Fliehr, 56 N.C. App. 465, 289 S.E.2d 105 (1982).

Staying Enforcement of Judgment. — Section 1A-1, Rule 62(g) allows the trial court, after it has ordered a final judgment as to one or more but fewer than all parties under the conditions stated in section (b) of this rule, to stay enforcement of the judgment until the entering of a subsequent judgment or judgments and to prescribe such conditions as are necessary to prevent any harm that might result to a party if the trial court should decide not to certify judgment for immediate appeal. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240, cert. denied and appeal dismissed, 301 N.C. 92 (1980).

Denial of Substantial Right Not Shown. — Trial court's denial of local boards' motion for attorneys' fees was not reviewable as an interlocutory order because trial court's G.S. 1A-1, N.C. R. Civ. P. 54(b) certification stating that, inter alia, that the interlocutory denial of the motion for attorneys' fees was an ancillary matter and did not affect the on-going proceedings in the case appeared to have been the exact opposite of what was necessary to establish a substantial right; further, the denial of attorneys' fees for the benefit of a party who was ill-equipped to pay such fees did not affect a substantial right justifying immediate appeal. Nevertheless, the appellate court elected to invoke its N.C. R. App. P. 2 power to hear this appeal notwithstanding the fact that the order was interlocutory. Hoke County Bd. of Educ. v. State, — N.C. App. —, 679 S.E.2d 512, 2009 N.C. App. LEXIS 1178 (July 21, 2009).

III. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-208.*

What Is a Judgment. — In its ordinary acceptation, a judgment is the conclusion of the law or facts admitted or in some way established. Sedbury v. Southern Express Co., 164

N.C. 363, 79 S.E. 286 (1913).

Judgments are the solemn determinations of judges upon subjects submitted to them, and the proceedings are recorded for the purpose of perpetuating them. They are the foundation of legal repose. Williams v. Woodhouse, 14 N.C. 257 (1831).

Judgments are considered as contracts to distinguish a cause of action thereon from one ex delicto. Moore v. Nowell, 94 N.C. 265 (1886).

But Are Not Contracts for Purposes of Impairment of Contract Clause. — While judgments are sometimes spoken of as contracts, they are not in reality contracts, and are never so considered in reference to the clause in the federal Constitution which forbids that contracts should be impaired by state legislation. Mottu v. Davis, 151 N.C. 237, 65 S.E. 969 (1909).

Final Judgment Defined. — A judgment is final which decides the case upon its merits without reservation for other and future directions of the court. Flemming v. Roberts, 84 N.C. 532 (1881); Sanders v. May, 173 N.C. 47, 91 S.E. 526 (1917); Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377, rehearing denied, 232 N.C. 744, 59 S.E.2d 429 (1950).

Interlocutory Order Defined. — An interlocutory order is one made during the pendency of an action, which does not dispose of the case but leaves it for further action by the trial court in order to settle and determine the entire controversy. Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377, rehearing denied, 232 N.C. 744, 59 S.E.2d 429 (1950).

A judgment is interlocutory when subject to change by the court, during the pendency of the action, to meet the exigencies of the case. Skidmore v. Austin, 261 N.C. 713, 136 S.E.2d 99 (1964).

An interlocutory order or decree is provisional or preliminary only. It does not determine the issues joined in the suit, but merely directs some further proceedings preparatory to the final decree. Johnson v. Robertson, 171 N.C. 194, 88 S.E. 231 (1916); Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

And Remains in Court's Control. — An interlocutory order remains in the control of and in the breast of the court, and upon good cause shown it may be amended, modified, changed, or rescinded, as the court may think proper. Maxwell v. Blair, 95 N.C. 317 (1886).

An interlocutory order or judgment differs from a final judgment in that an interlocutory order or judgment is subject to change by the court during the pendency of the action to meet the exigencies of the case. Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

Every judgment should and must have the sanction of the court, except in the case of consent judgments, and those must be entered with its knowledge and permission. Branch v. Walker, 92 N.C. 87 (1885).

A judgment may grant to the defendant any affirmative relief to which he may be entitled. Hutchinson v. Smith, 68 N.C. 354 (1873).

Judgments to Determine All the Rights of the Parties. — Since the gist of a judgment is the final determination of the rights of the parties to an action, courts are required to recognize both the legal and equitable rights of the parties, and to frame their judgments so as to determine all the rights of the parties, equitable as well as legal. Lee v. Pearce, 68 N.C. 76 (1873); Hutchinson v. Smith, 68 N.C. 354 (1873); McCown v. Sims, 69 N.C. 159 (1873).

It is not proper to enter a partial judgment on the pleadings for part of a litigant's claim, leaving controverted issues of fact relating to other parts of such claim open for subsequent trial. Erickson v. Starling, 235 N.C. 643, 71 S.E.2d 384 (1952).

Rule 55. Default.

(a) *Entry.* — When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

(b) *Judgment.* — Judgment by default may be entered as follows:

(1) By the Clerk. — When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if the defendant is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading

contains information sufficient to determine or compute the sum certain.

In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust or other contractual security in respect of which foreclosure may be had, or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414, the clerk may likewise make all further orders required to consummate foreclosure in accordance with the procedure provided in Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales."

(2) By the Judge. —

a. In all other cases the party entitled to a judgment by default shall apply to the judge therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, that party (or, if appearing by representative, the representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as the judge deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina. If the plaintiff seeks to establish paternity under Article 3 of Chapter 49 of the General Statutes and the defendant fails to appear, the judge shall enter judgment by default.

b. A motion for judgment by default may be decided by the court without a hearing if:

1. The motion specifically provides that the court will decide the motion for judgment by default without a hearing if the party against whom judgment is sought fails to serve a written response, stating the grounds for opposing the motion, within 30 days of service of the motion; and
2. The party against whom judgment is sought fails to serve the response in accordance with this sub-subdivision.

(c) *Service by publication.* — When service of the summons has been made by published notice, no judgment shall be entered on default until the plaintiff shall have filed a bond, approved by the court, conditioned to abide such order as the court may make touching the restitution of any property collected or obtained by virtue of the judgment in case a defense is thereafter permitted and sustained; provided, that in actions involving the title to real estate or to foreclose mortgages thereon or in actions in which the State of North Carolina or a county or municipality thereof is the plaintiff such bond shall not be required.

(d) *Setting aside default.* — For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b).

(e) *Plaintiffs, counterclaimants, cross claimants.* — The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a crossclaim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(f) *Judgment against the State of North Carolina.* — No judgment by default shall be entered against the State of North Carolina or an officer in his official capacity or agency thereof unless the claimant establishes his claim or right to relief by evidence. (1967, c. 954, s. 1; 1971, cc. 542, 1101; 1977, c. 675; 1991, c. 278, s. 1; 1993 (Reg. Sess., 1994), c. 733, s. 3; 1999-187, s. 1.)

COMMENT

The State statutes presented a hodgepodge. Although former § 1-211 purported by its literal terms to give an exclusive listing of all the cases in which judgment by default final might be given, there were various other authorizations for such judgments scattered throughout the procedural and substantive sections. Section 1-212 then purportedly rounded out the scheme by providing that in all other cases "except those mentioned in § 1-211," judgment by default and inquiry might be given. This was obviously in literal conflict with all sections other than former § 1-211 which specifically authorized judgment by default final.

Although failure to file appropriate responsive pleading to a claim for affirmative relief is the usual basis for default judgment, other grounds appear: e.g. failure to file required bonds (former § 1-211(4) and § 1-525), failure to comply with pretrial discovery orders (former §§ 1-568.19, 8-89), and filing of "frivolous" pleadings (former § 1-219).

By § 1-209, clerks of superior court were authorized to enter all judgments by default authorized generally by § 1-209, and former §§ 1-211 and 1-213. This jurisdiction given clerks is concurrent with that of the superior court judge. Moody v. Howell, 229 N.C. 198, 49 S.E.2d 233 (1948). But some of the other scattered statutes authorizing judgments by default apparently contemplate that in the specific situations dealt with only the judge may enter judgment (e.g. § 1-525). Where the concurrent jurisdiction existed however, the appellate jurisdiction of the superior court judge as to the clerk's entry of judgment was retained (former § 1-220).

Although not made plain in the statutes, it has been held that though there is a "right" to a judgment upon default, the court may always in the exercise of its discretion allow time to answer when motion for judgment by default is made. Kruger v. Bank of Commerce, 123 N.C. 16, 31 S.E. 270 (1898). And of course, such judgments, as others, may be set aside after entry either by the clerk who entered them (former § 1-220), or by any appropriate judge for the usual reasons, i.e., excusable neglect, mistake, surprise, etc.

The main infirmities in the prior North Carolina practice as codified were thought to be (1) a general lack of symmetry and orderliness in the style and pattern of the various statutes, and (2) as a matter of substance, too much power and too much readiness in clerks to enter judgments which may thereafter be hard to set aside.

Accordingly, it was felt that federal Rule 55, with some few modifications to accommodate certain actions found in state practice and not in federal should be adopted, partially supplanting certain of the statutes which dealt with default judgments.

The federal rule approach actually contemplates a two-stage approach to judgment by default: The entry of default by the clerk; and thereafter the entry of judgment by default. Federal Rule 55(b)(1) provides that the clerk may only enter judgments by default in a very limited context, when (a) the claim is for a sum certain or for a computable sum, and (b) the default is for want of appearance, and (c) the defaulting party is neither an infant nor incompetent. This approach of limiting the clerk's power to the purely ministerial functions of (a) making entry of default in all cases, and (b) entering judgment itself in only this very limited context is felt to be wise.

The basic federal scheme continues by providing in 55(b)(2) that in all other cases than the very limited area spelled out in 55(b)(1), judgment itself may only be entered by the judge. Thus, in all cases where (a) the claim is not for a sum certain or computable, or (b) the defaulting party has appeared, or (c) the defaulting party is an infant or incompetent, only the judge may actually enter judgment. And except where the defaulting party has made no appearance, he must be given notice, and the entry of the judgment is in all instances in the discretion of the judge. It is believed that deliberately pointing up the discretionary nature of this power to enter judgment by default at this stage is wise, and will result in an overall saving of time by prompting full inquiry into the matter at the pre-entry stage rather than, as under prior practice, having discretion in the matter exercised usually after judgment has already been entered.

Note next that the delineation between judges' and clerks' power is not the delineation between judgments by "default final" and those by "default and inquiry." This distinction indeed is not retained in literal terms in the federal rule pattern. Obviously those very limited judgments within the power of the clerk to enter are judgments by default final. But the judge may enter either type under 55(b)(2).

Instead of using this terminology, however, the rule as presented approaches the matter pragmatically by providing that when in order to enter final judgment something further must be done after entry of default, e.g. when an account must be taken or a jury trial had on an issue of damages or any other, the judge orders that done which is necessary. Thus, there is no intermediate judgment by "default and inquiry," but an entry of default in all cases and a final judgment by default entered only after everything required to its entry has been done. The same conceptions were involved in former § 1-212.

Section (c). — The Commission here attempted to take abundant precaution to protect the nonappearing defendant.

Section (d). — This section provides for setting aside default entries and judgments by default and ties the basis therefor into Rule 60(b) providing generally for setting aside judgments. Former § 1-220 and existing case law expressed this conception so that this involves no real change.

Section (e). — This section makes it plain that the general provisions of the rule apply as well to defendants and third-party plaintiffs as to plaintiffs seeking affirmative relief. This conception was expressed less artfully in former § 1-213 as to defendants and North Carolina actually had no express provision for default judgments in favor of third-party plaintiffs, or crossclaims. This is necessary now particularly in view of the third-party practice liberalization provided in other rules.

Section (f). — This section seems to be self-explanatory.

Editor's Note. — Section 105-414, referred to in subdivision (b)(1) of this rule, was repealed by Session Laws 1971, c. 806, s. 3.

Section 1-212, referred to in the Comment above, has been repealed. For general information regarding the official comments to the North Carolina Rules of Civil Procedure, see the Editor's Note under the heading for this Chapter.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1043 (1981).

For note on default not constituting an admission of facts for purposes of summary judgment, see 17 Wake Forest L. Rev. 49 (1981).

For survey of 1981 law on civil procedure, see 60 N.C.L. Rev. 1214 (1982).

For article on default judgments and motions to set aside, see 18 Wake Forest L. Rev. 683 (1982).

CASE NOTES

I. In General.
II. Entry of Default.
III. Entry of Judgment by Default.
  A. By Clerk.
  B. By Judge.
IV. Setting Aside Default.
V. Decisions under Prior Law.

I. IN GENERAL.

This rule appears to be a counterpart of FRCP, Rule 55. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970); Harris v. Carter, 33 N.C. App. 179, 234 S.E.2d 472 (1977).

This rule has no application where plaintiff does not proceed under it after defendant fails to file his answer within the required time, but allows the case to be regularly scheduled for trial. Whitaker v. Whitaker, 16 N.C. App. 432, 192 S.E.2d 80 (1972).

Plaintiffs Not Entitled to Default Judgment in Declaratory Judgment Action. — In an action for a declaratory judgment, failure of defendants to file an answer to the complaint or to answer interrogatories did not entitle plaintiffs to a judgment against such defendants based on plaintiffs' conclusions and contentions as to the construction of the instrument in question, since the rights of the parties had to be determined by a proper construction of the instrument. Baxter v. Jones, 14 N.C. App. 296, 188 S.E.2d 622, cert. denied, 281 N.C. 621, 190 S.E.2d 465 (1972).

This rule has no applicability to the entering of final judgments in condemna-

tion proceedings. Board of Transp. v. Williams, 31 N.C. App. 125, 229 S.E.2d 37 (1976).

Entry of default is to be distinguished from a judgment by default. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973); Miller v. Miller, 24 N.C. App. 319, 210 S.E.2d 438 (1974).

Effect of Appearance of Defendant on Right to Notice. — Defendant's appearance in an action is of no significance in determining whether he is entitled to notice of plaintiff's motion for any entry of default under section (a) of this rule. It is only in reference to entry of a default judgment, under section (b) of this rule, that a party's appearance entitles him to notice. G & M Sales of E.N.C., Inc. v. Brown, 64 N.C. App. 592, 307 S.E.2d 593 (1983).

Service of the answer is both a "pleading" and an "appearance" for the purpose of this rule. Quaker Furn. House, Inc. v. Ball, 31 N.C. App. 140, 228 S.E.2d 475 (1976).

A party may appear without pleading. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

Negotiations Between Parties as Appearance. — Negotiations between parties after institution of an action may constitute an appearance. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976); Webb v. James, 46 N.C. App. 551, 265 S.E.2d 642 (1980).

Letter as Appearance. — A letter sent by defendant to plaintiff's attorney and to the clerk of court, acknowledging plaintiff's complaint and setting out reasons for denial of plaintiff's claim, constituted an "appearance" for the purposes of this rule. Peebles v. Moore, 48 N.C. App. 497, 269 S.E.2d 694 (1980), modified and aff'd, 302 N.C. 351, 275 S.E.2d 833 (1981).

A motion to intervene after the entry of default against the defendant, his liability to the plaintiff being conclusively established, the extent of liability never being in issue, was untimely. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Where a complaint alleges a joint claim against more than one defendant, default judgment pursuant to this rule should not be entered against a defaulting defendant until all defendants have defaulted; if one or more defendants do not default, generally entry of default judgment should await an adjudication as to the liability of the non-defaulting defendants. Leonard v. Pugh, 86 N.C. App. 207, 356 S.E.2d 812 (1987).

Hearing on Punitive Damages Following Default. — Due process concerns demand that a party who is defaulted for failure to answer interrogatories be afforded an opportunity to be heard on the question of punitive damages. Hunter v. Spaulding, 97 N.C. App. 372, 388 S.E.2d 630 (1990).

Pre-answer Motion to Dismiss was not a responsible pleading within the confines of Rule 12 of the North Carolina Rules of Civil Procedure, preventing the entry of default judgment pursuant to this rule. Eden's Gate, Ltd. v. Leeper, 121 N.C. App. 171, 464 S.E.2d 696 (1995).

Applied in Gregg v. Steele, 24 N.C. App. 310, 210 S.E.2d 434 (1974); Lewis Clarke Assocs. v. Tobler, 32 N.C. App. 435, 232 S.E.2d 458 (1977); Quis v. Griffin, 42 N.C. App. 477, 256 S.E.2d 846 (1979); Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980); Whitfield v. Wakefield, 51 N.C. App. 124, 275 S.E.2d 263 (1981); Pryse v. Strickland Lumber & Bldg. Supply, Inc., 66 N.C. App. 361, 311 S.E.2d 598 (1984); Smith v. Barfield, 77 N.C. App. 217, 334 S.E.2d 487 (1985); Roan-Baker v. Southeastern Hosp. Supply Corp., 99 N.C. App. 30, 392 S.E.2d 663 (1990); John Henry Spainhour & Sons Grading Co. v. Carolina E.E. Homes, Inc., 109 N.C. App. 174, 426 S.E.2d 728 (1993); Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc., 140 N.C. App. 521, 537 S.E.2d 227, 2000 N.C. App. LEXIS 1212 (2000); L&M Transp. Servs. v. Morton Indus. Group, Inc., 163 N.C. App. 606, 594 S.E.2d 145, 2004 N.C. App. LEXIS 511 (2004); Revelle v. Chamblee, 168 N.C. App. 227, 606 S.E.2d 712, 2005 N.C. App. LEXIS 158 (2005).

Cited in Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407 (1971); East v. Smith, 11 N.C. App. 604, 182 S.E.2d 266 (1971); Engines & Equip., Inc. v. Lipscomb, 15 N.C. App. 120, 189 S.E.2d 498 (1972); Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976); Fagan v. Hazzard, 29 N.C. App. 618, 225 S.E.2d 640 (1976); Hickory White Trucks, Inc. v. Greene, 34 N.C. App. 279, 237 S.E.2d 862 (1977); Howard v. Williams, 40 N.C. App. 575, 253 S.E.2d 571 (1979); Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979); Davis v. Mitchell, 46 N.C. App. 272, 265 S.E.2d 248 (1980); Pelham Realty Corp. v. Board of Transp., 303 N.C. 424, 279 S.E.2d 826 (1981); Shaw v. Pedersen, 53 N.C. App. 796, 281 S.E.2d 700 (1981); Byrd v. Mortenson, 308 N.C. 536, 302 S.E.2d 809 (1983); Oak Island Southwind Realty, Inc. v. Pruitt, 89 N.C. App. 471, 366 S.E.2d 489 (1988); Jennings v. Jessen, 93 N.C. App. 731, 379 S.E.2d 53 (1989); Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991); Jennings v. Jessen, 103 N.C. App. 739, 407 S.E.2d 264 (1991); O'Neal v. Murray, 105 N.C. App. 102, 411 S.E.2d 628 (1992); Brown v. Booker, 121 N.C. App. 366, 465 S.E.2d 75 (1996); Cheek v. Poole, 121 N.C. App. 370, 465 S.E.2d 561 (1996); Hummel v. Univ. of N.C., 156 N.C. App. 108, 576 S.E.2d 124, 2003 N.C.

App. LEXIS 72 (2003); Shealy v. Lunsford, 355 F. Supp. 2d 820, 2005 U.S. Dist. LEXIS 2043 (M.D.N.C. 2005); Autec, Inc. v. Southlake Holdings, LLC, 171 N.C. App. 147, 613 S.E.2d 727, 2005 N.C. App. LEXIS 1162 (2005); Carolina Bldg. Servs.' Windows & Doors, Inc. v. Boardwalk, LLC, 362 N.C. 262, 658 S.E.2d 924, 2008 N.C. LEXIS 335 (2008); Sanders v. State Personnel Comm'n, — N.C. App. —, 677 S.E.2d 182, 2009 N.C. App. LEXIS 687 (2009).

II. ENTRY OF DEFAULT.

The "entry of default" has been characterized as a ministerial duty. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Miller v. Miller, 24 N.C. App. 319, 210 S.E.2d 438 (1974).

Interlocutory Entry of Default. — Where the trial court in its findings of fact referred to petitioner's "Motion for Entry of Default" and concluded that "the Clerk shall sign and file the Entry of Default, if not already signed and filed," and where the trial court then set for hearing a determination as to the money and property taken, damages caused, and "all other things" taken, the order entered by the trial court was not a final order or final judgment but was an interlocutory entry of default and not subject to appellate review. Duncan v. Duncan, 102 N.C. App. 107, 401 S.E.2d 398 (1991).

Entry of default is only an interlocutory act looking toward subsequent entry of final judgment by default and is more in the nature of a formal matter. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973); First-Citizens Bank & Trust Co. v. R & G Constr. Co., 24 N.C. App. 131, 210 S.E.2d 97 (1974); Battle v. Clanton, 27 N.C. App. 616, 220 S.E.2d 97 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Generally, there is first an interlocutory entry of default, and then a final judgment by default only after the requisites to its entry, including a jury trial on damages, have occurred. An entry of default is not a final order or a final judgment. Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984).

The entry of default is interlocutory in nature and is not a final judicial action. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

While obtaining a default judgment was normally a two-step process with entry of default before the clerk preceding the judgment, G.S. 1A-1, N.C. R. Civ. P. 55 did not prohibit both motions from being made in the same pleading. While it was the better practice to follow the normal procedure, under the facts of the case, there was no prejudice to the utility, which was sued by an accident victim, as the trial court considered setting aside the default judgment under the more lenient standard of G.S. 1A-1, N.C. R. Civ. P. 55(d), rather than G.S. 1A-1, N.C. R. Civ. P. 60(b), but found that relief was not warranted. Ruiz v. Mecklenburg Utils., Inc., 189 N.C. App. 123, 657 S.E.2d 432, 2008 N.C. App. LEXIS 418 (2008).

Defaults may not be entered after an answer has been filed, etc. even if the answer is late, as defaults should not be entered, even though technical default is clear, if justice may be served otherwise. Peebles v. Moore, 302 N.C. 351, 275 S.E.2d 833 (1981).

By waiting till an answer had been tardily filed before seeking to obtain entry of default, the plaintiff waived its rights to entry of default. Joe Newton, Inc. v. Tull, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

According to the language of this section, defaults may not be entered after answer has been filed, even though the answer is late; however, a better reasoned and more equitable result may be reached by adhering to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise. Fieldcrest Cannon Employees Credit Union v. Mabes, 116 N.C. App. 351, 447 S.E.2d 510 (1994).

Response to an amended complaint following a motion for a more definite statement was due within 20 days, however, because the answer was filed, albeit late, before default was entered and because there was no prejudice, it was not improper to deny a motion to strike the response. Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003).

Trial court erred in granting a default judgment because the cottage owner had filed an answer prior to entry of default judgment, and after an answer had been filed — even if the answer was untimely filed — a default could not be entered. Monteith v. Kovas, 162 N.C. App. 545, 594 S.E.2d 787, 2004 N.C. App. LEXIS 173 (2004), cert. granted, — N.C. —, 598 S.E.2d 382 (2004).

Written Motion Not Mandatory. — Section (a) of this rule provides for the use of affidavit or motion or some other method. The use of the disjunctive rather than the conjunctive suggests that the use of a written motion is not mandatory. While it may be better practice to file a written motion, the use of a written motion is not mandatory. Sawyer v. Cox, 36 N.C. App. 300, 244 S.E.2d 173, cert. denied, 295 N.C. 467, 246 S.E.2d 216 (1978).

Section (a) of this rule plainly does not require proof solely by affidavit; the clerk may act upon any proof he or she deems appropriate, including the record alone. Silverman v. Tate, 61 N.C. App. 670, 301 S.E.2d 732 (1983).

Default may not be entered if an answer has been filed, even if the answer is deficient in some respect. North Carolina Nat'l Bank v. Virginia Carolina Bldrs., 307 N.C. 563, 299 S.E.2d 629 (1983).

Where default is established, defendant has no further standing to contest the merits of plaintiff's right to recover. His only recourse is to show good cause for setting aside the default and, failing that, to contest the amount of the recovery. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971); Peebles v. Moore, 48 N.C. App. 497, 269 S.E.2d 694 (1980), modified and aff'd, 302 N.C. 351, 275 S.E.2d 833 (1981); Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981).

Challenge to Merits After Default. — Where an entry of default had not been set aside and the complaint was sufficient to state a claim, the defendant in default was not allowed to defend its merits by asserting affirmative defenses in a motion for summary judgment. Hartwell v. Mahan, 153 N.C. App. 788, 571 S.E.2d 252, 2002 N.C. App. LEXIS 1258 (2002), cert. denied, 356 N.C. 671, 577 S.E.2d 118 (2003).

Employee's motion in limine to exclude evidence from his former employer in a hearing on damages with respect to the employee's claim for recovery of unpaid commissions was proper because a default judgment had been entered against the employer pursuant to G.S. 1A-1, N.C. R. Civ. P. 55(d), such that the employer was not entitled to offer evidence to dispute its liability for the liquidated damages sought pursuant to the North Carolina Wage and Hour Act, G.S. 95-25.22(a) and (a1). Luke v. Omega Consulting Group, LC, — N.C. App. —, 670 S.E.2d 604, 2009 N.C. App. LEXIS 32 (2009).

Challenge to Sufficiency of Complaint After Default. — A default judgment admits only the allegations contained within the complaint, and a defendant may still show that the complaint is insufficient to warrant plaintiff's recovery. Hunter v. Spaulding, 97 N.C. App. 372, 388 S.E.2d 630 (1990).

Defendant's exception to judgment, entered in open court, permitted him to challenge on appeal whether a default judgment could be based upon plaintiff's complaint. Hunter v. Spaulding, 97 N.C. App. 372, 388 S.E.2d 630 (1990).

Substantive Allegations Deemed Admitted When Default Entered. — When default is entered due to defendant's failure to answer, the substantive allegations raised by plaintiff's complaint are no longer in issue, and, for the purposes of entry of default and default judgment, are deemed admitted. Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980); Peebles v. Moore, 48 N.C. App. 497, 269 S.E.2d 694 (1980), modified and aff'd, 302 N.C. 351, 275 S.E.2d 833 (1981); State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

Where respondent in a partition proceeding failed to answer petition for partition because he was satisfied that the interests of the tenants in common were correctly alleged and that the relief prayed for was appropriate, petitioners were not entitled to an entry of default, as respondents were not "in default" under this rule. Macon v. Edinger, 49 N.C. App. 624, 272 S.E.2d 411 (1980), rev'd on other grounds, 303 N.C. 274, 278 S.E.2d 256 (1981).

Raising Affirmative Defense for First Time on Summary Judgment Ruling. — Even if the plaintiff's motion to strike tardily filed answer had been ruled upon and allowed before the trial court considered the defendant's motion for summary judgment based upon an affirmative defense, the defendants would have been entitled to proceed with their motion. An affirmative defense may be raised for the first time by affidavit for the purpose of ruling on a motion for summary judgment. Joe Newton, Inc. v. Tull, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

Defendant is entitled to a hearing where he may move to vacate entry of default in favor of plaintiff. Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980).

Prior Hearing Not Required. — The North Carolina Industrial Commission was not required by subsection (f) to conduct a full evidentiary hearing prior to entering default against the State. Parker v. State DOT, 122 N.C. App. 279, 468 S.E.2d 589 (1996).

Effect of Entry of Default. — The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint and is prohibited from defending on the merits of the case. Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991).

Default Entered Properly. — Denial of the defendants' motion to set aside entry of default was not in error. RC Assocs. v. Regency Ventures, Inc., 111 N.C. App. 367, 432 S.E.2d 394 (1993).

III. ENTRY OF JUDGMENT BY DEFAULT.

A. By Clerk.

Subsection (b)(1) Subject to §§ 1-75.11 and 1-209(4). — Default judgment by the clerk, provided for by subsection (b)(1) of this rule, is subject to the jurisdictional proofs required by G.S. 1-75.11, and is still controlled by G.S. 1-209(4), which empowers the clerk to enter all judgments by default final and default and inquiry as are authorized by this rule. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C.

App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

Applicability of § 1-75.11 to Judgment Against Nonappearing Defendant. — In order for a valid judgment to be entered in an action against a nonappearing defendant, there must be compliance with the provisions of this rule as well as G.S. 1-75.11. Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

Entry of default by the clerk is not a prerequisite to obtaining judgment against a nonappearing defendant. Plaintiff has the option to bypass entry of default and proceed to trial. Love v. Nationwide Mut. Ins. Co., 45 N.C. App. 444, 263 S.E.2d 337, cert. denied, 300 N.C. 198, 269 S.E.2d 617 (1980).

Liens established pursuant to Chapter 44A are not "contractual security" within the meaning of subsection (b)(1) of this rule, and a clerk or assistant clerk of court is without jurisdiction to make orders consummating foreclosure of liens established pursuant to Chapter 44A. Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

Mere demand for a specified dollar amount does not suffice to make claim one for "a sum certain," as contemplated by section (b) of this rule. Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E.2d 858 (1980).

Complaint Not for "Sum Certain." — Where plaintiff's complaint alleged a breach of contract by defendant, but nothing in the allegations of the complaint made it possible to compute the amount of damages to which plaintiff was entitled by reason of the breach, then the allegations of the complaint were not sufficient to state a claim "for a sum certain or a sum which can by computation be made certain" within the meaning of subsection (b)(1) of this rule. Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E.2d 858 (1980).

Plaintiffs' claim was not for a sum certain where their damages were mitigated by a sum dependent on plaintiffs' estimate of the "fair rental value" of some unspecified amount of land, and where there was uncertainty as to how plaintiffs arrived at an expense figure for land clearing. Williams v. Moore, 95 N.C. App. 601, 383 S.E.2d 416 (1989).

Although a trial court did not abuse its discretion by finding that a failure to file an extension of time did not constitute a mistake since there was no explanation for a law firm's actions, a motion to set aside a default judgment should have been granted under G.S. 1A-1, N.C. R. Civ. P. 60(b) because a judgment was void since a clerk was unable to enter a default where there was no sum certain. Basnight Constr. Co. v. Peters & White Constr. Co., 169 N.C. App. 619, 610 S.E.2d 469, 2005 N.C. App. LEXIS 605 (2005).

Authority of Clerk Concurrent with That of Judge in Certain Instances. — The authority of the clerk of court to enter judgments in certain instances is concurrent with and in addition to that of the judge of the superior court. Highfill v. Williamson, 19 N.C. App. 523, 199 S.E.2d 469 (1973).

And Judge Is Not Deprived of Jurisdiction Thereby. — The judge of the superior court is in no way deprived of jurisdiction simply because the clerk, in certain instances, has concurrent jurisdiction. Highfill v. Williamson, 19 N.C. App. 523, 199 S.E.2d 469 (1973); Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981).

When Clerk May Enter Judgment. — There are two basic requirements that must be fulfilled before a clerk can enter a default judgment: (1) Plaintiff's claim must be for a sum certain or for a sum that can by computation be made certain, and (2) defendant must have been defaulted for failure to appear and he must not have been an infant or incompetent person. Roland v. W & L Motor Lines, 32 N.C. App. 288, 231 S.E.2d 685 (1977); General Foods Corp. v. Morris, 49 N.C. App. 541, 272 S.E.2d 17 (1980).

Clerk may enter default judgment against a defendant only if he has never made an appearance. Roland v. W & L Motor Lines, 32 N.C. App. 288, 231 S.E.2d 685 (1977).

This rule authorizes the clerk to enter only those judgments which would have been designated formerly as "default final." Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

The clerk can enter a default judgment against a defendant only if the defendant has failed to appear in the matter. North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983).

The entry of default by the clerk requires only that the clerk ascertain that the party against whom a judgment for affirmative relief is sought has failed to plead. Beard v. Pembaur, 68 N.C. App. 52, 313 S.E.2d 853, cert. denied, 311 N.C. 750, 321 S.E.2d 126 (1984).

Affidavit Held Sufficient. — Where plaintiffs' affidavit referred to complaint and complaint contained lease as Exhibit A, plaintiffs' affidavit met the requirements of this rule for entry of default judgment by the clerk, even though the affidavit was supplemented by allegations in plaintiffs' unverified complaint; while the basis for plaintiffs' motion would have been clearer if all material had been in either an affidavit or a verified complaint, it was not improper for plaintiffs to refer in their affidavit to material already set out in or attached to their complaint. Williams v. Moore, 95 N.C. App. 601, 383 S.E.2d 416 (1989).

Plaintiff is not required to show that

defendant is not an infant and not under disability before he is entitled to obtain an entry of default and a judgment by default. General Foods Corp. v. Morris, 49 N.C. App. 541, 272 S.E.2d 17 (1980).

Nor Is Clerk Required to Make Such Finding. — This rule and G.S. 1-75.11 do not require the clerk to make an affirmative finding that defendant is not a minor nor under legal disability in order to enter a default or a default judgment. General Foods Corp. v. Morris, 49 N.C. App. 541, 272 S.E.2d 17 (1980).

Basis for Finding Defendant Neither Infant Nor Incompetent. — Where verified complaint stated: "Defendant is a citizen and resident of the County of Person, State of North Carolina, and is of a legal age and under no legal disability," there was a basis upon which the court could find that defendant was neither an infant nor an incompetent person. Highfill v. Williamson, 19 N.C. App. 523, 199 S.E.2d 469 (1973).

Entry of default and of default judgment by the clerk may be simultaneous and can be contained in the same document. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

B. By Judge.

This rule does not provide for judgments by "default and inquiry" per se. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

Subsection (b)(2) of this rule does not require a written motion for entry of judgment by default. Sawyer v. Cox, 36 N.C. App. 300, 244 S.E.2d 173, cert. denied, 295 N.C. 467, 246 S.E.2d 216 (1978).

When Judgment Must Be Entered by Judge. — When a party, or his representative, has appeared in an action and later defaults, section (b) of this rule requires that the judge, rather than the clerk, enter the judgment by default after the required notice has been given. Roland v. W & L Motor Lines, 32 N.C. App. 288, 231 S.E.2d 685 (1977); Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

Where the claim is not for a sum certain or for a sum which can by computation be made certain, the party entitled to the default judgment must make his application to a judge. Grant v. Cox, 106 N.C. App. 122, 415 S.E.2d 378 (1992).

An appearance need not be a direct response to the complaint; there may be an appearance whenever a defendant takes, seeks or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff. Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

An appearance within the meaning of section (b) of this rule is not always comprised of a direct response to a complaint. Stanaland v. Stanaland, 89 N.C. App. 111, 365 S.E.2d 170 (1988).

In some cases, an appearance may arise by implication, as when a defendant takes, seeks or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff. Stanaland v. Stanaland, 89 N.C. App. 111, 365 S.E.2d 170 (1988).

Negotiations as Appearances. — Negotiations for settlements or continuances, whether by letter or by meeting, after the complaint is filed, constitute appearances within the meaning of subsection (b)(2) of this rule. Stanaland v. Stanaland, 89 N.C. App. 111, 365 S.E.2d 170 (1988).

Defendant's meeting with plaintiff and her attorney was sufficient to constitute an appearance within the meaning of subsection (b)(2) of this rule. Stanaland v. Stanaland, 89 N.C. App. 111, 365 S.E.2d 170 (1988).

Notice Requirement Under Subsection (b)(2) Inapplicable Where No Appearance Made. — Requirement of subsection (b)(2) of this rule that a defendant who has appeared in an action be served with written notice of application of a default judgment at least three days prior to the hearing on the application is inapplicable where defendant does not make an appearance prior to the entry of default by the clerk or default judgment. North Brook Farm Lines v. McBrayer, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

Effect of Failure to Give Notice under Subsection (b)(2). — Failure to give notice under subsection (b)(2) of this rule constitutes a mere procedural irregularity, subjecting resulting judgment to direct but not collateral attack. Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979).

"Request to Calendar Clerk" and calendar which were mailed to defendant were sufficient notice of an application for judgment to satisfy the requirements of subsection (b)(2) of this rule. Sawyer v. Cox, 36 N.C. App. 300, 244 S.E.2d 173, cert. denied, 295 N.C. 467, 246 S.E.2d 216 (1978).

Motion to Set Aside and Inquiry Thereon as Waiver of Notice Requirement. — Where defendants brought the matter in controversy before the trial court as a result of their motion to set aside clerk's order entering default, and there was a full inquiry, defendants in effect waived the notice requirement of subsection (b)(2) of this rule and were not entitled to further notice prior to entry of default judgment. Webb v. James, 46 N.C. App. 551, 265 S.E.2d 642 (1980).

Defendant Held Entitled to Notice. — Where defendant filed an application for an extension of time in which to answer, a motion to vacate entry of default, and a motion to dismiss the complaint, and was present for a hearing in superior court on his motion to vacate, he appeared in the action within the meaning of subsection (b)(2) of this rule and should have been served with written notice of plaintiff's application for default judgment at least three days prior to the hearing on the application; failure to provide the statutory notice required that the default judgment be vacated. Miller v. Belk, 18 N.C. App. 70, 196 S.E.2d 44, cert. denied, 283 N.C. 665, 197 S.E.2d 874 (1973).

Where defendant had made an appearance in plaintiff's action for purposes of section (b) of this rule by meeting with plaintiff and her attorney, plaintiff was required to provide three days' notice of subsequent default hearing. Stanaland v. Stanaland, 89 N.C. App. 111, 365 S.E.2d 170 (1988).

Oral Warning Not Sufficient Notice. — Oral warning given to defendant during meeting with plaintiff and her attorney that plaintiff would go forward with her case did not comprise the written notice required by subsection (b)(2) of this rule. Stanaland v. Stanaland, 89 N.C. App. 111, 365 S.E.2d 170 (1988).

Same Judge Need Not Enter Default Judgment and Default Final. — Subsection (b)(2) of this rule does not require the same judge who enters default judgment to likewise conduct jury trial to determine damages and enter default final. Highfill v. Williamson, 19 N.C. App. 523, 199 S.E.2d 469 (1973).

Default Judgment Did Not Prevent Answering Requests for Admissions. — Entry of default under G.S. 1A-1-55(a) did not preclude a seller from responding to the buyers' requests for admissions under G.S. 1A-1-36(b) because the seller was free to contest the sufficiency of the complaint to state a claim for recovery; by not responding to the requests, the seller admitted the matters requested, establishing a claim for breach of contract. Kniep v. Templeton, 185 N.C. App. 622, 649 S.E.2d 425, 2007 N.C. App. LEXIS 1943 (2007).

IV. SETTING ASIDE DEFAULT.

Entry of default may be set aside, not by motion pursuant to G.S. 1A-1, Rule 60(b), but by motion pursuant to section (d) of this rule and a showing of good cause. Bailey v. Gooding, 60 N.C. App. 459, 299 S.E.2d 267 (1983).

An adequate basis for the motion to set aside must be shown. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

Entry of Default Might Be Set Aside on Showing That Would Not Justify Setting Aside Default Judgment. — A court might feel justified in setting aside an entry of default on a showing that would not move it to set aside a default judgment. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973).

The rules evidently make a distinction between what is required to make a good case for setting aside a default and what is required to set aside a judgment. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

An entry of default is an interlocutory and ministerial act and, therefore, is more easily set aside than a default judgment. Peebles v. Moore, 48 N.C. App. 497, 269 S.E.2d 694 (1980), modified and aff'd, 302 N.C. 351, 275 S.E.2d 833 (1981).

First Clause of Section (d) Governs Motion to Vacate Entry of Default. — Where a default but no judgment has been entered, the motion to vacate the default is governed by the first clause of section (d) of this rule. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

And Reference to § 1A-1, Rule 60 Is Unnecessary. — Where defendant's motion to set aside and vacate entry of default is governed by section (d) of this rule, any reference to or discussion of G.S. 1A-1, Rule 60, governing the setting aside of judgment by default, is unnecessary and surplusage. Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973).

Standard of § 1A-1, Rule 60(b)(1) Inapplicable to Judgment Determining Issue of Liability But Not Damages. — A judgment by a superior court judge which determined the issue of liability in a personal injury action and ordered a trial on the issue of damages was an entry of default, rather than a default judgment, since it was not a final judgment. Therefore, the trial court erred in applying the "mistake, inadvertence, surprise or excusable neglect" standard of G.S. 1A-1, Rule 60(b)(1) rather than the "good cause shown" standard of section (d) of this rule in ruling on defendant's motion to set aside its judgment. Pendley v. Ayers, 45 N.C. App. 692, 263 S.E.2d 833 (1980).

There is no necessity to find excusable neglect in granting motion to set aside entry of default. Hence, plaintiff's assignment of error directed at trial judge's conclusion that excusable neglect existed was to no avail; such finding was surplusage, and though erroneous, was not prejudicial. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

In setting aside an entry of default, as opposed to a default judgment, a showing of excusable neglect is not necessary. Frye v. Wiles, 33 N.C. App. 581, 235 S.E.2d 889 (1977); Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E.2d 858 (1980).

Attack of Default Judgment on Appeal. — Failure to attack default judgment at the trial court level precludes such an attack on appeal. University of N.C. v. Shoemate, 113 N.C. App. 205, 437 S.E.2d 892, cert. denied, 336 N.C. 615, 447 S.E.2d 413 (1994).

Only Good Cause Required to Set Aside Entry of Default. While setting aside a default judgment under G.S. 1A-1, Rule 60(b) generally involves a showing of excusable neglect and a meritorious defense, to set aside an entry of default all that need be shown is good cause. Peebles v. Moore, 48 N.C. App. 497, 269 S.E.2d 694 (1980), modified and aff'd, 302 N.C. 351, 275 S.E.2d 833 (1981).

To set aside a default all that need be shown is good cause. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Frye v. Wiles, 33 N.C. App. 581, 235 S.E.2d 889 (1977); Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E.2d 858 (1980).

Where the facts of a case are sufficient to warrant a conclusion by the trial judge that defendant has shown good cause for his failure to file an answer, the judge's action in vacating the entry of default must be upheld. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972).

For the entry of a default to be disturbed, section (d) of this rule requires that "good cause" be shown. That determination is in the trial judge's discretion and will not be disturbed absent an abuse of discretion. Byrd v. Mortenson, 60 N.C. App. 85, 298 S.E.2d 170 (1982).

A motion to set aside entry of default is governed by the first clause of section (d) of this rule that, for good cause shown, the court may set aside an entry of default. This standard is more lax than that required for setting aside a default judgment pursuant to G.S. 1A-1, Rule 60(b), which requires the presence of mistake, inadvertence, or excusable neglect. Bailey v. Gooding, 60 N.C. App. 459, 299 S.E.2d 267 (1983).

To set aside an entry of default, good cause must be shown. Silverman v. Tate, 61 N.C. App. 670, 301 S.E.2d 732 (1983).

What constitutes "good cause" depends on the circumstances in a particular case, and within the limits of discretion, an inadvertence which is not strictly excusable may constitute good cause, particularly where plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to defendant. Peebles v. Moore, 48 N.C. App. 497, 269 S.E.2d 694 (1980), modified and aff'd, 302 N.C. 351, 275 S.E.2d 833 (1981).

Inadvertence, even if not strictly "excusable," may constitute good cause, particularly in a case where plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to defendant. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

Burden on Defendant to Show Good Cause. — In moving for relief pursuant to section (d) of this rule, the burden is on defendant, as the defaulting party, not to refute the allegations of plaintiff's complaint, nor to show the existence of factual issues as in summary judgment, but to show good cause why he should be allowed to file answer to plaintiff's complaint. Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980); Peebles v. Moore, 48 N.C. App. 497, 269 S.E.2d 694 (1980), modified and aff'd, 302 N.C. 351, 275 S.E.2d 833 (1981).

Defendant failed to show good cause for setting aside of entry of default where defendant's affidavits showed that, although defendant's legal department received suit papers on June 7, 1978, they were misplaced and not relocated until July 12, 1978, the day entry of default was made. Britt v. Georgia-Pacific Corp., 46 N.C. App. 107, 264 S.E.2d 395 (1980).

Trial court did not abuse its discretion in refusing to set aside the entry of default where defendant's only action was to deliver the suit papers to his insurance company; after delivery, he took no further action to inquire into the progress of the case. Cabe v. Worley, 140 N.C. App. 250, 536 S.E.2d 328, 2000 N.C. App. LEXIS 1111 (2000).

Trial court did not err in denying a credit union's motion for relief from entry of default, as the credit union was properly served but failed to file a responsive pleading to the complaint and lacked good cause for failing to file a responsive pleading. Old Salem Foreign Car Serv., Inc. v. Webb, 159 N.C. App. 93, 582 S.E.2d 673, 2003 N.C. App. LEXIS 1426 (2003).

Where an individual claimed good cause for striking an entry of default judgment because he was not a lawyer and was unfamiliar with legal matters, the trial court properly found that such did not constitute good cause for setting aside the entry of default under G.S. 1A-1, Rule 55(d). Granville Med. Ctr. v. Tipton, 160 N.C. App. 484, 586 S.E.2d 791, 2003 N.C. App. LEXIS 1826 (2003).

Trial court did not abuse its discretion under G.S. 1A-1-55(d) and G.S. 1A-1-60(b) in denying an insurance carrier's motion to vacate a default judgment, as the carrier failed to show good cause to grant the requested relief where the carrier's actions upon being served with the papers were not diligent, and it was not attentive to its responsibilities and duties; there was no showing that the judge's decision was manifestly unsupported by reason in the circumstances. Lowery v. Campbell, 185 N.C. App. 659, 649 S.E.2d 453, 2007 N.C. App. LEXIS 1948 (2007).

Order Refusing to Set Aside Upheld on

Appeal. — The trial court's decision not to set aside the entry of default was not unsupported by reason where the defendant filed her motion to set aside the entry of default almost six months after its entry; where she claimed to be "unaware that she was required to file an answer to the plaintiff's complaint as she is not an attorney and has not been involved in civil litigation, other than the present domestic civil action;" and where she claimed to believe that she was entitled to rely on her former husband's defense of this deficiency action, since it related to property jointly owned by them. First Citizens Bank & Trust Co. v. Shaut, 138 N.C. App. 153, 530 S.E.2d 581, 2000 N.C. App. LEXIS 549 (2000).

Regarding a breach of contract action filed against an individual and his business entities, where uncontradicted evidence established that a civil summons addressed to the individual was sent to him via U.S. Postal Service by certified mail, return receipt requested; the summons was delivered and a signature was obtained on the registry receipt; and the medical center executed an affidavit attesting to such facts, attaching the registry receipt bearing a signature showing delivery of the summons, the individual's motion to strike the subsequent entry of default was properly denied because the medical center showed proof of service, even though the postal receipt had been signed by a third party. Granville Med. Ctr. v. Tipton, 160 N.C. App. 484, 586 S.E.2d 791, 2003 N.C. App. LEXIS 1826 (2003).

Seller Not Deprived of Right to Have Default Judgment Set Aside. — Seller's claim that the entry of both a default judgment and a summary judgment simultaneously deprived the seller of the seller's right to move to have the default judgment set aside for good cause was rejected, as the seller's burden would have been the same regardless of which judgment the seller moved to set aside since: (1) the seller never made a G.S. 1A-1-55(d) motion to have the entry of default set aside; and (2) after entry of the default judgment and the summary judgment, the seller could only have sought relief from the trial court pursuant to G.S. 1A-1-60(b). Kniep v. Templeton, 185 N.C. App. 622, 649 S.E.2d 425, 2007 N.C. App. LEXIS 1943 (2007).

Excusable Mistake, Inadvertence, Surprise or Neglect Required to Set Aside Default Judgment. — The rule as to what is required to set aside a judgment specifies "mistake, inadvertence, surprise, or excusable neglect." This has been construed to mean that the mistake, inadvertence, or surprise, as well as neglect, must be excusable in order to give the court the power to set aside the judgment. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

Meritorious Defense and Good Reason for Default Must Be Shown. — The court should not reopen a default judgment merely because the party in default requests it, but should require the party to show both that there was a good reason for the default and that he has a meritorious defense to the action. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

Excusable Neglect Not Shown. — Affidavit filed by defendant stating that he was 63 years old and semi-retired; that he had two nephews who were seriously ill; that due to his nephews' illnesses he had to operate both his own general store and his nephews' trucking business; and that he was under great physical and mental strain at the time summons and complaint were served and for several weeks thereafter, failed to make out a case of excusable neglect under subsection (b)(1) of this rule. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

Failure of defendant subcontractor to contact its attorney until after a default judgment was entered against it did not constitute excusable neglect, and the trial court, therefore, properly denied the subcontractor's motion for relief from judgment. JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., 169 N.C. App. 199, 609 S.E.2d 487, 2005 N.C. App. LEXIS 509 (2005).

Trial court properly denied defendants' N.C. R. Civ. P. 60(b) motion to set aside default judgment because defendants made no request for written findings of fact regarding the trial court's order denying their post-trial motions but rather requested the trial court to amend its findings under G.S. 1A-1, N.C. R. Civ. P. 52(b); the trial court did not err in failing to make findings of fact and conclusions of law as to whether there was a showing of excusable neglect and meritorious defense because the issue of whether there was a showing of a meritorious defense was immaterial when there was sufficient evidence to support the trial court's conclusion that defendants failed to establish excusable neglect. Monaghan, M.D. v. Schilling, MD, — N.C. App. —, 677 S.E.2d 562, 2009 N.C. App. LEXIS 718 (2009).

Jurisdiction of Court on Motion to Set Aside Clerk's Entry of Default Judgment. — When defendants made a motion to set aside the clerk's entry of default and default judgment, the trial court was not limited to a review of the action of the clerk, but was vested with jurisdiction to hear and determine all matters in controversy and render such judgment or order within the limits provided by law, including default judgment; this principle would apply even if the order by the clerk was a nullity. Webb v. James, 46 N.C. App. 551, 265 S.E.2d 642 (1980).

Motion to set aside a default or a judgment by default is addressed to the discretion of the court. North Am. Acceptance Corp.

v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

Motion pursuant to section (d) of this rule to set aside an entry by default is addressed to the discretion of the trial court. Privette v. Privette, 30 N.C. App. 41, 226 S.E.2d 188 (1976).

Motion to set aside an entry of default is addressed to the sound discretion of the trial judge, and the order of the trial court ruling on such a motion will not be disturbed on appeal absent a showing of abuse of that discretion. Coulbourn Lumber Co. v. Grizzard, 51 N.C. App. 561, 277 S.E.2d 95 (1981).

Motion to set aside a default is addressed to the discretion of the court. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972).

As Is Determination of Good Cause to Vacate Entry of Default. — The determination of good cause is for the trial judge in the exercise of his sound discretion. Pioneer Acoustical Co. v. Cisne & Assocs., 25 N.C. App. 114, 212 S.E.2d 402 (1975).

Determination as to whether good cause exists to vacate an entry of default is addressed to the sound discretion of the trial judge. Hasty v. Carpenter, 51 N.C. App. 333, 276 S.E.2d 513 (1981).

Section (d) of this rule specifically allows the trial court to set aside an entry of default for good cause shown. The determination of whether good cause has been shown is for the trial judge in the exercise of his sound discretion. Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984).

And Court's Determination Will Not Be Disturbed Absent Abuse. — Determination of whether good cause exists to vacate an entry of default is addressed to the sound discretion of the trial judge, and his exercise of that discretion will not be disturbed on appeal unless a clear abuse of discretion is shown. Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973); Miller v. Miller, 24 N.C. App. 319, 210 S.E.2d 438 (1974); Frye v. Wiles, 33 N.C. App. 581, 235 S.E.2d 889 (1977); Britt v. Georgia-Pacific Corp., 46 N.C. App. 107, 264 S.E.2d 395 (1980); Webb v. James, 46 N.C. App. 551, 265 S.E.2d 642 (1980); Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason. Byrd v. Mortenson, 60 N.C. App. 85, 298 S.E.2d 170 (1982), modified on other grounds, 308 N.C. 536, 302 S.E.2d 809 (1983).

Presumption That Judge Acted Within Discretion. — Where appellant failed to bring evidence up for review, the appellate court would presume that the trial judge acted within his discretion on evidence showing good cause to vacate the entry of default. Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Moseley v. Branch Banking & Trust Co., 19 N.C. App. 137, 198 S.E.2d 36, cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

Discretion Not Abused. — Where defendant did not offer any evidence showing a good reason for her default upon which the judge could have set aside the entry of default, nor show an adequate basis for the judge to have set aside the default judgment on the grounds of mistake, inadvertence, surprise, excusable neglect or meritorious defense, the judge did not abuse her discretion in failing to set aside the entry of default or the judgment by default. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

Trial court did not abuse its discretion in setting aside the entry of default in a medical malpractice action even though the doctor did not take any further action after delivering the patient's claim to his office manager, who forwarded the claim to an insurer; the potentially grave damage to the doctor coupled with the relatively short delay in processing the claim supported the trial court's finding of good cause. Atkins v. Mortenson, — N.C. App. —, 644 S.E.2d 625, 2007 N.C. App. LEXIS 1100 (2007).

Former employer failed to show that a trial court abused its discretion when it denied the employer's motion under G.S. 1A-1, N.C. R. Civ. P. 55(d) to set aside a default judgment that was entered against it in a former employee's action to recover unpaid commissions, as the employer failed to show that it acted diligently where it chose not to defend the action based on the advice of counsel and the determination that the employee was not owed anything; good cause was not shown. Luke v. Omega Consulting Group, LC, — N.C. App. —, 670 S.E.2d 604, 2009 N.C. App. LEXIS 32 (2009).

As to considerations in exercising discretion, see Howell v. Haliburton, 22 N.C. App. 40, 205 S.E.2d 617 (1974).

Default Judgments Not Favored. — Inasmuch as the law generally disfavors default judgments, any doubt should be resolved in favor of setting aside an entry of default so the case may be decided on its merits. At the same time the rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity. Byrd v. Mortenson, 60 N.C. App. 85, 298 S.E.2d 170 (1982), modified on other grounds, 308 N.C. 536, 302 S.E.2d 809 (1983).

In exercising its discretion the court will be guided by the fact that default judgments are not favored in the law. North Am. Acceptance Corp. v. Samuels, 11 N.C. App.

504, 181 S.E.2d 794 (1971). See also, Peebles v. Moore, 48 N.C. App. 497, 269 S.E.2d 694 (1980), modified and aff'd, 302 N.C. 351, 275 S.E.2d 833 (1981).

A motion for entry of default and default judgment is addressed to the discretion of the court. In exercising its discretion the trial court should be guided by the consideration that default judgments are disfavored by the law. North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983).

Any doubt should be resolved in favor of setting aside defaults, so that cases may be decided on their merits. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Peebles v. Moore, 48 N.C. App. 497, 269 S.E.2d 694 (1980), modified and aff'd, 302 N.C. 351, 275 S.E.2d 833 (1981).

Order setting aside or refusing to set aside entry of default is not a final order and is, therefore, not appealable, where judgment has not been entered. First-Citizens Bank & Trust Co. v. R & G Constr. Co., 24 N.C. App. 131, 210 S.E.2d 97 (1974).

Order entered pursuant to section (d) of this rule, setting aside entry by default, was interlocutory, and plaintiff's appeal thereon was premature. Pioneer Acoustical Co. v. Cisne & Assocs., 25 N.C. App. 114, 212 S.E.2d 402 (1975).

Entry of Default Judgment Against One of Several Defendants Properly Set Aside. — Where, in a civil action to recover money advanced by plaintiff in an alleged factoring agreement with defendant furniture company, brought against the company and five individual guarantors, one individual defendant failed to answer, an entry of default against said defendant was proper, but default judgment against him was properly set aside; while said defendant was not entitled to file an answer or other defensive pleading, the action would proceed to trial on its merits on the complaint and answers filed by the non-defaulting defendants, and appropriate judgment would be entered as to the defaulting defendant following the trial. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

Entry of default and judgment by default would be improper where defendants showed (1) excusable neglect in failing to timely file a responsive pleading, and (2) a meritorious defense to plaintiff's claim. North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983).

Where 30 days had not elapsed since the filing of amended complaint, judgment by default was not available; the default judgment obtained was, therefore, void, and it was error as a matter of law for the court to refuse to set it aside. Hyder v. Dergance, 76 N.C. App. 317, 332 S.E.2d 713 (1985).

Early Pretrial Judgments. — Court could set aside judgment reassigning child custody when the previous child custody order had not been vacated and there was no showing of a change in circumstances concerning the child's welfare that supported the change in custody. West v. Marko, 130 N.C. App. 751, 504 S.E.2d 571, 1998 N.C. App. LEXIS 1165 (1998).

Entry of Judgment Set Aside. — Where counsel for defendant failed to file responsive pleadings within the allowable time limit and there was no evidence in the record that defendant was anything less than diligent in its pursuit of the matter, nor any allegations that plaintiff was prejudiced by the five-day delay between the expiration of the filing period and the date defendant filed its motion and proposed answer, justice would best be served by setting aside the entry of default. Automotive Equip. Distribs., Inc. v. Petroleum Equip. & Serv., Inc., 87 N.C. App. 606, 361 S.E.2d 895 (1987).

The trial court erred in denying defendant's motion to set aside entry of default where defendant did everything that could reasonably have been required to demonstrate diligent attention to the case, it did not appear as though plaintiffs suffered any harm by virtue of the delay, and there was the possibility that defendant would suffer injustice by being unable to defend the action. Brown v. Lifford, 136 N.C. App. 379, 524 S.E.2d 587, 2000 N.C. App. LEXIS 3 (2000).

Court could set aside judgment reassigning child custody when the previous child custody order had not been vacated and there was no showing of a change in circumstances concerning the child's welfare that supported the change in custody. West v. Marko, 130 N.C. App. 751, 504 S.E.2d 571, 1998 N.C. App. LEXIS 1165 (1998).

In a negligence case, a trial court did not abuse discretion by setting aside a default judgment, under G.S. 1A-1, N.C. R. Civ. P. 55(d), where the party's failure to timely file an answer was primarily due to the negligence of her insurance company, and the delay caused by setting aside the default was relatively brief and did not prejudice the opposing party. Vares v. Vares, 154 N.C. App. 83, 571 S.E.2d 612, 2002 N.C. App. LEXIS 1409 (2002), cert. denied, 357 N.C. 67, 579 S.E.2d 576 (2003).

In a case brought by homeowners against a construction company alleging faulty construction of a house, the homeowners failed to show that the trial court abused its discretion in setting aside a default against the construction company where the construction company had informed the trial court of confusion regarding the attorney who would represent it; on the day the entry of default was entered, the construction company's attorney had informed homeowners' counsel that representation had been secured and the construction company was prepared to file an answer, the construction company asserted that setting aside the entry of default would not prejudice homeowners since discovery had taken place during an earlier dismissed action, and the construction company also argued that homeowners knew that the construction company would assert the statute of repose as a defense as it had previously done in the earlier case. Moore v. F. Douglas Biddy Constr., Inc., 161 N.C. App. 87, 587 S.E.2d 479 (2003).

Under circumstances in which the third-party plaintiffs who obtained an entry of default stipulated to the existence of good cause for setting aside the entry, the trial court did not abuse its discretion in finding good cause to set the default aside; further, the homeowners presented no evidence to show that the trial court abused its discretion in making this determination. Emick v. Sunset Beach & Twin Lakes, Inc., 180 N.C. App. 582, 638 S.E.2d 490, 2006 N.C. App. LEXIS 2516 (2006).

Pursuant to G.S. 40A-46 and G.S. 1A-1, N.C. R. Civ. P. 55(d), a trial court did not abuse its discretion by granting a condemnee's motion to set aside the entry of default against a second condemnee and deem the second condemnee's answer timely filed. The State was aware that the second condemnee had given the condemnee a power of attorney no later than October 2005, as evidenced by the fact that the State served notice of the condemnation and an amended answer on the second condemnee in care of the condemnee; the State nonetheless waited until the day of trial to seek entry of default against the second condemnee. City of Wilson Redevelopment Comm'n v. Boykin, — N.C. App. —, 667 S.E.2d 282, 2008 N.C. App. LEXIS 1755 (2008).

Multiple Default Judgments. — A custody order remained binding and effective, where the trial court entered an order setting aside the entry of default obtained by the father of a minor child against the mother, but the order did not purport to set aside the subsequent default judgment that was entered against the mother awarding custody of their minor child to the father, so that the custody order remained valid and could be modified only by showing a substantial change in circumstances. West v. Marko, 130 N.C. App. 751, 504 S.E.2d 571 (1998).

Party May Not Claim Judgment Is Defective After Accepting Its Benefits. — After petitioning the court to enter a default judgment, plaintiff relied upon its validity and force thrice — by executing on it; by retaining the money collected by execution; and by suing defendant in a separate action for future rents. The law does not permit a party to claim that a judgment is defective after relying upon its validity and accepting its benefits. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

An order reopening and enlarging a default judgment was erroneous because, by deciding to obtain a final judgment for the sum certain that was owed when the default judgment was entered, rather than to have the damages determined later by a trial, plaintiff waived any right it might have had to obtain judgment for a larger amount. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Superior court order which kept a default judgment in effect and permitted it to be enlarged from $7,039 to $35,857 was erroneous because the court had no authority to enter it. The order neither set aside the default judgment nor relieved plaintiff of it as authorized by this rule or G.S. 1A-1, Rule 60(b), N.C.R.Civ.P. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Motion for Relief on Grounds of Insufficient Service. — In filing a motion to claim exempt property, which was inconsistent with her later motion for relief from judgment on the grounds of the invalidity of service of process, defendant made a general appearance, and her subsequent motion for relief from a default judgment on the grounds of the invalidity of service of process was properly dismissed. Faucette v. Dickerson, 103 N.C. App. 620, 406 S.E.2d 602 (1991).

Default judgment was void under G.S. 1A-1, N.C. R. Civ. P. 55(d) and G.S. 1A-1, N.C. R. Civ. P. 60(b) because the service by publication under G.S. 1A-1, N.C. R. Civ. P. 4(j1) failed to list the correct county where the action was commenced. Accordingly, because the default judgment was void, the trial court abused its discretion in not granting a motion to set aside the judgment. Connette v. Jones, — N.C. App. —, 674 S.E.2d 751, 2009 N.C. App. LEXIS 359 (2009).

Motion for Relief on Grounds of Invalid Entry of Default. — Trial court erred in denying the driver's motion to set aside a default judgment entered in favor of the victim in the victim's personal injury action, as the default judgment was predicated upon an invalid entry of default. McIlwaine v. Williams, 155 N.C. App. 426, 573 S.E.2d 262, 2002 N.C. App. LEXIS 1620 (2002).

Appeal of a judgment setting aside an execution sale of certain real property was interlocutory because, while the record contained an entry of default as to the property's owners, it did not contain a default judgment against them, as provided in G.S. 1A-1, N.C. R. Civ. P. 55(b), so the record did not establish that all claims against all parties had been resolved. Beneficial Mortg. Co. v. Peterson, 163 N.C. App. 73, 592 S.E.2d 724, 2004 N.C. App. LEXIS 292 (2004).

V. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-211.*

Complaint which fails to state a cause of action is not sufficient to support a default judgment for plaintiff. Lowe's of Raleigh, Inc. v. Worlds, 4 N.C. App. 293, 166 S.E.2d 517 (1969).

Default judgment admits only the averments in the complaint, and the defendant may still show that such averments are insufficient to warrant plaintiff's recovery. Lowe's of Raleigh, Inc. v. Worlds, 4 N.C. App. 293, 166 S.E.2d 517 (1969).

Where judgment by default is irregularly and improvidently entered by the assistant clerk of the superior court, the clerk of the superior court has authority to vacate the same upon motion in the cause. Booker v. Porth, 1 N.C. App. 434, 161 S.E.2d 767 (1968).

Rule 56. Summary judgment.

(a) *For claimant.* — A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* — A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* — The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party may serve opposing affidavits at least two days before the hearing. If the opposing affidavit is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served affidavit, or take such other action as the ends of justice require. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other means such that the party actually receives the affidavit within the required time.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) *Case not fully adjudicated on motion.* — If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established.

(e) *Form of affidavits; further testimony; defense required.* — Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* — Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* — Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. (1967, c. 954, s. 1; 2000-127, s. 6.)

COMMENT

While it has long been urged in North Carolina, see Chadbourn, *A Summary Judgment Procedure for North Carolina,* 14 N.C.L. Rev., 211 (1936), and while, in one form or another, it has been adopted in a majority of the states, the procedure provided by this rule is wholly new to North Carolina. It adds a powerful new weapon for the just, swift and efficient disposition of claims or defenses patently without merit. The rule provides a device whereby it can expeditiously be determined whether or not there exists between the parties a genuine issue as to any material fact. It is not the purpose of the rule to resolve disputed material issues of fact but rather to determine if such issues exist.

Under prior procedure, if the pleadings disclosed an issue of fact, a trial was generally necessary even though there might in actuality be no genuine dispute at all as to the facts. It was enough if the issue was formally raised by the pleadings. Significantly, however, the code drafters were well aware that there might indeed be no issue of material fact present even though the pleadings appeared to present one. They thus provided that sham and irrelevant defenses could be stricken, former § 1-126, that irrelevant and redundant matter might be stricken, former § 1-153, and that a frivolous demurrer, answer or reply might be disregarded, former § 1-219. But, for reasons that need not be examined here, these devices have not proved equal to the task of identifying those claims or defenses in which there was no genuine dispute as to a material fact.

The great merit of the summary judgment is that it does provide a device for identifying the factually groundless claim or defense. It does so by enabling the parties to lay before the court materials extraneous to the pleadings. If these materials reveal any dispute as to a material fact, summary judgment is precluded. But as section (e) makes clear, a party cannot necessarily rely on the pleadings to show the existence of such a dispute.

The operation of the rule can be illustrated by supposing an action to recover damages for personal injuries. The sole defense offered is that the plaintiff's exclusive remedy is afforded by the Workmen's Compensation Act. The plaintiff moves for summary judgment, supporting his motion with affidavits which on their face show that the act is inapplicable to the defendant's enterprise. At the hearing on the motion, the defendant can forestall summary judgment simply by producing an affidavit, deposition or interrogatory or oral testimony tending to show that he does come under the act. If, on the other hand, he does nothing, entry of partial summary judgment, leaving for later jury determination the amount of damages, can be entered against him. He has failed to show that there is a genuine issue as to any material fact except damages.

The defendant might also move for a summary judgment in the case supposed. If he shows, without any contrary showing by the plaintiff, that the act applies, then it would be appropriate to enter judgment for the defendant. Of course, section (f) permits the refusal of the motion when a party presents reasons for his inability to present affidavits opposing the motion.

It will be observed that section (e) requires that supporting and opposing affidavits "shall be made on personal knowledge" and "shall set forth such facts as would be admissible in evidence."

Legal Periodicals. — For article on the new summary judgment rule in North Carolina, see 5 Wake Forest Intra. L. Rev. 87 (1969).

For survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

For note dealing with summary judgment on testimonial evidence, see 55 N.C.L. Rev. 232 (1977).

For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1058 (1981).

For note on default not constituting an admission of facts for purposes of summary judgment, see 17 Wake Forest L. Rev. 49 (1981).

For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For a survey of 1996 development in civil procedure law, see 75 N.C.L. Rev. 2229 (1997).

CASE NOTES

I. In General.
II. Purpose of Summary Judgment.
III. Propriety of Summary Judgment.
  A. In General.
  B. Particular Types of Actions, etc.
  C. Cases in Which Summary Judgment Held Proper.
  D. Cases in Which Summary Judgment Held Improper.
IV. Burden on Motion for Summary Judgment.
V. Function of Trial Court.
VI. Evidence on Motion.
  A. In General.

I. IN GENERAL.

Summary Judgment Defined. — Summary judgment is a device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980); Rose v. Guilford County, 60 N.C. App. 170, 298 S.E.2d 200 (1982).

This rule and its federal counterpart are practically the same. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975); Pitts v. Village Inn Pizza, Inc., 296 N.C. 81, 249 S.E.2d 375 (1978); Piedmont Consultants of Statesville, Inc. v. Baba, 48 N.C. App. 160, 268 S.E.2d 222 (1980).

And Federal Decisions May Be Looked to for Guidance in Applying This Rule. — FRCP, Rule 56 is substantially the same as this rule and the Supreme Court therefore looks to the federal decisions for guidance in applying this rule. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972); Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

Summary judgment is a new procedure in North Carolina. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970); Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970).

Demurrer and Summary Judgment Compared. — A demurrer was a proper method of testing the legal sufficiency of the complaint, but it was confined only to the complaint itself. A motion for summary judgment allows the court to consider matter outside of the complaint for the purpose of ascertaining whether a genuine issue of fact does exist, thus recognizing the fact that a genuine issue of fact may not exist even though one appears in the complaint. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

Motion for Directed Verdict Similar. — The motion for summary judgment and the motion for a directed verdict are functionally very similar. Williams v. Carolina Power & Light Co., 296 N.C. 400, 250 S.E.2d 255 (1979).

Functionally the motion for summary judgment and the motion for a directed verdict are closely akin to each other. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

For comparison of motion for directed verdict and motion for summary judgment, see Edwards v. Northwestern Bank, 53 N.C. App. 492, 281 S.E.2d 86, cert. denied, 304 N.C. 389, 285 S.E.2d 831 (1981).

For comparison of motion for failure to state a claim under § 1A-1, Rule 12(b)(6) and motion for summary judgment, see Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50, cert. denied, 298 N.C. 296, 259 S.E.2d 301 (1979).

Conversion of G.S. 1A-1, Rule 10(c) Motion to Motion for Summary Judgment. — Where affidavits considered by the trial court were not incorporated by reference into the pleadings pursuant to Rule 10(c), the motion to dismiss was converted into a motion for summary judgment. Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996), rev'd, 346 N.C. 170, 484 S.E.2d 527 (1997).

Conversion of § 1A-1, Rule 12(b)(6) and 12(c) Motions to Motions for Summary Judgment. — Motions under G.S. 1A-1, Rules 12(b)(6) and 12(c) can be treated as summary judgment motions, the difference being that under G.S. 1A-1, Rules 12(b)(6) and 12(c) the motion is decided on the pleadings alone, while under this rule the court may receive and consider various kinds of evidence. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

A motion to dismiss for failure to state a claim under G.S. 1A-1, Rule 12(b)(6) is converted to a motion under this rule for summary judgment when matters outside the pleadings are presented to and not excluded by the court. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979); Piedmont Consultants of Statesville, Inc. v. Baba, 48 N.C. App. 160, 268 S.E.2d 222 (1980); Baugh v. Woodard, 56 N.C. App. 180, 287 S.E.2d 412, appeal dismissed and cert. denied, 305 N.C. 759, 292 S.E.2d 574 (1982).

Where extraneous matter is received and considered on a motion to dismiss under G.S. 1A-1, Rule 12(b)(6), the motion should be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in this rule. Fowler v. Williamson, 39 N.C. App. 715, 251 S.E.2d 889 (1979); Roach v. City of Lenoir, 44 N.C. App. 608, 261 S.E.2d 299 (1980); Parslow v. Parslow, 47 N.C. App. 84, 266 S.E.2d 746 (1980); Oliver v. Roberts, 49 N.C. App. 311, 271 S.E.2d 399 (1980).

Where the record contains affidavits and indicates that the trial judge, in addition to considering the pleadings and attached exhibits, also heard counsel for both parties and considered briefs submitted by both parties, the motion for judgment on the pleadings under G.S. 1A-1, Rule 12(c) must be considered as though it was made under this rule. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

Where matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment under this rule. DeArmon v. B. Mears Corp., 312 N.C. 749, 325 S.E.2d 223 (1985); King v. Durham County Mental Health Developmental Disabilities & Substance Abuse Auth., 113 N.C. App. 341, 439 S.E.2d 771 (1994), cert. denied, 336 N.C. 316, 445 S.E.2d 396 (1994).

The denial of a motion to dismiss under G.S. 1A-1, Rule 12(b)(6) does not prevent the court from allowing a subsequent motion for summary judgment. Dull v. Mutual of Omaha Ins. Co., 85 N.C. App. 310, 354 S.E.2d 752, cert. denied, 320 N.C. 512, 358 S.E.2d 518 (1987); Burton v. NCNB Nat'l Bank, 85 N.C. App. 702, 355 S.E.2d 800 (1987).

Where matters outside the pleadings are before the court, a motion to dismiss may be treated as a motion for summary judgment. Deans v. Layton, 89 N.C. App. 358, 366 S.E.2d 560, cert. denied, 322 N.C. 834, 371 S.E.2d 276 (1988).

When a trial court considers matters outside the pleadings, a motion under Rule 12 is automatically converted into a motion for summary judgment. North Carolina Steel, Inc. v. National Council on Comp. Ins., 123 N.C. App. 163, 472 S.E.2d 578 (1996), aff'd in part and rev'd in part, 347 N.C. 627, 496 S.E.2d 369 (1998).

Where, in a claim brought by mobile home owners alleging unfair and deceptive trade practices by the manufacturers of the homes, the parties presented to the trial court deposition testimony and affidavits, none of which was excluded by the trial court, the trial court's conversion of the manufacturers' N.C. R. Civ. P. 12(b)(6) motion into a N.C. R. Civ. P. 56 motion was proper; although the owners argued that they were not given a reasonable opportunity to present all pertinent material, the owners did not request a continuance or additional time to produce evidence, but fully participated in the hearing, and thus their claim was meritless. Belcher v. Fleetwood Enters., 162 N.C. App. 80, 590 S.E.2d 15, 2004 N.C. App. LEXIS 9 (2004).

Where, in support of their motion claiming that a legal malpractice claim against them was time barred, lawyers submitted a complaint filed against the client in a separate case and the client's answer to that complaint, which were not excluded by the trial court, the motion was treated as one for summary judgment. Bolton v. Crone, 162 N.C. App. 171, 589 S.E.2d 915, 2004 N.C. App. LEXIS 56 (2004).

Trial court converted a G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion into a motion for summary judgment because the court considered matters outside of the pleadings in the form of exhibits, depositions, affidavits and discovery responses. Bailey v. Handee Hugo's, Inc., 173 N.C. App. 723, 620 S.E.2d 312, 2005 N.C. App. LEXIS 2302 (2005).

Because the trial court clearly considered matters outside the pleadings, the trial court properly treated defendants' G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion to dismiss as a motion for summary judgment under G.S. 1A-1, N.C. R. Civ. P. 56. Barbee v. Johnson, 190 N.C. App. 349, 660 S.E.2d 135, 2008 N.C. App. LEXIS 887 (2008).

Memoranda, Briefs and Oral Arguments Not Outside the Pleadings for Purposes of Converting Motion. — Memoranda of points and authorities as well as briefs and oral arguments are not considered matters outside the pleading for purposes of converting a motion under G.S. 1A-1, Rule 12 into a motion for summary judgment. Privette v. University of N.C., 96 N.C. App. 124, 385 S.E.2d 185 (1989).

Section (c) of this rule does not require that a party move for summary judgment in order to be entitled to it. McNair Constr. Co. v. Fogle Bros. Co., 64 N.C. App. 282, 307 S.E.2d 200 (1983), cert. denied, 312 N.C. 84, 321 S.E.2d 897 (1984).

Motion Under § 1A-1, Rule 12(b)(6) Not Converted by Incorporation of Exhibit by Reference in Complaint. — Where, in her complaint, plaintiff incorporated by reference a complaint in a federal court action and attached a copy of it, the complaint in the federal court action was not a matter outside the pleadings so as to convert her motion to dismiss under G.S. 1A-1, Rule 12(b)(6) into a motion for summary judgment, since G.S. 1A-1, Rule 10(c) provides that such an exhibit is a part of the pleading for all purposes. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979).

Treatment of Summary Judgment Motion as Though Made Under § 1A-1, Rule 12(c). — Where the record on appeal contained no affidavits, answers to interrogatories, or anything other than the pleadings upon which to base decision, motion for summary judgment would be considered as though made under G.S. 1A-1, Rule 12(c) for judgment on the pleadings, and not as a motion under this rule. Reichler v. Tillman, 21 N.C. App. 38, 203 S.E.2d 68 (1974); Town of Bladenboro v. McKeithan, 44 N.C. App. 459, 261 S.E.2d 260, appeal dismissed, 300 N.C. 202, 282 S.E.2d 228 (1980).

Notice Requirement. — Where the trial court entered an order substituting estate administrator as defendant on the same day it granted summary judgment to plaintiffs, the administrator did not receive timely notice of the motion for summary judgment motion as provided for in G.S. 1A-1, Rule 56(e), and the grant of summary judgment was error. Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005), cert. denied, — U.S. —, 126 S. Ct. 2972, 165 L. Ed. 2d 954 (2006).

In a wife's appeal of the absolute divorce, she failed to show that she did not receive adequate and proper notice of the hearing on the husband's motion for summary judgment since the husband's notice of hearing was adequate and proper in light of G.S. 1A-1, N.C. R. Civ. P. 56, as despite the fact that it failed to state the time of the hearing, it did state the date, location, and courtroom number and was served upon the wife at least 10 days prior to the hearing. Wilson v. Wilson, 191 N.C. App. 789, 666 S.E.2d 653, 2008 N.C. App. LEXIS 1479 (2008).

Plaintiff may not defeat a motion for summary judgment by taking a voluntary dismissal after a hearing on the summary judgment motion where plaintiff introduces evidence, and after the court signs the summary judgment, but before it is filed with the clerk. Maurice v. Hatterasman Motel Corp., 38 N.C. App. 588, 248 S.E.2d 430 (1978).

Where a party appears at a summary judgment hearing and produces evidence or is given an opportunity to produce evidence and fails to do so, and the question is submitted to the court for decision, he has "rested his case" within the meaning of G.S. 1A-1, Rule 41(a)(1)(i). He cannot thereafter take a voluntary dismissal under G.S. 1A-1, Rule 41(a)(1)(i). Maurice v. Hatterasman Motel Corp., 38 N.C. App. 588, 248 S.E.2d 430 (1978); Wesley v. Bland, 92 N.C. App. 513, 374 S.E.2d 475 (1988).

Validity of the judgment does not depend upon the form in which the determination is made, whether express or implied, but upon the correctness of the determination. Tripp v. Flaherty, 27 N.C. App. 180, 218 S.E.2d 709 (1975).

There is no requirement that summary judgment, to be valid, must contain ritual statement that there is no genuine issue as to any material fact. Tripp v. Flaherty, 27 N.C. App. 180, 218 S.E.2d 709 (1975).

When it is unclear from looking at a judgment whether a default judgment or a summary judgment was intended, the wording of the body of the judgment itself controls, not the heading. East Carolina Oil Transp., Inc. v. Petroleum Fuel & Term. Co., 82 N.C. App. 746, 348 S.E.2d 165 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 745 (1987).

Matters determined by summary judgment, as by any other judgment, are res judicata in a subsequent action. T.A. Loving

Co. v. Latham, 15 N.C. App. 441, 190 S.E.2d 248 (1972).

But an order denying summary judgment is not res judicata, and a judge is clearly within his rights in vacating such denial. Where nothing pertinent to the motion has been filed subsequent to the previous order, it is not necessary to issue new notice. Miller v. Miller, 34 N.C. App. 209, 237 S.E.2d 552 (1977).

Ripeness. — Inmate's case was ripe for summary judgment because whether the inmate had a legal right to have credits applied against his life sentence was a matter of law, not an issue of fact. Price v. Beck, 153 N.C. App. 763, 571 S.E.2d 247, 2002 N.C. App. LEXIS 1253, cert. denied, 356 N.C. 615, 575 S.E.2d 26 (2002).

Conversion of G.S. 1A-1, Rule 12(B)(6) and 12(C) Motions to Motions for Summary Judgment . — Where an employee referred in a complaint for a violation of the North Carolina Retaliatory Employment Discrimination Act, G.S. 95-240 et seq., to the administrative complaint and/or right-to-sue letter from the North Carolina Department of Labor, which were not attached to the complaint, and they formed the procedural basis for the complaint, the trial court did not convert the employer's motion to dismiss under G.S. 1A-1, Rule 12(b)(6), into one for summary judgment under this rule, by considering the unattached documents. Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 580 S.E.2d 757 (2003).

Summary Judgment Not Precluded by Earlier Denial of Motion Under § 1A-1, Rule 12(b)(6). — Denial of a motion to dismiss for failure to state a claim upon which relief can be granted, which motion merely challenges the sufficiency of the complaint, does not prevent the court's allowance of a subsequent motion for summary judgment based on affidavits outside the complaint. Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

Denial of a motion to dismiss made under G.S. 1A-1, Rule 12(b)(6) does not prevent the court, whether in the person of the same or a different superior court judge, from thereafter allowing a subsequent motion for summary judgment made and supported as provided in this rule. Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978).

In a wrongful death action against a city and a railroad arising from a motorist's death after being struck by a train at a railroad crossing, after a trial court partially denied the city's motion to dismiss under Rule 12(b)(6) and Rule 12(c), it was not precluded from granting the city's summary judgment motion. Wilkerson v. Norfolk S. Ry., 151 N.C. App. 332, 566 S.E.2d 104, 2002 N.C. App. LEXIS 744 (2002).

However, a motion for summary judgment denied by one superior court judge may not be allowed by another on identical legal issues. But this does not apply to interlocutory orders given in the progress of the cause. American Travel Corp. v. Central Carolina Bank & Trust Co., 57 N.C. App. 437, 291 S.E.2d 892, cert. denied and appeal dismissed, 306 N.C. 555, 294 S.E.2d 369 (1982).

A motion for summary judgment denied by one superior court judge may not be allowed by another superior court judge on identical legal issues. Furr v. Charmichael, 82 N.C. App. 634, 347 S.E.2d 481 (1986).

Summary Judgment for Nonmovant. — Although plaintiffs filed motion for summary judgment, trial court entered summary judgment for defendants. When appropriate, summary judgment may be rendered against the party moving for such judgment. Coulter v. City of Newton, 100 N.C. App. 523, 397 S.E.2d 244 (1990).

Pleadings Deemed Amended. — Where a motion for summary judgment is supported by matters outside the pleadings, the pleadings are deemed amended if in fact the issue not raised by the pleadings or by the motion for summary judgment is tried by the express or implied consent of both parties. County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

Because the plaintiffs' summary judgment motion went only to liability, the trial court had the power to render summary judgment for the defendants with respect to liability notwithstanding the procedural defects in the defendants' summary judgment motion. Messer v. Laurel Hill Assocs., 102 N.C. App. 307, 401 S.E.2d 843 (1991).

Continuance Properly Denied. — Trial court properly declined to continue a summary judgment hearing in a wrongful death action where the mother of a deceased child failed to move to continue the hearing: the trial court did not abuse its discretion when it denied a motion to continue a hearing on a motion for summary judgment when the party failed to file and give notice of the motion to continue and submit an affidavit pursuant to subsection (f) of this rule. Draughon v. Harnett County Bd. of Educ., 158 N.C. App. 208, 580 S.E.2d 732, 2003 N.C. App. LEXIS 1047 (2003), aff'd, without op., 358 N.C. 131, 591 S.E.2d 521 (2004).

Entry of Summary Judgment. — The mere filing of an affirmative defense without more is not sufficient to establish the absence of a justiciable issue, nor is the grant of a G.S. 1A-1, Rule 12(b)(6) motion, nor the entry of summary judgment. These events may only be evidence of the absence of a justiciable issue. However, action by the losing party which perpetuated litigation in the fact of events substantially establishing that the pleadings no longer presented a justiciable controversy may also serve as evidence for purposes of G.S. 6-21.5. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Distinction Between Motion to Dismiss and Summary Judgment. — The distinction between a G.S. 1A-1, Rule 12(b)(6) motion to dismiss and a motion for summary judgment is more than a mere technicality. When considering a G.S. 1A-1, Rule 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery. By contrast, when considering a summary judgment motion, the trial court must look at more than the pleadings; it must also consider additional matters such as affidavits, depositions and other specified matter outside the pleadings. Locus v. Fayetteville State Univ., 102 N.C. App. 522, 402 S.E.2d 862 (1991).

Ordinarily, findings of fact and conclusions of law are not required in the determination of a motion for summary judgment, and if these are made, they are disregarded on appeal. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Effect of Denial of Motion on Subsequent Motions Based on Trial Evidence. — Denial of a motion for summary judgment, based only upon a forecast of evidence, should not operate to bar the granting of a directed verdict or a judgment notwithstanding the verdict based on the evidence actually presented at trial. Whittaker Gen. Medical Corp. v. Daniel, 87 N.C. App. 659, 362 S.E.2d 302 (1987), rev'd in part on other grounds, 324 N.C. 523, 379 S.E.2d 824 (1989).

Attorneys' Fees. — Section 6-21.5 provides in part that the entry of judgment pursuant to Rule 50 or this rule may be some evidence that an attorneys' fee may be warranted. The statute's reference to these rules, which are applicable only if evidence in addition to the pleadings is before the court, thus implies that when deciding whether to grant a motion under G.S. 6-21.5 the trial court may consider evidence developed after the pleadings have been filed. Sunamerica Fin. Corp. v. Bonham, 328 N.C. 254, 400 S.E.2d 435 (1991).

Denial of Sanctions Upheld. — Motion brought by plaintiffs who sought sanctions under G.S. 1A-1, Rule 56(g) on the grounds that defendant filed an affidavit in support of summary judgment that was not based on his personal knowledge, because it used a phrase with which he was unacquainted, in bad faith, was not so unwarranted by existing case law as to merit sanctions under G.S. 1A-1, Rule 11. Johnson v. Harris, 149 N.C. App. 928, 563 S.E.2d 224, 2002 N.C. App. LEXIS 383 (2002).

Interlocutory Appeals. — Defendants were allowed to make an interlocutory appeal of plaintiff's motion for partial summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56; although the appeal was interlocutory, to deny appellate review would have allowed the judgment to strip defendants of their property without any possible redress except another lawsuit, and therefore would have affected a substantial right pursuant to G.S. 1-277. Estate of Graham v. Morrison, 156 N.C. App. 154, 576 S.E.2d 355, 2003 N.C. App. LEXIS 81 (2003).

Because a trial court's order requiring landowners to remove substantial structures from their property affected their substantial rights, the partial summary judgment under G.S. 1A-1, N.C. R. Civ. P. 56(c) was immediately appealable. Keener v. Arnold, 161 N.C. App. 634, 589 S.E.2d 731, 2003 N.C. App. LEXIS 2278 (2003), cert. denied, 358 N.C. 376, 598 S.E.2d 136 (2004).

In a defamation action, the appeal of the candidate and campaign from the trial court's denial of their G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion was interlocutory, and the denial did not challenge a substantial right that was to be lost absent immediate appellate review pursuant to G.S. 1-277(a); the instant case was akin to a previous case in which an appeal from a motion for judgment on pleadings pursuant to G.S. 1A-1, N.C. R. Civ. P. 12(c) was dismissed, and the instant case was distinguishable from a previous case in which an appeal on a ruling on a motion for summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56 was allowed, as a motion under G.S. 1A-1, N.C. R. Civ. P. 12(c) was more similar to a G.S. 1A-1, N.C. R. Civ. P. 12(b)(6) motion. Grant v. Miller, 170 N.C. App. 184, 611 S.E.2d 477, 2005 N.C. App. LEXIS 902 (2005).

In a case involving specific performance, an appellate court considered an appeal from the granting of a motion for partial summary judgment because it was not interlocutory since it disposed of all of the claims brought before the trial court. Wolfe v. Villines, 169 N.C. App. 483, 610 S.E.2d 754, 2005 N.C. App. LEXIS 690 (2005).

Because the granting of summary judgment did not dispose of the case as to all parties, as the injured person entered into a stipulation of dismissal without prejudice as to the motel, and the granting summary judgment as to contributory negligence completely disposed of the case, the judgment was not interlocutory as it disposed of the cause leaving nothing to be judicially determined between the parties in the trial court. Duval v. OM Hospitality, LLC, 186 N.C. App. 390, 651 S.E.2d 261, 2007 N.C. App. LEXIS 2190 (2007).

Applied in Pulley v. Rex Hosp., 326 N.C. 701, 392 S.E.2d 380 (1990); Barclays American/Leasing, Inc. v. North Carolina Ins. Guar. Ass'n, 99 N.C. App. 290, 392 S.E.2d 772 (1990); Kearney v. County of Durham, 99 N.C. App. 349, 393 S.E.2d 129 (1990); Lowry v. Lowry, 99 N.C. App. 246, 393 S.E.2d 141 (1990); Medley v. North Carolina Dep't of Cor., 99 N.C. App. 296, 393 S.E.2d 288 (1990); Jones Cooling & Heating, Inc. v. Booth, 99 N.C. App. 757, 394 S.E.2d 292 (1990); Raleigh Fed. Sav. Bank v. Godwin, 99 N.C. App. 761, 394 S.E.2d 294 (1990); Mozingo ex rel. Thomas v. Pitt County Mem. Hosp., 101 N.C. App. 578, 400 S.E.2d 747 (1991); Nisbet v. Nisbet, 102 N.C. App. 232, 402 S.E.2d 151 (1991); Spartan Leasing, Inc. v. Pollard, 101 N.C. App. 450, 400 S.E.2d 476 (1991); Rogers v. T.J.X. Cos., 329 N.C. 226, 404 S.E.2d 664 (1991); Easterwood v. Burge, 103 N.C. App. 507, 405 S.E.2d 787 (1991); Diorio v. Penny, 103 N.C. App. 407, 405 S.E.2d 789 (1991); Triad Bank v. Educational Consultants, Inc., 103 N.C. App. 483, 405 S.E.2d 800 (1991); Isbey v. Cooper Cos., 103 N.C. App. 774, 407 S.E.2d 254 (1991); Anders v. Hyundai Motor Am. Corp., 104 N.C. App. 61, 407 S.E.2d 618 (1991); Gray v. Small, 104 N.C. App. 222, 408 S.E.2d 538 (1991); Safety Mut. Cas. Corp. v. Spears, 104 N.C. App. 467, 409 S.E.2d 736 (1991); Rose v. Steen Cleaning, Inc., 104 N.C. App. 539, 410 S.E.2d 221 (1991); Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992); Lenzer v. Flaherty, 106 N.C. App. 496, 418 S.E.2d 276 (1992); Whiteside v. Lawyers Sur. Corp., 107 N.C. App. 230, 418 S.E.2d 829 (1992); Thomco Realty, Inc. v. Helms, 107 N.C. App. 224, 418 S.E.2d 834 (1992); Catawba County Horsemen's Ass'n v. Deal, 107 N.C. App. 213, 419 S.E.2d 185 (1992); Canady v. Mann, 107 N.C. App. 252, 419 S.E.2d 597 (1992); Goodman v. Wenco Foods, Inc., 331 N.C. 1, 423 S.E.2d 444 (1992); Kirkland v. National Civic Assistance Group, Inc., 108 N.C. App. 326, 423 S.E.2d 822 (1992); AT & T Family Fed. Credit Union v. Beaty Wrecker Serv., Inc., 108 N.C. App. 611, 425 S.E.2d 427 (1993); McMurry v. Cochrane Furn. Co., 109 N.C. App. 52, 425 S.E.2d 735 (1993); Smith v. State Farm Fire & Cas. Co., 109 N.C. App. 276, 426 S.E.2d 457 (1993); Wachovia Bank & Trust Co. v. Templeton Oldsmobile-Cadillac-Pontiac, Inc., 109 N.C. App. 352, 427 S.E.2d 629 (1993); Cowan v. Brian Ctr. Mgt. Corp., 109 N.C. App. 443, 428 S.E.2d 263 (1993); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Dickens v. Thorne, 110 N.C. App. 39, 429 S.E.2d 176 (1993); Jefferson-Pilot Life Ins. Co. v. Spencer, 110 N.C. App. 194, 429 S.E.2d 583 (1993); Reece v. Homette Corp., 110 N.C. App. 462, 429 S.E.2d 768 (1993); APAC-Carolina, Inc. v. Greensboro-High Point Airport Auth., 110 N.C. App. 664, 431 S.E.2d 508 (1993); State ex rel. State Art Museum Bldg. Comm'n v. Travelers Indem. Co., 111 N.C. App. 330, 432 S.E.2d 419 (1993); L.B. Best Furn. 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App. LEXIS 890 (2005); Sawyers v. Farm Bureau Ins. Co. of N.C., Inc., 170 N.C. App. 17, 612 S.E.2d 184, 2005 N.C. App. LEXIS 893 (2005); Granville Farms, Inc. v. County of Granville, 170 N.C. App. 109, 612 S.E.2d 156, 2005 N.C. App. LEXIS 906 (2005); Jacobs v. Physicians Weight Loss Ctr. of Am., Inc., 173 N.C. App. 663, 620 S.E.2d 232, 2005 N.C. App. LEXIS 2280 (2005); Am. Gen. Fin. Servs. v. Barnes, 175 N.C. App. 406, 623 S.E.2d 617, 2006 N.C. App. LEXIS 54 (2006); Lohrmann v. Iredell Mem'l Hosp., Inc., 174 N.C. App. 63, 620 S.E.2d 258, 2005 N.C. App. LEXIS 2287 (2005); White v. Cross Sales & Eng'g Co., 177 N.C. App. 765, 629 S.E.2d 898, 2006 N.C. App. LEXIS 1225 (2006); Duke Energy Corp. v. Malcolm, 178 N.C. App. 62, 630 S.E.2d 693, 2006 N.C. App. LEXIS 1300 (2006); Bio-Medical Applications of N.C., Inc. v. N.C. HHS, 179 N.C. App. 483, 634 S.E.2d 572, 2006 N.C. App. LEXIS 1979 (2006); Griffin v. Holden, 180 N.C. App. 129, 636 S.E.2d 298, 2006 N.C. App. LEXIS 2244 (2006); Griggs v. Shamrock Bldg. Servs., 179 N.C. App. 543, 634 S.E.2d 635, 2006 N.C. App. LEXIS 1976 (2006); Pender County v. Bartlett, 361 N.C. 491, 649 S.E.2d 364, 2007 N.C. LEXIS 816 (2007); Britt v. State, 185 N.C. App. 610, 649 S.E.2d 402, 2007 N.C. App. LEXIS 1938 (2007); Cowell v. Gaston County, — N.C. App. —, 660 S.E.2d 915, 2008 N.C. App. LEXIS 1092 (June 3, 2008); CIM Ins. Corp. v. Cascade Auto Glass, Inc., — N.C. App. —, 660 S.E.2d 907, 2008 N.C. App. LEXIS 1066 (June 3, 2008); Wake Cares, Inc. v. Wake County Bd. of Educ., 190 N.C. App. 1, 660 S.E.2d 217, 2008 N.C. App. LEXIS 872 (2008); Free Spirit Aviation, Inc. v. Rutherford Airport Auth., 191 N.C. App. 581, 664 S.E.2d 8, 2008 N.C. App. LEXIS 1494 (2008); Muchmore v. Trask, — N.C. App. —, 666 S.E.2d 667, 2008 N.C. App. LEXIS 1649 (2008); Johns v. Johns, — N.C. App. —, 672 S.E.2d 34, 2009 N.C. App. LEXIS 110 (2009); Crocker v. Roethling, 363 N.C. 140, 675 S.E.2d 625, 2009 N.C. LEXIS 350 (2009); Reese v. City of Charlotte, — N.C. App. —, 676 S.E.2d 493, 2009 N.C. App. LEXIS 506 (2009); Reese v. Charlotte-Mecklenburg Bd. of Educ. & Mecklenburg, — N.C. App. —, 676 S.E.2d 481, 2009 N.C. App. LEXIS 532 (2009); Barringer v. Wake Forest Univ. Baptist Med. Ctr., — N.C. App. —, 677 S.E.2d 465, 2009 N.C. App. LEXIS 673 (2009); Town of Oriental v. Henry, — N.C. App. —, 678 S.E.2d 703, 2009 N.C. App. LEXIS 1057 (July 7, 2009).

Applied in Liptrap v. Coyne, — N.C. App. —, 675 S.E.2d 693, 2009 N.C. App. LEXIS 981 (May 5, 2009).

II. PURPOSE OF SUMMARY JUDGMENT.

This rule is designed to permit penetration of an unfounded claim or defense in advance of trial and to allow summary disposition for either party when a fatal weakness in the claim or defense is exposed. Patrick v. Hurdle, 16 N.C. App. 28, 190 S.E.2d 871, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Philbin Invs., Inc. v. Orb Enters., Ltd., 35 N.C. App. 622, 242 S.E.2d 176, cert. denied, 295 N.C. 90, 244 S.E.2d 260 (1978); Thompson v. Northwestern Sec. Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397, cert. denied, 300 N.C. 202, 269 S.E.2d 620 (1980); Southeastern Asphalt & Concrete Co. v. American Defender Life Ins. Co., 69 N.C. App. 185, 316 S.E.2d 311 (1984); Cannon v. Miller, 71 N.C. App. 460, 322 S.E.2d 780 (1984); N.C. Coastal Motor Line v. Everette Truck Line, 77 N.C. App. 149, 334 S.E.2d 499 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986); Sink v. Andrews, 81 N.C. App. 594, 344 S.E.2d 831 (1986); Palm Beach, Inc. v. Allen, 91 N.C. App. 115, 370 S.E.2d 440 (1988), overruled on other grounds, Kraft v. Hardee, 340 N.C. 344, 457 S.E.2d 596 (1995).

The purpose of this rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleadings as means to delay the recovery of just demands. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976); Baum v. Golden, 83 N.C. App. 218, 349 S.E.2d 625 (1986), cert. denied, 319 N.C. 102, 353 S.E.2d 104 (1987).

Summary judgment is designed to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

The goal of this procedural device is to allow penetration of an unfounded claim or defense before trial. Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983).

A motion for summary judgment is an attempt by a party to avoid the necessity of trial by exposing a fatal weakness in the claim or defense of his opponent. Normile v. Miller, 63 N.C. App. 689, 306 S.E.2d 147 (1983), modified on other grounds, 313 N.C. 98, 326 S.E.2d 11 (1985).

The goal of summary judgment procedures is to allow penetration of an unfounded claim or defense before trial. Thus, if there is any question as to the credibility of an affiant in a summary judgment motion or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied. Broadway v. Blythe Indus., Inc., 313 N.C. 150, 326 S.E.2d 266 (1985), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998).

The ultimate goal of the procedural device of summary judgment is to allow penetration of an unfounded claim or defense before trial. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, cert. denied as to additional issues, 312 N.C. 495, 322 S.E.2d 558 (1984).

Summary judgment is designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed. Hall v. Post, 85 N.C. App. 610, 355 S.E.2d 819 (1987), rev'd on other grounds, 323 N.C. 259, 372 S.E.2d 711 (1988).

And to Allow a Preview or Forecast of the Proof. — The procedure for a summary judgment motion is designed to allow a "preview" or "forecast" of the proof of the parties in order to determine whether a jury trial is necessary. Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 897 (1981); Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983).

Purpose of summary judgment is to provide an expeditious method for determining whether a material issue of fact actually exists. Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970); Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971); Blackmon v. Valley Decorating Co., 11 N.C. App. 137, 180 S.E.2d 396 (1971); Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972); Emanuel v. Colonial Life & Accident Ins. Co., 35 N.C. App. 435, 242 S.E.2d 381 (1978); Vassey v. Burch, 301 N.C. 68, 269 S.E.2d 137 (1980); Gregory v. Perdue, Inc., 47 N.C. App. 655, 267 S.E.2d 584 (1980); Southerland v. Kapp, 59 N.C. App. 94, 295 S.E.2d 602 (1982).

The purpose of summary judgment is to go beyond or to pierce the pleadings and determine whether there is a genuine issue of material fact. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972).

The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. Gray v. Hager, 69 N.C. App. 331, 317 S.E.2d 59 (1984).

And, If Not, Whether Movant Is Entitled to Judgment. — The purpose of the summary judgment rule is to provide an expeditious method of determining whether a genuine issue as to any material fact actually exists, and if not, whether the moving party is entitled to judgment as a matter of law. Schoolfield v. Collins, 12 N.C. App. 106, 182 S.E.2d 648 (1971), rev'd on other grounds, 281 N.C. 604, 189 S.E.2d 208 (1972); Gudger v. Transitional Furn., Inc., 30 N.C. App. 387, 226 S.E.2d 835 (1976).

The purpose of the summary judgment procedure provided by this rule is to ferret out those cases in which there is no genuine issue as to any material fact and in which, upon such undisputed facts, a party is entitled to judgment as a matter of law. Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971); Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971); Peterson v. Winn-Dixie of Raleigh, Inc., 14 N.C. App. 29, 187 S.E.2d 487 (1972); Cameron-Brown Capital Corp. v. Spencer, 31 N.C. App. 499, 229 S.E.2d 711 (1976), cert. denied, 291 N.C. 710, 232 S.E.2d 203 (1977).

And to Bring Litigation to a Prompt Disposition on the Merits. — The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Yount v. Lowe, 24 N.C. App. 48, 209 S.E.2d 867 (1974); 288 N.C. 90, 215 S.E.2d 563 (1975); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976); Carr v. Great Lakes Carbon Corp., 49 N.C. App. 631, 272 S.E.2d 374 (1980), cert. denied, 302 N.C. 217, 276 S.E.2d 914 (1981); Texaco, Inc. v. Creel, 57 N.C. App. 611, 292 S.E.2d 130, aff'd, 310 N.C. 695, 314 S.E.2d 506 (1984); Jones v. City of Burlington, 58 N.C. App. 193, 293 S.E.2d 252 (1982); Southern Ry. v. ADM Milling Co., 58 N.C. App. 667, 294 S.E.2d 750, cert. denied, 307 N.C. 270, 299 S.E.2d 215 (1982); Angola Farm Supply & Equip. Co. v. FMC Corp., 59 N.C. App. 272, 296 S.E.2d 503 (1982); Harris v. Walden, 314 N.C. 284, 333 S.E.2d 254 (1985); Campbell v. Board of Educ., 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

Summary judgment is a device to make possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Town of Southern Pines v. Mohr, 30 N.C. App. 342, 226 S.E.2d 865 (1976).

This rule is for the disposition of cases where there is no genuine issue of fact. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Riggins v. County of Mecklenburg, 14 N.C. App. 624, 188 S.E.2d 749 (1972); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976); Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979).

The purpose of the motion for summary judgment is to determine prior to trial whether there is any genuine issue with respect to any material fact and, if not, to provide for an early and effective disposition of the matter. Doggett v. Welborn, 18 N.C. App. 105, 196 S.E.2d 36, cert. denied, 283 N.C. 665, 197 S.E.2d 873 (1973); Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172, appeal dismissed, 288 N.C. 238, 217 S.E.2d 678 (1975); Carroll v. Rountree, 34 N.C. App. 167, 237 S.E.2d 566 (1977), aff'd on rehearing, 36 N.C. App. 156, 243 S.E.2d 821, cert. denied, 295 N.C. 549, 248 S.E.2d 725 (1978).

While a day in court may be a constitutional necessity when there are disputed questions of fact, the function of the motion of summary judgment is to smoke out if there is any case, i.e., any genuine dispute as to any material fact, and if there is no case, to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Town of Southern Pines v. Mohr, 30 N.C. App. 342, 226 S.E.2d 865 (1976).

Summary judgment allows quick and final disposition of claims where there is no real question as to whether plaintiff should recover, or where the defendant has established a complete defense. Oakley v. Little, 49 N.C. App. 650, 272 S.E.2d 370 (1980).

The purpose of this rule is to eliminate formal trials where only questions of law are involved. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793 (1972); Riggins v. County of Mecklenburg, 14 N.C. App. 624, 188 S.E.2d 749 (1972); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976); Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979); Phillips v. Universal Underwriters Ins. Co., 43 N.C. App. 56, 257 S.E.2d 671 (1979); Thompson v. Northwestern Sec. Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397, cert. denied, 300 N.C. 202, 269 S.E.2d 620 (1980); Poindexter v. Sanco Corp., 44 N.C. App. 694, 262 S.E.2d 333 (1980); Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983).

The purpose of a summary judgment motion is to eliminate a trial when, based on the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are at issue. Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 897 (1981).

The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. Gray v. Hager, 69 N.C. App. 331, 317 S.E.2d 59 (1984).

The purpose of this rule is to prevent unnecessary trials when there are no genuine issues of fact and to identify and separate such issues if they are present. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976); Arnold v. Howard, 29 N.C. App. 570, 225 S.E.2d 149 (1976); Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978); Pierce Concrete, Inc. v. Cannon Realty & Constr. Co., 77 N.C. App. 411, 335 S.E.2d 30 (1985).

The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. Pressman v. University of N.C., 78 N.C. App. 296, 337 S.E.2d 644 (1985), cert. granted, 315 N.C. 589, 341 S.E.2d 28 (1986).

The purpose of a summary judgment motion is to foreclose the need for a trial when, based upon the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are to be decided. Robertson v. Hartman, 90 N.C. App. 250, 368 S.E.2d 199 (1988).

Thus Saving Time and Expense. — The obvious purpose of summary judgment is to save time and expense in cases where there is no "genuine issue" as to any material fact. Dandy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975).

One purpose of motion for summary judgment is to avoid useless trials when a debtor has chosen to defend rather than default. Land-of-Sky Regional Council v. County of Henderson, 78 N.C. App. 85, 336 S.E.2d 653 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

The purpose of a motion for summary judgment is to avoid a useless trial. N.C. Coastal Motor Line v. Everette Truck Line, 77 N.C. App. 149, 334 S.E.2d 499 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

It is not the purpose of the summary judgment procedure to resolve disputed material issues of fact. Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970); Blackmon v. Valley Decorating Co., 11 N.C. App. 137, 180 S.E.2d 396 (1971); Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972); Stonestreet v. Compton Motors, Inc., 18 N.C. App. 527, 197 S.E.2d 579 (1973); Reid v. Reid, 32 N.C. App. 750, 233 S.E.2d 620 (1977); Carroll v. Rountree, 34 N.C. App. 167, 237 S.E.2d 566 (1977), aff'd on rehearing, 36 N.C. App. 156, 243 S.E.2d 821, cert. denied, 295 N.C. 549, 248 S.E.2d 725 (1978).

The purpose of this rule is not to allow the court to decide an issue of fact, but to determine whether a genuine issue of fact exists and thereby eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim or defense of a party is exposed. Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E.2d 54 (1980).

Summary judgment is not a device to resolve factual disputes; however, complex facts and legal issues do not preclude summary judgment. Land-of-Sky Regional Council v. County of Henderson, 78 N.C. App. 85, 336 S.E.2d 653 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

Nor to Test the Sufficiency of the Evidence. — The office of summary judgment is not to test the sufficiency of the evidence. Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971).

The summary judgment rule was not intended to deprive a party of a jury trial. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Nor to Provide a Quick and Easy Method of Clearing the Docket. — The purpose of summary judgment is not to provide a quick and easy method for clearing the docket, but is to permit the disposition of cases in which there is no genuine controversy concerning any fact material to issues raised by the pleadings, so that the litigation involves questions of law only. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972); Housing, Inc. v. Weaver, 37 N.C. App. 284, 246 S.E.2d 219 (1978), aff'd, 296 N.C. 581, 251 S.E.2d 457 (1979); Durham v. Vine, 40 N.C. App. 564, 253 S.E.2d 316 (1979), overruled on other grounds, Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 414 S.E.2d 339 (1992), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998).

III. PROPRIETY OF SUMMARY JUDGMENT.

A. In General.

Summary judgment is a drastic remedy. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972); Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976); Wilson Bros. v. Mobil Oil, 63 N.C. App. 334, 305 S.E.2d 40, cert. denied, 309 N.C. 634, 308 S.E.2d 718, 308 S.E.2d 719 (1983); Bradshaw v. McElroy, 62 N.C. App. 515, 302 S.E.2d 908 (1983).

And Must Be Used Cautiously. — Summary judgment is a drastic remedy, one to be approached with caution. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976); DeCarlo v. Gerryco, Inc., 46 N.C. App. 15, 264 S.E.2d 370; Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 69 N.C. App. 164, 316 S.E.2d 318, cert. denied, 312 N.C. 496, 322 S.E.2d 560 (1984).

Summary judgment should be used cautiously. North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976).

Requirement that summary judgment be entered only where there is no genuine disputed factual issue and the party is entitled to judgment as a matter of law should be cautiously observed. Volkman v. DP Assocs., 48 N.C. App. 155, 268 S.E.2d 265 (1980).

While the granting of summary judgment is a drastic remedy and should be granted cautiously, summary judgment is appropriate when the nonmoving party cannot produce evidence of an essential element of his claim. Anderson v. Canipe, 69 N.C. App. 534, 317 S.E.2d 44 (1984).

Especially in Negligence Cases. — Summary judgment is a drastic measure, and it should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case. Williams v. Carolina Power & Light Co., 296 N.C. 400, 250 S.E.2d 255 (1979); Willis v. Duke Power Co., 42 N.C. App. 582, 257 S.E.2d 471 (1979); Brown v. Duke Power Co., 45 N.C. App. 384, 263 S.E.2d 366, cert. denied, 300 N.C. 194, 269 S.E.2d 615 (1980); Holcomb v. United States Fire Ins. Co., 52 N.C. App. 474, 279 S.E.2d 50 (1981); Laughter v. Southern Pump & Tank Co., 75 N.C. App. 185, 330 S.E.2d 51, cert. denied, 314 N.C. 666, 335 S.E.2d 495 (1985).

Summary judgment is a somewhat drastic remedy and should be granted cautiously, especially in actions alleging negligence as a basis of recovery. Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984).

Although North Carolina appellate courts have consistently held that summary judgment is rarely appropriate in negligence actions, summary judgment should be entered where the forecast of evidence before the trial court demonstrates that a plaintiff cannot support an essential element of his claim. Thus, summary judgment was appropriate in action arising from automobile collision. Patterson v. Pierce, 115 N.C. App. 142, 443 S.E.2d 770, cert. denied, 337 N.C. 803, 449 S.E.2d 749 (1994).

And Awarded Only Where the Truth Is Clear. — Summary judgment is an extreme remedy and should be awarded only where the truth is quite clear. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970); Nationwide Mut. Ins. Co. v. Chantos, 25 N.C. App. 482, 214 S.E.2d 438, cert. denied, 287 N.C. 465, 215 S.E.2d 624 (1975); Edwards v. Means, 36 N.C. App. 122, 243 S.E.2d 161, cert. denied, 295 N.C.

260, 245 S.E.2d 777 (1978); Volkman v. DP Assocs., 48 N.C. App. 155, 268 S.E.2d 265 (1980); Warren v. Rosso & Mastracco, Inc., 78 N.C. App. 163, 336 S.E.2d 699 (1985).

So That No Party Is Deprived of Trial on a Genuinely Disputed Factual Issue. — Since this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements, in order that no person shall be deprived of a trial on a genuinely disputed factual issue. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971); Miller v. Snipes, 12 N.C. App. 342, 183 S.E.2d 270, cert. denied, 279 N.C. 619, 184 S.E.2d 883 (1971); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972); Executive Leasing Assocs. v. Rowland, 30 N.C. App. 590, 227 S.E.2d 642 (1976); Texaco, Inc. v. Creel, 57 N.C. App. 611, 292 S.E.2d 130, aff'd, 310 N.C. 695, 314 S.E.2d 506 (1984); Angola Farm Supply & Equip. Co. v. FMC Corp., 59 N.C. App. 272, 296 S.E.2d 503 (1982); Godwin Sprayers, Inc. v. Utica Mut. Ins. Co., 59 N.C. App. 497, 296 S.E.2d 843 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 646 (1983); Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983); Justus v. Deutsch, 62 N.C. App. 711, 303 S.E.2d 571, cert. denied, 309 N.C. 821, 310 S.E.2d 349 (1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984); Barnes v. Wilson Hdwe. Co., 77 N.C. App. 473, 336 S.E.2d 457 (1985).

Where matters involving the credibility and weight of the evidence exist, summary judgment ordinarily should be denied. Burrow v. Westinghouse Elec. Corp., 88 N.C. App. 347, 363 S.E.2d 215, cert. denied, 322 N.C. 111, 367 S.E.2d 910 (1988).

Summary judgment may not be used to resolve factual disputes which are material to the disposition of the action. Robertson v. Hartman, 90 N.C. App. 250, 368 S.E.2d 199 (1988).

Where there is a need to find facts, then summary judgment is not an appropriate device to employ, provided those facts are material. Robertson v. Hartman, 90 N.C. App. 250, 368 S.E.2d 199 (1988).

Generally Summary Judgment Inappropriate Where Subjective Feelings or Conflicting Evidence Is Involved. — Generally summary judgment is inappropriate when issues such as motive, intent, and other subjective feelings and reactions are material, or when the evidence presented is subject to conflicting interpretations, or reasonable men might differ as to its significance. Smith v. Currie, 40 N.C. App. 739, 253 S.E.2d 645, cert. denied, 297 N.C. 612, 257 S.E.2d 219 (1979); Feibus & Co. v. Godley Constr. Co., 301 N.C. 294, 271 S.E.2d 385 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981).

Summary judgment is rarely proper when a state of mind such as intent or knowledge is at issue. Valdese Gen. Hosp. v. Burns, 79 N.C. App. 163, 339 S.E.2d 23 (1986); Robertson v. Hartman, 90 N.C. App. 250, 368 S.E.2d 199 (1988).

Summary judgment is generally not appropriate where intent or other subjective feelings are at issue. The rule that intent should generally be a question of fact for the jury does not mean, however, that it should always be so. Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986).

Two types of cases involve an absence of material issues of fact: (a) Those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Calhoun v. Calhoun, 18 N.C. App. 429, 197 S.E.2d 83 (1973); Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979); Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918, cert. denied, 304 N.C. 196, 285 S.E.2d 101 (1981).

Summary judgment should be granted only when movant is clearly entitled thereto. Houck v. Overcash, 282 N.C. 623, 193 S.E.2d 905 (1973).

Test Is Whether There Is Any Genuine Issue as to Any Material Fact. — Where a motion for summary judgment, the test is whether on the basis of the materials presented to the court there is any genuine issue as to any material fact. Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971); Prather, Thomas, Campbell, Pridgeon, Inc. v. Florilina Properties, Inc., 29 N.C. App. 316, 224 S.E.2d 289 (1976); Lowe v. Murchison, 44 N.C. App. 488, 261 S.E.2d 255 (1980).

The critical question for determination by the trial court in considering a motion for summary judgment is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, establish a genuine issue as to any material fact. Johnston County Tuberculosis Ass'n v. North Carolina Tuberculosis & Respiratory Disease Ass'n, 15 N.C. App. 492, 190 S.E.2d 264 (1972); In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976); Oliver v. Roberts, 49 N.C. App. 311, 271 S.E.2d 399 (1980).

Upon a motion for summary judgment, the

trial court first must determine whether there is a genuine issue as to any material fact. Only after the trial court determines that there is no genuine issue as to any material fact, can it dispose of the matter. Housing, Inc. v. Weaver, 37 N.C. App. 284, 246 S.E.2d 219 (1978), aff'd, 296 N.C. 581, 251 S.E.2d 457 (1979).

And Whether Party Is Entitled to Judgment. — The test for summary judgment is twofold: Is there a genuine issue of material fact, and is the moving party entitled to judgment as a matter of law? Gore v. Hill, 52 N.C. App. 620, 279 S.E.2d 102, cert. denied, 303 N.C. 710, 283 S.E.2d 136 (1981); First Am. Fed. Sav. & Loan Ass'n v. Royall, 77 N.C. App. 131, 334 S.E.2d 792 (1985).

The test on a motion for summary judgment made under this rule and supported by matters outside the pleadings is whether, on the basis of the materials presented to the courts, there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978); Ward v. Durham Life Ins. Co., 90 N.C. App. 286, 368 S.E.2d 391 (1988), aff'd, 325 N.C. 202, 381 S.E.2d 698 (1989).

On motion for summary judgment, the question before the court is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. Gregory v. Perdue, Inc., 47 N.C. App. 655, 267 S.E.2d 584 (1980); Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984); Herbert v. Browning-Ferris Indus. of S. Atl., Inc., 90 N.C. App. 339, 368 S.E.2d 416 (1988); Meadows v. Cigar Supply Co., 91 N.C. App. 404, 371 S.E.2d 765 (1988).

Where there is no genuine issue as to any material fact, the sole question for the court's determination is whether defendant is entitled to judgment as a matter of law. Weaver v. Home Sec. Life Ins. Co., 20 N.C. App. 135, 201 S.E.2d 63 (1973); Prather, Thomas, Campbell, Pridgeon, Inc. v. Florilina Properties, Inc., 29 N.C. App. 316, 224 S.E.2d 289 (1976).

Determination of what constitutes a "genuine issue as to any material fact" is often difficult. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Lowman v. Huffman, 15 N.C. App. 700, 190 S.E.2d 700 (1972); Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976).

A genuine issue is one which can be maintained by substantial evidence. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976); Gladstein v. South Square Assocs., 39 N.C. App. 171, 249 S.E.2d 827 (1978), cert. denied, 296 N.C. 736, 254 S.E.2d 178 (1979); Steel Creek Dev. Corp. v. Smith, 300 N.C. 631, 268 S.E.2d 205 (1980); City of Thomasville v. Lease-Afex, Inc., 300 N.C. 651, 268 S.E.2d 190 (1980); Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982); Hillman v. United States Liab. Ins. Co., 59 N.C. App. 145, 296 S.E.2d 302 (1982); Godwin Sprayers, Inc. v. Utica Mut. Ins. Co., 59 N.C. App. 497, 296 S.E.2d 843 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 646 (1983); Justus v. Deutsch, 62 N.C. App. 711, 303 S.E.2d 571, cert. denied, 309 N.C. 821, 310 S.E.2d 349 (1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984); Anderson v. Canipe, 69 N.C. App. 534, 317 S.E.2d 44 (1984); All In One Maintenance Serv. v. Beech Mt. Constr. Co., 70 N.C. App. 49, 318 S.E.2d 856 (1984); Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985); Surrette v. Duke Power Co., 78 N.C. App. 647, 338 S.E.2d 129 (1986); Sturm v. Goss, 90 N.C. App. 326, 368 S.E.2d 399 (1988).

A genuine issue of material fact is defined as one in which the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. A genuine issue is one which can be maintained by substantial evidence. Smith v. Smith, 65 N.C. App. 139, 308 S.E.2d 504 (1983).

When Issue Is Material. — An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Lowman v. Huffman, 15 N.C. App. 700, 190 S.E.2d 700 (1972); Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Norfolk & W. Ry. v. Werner

Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); Mecklenburg County v. Westbery, 32 N.C. App. 630, 233 S.E.2d 658 (1977); First Citizens Bank & Trust Co. v. Northwestern Ins. Co., 44 N.C. App. 414, 261 S.E.2d 242 (1980); Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 897 (1981); Godwin Sprayers, Inc. v. Utica Mut. Ins. Co., 59 N.C. App. 497, 296 S.E.2d 843 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 646 (1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984); Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985).

An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. Raleigh Paint & Wallpaper Co. v. Peacock & Assocs., 38 N.C. App. 144, 247 S.E.2d 728 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979); Miller v. Lemon Tree Inn of Wilmington, Inc., 39 N.C. App. 133, 249 S.E.2d 836 (1978); Gladstein v. South Square Assocs., 39 N.C. App. 171, 249 S.E.2d 827 (1978), cert. denied, 296 N.C. 736, 254 S.E.2d 178 (1979); Steel Creek Dev. Corp. v. Smith, 300 N.C. 631, 268 S.E.2d 205 (1980); City of Thomasville v. Lease-Afex, Inc., 300 N.C. 651, 268 S.E.2d 190 (1980); Hillman v. United States Liab. Ins. Co., 59 N.C. App. 145, 296 S.E.2d 302 (1982); Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983); Elmore's Feed & Seed, Inc. v. Patrick, 62 N.C. App. 715, 303 S.E.2d 394 (1983).

An issue is material if the facts alleged would constitute a legal defense or would affect the result of the action. North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976).

A fact is material if it would constitute or would irrevocably establish any material element of a claim or defense. Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982); Anderson v. Canipe, 69 N.C. App. 534, 317 S.E.2d 44 (1984); All In One Maintenance Serv. v. Beech Mt. Constr. Co., 70 N.C. App. 49, 318 S.E.2d 856 (1984); Surrette v. Duke Power Co., 78 N.C. App. 647, 338 S.E.2d 129 (1986).

A fact is material if it constitutes a legal defense, such as the bar of an applicable statute of limitations. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 329 S.E.2d 350 (1985); Boundreau v. Baughman, 86 N.C. App. 165, 356 S.E.2d 907 (1987), rev'd in part on other grounds, modified and aff'd in part, 322 N.C. 331, 368 S.E.2d 849 (1988).

In application for life insurance policy, written questions and answers relating to health are material as a matter of law. Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983).

How Absence of Genuine Issue of Material Fact Established. — A party may show that there is no genuine issue as to any material facts by showing that no facts are in dispute. And where an issue of fact arises, a party may show that it is not a genuine issue as to a material fact by showing that the party with the burden of proof in the action will not be able to present substantial evidence which would allow that issue to be resolved in his favor. Best v. Perry, 41 N.C. App. 107, 254 S.E.2d 281 (1979).

A question of fact which is immaterial does not preclude summary judgment. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Keith v. G.D. Reddick, Inc., 15 N.C. App. 94, 189 S.E.2d 775 (1972); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Johnson v. Northwestern Bank, 27 N.C. App. 240, 218 S.E.2d 722 (1975); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); Mecklenburg County v. Westbery, 32 N.C. App. 630, 233 S.E.2d 658 (1977); Capps v. City of Raleigh, 35 N.C. App. 290, 241 S.E.2d 527 (1978); Ledford v. Ledford, 49 N.C. App. 226, 271 S.E.2d 393 (1980); Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986); Prince v. Mallard Lakes Ass'n, 82 N.C. App. 431, 346 S.E.2d 191, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986); Dull v. Mutual of Omaha Ins. Co., 85 N.C. App. 310, 354 S.E.2d 752, cert. denied, 320 N.C. 512, 358 S.E.2d 518 (1987).

Summary Judgment to Be Granted Only Where No Genuine Issue of Material Fact Is Presented. — Summary judgment is an extreme remedy and is appropriate only where no genuine issue of material fact is presented. Long v. Long, 15 N.C. App. 525, 190 S.E.2d 415 (1972); Haddock v. Smithson, 30 N.C. App. 228, 226 S.E.2d 411, cert. denied, 290 N.C. 776, 229 S.E.2d 32 (1976); Emanuel v. Colonial Life & Accident Ins. Co., 35 N.C. App. 435, 242 S.E.2d 381 (1978).

Summary judgment should be granted with caution and only where the movant has established the nonexistence of any genuine issue of fact. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223 (1979), overruled on other grounds, Crow v. Citicorp Acceptance Co., 319 N.C. 274, 354 S.E.2d 459 (1987).

In ruling on a motion for summary judgment the court does not resolve issues of fact, and must deny the motion if there is any issue of genuine material fact. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972); Whitten v. Bob King's AMC/Jeep, Inc., 30 N.C. App. 161, 226 S.E.2d 530 (1976), rev'd on other grounds, 292 N.C. 84, 231 S.E.2d 891 (1977); Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979);

Southland Assocs. v. Peach, 52 N.C. App. 340, 278 S.E.2d 293, cert. denied, 303 N.C. 546, 281 S.E.2d 394 (1981).

Summary judgment may not be granted if there is any genuine issue as to any material fact. Williams v. North Carolina State Bd. of Educ., 284 N.C. 588, 201 S.E.2d 889 (1974); Gray v. American Express Co., 34 N.C. App. 714, 239 S.E.2d 621 (1977).

The motion for summary judgment should not be granted unless it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975); Carlton v. Carlton, 74 N.C. App. 690, 329 S.E.2d 682 (1985).

Before entry of summary judgment it must be clearly established by the record before the trial court that there is a lack of any triable issue of fact. A-S-P Assocs. v. City of Raleigh, 38 N.C. App. 271, 247 S.E.2d 800 (1978), rev'd on other grounds, 298 N.C. 207, 258 S.E.2d 444 (1979).

Generally, on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. Taylor v. Greensboro News, Co., 57 N.C. App. 426, 291 S.E.2d 852 (1982), appeal dismissed, 307 N.C. 459, 298 S.E.2d 385 (1983); Quality Inns Int'l, Inc. v. Booth, Fish, Simpson, Harrison & Hall, 58 N.C. App. 1, 292 S.E.2d 755 (1982); Bicycle Transit Auth., Inc. v. Bell, 314 N.C. 219, 333 S.E.2d 299 (1985).

Summary judgment is proper only where there are no material facts in issue. Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 69 N.C. App. 164, 316 S.E.2d 318, cert. denied, 312 N.C. 496, 322 S.E.2d 560 (1984).

Summary judgment is appropriate only where there are no genuine and material issues of fact to be resolved. Harris-Teeter Supermarkets, Inc. v. Hampton, 76 N.C. App. 649, 334 S.E.2d 81, cert. denied, 315 N.C. 183, 337 S.E.2d 857 (1985).

Summary judgment under this section should be granted when there is no genuine issue of material fact and only issues of law remain. Johnson v. Holbrook, 77 N.C. App. 485, 335 S.E.2d 53 (1985).

Evidence held insufficient to establish any genuine issue of material fact. Long v. Vertical Technologies, Inc., 113 N.C. App. 598, 439 S.E.2d 797 (1994).

And Where a Party Is Entitled to Judgment as a Matter of Law. — Summary judgment is proper only when there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. Bogle v. Duke Power Co., 27 N.C. App. 318, 219 S.E.2d 308 (1975), cert. denied, 289 N.C. 296, 222 S.E.2d 695 (1976); Mecklenburg County v. Westbery, 32 N.C. App. 630, 233 S.E.2d 658 (1977); Frye v. Arrington, 58 N.C. App. 180, 292 S.E.2d 772 (1982); Laughter v. Southern Pump & Tank Co., 75 N.C. App. 185, 330 S.E.2d 51, cert. denied, 314 N.C. 666, 335 S.E.2d 495 (1985); Schaffner v. Cumberland County Hosp. Sys., 77 N.C. App. 689, 336 S.E.2d 116 (1985); Valdese Gen. Hosp. v. Burns, 79 N.C. App. 163, 339 S.E.2d 23 (1986); Ward v. Turcotte, 79 N.C. App. 458, 339 S.E.2d 444 (1986); Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986); Vance v. Wiley T. Booth, Inc., 112 N.C. App. 600, 436 S.E.2d 256 (1993).

Rendition of summary judgment is conditioned upon a showing by the movant that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Page v. Sloan, 12 N.C. App. 433, 183 S.E.2d 813 (1971), aff'd, 281 N.C. 697, 190 S.E.2d 189 (1972); Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972); Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Van Poole v. Messer, 19 N.C. App. 70, 198 S.E.2d 106 (1973); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Parker v. Bennett, 32 N.C. App. 46, 231 S.E.2d 10, cert. denied, 292 N.C. 266, 233 S.E.2d 393 (1977); Harris v. Carter, 33 N.C. App. 179, 234 S.E.2d 472 (1977); Moore v. Fieldcrest Mills, Inc., 36 N.C. App. 350, 244 S.E.2d 208 (1978), aff'd, 296 N.C. 467, 251 S.E.2d 419 (1979); Baumann v. Smith, 41 N.C. App. 223, 254 S.E.2d 627, rev'd on other grounds, 298 N.C. 778, 260 S.E.2d 626 (1979); Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325, cert. denied, 298 N.C. 304, 259 S.E.2d 917 (1979); Willis v. Duke Power Co., 42 N.C. App. 582, 257 S.E.2d 471 (1979); Williams v. Congdon, 43 N.C. App. 53, 257 S.E.2d 677 (1979); Heritage Communities of N.C., Inc. v. Powers, Inc., 49 N.C. App. 656, 272 S.E.2d 399 (1980); Miller v. Triangle Volkswagen, Inc., 55 N.C. App. 593, 286 S.E.2d 608 (1982); Ft. Recovery Indus., Inc. v. Perry, 57 N.C. App. 354, 291 S.E.2d 329 (1982); Candid Camera Video World, Inc. v. Mathews, 76 N.C. App. 634, 334 S.E.2d 94 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 879 (1986).

Motion for summary judgment may be granted only when there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law. Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976); Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978); Branch Banking & Trust Co. v. Creasy, 301 N.C. 44, 269 S.E.2d 117 (1980); First Citizens Bank & Trust Co. v. Northwestern Ins. Co., 44 N.C. App. 414, 261 S.E.2d 242 (1980); Ellis v. Smith-Broadhurst, Inc., 48 N.C. App.

180, 268 S.E.2d 271 (1980); Cunningham v. Brown, 51 N.C. App. 264, 276 S.E.2d 718 (1981); Loy v. Lorm Corp., 52 N.C. App. 428, 278 S.E.2d 897 (1981); Lattimore v. Fisher's Food Shoppe, Inc., 69 N.C. App. 227, 316 S.E.2d 344 (1984), reversed on other grounds, 313 N.C. 467, 329 S.E.2d 346 (1985); Ivey v. Williams, 74 N.C. App. 532, 328 S.E.2d 837 (1985).

Summary judgment is proper only when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970); Lowman v. Huffman, 15 N.C. App. 700, 190 S.E.2d 700 (1972); Ryals v. Barefoot, 19 N.C. App. 564, 199 S.E.2d 483 (1973); Pilot Freight Carriers, Inc. v. David G. Allen Co., 22 N.C. App. 442, 206 S.E.2d 750 (1974), cert. denied, 287 N.C. 465, 215 S.E.2d 625 (1975), cert. denied, 423 U.S. 1055, 96 S. Ct. 786, 46 L. Ed. 2d 644 (1976); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Barnes v. Barnes, 30 N.C. App. 196, 226 S.E.2d 549, cert. denied, 290 N.C. 775, 229 S.E.2d 31 (1976); Haddock v. Smithson, 30 N.C. App. 228, 226 S.E.2d 411, cert. denied, 290 N.C. 776, 229 S.E.2d 32 (1976); Whitten v. Bob King's AMC/Jeep, Inc., 292 N.C. 84, 231 S.E.2d 891 (1977); Reid v. Reid, 32 N.C. App. 750, 233 S.E.2d 620 (1977); Edwards v. Means, 36 N.C. App. 122, 243 S.E.2d 161, cert. denied, 295 N.C. 260, 245 S.E.2d 777 (1978); Bentley v. Langley, 39 N.C. App. 20, 249 S.E.2d 481 (1978), cert. denied, 296 N.C. 735, 254 S.E.2d 176 (1979); Fitzgerald v. Wolf, 40 N.C. App. 197, 252 S.E.2d 523 (1979); Jenkins v. Stewart & Everett Theatres, Inc., 41 N.C. App. 262, 254 S.E.2d 776, cert. denied, 297 N.C. 698, 259 S.E.2d 295 (1979); Neihage v. Kittrell Auto Parts, Inc., 41 N.C. App. 538, 255 S.E.2d 315, cert. denied, 298 N.C. 298, 259 S.E.2d 914 (1979); Stillwell Enters., Inc. v. Interstate Equip. Co., 41 N.C. App. 204, 254 S.E.2d 770 (1979), rev'd on other grounds, 300 N.C. 286, 266 S.E.2d 812 (1980); Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979), rev'd on other grounds, 300 N.C. 247, 266 S.E.2d 610 (1980); Wells v. North Carolina Nat'l Bank, 44 N.C. App. 592, 261 S.E.2d 296 (1980); Thompson v. Northwestern Sec. Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397, cert. denied, 300 N.C. 202, 269 S.E.2d 620 (1980); Econo-Travel Motor Hotel Corp. v. Taylor, 45 N.C. App. 229, 262 S.E.2d 869, rev'd on other grounds, 301 N.C. 200, 271 S.E.2d 54 (1980); Bell v. Martin, 299 N.C. 715, 264 S.E.2d 101 (1980); Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E.2d 54 (1980); Quail Hollow E. Condominium Ass'n v. Donald J. Scholz Co., 47 N.C. App. 518, 268 S.E.2d 12, cert. denied, 301 N.C. 527, 273 S.E.2d 454 (1980); Brenner v. Little Red Sch. House, Ltd., 302 N.C. 207, 274 S.E.2d 206 (1981); Kent v. Humphries, 303 N.C. 675, 281 S.E.2d 43 (1981); Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., 54 N.C. App. 46, 283 S.E.2d 155 (1981), modified and aff'd, 305 N.C. 633, 291 S.E.2d 137 (1982); Sharpe v. Quality Educ., Inc., 59 N.C. App. 304, 296 S.E.2d 661 (1982); Ruffin v. Contractors & Materials, Inc., 69 N.C. App. 174, 316 S.E.2d 353 (1984); Amoco Oil Co. v. Griffin, 78 N.C. App. 716, 338 S.E.2d 601, cert. denied, 316 N.C. 374, 342 S.E.2d 889 (1986).

In order for the granting of plaintiff's motion for summary judgment to be appropriate, it must appear from the items submitted in support of plaintiff's motion that plaintiff was entitled to judgment as a matter of law. Atkinson v. Wilkerson, 10 N.C. App. 643, 179 S.E.2d 872 (1971); Carr v. Great Lakes Carbon Corp., 49 N.C. App. 631, 272 S.E.2d 374 (1980), cert. denied, 302 N.C. 217, 276 S.E.2d 914 (1981).

If the evidentiary materials filed by the parties indicate that a genuine issue of material fact does exist, the motion for summary judgment must be denied, as the motion may be granted only where there is no such issue and the moving party is entitled to judgment as a matter of law. Vassey v. Burch, 301 N.C. 68, 269 S.E.2d 137 (1980).

In addition to no issue of fact being present, to grant summary judgment a court must find that on the undisputed aspects of the opposing evidential forecasts the party given judgment is entitled to it as a matter of law. Godwin Sprayers, Inc. v. Utica Mut. Ins. Co., 59 N.C. App. 497, 296 S.E.2d 843 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 646 (1983).

Summary judgment, like judgment on the pleadings, is appropriately granted only where no disputed issues of fact have been presented and the undisputed facts show that any party is entitled to judgment as a matter of law. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

When considering a motion for summary judgment, the question before the court is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. The burden upon the moving party is to establish that there is no genuine issue as to any material fact remaining to be determined and this burden may be carried by a movant by proving that an essential element of the opposing party's claim is nonexistent. Gray v. Hager, 69 N.C. App. 331, 317 S.E.2d 59 (1984).

A motion for summary judgment should be allowed only when there exists no triable genuine issue of material fact and the movant's forecast of the evidence demonstrates that it is entitled to a judgment as a matter of law. Cashion v. Texas Gulf, Inc., 79 N.C. App. 632, 339 S.E.2d 797 (1986).

Summary judgment is appropriate only where the pleadings, affidavits and other evidentiary materials before the court disclose that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. Rolling Fashion Mart, Inc. v. Mainor, 80 N.C. App. 213, 341 S.E.2d 61 (1986).

A party moving for summary judgment is entitled to such judgment if he can show, through pleadings and affidavits, that there is no genuine issue of material fact requiring a trial and that he is entitled to judgment as a matter of law. Hagler v. Hagler, 319 N.C. 287, 354 S.E.2d 228 (1987).

This rule does not require that party move for summary judgment in order to be entitled to it; however, the nonmovant must be entitled to the judgment as a matter of law. N.C. Coastal Motor Line v. Everette Truck Line, 77 N.C. App. 149, 334 S.E.2d 499 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

There was no merit to plaintiff's argument that upon plaintiff's motion for summary judgment, the trial court was unauthorized to enter summary judgment for defendant because defendant had not requested summary judgment. Summary judgment could, when appropriate, be rendered against the party moving for such judgment. Sullivan v. Pender County, — N.C. App. —, 676 S.E.2d 69, 2009 N.C. App. LEXIS 526 (2009).

Evidence Must Be Insufficient to Support a Verdict for Nonmovant. — Motion for summary judgment should be granted only if, as a matter of law, the evidence is insufficient to support a verdict for the nonmovant. Freeman v. Sturdivant Dev. Co., 25 N.C. App. 56, 212 S.E.2d 190 (1975).

Even If Facts Claimed by Plaintiff Are Proved or Taken as True. — Summary judgment is proper when it appears that even if the facts as claimed by plaintiff are taken as true, there can be no recovery. Doggett v. Welborn, 18 N.C. App. 105, 196 S.E.2d 36, cert. denied, 283 N.C. 665, 197 S.E.2d 873 (1973); Hudson v. All Star Mills, Inc., 68 N.C. App. 447, 315 S.E.2d 514, cert. denied, 311 N.C. 755, 321 S.E.2d 134 (1984); Lowder v. Lowder, 68 N.C. App. 505, 315 S.E.2d 520, cert. denied, 311 N.C. 759, 321 S.E.2d 138 (1984).

Summary judgment is proper where it appears that even if the facts as claimed by a plaintiff are proved, there can be no recovery, thus providing a device for identifying the factually groundless claim or defense. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

Absence of Evidence Leading to Different Conclusion Must Be Shown. — Before summary judgment may be had, the record must affirmatively show that not only would the moving party be entitled to judgment from the evidence before the court, but it must also show there can be no other evidence from which a jury could reach a different conclusion as to a material fact. Goode v. Tait, Inc., 36 N.C. App. 268, 243 S.E.2d 404, cert. denied, 295 N.C. 465, 246 S.E.2d 215 (1978); McLean v. Sale, 38 N.C. App. 520, 248 S.E.2d 372 (1978), cert. denied, 296 N.C. 585, 254 S.E.2d 32 (1979); Easter v. Lexington Mem. Hosp., 49 N.C. App. 398, 271 S.E.2d 545 (1980), rev'd on other grounds, 303 N.C. 303, 278 S.E.2d 253 (1981).

If different material conclusions can be drawn from the evidence, summary judgment should be denied, even though the evidence is uncontradicted. Durham v. Vine, 40 N.C. App. 564, 253 S.E.2d 316 (1979), overruled on other grounds, Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 414 S.E.2d 339 (1992), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Spector United Employees Credit Union v. Smith, 45 N.C. App. 432, 263 S.E.2d 319 (1980).

Where the evidence of the party to be awarded summary judgment is self-contradictory or allows reasonable inferences inconsistent with conclusions necessary to entitle that party to summary judgment, the trial court should not enter summary judgment and should allow the case to proceed to trial. A-S-P Assocs. v. City of Raleigh, 38 N.C. App. 271, 247 S.E.2d 800 (1978), rev'd on other grounds, 298 N.C. 207, 258 S.E.2d 444 (1979).

Summary judgment should be denied if different material conclusions can be drawn from the evidence. Godwin Sprayers, Inc. v. Utica Mut. Ins. Co., 59 N.C. App. 497, 296 S.E.2d 843 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 646 (1983); Carlton v. Carlton, 74 N.C. App. 690, 329 S.E.2d 682 (1985); Warren v. Rosso & Mastracco, Inc., 78 N.C. App. 163, 336 S.E.2d 699 (1985); Herbert v. Browning-Ferris Indus. of S. Atl., Inc., 90 N.C. App. 339, 368 S.E.2d 416 (1988).

As Where Moving Papers Affirmatively Disclose a Material Controversy. — Where the moving papers affirmatively disclose that the nature of the controversy presents a good faith and actual, as distinguished from formal, dispute on one or more material issues, summary judgment cannot be used. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Pitts v. Village Inn Pizza, Inc., 296 N.C. 81, 249 S.E.2d 375 (1978).

Motion for summary judgment must be denied if the opposing party submits material which casts doubts upon the existence of a material fact or upon the credibility of a material witness, or if such doubts are raised by movant's own evidentiary material. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Summary judgment is appropriate when movant shows through discovery that the opposing party cannot produce evidence to support an essential element of his claim. Dellinger v. Belk, 34 N.C. App. 488, 238 S.E.2d 788 (1977), cert. denied, 294 N.C. 182, 241 S.E.2d 517 (1978).

Lack of Cause of Action or Defense Supports Grant of Judgment. — Where the pleadings or proof disclose that no cause of action or defense exists, summary judgment may be granted. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793 (1972); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976).

Where the pleadings or proof disclose that no cause of action exists, summary judgment may be granted. Davenport v. Davenport, 25 N.C. App. 621, 214 S.E.2d 294 (1975); Williams v. Congdon, 43 N.C. App. 53, 257 S.E.2d 677 (1979); Rockingham Square Shopping Center, Inc. v. Town of Madison, 45 N.C. App. 249, 262 S.E.2d 705 (1980).

Summary judgment is appropriately entered if the movant establishes that an essential part or element of the opposing party's claim is nonexistent. Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 (1985).

Where the pleadings or proof of the plaintiff disclose that no claim exists, summary judgment for defendant is proper. Colonial Bldg. Co. v. Justice, 83 N.C. App. 643, 351 S.E.2d 140 (1986), cert. denied, 319 N.C. 402, 354 S.E.2d 711 (1987).

When the only issues to be decided are issues of law, summary judgment is proper. Wachovia Mtg. Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 S.E.2d 727 (1978), aff'd, 297 N.C. 696, 256 S.E.2d 688 (1979); Brawley v. Brawley, 87 N.C. App. 545, 361 S.E.2d 759 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 918 (1988).

And Presence of Difficult Questions of Law Is No Barrier. — Where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Wachovia Mtg. Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 S.E.2d 727 (1978), aff'd, 297 N.C. 696, 256 S.E.2d 688 (1979).

Summary judgment is appropriate where there is no genuine issue of material fact and the case presents only questions of law. This is true even if the questions of law are complex. VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986).

Movant Entitled to Summary Judgment Where Directed Verdict Would Be Required. — If the materials before the court at the summary judgment hearing would require a directed verdict for defendants at trial, defendants are entitled to summary judgment. Whitaker v. Blackburn, 47 N.C. App. 144, 266 S.E.2d 763 (1980).

If a verdict would be directed for the movant on the evidence presented at the hearing on the motion for summary judgment, the motion for summary judgment may properly be granted. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975); Haskins v. Carolina Power & Light Co., 47 N.C. App. 664, 267 S.E.2d 587 (1980).

On motion for summary judgment, the test is whether the moving party presents materials which would require a directed verdict in his favor if offered as evidence at trial. Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971); Coakley v. Ford Motor Co., 11 N.C. App. 636, 182 S.E.2d 260, cert. denied, 279 N.C. 393, 183 S.E.2d 244 (1971); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972); Fitzgerald v. Wolf, 40 N.C. App. 197, 252 S.E.2d 523 (1979).

Unless Nonmovant Shows a Triable Issue of Fact. — Where a motion for summary judgment is supported by proof which would require a directed verdict in his favor at trial, movant is entitled to summary judgment, unless the opposing party comes forward to show a triable issue of material fact. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976); Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978); Watson v. Watson, 49 N.C. App. 58, 270 S.E.2d 542 (1980).

The opposing party is not entitled to have the motion for summary judgment denied on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Or Shows Unavailability of Affidavits. — If the party moving for summary judgment by affidavit or otherwise presents materials which would require a directed verdict in his favor if presented at trial, he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him or comes forward with affidavits or other materials that show there is a triable issue of fact. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 14 N.C. App. 567, 188 S.E.2d 661, rev'd on other grounds, 282 N.C. 44, 191 S.E.2d 683 (1972); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972); Brooks v. Smith, 27 N.C.

App. 223, 218 S.E.2d 489 (1975).

If plaintiff's claim is barred by the statute of limitations, defendant is entitled to judgment as a matter of law and summary judgment is appropriate. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971); Poston v. Morgan-Schultheiss, Inc., 46 N.C. App. 321, 265 S.E.2d 615 (1980).

Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 329 S.E.2d 350 (1985).

The statute of limitations, if properly pled, and if all the facts with reference thereto are admitted or established, may act as an affirmative defense, barring plaintiff's claims and entitling defendants to summary judgment as a matter of law. Lackey v. Bressler, 86 N.C. App. 486, 358 S.E.2d 560 (1987); Rowan County Bd. of Educ. v. United States Gypsum Co., 87 N.C. App. 106, 359 S.E.2d 814, cert. denied, 321 N.C. 298, 362 S.E.2d 782 (1987).

When the statute of limitations is properly pleaded and the facts of the case are not in dispute, resolution of the question becomes a matter of law, and summary judgment may be appropriate. Marshburn v. Associated Indem. Corp., 84 N.C. App. 365, 353 S.E.2d 123, cert. denied, 319 N.C. 673, 356 S.E.2d 779, petition for reconsideration denied, 320 N.C. 170, 358 S.E.2d 53 (1987); Boundreau v. Baughman, 86 N.C. App. 165, 356 S.E.2d 907 (1987), rev'd in part, modified and aff'd in part, 322 N.C. 331, 368 S.E.2d 849 (1988).

The failure of the defendant to plead res judicata is not a bar to that issue being raised at hearing on summary judgment. County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

When defendant establishes a complete defense to plaintiff's claim, he is entitled to the quick and final disposition of that claim which summary judgment provides. Ballinger v. North Carolina Dep't of Revenue, 59 N.C. App. 508, 296 S.E.2d 836 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 645 (1983).

The court may grant summary judgment if the movant conclusively establishes every element of its claim or conclusively establishes a complete defense or legal bar to the nonmovant's claim. VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

A defending party is entitled to summary judgment if he can show that no claim for relief exists or that the claimant cannot overcome an affirmative defense to the claim. Rolling Fashion Mart, Inc. v. Mainor, 80 N.C. App. 213, 341 S.E.2d 61 (1986).

A defending party is entitled to summary judgment if it can establish that no claim for relief exists or that the claimant cannot overcome an affirmative defense or legal bar to the claim. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Motive, like intent or other states of mind, is rarely susceptible to direct proof and almost always depends on inferences drawn from circumstantial evidence. Consequently, summary judgment should rarely be granted in cases in which it is at issue. Burrow v. Westinghouse Elec. Corp., 88 N.C. App. 347, 363 S.E.2d 215, cert. denied, 322 N.C. 111, 367 S.E.2d 910 (1988).

Constitutional Arguments Susceptible to Summary Judgment. — Since the general rule is that the constitutionality of a statute is to be determined merely from an examination of the statute itself and of only those matters of which the court may take judicial notice, plaintiff's constitutional arguments presented a question of law and were properly susceptible to summary judgment. Baugh v. Woodard, 56 N.C. App. 180, 287 S.E.2d 412, appeal dismissed and cert. denied, 305 N.C. 759, 292 S.E.2d 574 (1982).

Summary judgment is not a proper remedy for failure to join a necessary party. Dildy v. Southeastern Fire Ins. Co., 13 N.C. App. 66, 185 S.E.2d 272 (1971).

Summary judgment procedure is available to both plaintiff and defendant. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Clear Fir Sales Co. v. Carolina Plywood Distrib., Inc., 13 N.C. App. 429, 185 S.E.2d 737 (1972); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972).

A defending party may show as a matter of law that he is entitled to summary judgment in his favor by showing that there is no genuine issue of material fact concerning an essential element of the claimant's claim for relief and that the claimant cannot prove the existence of that element. Best v. Perry, 41 N.C. App. 107, 254 S.E.2d 281 (1979); Ramsey v. Rudd, 49 N.C. App. 670, 272 S.E.2d 162 (1980), cert. denied, 302 N.C. 220, 276 S.E.2d 917 (1981).

If defendants clearly establish that there is no genuine issue as to the nonexistence of material facts which are necessary as an essential element of any cause of action against them, then they are entitled to summary judgment on that action. Clodfelter v. Bates, 44 N.C. App. 107, 260 S.E.2d 672 (1979), cert. denied, 299 N.C. 329, 265 S.E.2d 394 (1980).

A defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986).

Party Need Not Move for Judgment in Order to Be Entitled to It. — Section (c) of this rule does not require that a party move for summary judgment in order to be entitled to it. Greenway v. North Carolina Farm Bureau Mut. Ins. Co., 35 N.C. App. 308, 241 S.E.2d 339 (1978); McNair Constr. Co. v. Fogle Bros. Co., 64 N.C. App. 282, 307 S.E.2d 200 (1983), cert. denied, 312 N.C. 84, 321 S.E.2d 897 (1984).

Summary judgment may be granted in favor of a nonmoving party in proper cases. A-S-P Assocs. v. City of Raleigh, 38 N.C. App. 271, 247 S.E.2d 800 (1978), rev'd on other grounds, 298 N.C. 207, 258 S.E.2d 444 (1979).

Summary judgment in favor of the nonmovant is appropriate when the evidence presented demonstrates that no material issues of fact are in dispute, and the nonmovant is entitled to entry of judgment as a matter of law. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

In an appropriate case, summary judgment may be rendered against the moving party. Candid Camera Video World, Inc. v. Mathews, 76 N.C. App. 634, 334 S.E.2d 94 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 879 (1980).

After Movant Is Given Opportunity to Show Existence of a Genuine Issue. — Summary judgment for the nonmoving party should be granted only when the moving party has been given adequate opportunity to show in opposition that there is a genuine issue of fact to be resolved. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

Granting of Summary Judgment by Judge on Own Motion. — The granting of summary judgment or judgment on the pleadings by the trial judge on his own motion is a practice not to be commended, and is clearly erroneous where there is a factual question to be answered. Crews v. Taylor, 21 N.C. App. 296, 204 S.E.2d 193 (1974).

Rarely is it proper to enter summary judgment in favor of the party having the burden of proof. Blackwell v. Massey, 69 N.C. App. 240, 316 S.E.2d 350 (1984).

Jurisdiction of Successor Judge. — Successor judge in the superior court had no jurisdiction to overrule at summary judgment the order of the first judge who in ruling on the same legal issues at summary judgment determined that the issues were to go to trial rather than be decided on summary judgment. Cail v. Cerwin, 185 N.C. App. 176, 648 S.E.2d 510, 2007 N.C. App. LEXIS 1684 (2007).

Summary judgment may be granted for a party with the burden of proof on his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize section (f) of this rule; and (3) when summary judgment is otherwise appropriate. Almond Grading Co. v. Shaver, 74 N.C. App. 576, 329 S.E.2d 417 (1985); Valdese Gen. Hosp. v. Burns, 79 N.C. App. 163, 339 S.E.2d 23 (1986).

Plaintiff's bare assertions in unverified complaint, which were denied by defendant, held insufficient to support entry of summary judgment for plaintiff. Smith v. Rushing Constr. Co., 84 N.C. App. 692, 353 S.E.2d 692 (1987).

Where plaintiff made a motion for summary judgment, which was denied, and later plaintiff filed a second motion for summary judgment involving the same issue as presented by the initial motion, the trial court erred by granting plaintiff's second motion for summary judgment. Taylorsville Fed. Savs. & Loan Ass'n v. Keen, 110 N.C. App. 784, 431 S.E.2d 484 (1993).

Appellate Conclusion Improper. — Where Court of Appeals majority opinion included a paragraph that concluded that a balancing of the equities favored denial of relief to plaintiff, such a conclusion was improper at the summary judgment stage. Roberts v. Madison County Realtors Ass'n, 344 N.C. 394, 474 S.E.2d 783 (1996).

Judgment on Pleadings Treated As Summary Judgment. — Where matters outside the pleadings were considered by the court in reaching its decision on the judgment on the pleadings, the motion was treated as if it was a motion for summary judgment. Helms v. Holland, 124 N.C. App. 629, 478 S.E.2d 513 (1996).

Standing Determination May Be Reviewed by Subsequent Superior Court Judge. — Standing is an issue of subject matter jurisdiction which may be raised at any time; therefore, it is proper for a second superior court judge to review standing in motion for summary judgment after a previous motion to dismiss had been denied by another judge. Transcontinental Gas Pipe Line Corp. v. Calco Enters., 132 N.C. App. 237, 511 S.E.2d 671 (1999).

Summary Judgment Granted. — Landowner was entitled to summary judgment pursuant to G.S. 1A-1, Rule 56 in the landowner's action seeking relief from a county ordinance that imposed a moratorium on the issuance of building permits dealing with the construction of heavy industry; the ordinance was invalid, because notice was not given once a week for two successive weeks before the public hearing on the ordinance was held, as was required under G.S. 153A-323, and instead notice was only published once. Sandy Mush Props., Inc. v. Rutherford County, 160 N.C. App. 683, 586 S.E.2d 849, 2003 N.C. App. LEXIS 1934 (2003).

Summary Judgment Denied. — Given the fact issues as to whether an officer violated a worker's constitutional rights, the officer was not immune from suit and summary judgment was denied. Campbell v. Anderson, 156 N.C. App. 371, 576 S.E.2d 726, 2003 N.C. App. LEXIS 128 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 385 (2003).

Exclusions in a commercial insurance policy issued to a corporation precluded the conclusion that it provided coverage for a non-covered vehicle involved in an accident while being driven by the owner of the corporation, and an appellate court declined to disregard the corporation's identity under the doctrine of piercing the corporate veil for the purpose of reaching the coverage in the corporation's policy; a trial court erred in denying an insurance company's motion for summary judgment and in granting summary judgment for an administratrix in a declaratory judgment action brought by the administratrix seeking to determine the rights and responsibilities relating to the corporation's commercial policy. Cherry v. State Farm Mut. Auto. Ins. Co., 162 N.C. App. 535, 590 S.E.2d 925, 2004 N.C. App. LEXIS 179 (2004).

B. Particular Types of Actions, etc.

This rule is not limited in its application to any particular type or types of action. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972); Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

While the motion for summary judgment will receive stricter application in negligence cases, summary judgment is available in all types of litigation to both plaintiff and defendant. Emerson v. Great Atl. & Pac. Tea Co., 41 N.C. App. 715, 255 S.E.2d 768 (1979).

Section (a) of this rule contemplates that summary judgment may be granted for any type of claim, counterclaim, or cross-claim, or for a declaratory judgment, so long as the issue to be determined is one which lends itself to summary adjudication. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

Summary judgment may be granted for any type of claim, including a claim for specific performance of a contract. Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

Summary judgment is an appropriate procedure in a declaratory judgment action. Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980); Threatte v. Threatte, 59 N.C. App. 292, 296 S.E.2d 521 (1982), discretionary review improvidently granted, 308 N.C. 384, 302 S.E.2d 226 (1983); Pine Knoll Ass'n v. Cardon, 126 N.C. App. 155, 484 S.E.2d 446 (1997).

Summary judgment may be entered upon the motion of either the plaintiff or the defendant under this rule, and the rule applies in an action for declaratory judgment. Bellefonte Underwriters Ins. Co. v. Alfa Aviation, Inc., 61 N.C. App. 544, 300 S.E.2d 877 (1983), aff'd, 310 N.C. 471, 312 S.E.2d 426 (1984).

The propriety of a summary judgment in an action for a declaratory judgment is governed by the same rules applicable to other actions. Meachan v. Montgomery County Bd. of Educ., 47 N.C. App. 271, 267 S.E.2d 349 (1980); North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Underwriters Nat'l Assurance Co., 48 N.C. App. 508, 269 S.E.2d 688, appeal dismissed and cert. denied, 301 N.C. 527, 273 S.E.2d 453 (1980), rev'd on other grounds, 455 U.S. 691, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982).

Summary judgment can be appropriate in an action for a declaratory judgment where there is no genuine issue of material fact and one of the parties is entitled to judgment as a matter of law. North Carolina Ass'n of ABC Bds. v. Hunt, 76 N.C. App. 290, 332 S.E.2d 693, cert. denied, 314 N.C. 667, 336 S.E.2d 400 (1985).

Summary judgment is appropriate in a special proceeding under G.S. 136-68 to establish a cartway; where respondents to an action seeking to establish a cartway across their land failed to respond to affidavits by petitioners establishing their right to the cartway, the petitioners were granted partial summary judgment on the establishment of the right to a permanent cartway, but the action was remanded for a jury determination of the path of the cartway and the damages to be paid to respondents. Greene v. Garner, 163 N.C. App. 142, 592 S.E.2d 589, 2004 N.C. App. LEXIS 294 (2004).

Summary Judgment on a Claim for Damages. — Summary judgment on a claim for damages is appropriate where the moving party sufficiently establishes by competent documents that a liquidated amount is owing him and the opposing party fails to show facts which dispute that evidence. In such a case there is no triable issue of fact concerning damages due the moving party. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

No prohibition exists as to granting summary judgment on the issue of damages where there is no genuine issue of material fact as to those damages. Sylva Shops, Ltd. P'ship v. Hibbard, 175 N.C. App. 423, 623 S.E.2d 785, 2006 N.C. App. LEXIS 181 (2006).

Summary judgment is rarely appropriate in a negligence action. Barnes v. Wilson Hdwe. Co., 77 N.C. App. 773, 336 S.E.2d 457 (1985); Warren v. Rosso & Mastracco, Inc., 78

N.C. App. 163, 336 S.E.2d 699 (1985); White v. Hunsinger, 88 N.C. App. 382, 363 S.E.2d 203 (1988).

Summary judgment should rarely be granted in negligence cases. Moore v. Crumpton, 306 N.C. 618, 295 S.E.2d 436 (1982).

Negligence claims are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial of the issues. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

Although summary judgment is seldom granted in negligence cases, it may be granted where the evidence shows a lack of any negligence on the part of the defendant. Smith-Price v. Charter Behavioral Health Sys., 164 N.C. App. 349, 595 S.E.2d 778, 2004 N.C. App. LEXIS 816 (2004).

Summary judgment may be granted in a negligence action even though summary judgment is seldom appropriate in a negligence case where there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence. Lavelle v. Schultz, 120 N.C. App. 857, 463 S.E.2d 567 (1995).

To survive a defendant's motion for summary judgment in a negligence action, a plaintiff must set forth a prima facie case (1) that the defendant failed to exercise proper care in the performance of a duty owed the plaintiff; (2) that the negligent breach of that duty was a proximate cause of the plaintiff's injury; and (3) that a person of ordinary prudence should have foreseen that the plaintiff's injury was probable under the circumstances. While summary judgment is normally not appropriate in negligence actions, where the forecast of evidence shows that a plaintiff cannot establish one of these required elements, summary judgment is appropriate. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

Although the issue of contributory negligence was often not appropriate for summary judgment, the investors contributory negligence in neither reviewing nor requesting financial data before purchasing stock allegedly recommended by the attorney in two corporations, along with their signing of an investment letter stating that the decision to purchase the stock was not based on any representation as to the stock's likely performance but instead was based on the investors' independent examination and judgment of the company's prospects when it was not, so clearly established the investors' contributory negligence that no other reasonable conclusion could be reached that their contributory negligence barred their negligence claims against the attorney. Hahne v. Hanzel, 161 N.C. App. 494, 588 S.E.2d 915, 2003 N.C. App. LEXIS 2182 (2003), cert. denied, 358 N.C. 543, 599 S.E.2d 46 (2004).

Or Where Contributory Negligence Is Involved. — Like negligence, contributory negligence is rarely appropriate for summary judgment. Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978); Branks v. Kern, 83 N.C. App. 32, 348 S.E.2d 815 (1986), rev'd on other grounds, 320 N.C. 621, 359 S.E.2d 780 (1987).

Summary judgment, under G.S. 1A-1, N.C. R. Civ. P. 56(c), dismissing a prospective employee's negligence claim against a prospective employer for injuries received during a pre-employment interview was proper, as the employer owed the employee no duty of care, because the injuries were the result of the employee's failure to observe the open and obvious condition of where certain safety devices were placed. Huntley v. Howard Lisk Co., 154 N.C. App. 698, 573 S.E.2d 233, 2002 N.C. App. LEXIS 1528 (2002), cert. denied, 357 N.C. 62, 579 S.E.2d 389 (2003).

And Ordinarily Negligence Actions Should Be Resolved by Trial. — As a general proposition issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Roberts v. Whitley, 17 N.C. App. 554, 195 S.E.2d 62 (1973); Moore v. Fieldcrest Mills, Inc., 296 N.C. 467, 251 S.E.2d 419 (1979); Moye v. Thrifty Gas Co., 40 N.C. App. 310, 252 S.E.2d 837, cert. denied, 297 N.C. 611, 257 S.E.2d 219 (1979); Vassey v. Burch, 301 N.C. 68, 269 S.E.2d 137 (1980); Hockaday v. Morse, 57 N.C. App. 109, 290 S.E.2d 763 (1982), cert. denied, 306 N.C. 384, 294 S.E.2d 209 (1982), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Roberson v. Griffeth, 57 N.C. App. 227, 291 S.E.2d 347, cert. denied, 306 N.C. 558, 294 S.E.2d 224 (1982); Quality Inns Int'l, Inc. v. Booth, Fish, Simpson, Harrison & Hall, 58 N.C. App. 1, 292 S.E.2d 755 (1982).

Negligence issues are not ordinarily susceptible to summary disposition. However, where there is no genuine issue of material fact and reasonable men could only concede the defendant was not negligent, then a motion for summary judgment is proper. Boza v. Schiebel, 65 N.C. App. 151, 308 S.E.2d 510 (1983), cert. denied, 310 N.C. 475, 312 S.E.2d 882 (1984).

Issues of negligence should ordinarily be resolved by a jury and are rarely appropriate for summary judgment. Schaffner v. Cumberland County Hosp. Sys., 77 N.C. App. 689, 336 S.E.2d 116 (1985), cert. denied, 316 N.C. 195, 341 S.E.2d 578, 341 S.E.2d 579 (1986).

There is a presumption against granting summary judgment in negligence cases. Wilson Bros. v. Mobil Oil, 63 N.C. App. 334, 305

S.E.2d 40, cert. denied, 309 N.C. 634, 308 S.E.2d 718, 308 S.E.2d 719 (1983).

Only in exceptional cases involving the question of negligence or reasonable care will summary judgment be appropriate to resolve the controversy. Gladstein v. South Square Assocs., 39 N.C. App. 171, 249 S.E.2d 827 (1978), cert. denied, 296 N.C. 736, 254 S.E.2d 178 (1979); Emerson v. Great Atl. & Pac. Tea Co., 41 N.C. App. 715, 255 S.E.2d 768 (1979); Letchworth v. Town of Ayden, 44 N.C. App. 1, 260 S.E.2d 143 (1979), cert. denied, 299 N.C. 331, 265 S.E.2d 396 (1980).

As it is usually the jury's prerogative to apply the standard of reasonable care in a negligence action, and in such actions summary judgment is, therefore, appropriate only in exceptional cases where the movant shows that one or more of the essential elements of the claim do not appear in the pleadings or proof at the discovery stage of the proceedings. Ziglar v. E.I. Du Pont De Nemours & Co., 53 N.C. App. 147, 280 S.E.2d 510, cert. denied, 304 N.C. 393, 285 S.E.2d 838 (1981).

It is only in the exceptional negligence case that this rule should be invoked. Even in a case in which there is no substantial dispute as to what occurred, it usually remains for the jury, under appropriate instructions from the court, to apply the standard of the reasonably prudent man to the facts of the case. Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971); Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Roberts v. Whitley, 17 N.C. App. 554, 195 S.E.2d 62 (1973); Stancill v. City of Washington, 29 N.C. App. 707, 225 S.E.2d 834 (1976); Haddock v. Smithson, 30 N.C. App. 228, 226 S.E.2d 411, cert. denied, 290 N.C. 776, 229 S.E.2d 32 (1976); Edwards v. Means, 36 N.C. App. 122, 243 S.E.2d 161, cert. denied, 295 N.C. 260, 245 S.E.2d 777 (1978); Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978); Moore v. Fieldcrest Mills, Inc., 296 N.C. 467, 251 S.E.2d 419 (1979); Johnson v. Lockman, 41 N.C. App. 54, 254 S.E.2d 187, cert. denied, 297 N.C. 610, 257 S.E.2d 436 (1979); Vassey v. Burch, 301 N.C. 68, 269 S.E.2d 137 (1980); Stansfield v. Mahowsky, 46 N.C. App. 829, 266 S.E.2d 28, cert. denied, 301 N.C. 96, 273 S.E.2d 442 (1980); Arey v. Board of Light & Water Comm'n, 50 N.C. App. 505, 274 S.E.2d 268, cert. denied, 302 N.C. 629, 280 S.E.2d 440 (1981); Hockaday v. Morse, 57 N.C. App. 109, 290 S.E.2d 763 (1982), cert. denied, 306 N.C. 384, 294 S.E.2d 209 (1982), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Roberson v. Griffeth, 57 N.C. App. 227, 291 S.E.2d 347, cert. denied, 306 N.C. 558, 294 S.E.2d 224 (1982); Quality Inns Int'l, Inc. v. Booth, Fish, Simpson, Harrison & Hall, 58 N.C. App. 1, 292 S.E.2d 755 (1982); Derrick v. Ray, 61 N.C. App. 218, 300 S.E.2d 721 (1983); Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 69 N.C. App. 164, 316 S.E.2d 318, cert. denied, 312 N.C. 496, 322 S.E.2d 560 (1984).

Summary judgment will not usually be feasible in negligence cases where the standard of the prudent man must be applied. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971); Long v. Long, 15 N.C. App. 525, 190 S.E.2d 415 (1972); Brawley v. Heymann, 16 N.C. App. 125, 191 S.E.2d 366, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Forte v. Dillard Paper Co., 35 N.C. App. 340, 241 S.E.2d 394, cert. denied, 295 N.C. 89, 244 S.E.2d 258 (1978); Whitaker v. Blackburn, 47 N.C. App. 144, 266 S.E.2d 763 (1980).

The propriety of summary judgment does not always revolve around the elusive distinction between questions of fact and law. Although there may be no question of fact, when the facts are such that reasonable men could differ on the issue of negligence, courts have generally considered summary judgment improper. Gladstein v. South Square Assocs., 39 N.C. App. 171, 249 S.E.2d 827 (1978), cert. denied, 296 N.C. 736, 254 S.E.2d 178 (1979).

When the facts are such that reasonable men could differ on the issue of negligence, courts have generally considered summary judgment improper. Derrick v. Ray, 61 N.C. App. 218, 300 S.E.2d 721 (1983).

Summary judgment is rarely appropriate in negligence actions because ordinarily it is the duty of the jury to apply the standard of care of a reasonably prudent person. Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982).

The stringent requirements placed on a movant are intended, because summary judgment is a drastic measure, and it should be used with caution. This is especially true in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case. McCullough v. AMOCO Oil Co., 64 N.C. App. 312, 307 S.E.2d 208 (1983), rev'd on other grounds, 310 N.C. 452, 312 S.E.2d 417 (1984).

It is an accepted tenet of jurisprudence that summary judgment is rarely proper in negligence cases. Even where there is no dispute as to the essential facts, where reasonable people could differ with respect to whether a party acted with reasonable care, it ordinarily remains the province of the jury to apply the reasonable person standard. But where there is no genuine issue of material fact and reasonable men could only conclude that the defendant was not negligent, entry of summary judgment is proper. Elmore's Feed & Seed, Inc. v. Patrick, 62 N.C. App. 715, 303 S.E.2d 394

(1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984); Wilson Bros. v. Mobil Oil, 63 N.C. App. 334, 305 S.E.2d 40, cert. denied, 309 N.C. 634, 308 S.E.2d 718, 308 S.E.2d 719 (1983).

Ordinarily, summary judgment is not appropriate in negligence actions because the right of recovery usually depends on the application of the reasonable person standard of care. Only the jury, under instructions from the court, may apply that standard. Holley v. Burroughs Wellcome Co., 74 N.C. App. 736, 330 S.E.2d 228 (1985), aff'd, 318 N.C. 352, 348 S.E.2d 772 (1986).

Summary judgment is rarely appropriate in negligence cases, even when there is no dispute as to the facts, because the issue of whether a party acted in conformity with the reasonable person standard is ordinarily an issue to be determined by a jury. Surrette v. Duke Power Co., 78 N.C. App. 647, 338 S.E.2d 129 (1986).

If the pleadings establish the existence of a cause of action, summary judgment should be granted cautiously in negligence cases, in which the jury ordinarily applies a standard of care to the facts of the case. Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2, cert. denied, 322 N.C. 834, 371 S.E.2d 275 (1988).

Summary judgment may be granted in a negligence action. Cole v. Duke Power Co., 68 N.C. App. 159, 314 S.E.2d 808, cert. denied, 311 N.C. 752, 321 S.E.2d 129 (1984).

And when the facts in a negligence action are admitted or established, negligence is a question of law and the court must say whether it does or does not exist. Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973).

When Summary Judgment for Defendant Is Proper in Negligence Action. — Summary judgment for defendant in a negligence action is proper where the evidence fails to show negligence on the part of defendant, or where contributory negligence on the part of plaintiff is established, or where it is established that the purported negligence of defendant was not the proximate cause of plaintiff's injury. Hale v. Duke Power Co., 40 N.C. App. 202, 252 S.E.2d 265, cert. denied, 297 N.C. 452, 256 S.E.2d 805 (1979); Stansfield v. Mahowsky, 46 N.C. App. 829, 266 S.E.2d 28, cert. denied, 301 N.C. 96, 273 S.E.2d 442 (1980); Edwards v. Akion, 52 N.C. App. 688, 279 S.E.2d 894, aff'd, 304 N.C. 585, 284 S.E.2d 518 (1981); Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 (1985).

Summary judgment is proper in negligence cases where it appears that there can be no recovery even if the facts as claimed by plaintiff are true. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Joyce v. City of High Point, 30 N.C. App. 346, 226 S.E.2d 856 (1976); Whitaker v. Blackburn, 47 N.C. App. 144, 266 S.E.2d 763 (1980); Long v. Southern Bell Tel. & Tel. Co., 53 N.C. App. 110, 280 S.E.2d 3 (1981); Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 69 N.C. App. 164, 316 S.E.2d 318, cert. denied, 312 N.C. 496, 322 S.E.2d 560 (1984); O'Connor v. Corbett Lumber Corp., 84 N.C. App. 178, 352 S.E.2d 267 (1987); Jacobs v. Hill's Food Stores, Inc., 88 N.C. App. 730, 364 S.E.2d 692 (1988).

Where motion for summary judgment is supported by evidentiary matter showing a lack of negligence on the part of the movants and there is no question as to the credibility of the witnesses and no evidence is offered in opposition thereto, no issue is raised for the jury to consider under appropriate instructions. Moore v. Fieldcrest Mills, Inc., 296 N.C. 467, 251 S.E.2d 419 (1979).

Although issues of negligence and contributory negligence are rarely appropriate for summary judgment, where the uncontroverted evidence indicated that plaintiff failed to use ordinary care and that want of due care was at least one of the proximate causes of the fall at issue, and plaintiff was contributorily negligent as a matter of law, summary judgment in favor of defendants was proper. Brooks v. Francis, 57 N.C. App. 556, 291 S.E.2d 889 (1982).

While summary judgment is generally not appropriate in negligence cases, it is appropriate in cases in which it appears that the plaintiff cannot recover even if the facts as alleged by the plaintiff are true. Stoltz v. Burton, 69 N.C. App. 231, 316 S.E.2d 646 (1984).

Where it is clearly established that defendant's negligence was not the proximate cause of plaintiff's injury, summary judgment is appropriate. Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 69 N.C. App. 164, 316 S.E.2d 318, cert. denied, 312 N.C. 496, 322 S.E.2d 560 (1984).

Summary judgment may be granted in a negligence case where there is no question as to the credibility of witnesses and the evidence shows either (1) a lack of any negligence on the part of the defendant, or (2) that plaintiff was contributorily negligent as a matter of law. Surrette v. Duke Power Co., 78 N.C. App. 647, 338 S.E.2d 129 (1986).

As a general rule, summary judgment is not appropriate where issues of negligence are involved. However, if the evidentiary forecasts establish either a lack of any conduct on the part of the movant which could constitute negligence, or the existence, as a matter of law, of a complete defense to the claim, summary judgment may be properly allowed. Sink v. Andrews, 81 N.C. App. 594, 344 S.E.2d 831 (1986).

Summary judgment is appropriate in a negligence case if it is established that the alleged negligence of a defendant was not the proximate cause of a plaintiff's injury. Street v. Moffitt, 84 N.C. App. 138, 351 S.E.2d 821 (1987).

Alleged tortfeasor was entitled to summary judgment, as there was no evidence that his driving while under the influence proximately caused the accident; the tortfeasor, who was under the legal blood-alcohol limit, had not violated any rules of the road. Efird v. Hubbard, 151 N.C. App. 577, 565 S.E.2d 713, 2002 N.C. App. LEXIS 753 (2002).

Summary judgment based on res judicata in a negligence action was proper in favor of third-party defendants/contractors but not in favor of third-party defendant/Department of Transportation, where the court had reversed the final judgment for the latter defendant in the prior case. Green v. Dixon, 137 N.C. App. 305, 528 S.E.2d 51, 2000 N.C. App. LEXIS 333 (2000), aff'd, 352 N.C. 666, 535 S.E.2d 356 (2000).

A premises owner is entitled to summary judgment in a slip and fall case if it can show either the non-existence of an essential element of the plaintiff's claim or that the plaintiff has no evidence of an essential element of her claim. Nourse v. Food Lion, Inc., 127 N.C. App. 235, 488 S.E.2d 608 (1997), aff'd, 347 N.C. 666, 496 S.E.2d 379 (1998).

Wrongful Death Actions. — Trial court properly granted summary judgment to employee's of a school in a wrongful death action filed by the mother of a child who died after suffering a heat stroke during a football practice; the sworn evidence of record showed that no genuine issue of material fact existed regarding the employees' breach of any duty toward the child. Draughon v. Harnett County Bd. of Educ., 158 N.C. App. 208, 580 S.E.2d 732, 2003 N.C. App. LEXIS 1047 (2003), aff'd, without op., 358 N.C. 131, 591 S.E.2d 521 (2004).

Summary judgment dismissal of claims against a board of education for the alleged wrongful death of a football player was proper since all of the personal representative's claims against the board were purely derivative of claims against the board's individual employees and those claims against the individual employees were previously dismissed on the merits. Draughon v. Harnett County Bd. of Educ., 166 N.C. App. 464, 602 S.E.2d 721, 2004 N.C. App. LEXIS 1785 (2004).

Ordinarily discovery is required prior to granting summary judgment in a medical malpractice suit so that the party can explore issues of malpractice. Easter v. Lexington Mem. Hosp., 49 N.C. App. 398, 271 S.E.2d 545 (1980), rev'd on other grounds, 303 N.C. 303, 278 S.E.2d 253 (1981).

The inference created by res ipsa loquitur will defeat a motion for summary judgment even though the defendant presents evidence tending to establish absence of negligence. The burden of proving negligence, however, remains with the plaintiff; accordingly, the finder of fact may reject the permissible inference of negligence even though the defendant presents no evidence. Schaffner v. Cumberland County Hosp. Sys., 77 N.C. App. 689, 336 S.E.2d 116 (1985), cert. denied, 316 N.C. 195, 341 S.E.2d 578, 341 S.E.2d 579 (1986).

For discussion of application of res ipsa loquitur in medical malpractice actions, see Schaffner v. Cumberland County Hosp. Sys., 77 N.C. App. 689, 336 S.E.2d 116 (1985), cert. denied, 316 N.C. 195, 341 S.E.2d 578, 341 S.E.2d 579 (1986).

Summary Judgment Upheld in Medical Malpractice Action. — Inmate who sued a sheriff and various medical providers, alleging medical malpractice and negligence, did not show excusable neglect for failing to designate his expert witnesses by the date specified in the trial court's order, and because the trial court properly denied the inmate's motion for an extension of time to designate his expert witnesses, and his forecast of evidence could not include a designation of witnesses, the trial court's order granting summary judgment in favor of all defendants was upheld. Summey v. Barker, 357 N.C. 492, 586 S.E.2d 247, 2003 N.C. LEXIS 1105 (2003).

Summary judgment is generally inappropriate in an action for fraud, as the existence of fraud necessarily involves a question concerning the existence of fraudulent intent, and the intent of a party is a state of mind generally within the exclusive knowledge of that party which must, by necessity, must be proved by circumstantial evidence. Girard Trust Bank v. Belk, 41 N.C. App. 328, 255 S.E.2d 430, cert. denied, 298 N.C. 293, 259 S.E.2d 299 (1979).

Allegations of fraud do not readily lend themselves to resolution by way of summary judgment, because a cause of action based on fraud usually requires the determination of a litigant's state of mind. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980); Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), rev'd on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986).

But Fraud May Be Summarily Adjudicated When Absence of Genuine Issue Is Clearly Established. — Summary judgment is inappropriate in a fraud case where the court is called upon to draw a factual inference in favor of the moving party, or where the court is called upon to resolve a genuine issue of credibility, but the issue of fraud may be summarily adjudicated when it is clearly established that there is no genuine issue of material fact. Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C.

247, 266 S.E.2d 610 (1980); Ramsey v. Keever's Used Cars, 92 N.C. App. 187, 374 S.E.2d 135 (1988).

In order for defendant in an action for fraud to prevail on its motion for summary judgment, he must show that evidence of one or more of the elements of fraud is unavailable to plaintiff. Johnson v. Phoenix Mut. Life Ins. Co., 44 N.C. App. 210, 261 S.E.2d 135 (1979), rev'd on other grounds, 300 N.C. 247, 266 S.E.2d 610 (1980).

If the defendant moving for summary judgment in a fraud case presents material evidence which effectively negates even one of the essential elements of fraud, summary judgment in defendant's favor should be allowed. It is not necessary that defendant's material evidence negate all of the essential elements. Russo v. Mountain High, Inc., 38 N.C. App. 159, 247 S.E.2d 654 (1978); Ramsey v. Keever's Used Cars, 92 N.C. App. 187, 374 S.E.2d 135 (1988).

In a claim for relief based on fraud, summary judgment for defendant is proper where the forecast of evidence shows that even one of the essential elements of fraud is missing. Uzzell v. Integon Life Ins. Corp., 78 N.C. App. 458, 337 S.E.2d 639 (1985), cert. denied, 317 N.C. 341, 346 S.E.2d 149 (1986).

To overcome defendant's motion for summary judgment in an action alleging fraud, breach of contract, and unfair trade practices, plaintiff needed only to forecast evidence: (1) that defendant made a definite and specific representation to her that was materially false; (2) that defendant made the representation with knowledge of its falsity; and (3) that plaintiff reasonably relied on the representation to her detriment. Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176, modified and aff'd, 303 N.C. 675, 281 S.E.2d 43 (1981).

Libel Action by Public Figure. — When a libel action brought by a public figure is at the summary judgment stage, the appropriate question for the trial judge is whether the evidence in the record would allow a reasonable finder of fact to find either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not. Proffitt v. Greensboro News & Record, Inc., 91 N.C. App. 218, 371 S.E.2d 292 (1988).

Summary judgment in a libel action is not favored where proof of actual malice is required of the plaintiff. Cochran v. Piedmont Publishing Co., 62 N.C. App. 548, 302 S.E.2d 903, cert. denied, 309 N.C. 819, 310 S.E.2d 348 (1983); 469 U.S. 816, 105 S. Ct. 83, 83 L. Ed. 2d 30 (1984).

Falsely Reporting Child Abuse and Neglect. — Where plaintiff alleged that the defendant store clerk made false accusations of child abuse and neglect and injury, and forecast evidence that the defendant knew the report to be false, a genuine issue of material fact existed — particularly as to whether the defendant acted with malice and therefore lost the immunity accorded by former G.S. 7A-550 — to withstand summary judgment in a slander per se cause of action; however, summary judgment was appropriately granted in favor of defendant store where, if actual malice was proven, the defendant store clerk acted outside the scope of her employment. Dobson v. Harris, 134 N.C. App. 573, 521 S.E.2d 710, 1999 N.C. App. LEXIS 894 (1999), cert. denied, 351 N.C. 187, 541 S.E.2d 728 (1999).

Legal Malpractice Action. — For a discussion of the standard for granting summary judgment in a legal malpractice action, see Bamberger v. Bernholz, 96 N.C. App. 555, 386 S.E.2d 450 (1989), rev'd on other grounds, 326 N.C. 589, 391 S.E.2d 192 (1990).

Termination of Parental Rights. — Article 24B of Chapter 7A (former G.S. 7A-289.22 et seq.) does not provide for a summary proceeding to determine whether the petitioner has proven the existence of one or more of the grounds for termination. Thus, the trial court erred in granting petitioners' motion for partial summary judgment. Curtis v. Curtis, 104 N.C. App. 625, 410 S.E.2d 917 (1991).

A summary judgment may not be entered granting an absolute divorce in this State. Edwards v. Edwards, 42 N.C. App. 301, 256 S.E.2d 728 (1979).

Raising of Affirmative Defenses on Motion. — The nature of summary judgment procedure, coupled with the generally liberal rules relating to amendment of pleadings, requires that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on a motion for summary judgment. Cooke v. Cooke, 34 N.C. App. 124, 237 S.E.2d 323, cert. denied, 293 N.C. 740, 241 S.E.2d 513 (1979); Ridings v. Ridings, 55 N.C. App. 630, 286 S.E.2d 614, cert. denied, 305 N.C. 586, 292 S.E.2d 571 (1982).

If an affirmative defense required to be raised by a responsive pleading is sought to be raised for the first time in a motion for summary judgment, the motion must ordinarily refer expressly to the affirmative defense relied upon. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

Defense of laches may be properly raised by summary judgment motion. Capps v. City of Raleigh, 35 N.C. App. 290, 241 S.E.2d 527 (1978).

As May Statute of Frauds. — While the statute of frauds is an affirmative defense which ordinarily must be pleaded, for the purpose of ruling on a motion for summary judgment, an affirmative defense may be raised for the first time by affidavit. Bassett Furn. Indus. of N.C., Inc. v. Griggs, 47 N.C. App. 104, 266 S.E.2d 702 (1980).

Expiration of Statute of Repose. — Whether a statute of repose has expired is strictly a legal issue, and where the pleadings and proof show without contradiction that the statute has expired, then summary judgment may be granted. Cellu Prods. Co. v. G.T.E. Prods. Corp., 81 N.C. App. 474, 344 S.E.2d 566 (1986).

Summary judgment is an appropriate means of raising the defense of a statute of limitation if the statute is properly before the court. Baucom's Nursery Co. v. Mecklenburg County, 89 N.C. App. 542, 366 S.E.2d 558, cert. denied, 322 N.C. 834, 371 S.E.2d 274 (1988).

Assignments. — Generally, the interpretation of an assignment is governed by rules applicable to the interpretation of a contract. If there is no ambiguity regarding the subject matter of the assignment, the plaintiff's intent can be interpreted without resort to extrinsic evidence and summary judgment may be appropriate. Martin v. Ray Lackey Enters., Inc., 100 N.C. App. 349, 396 S.E.2d 327 (1990).

Shareholders' Derivative Actions. — For a case discussing interplay of rules and statutes governing procedure and discovery in shareholders' derivative action, particularly with respect to former G.S. 55-55(c) (see now G.S. 55-7-40), this rule, and G.S. 1A-1, Rules 12 and 23, see Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Lack of Verification Pursuant to § 1A-1, Rule 23(b). — Because the verification requirement in G.S. 1A-1, Rule 23(b) is not jurisdictional in nature, where the purposes behind the rule have been fulfilled by the time the objection to a defective or absent verification is lodged, dismissal or summary judgment in favor of defendants is not appropriate. Alford v. Shaw, 327 N.C. 526, 398 S.E.2d 445 (1990).

Actions Against Counties and Municipalities. — County waived sovereign immunity to the extent that an insurance policy it purchased covered negligent acts committed by emergency medical technicians (EMTs) who worked for the county, and the trial court erred by dismissing a lawsuit which claimed that a person died because EMTs employed by the county were negligent. Dawes v. Nash County, 357 N.C. 442, 584 S.E.2d 760, 2003 N.C. LEXIS 829 (2003).

Condemnation Proceedings. — In condemnation proceeding brought pursuant to city's power of eminent domain under G.S. 160A-240.1, partial summary judgment was properly granted precluding property owners from recovering for diminution in value caused by the city's construction of a median restricting access to lanes in only one direction of travel; the separation of lanes of traffic was an exercise of police power, and the means used to accomplish the legitimate objective were reasonable in light of the fact that the owners still had free ingress and egress to their property, and injury to property caused by such an exercise of police power was not compensable. City of Concord v. Stafford, 173 N.C. App. 201, 618 S.E.2d 276, 2005 N.C. App. LEXIS 1915 (2005), cert. dismissed, — N.C. —, 625 S.E.2d 784 (2005), cert. denied, — N.C. —, 625 S.E.2d 785 (2005).

Court Properly Granted Summary Judgment to an Executor Where No Evidence of Lack of Testamentary Capacity. —Although a trial court properly granted summary judgment to an executor where there was no evidence of a lack of testamentary capacity, the trial court erred in finding estoppel and no undue influence; a caveator showed that the caveator would have received a bequest in any event and that there were genuine issues of material fact relating to undue influence. In re Will of Smith, 158 N.C. App. 722, 582 S.E.2d 356, 2003 N.C. App. LEXIS 1229 (2003).

C. Cases in Which Summary Judgment Held Proper.

Declaratory Judgment. — Summary judgment was proper in an action seeking a declaratory judgment as to the validity of a zoning ordinance where there was no substantial controversy as to the facts disclosed by the evidence, but the controversy involved the legal significance of those facts. Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); Taylor v. Taylor, 45 N.C. App. 449, 263 S.E.2d 351, rev'd on other grounds, 301 N.C. 357, 271 S.E.2d 506 (1980).

Summary judgment was proper in case involving a determination of prior jurisdiction between two towns' competing resolutions of intent where one municipality had sought to involuntarily annex two acres within the boundaries of the other. Town of Spencer v. Town of E. Spencer, 351 N.C. 124, 522 S.E.2d 297 (1999).

Declaratory Judgment Action Challenging the Denial of a Rezoning Application. — Trial court properly granted summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56 to a city in property owners' declaratory judgment action pursuant to G.S. 1-253, challenging a denial of an application to rezone property; a city council's finding that the rezoning would lead to further traffic congestion in the area had a plausible basis, and that the decision had a basis in reason and bore a substantial relation to public safety. Ashby v. Town of Cary, 161 N.C. App. 499, 588 S.E.2d 572, 2003 N.C. App. LEXIS 2199 (2003).

Issue of Punitive Damages Was Appropriate for Ruling in a Second Summary Judgment Motion. — Trial court properly granted defendants' summary judgment motion pursuant to G.S. 1A-1, N.C. R. Civ. P. 56 in a medical malpractice action as to the issue punitive damages, because the issue of punitive damages was not mentioned in an initial summary judgment motion decided by a different judge, and was thus appropriate for ruling in the second motion. Fox v. Green, 161 N.C. App. 460, 588 S.E.2d 899, 2003 N.C. App. LEXIS 2193 (2003).

In a declaratory judgment action challenging a city's condemnation proceeding for expansion of the city's sewer system, a judgment for the city that was essentially a grant of summary judgment was proper because the intended use of the condemnation satisfied the public use and public benefit test as all city residents, including the landowners whose property was being condemned, would have the equal right to connect to the expanded sewer system, which was an essential service. Tucker v. City of Kannapolis, 159 N.C. App. 174, 582 S.E.2d 697, 2003 N.C. App. LEXIS 1442 (2003).

In the declaratory judgment action, the trial court properly granted partial summary judgment pursuant to G.S. 1A-1, Rule 56, in favor of the estate administrator on the issue as to whether the airport insurance policies issued by the insurer provided coverage to the corporations if the corporations were to be found liable; coverage of the corporations was not excluded as the plane that crashed was not owned by, rented by, or loaned to the corporations, and the plane was in flight for the account of its owner, not the corporations. Carlson v. Old Republic Ins. Co., 160 N.C. App. 399, 585 S.E.2d 497, 2003 N.C. App. LEXIS 1796 (2003).

When a deceased child's mother filed a declaratory judgment action against the child's father, seeking a determination of the parties' rights to share in the child's estate, including the proceeds of a wrongful death suit on the child's behalf, under G.S. 31A-2, because the father did not support or communicate with the child from age four until almost age 20, the mother's summary judgment motion, under G.S. 1A-1, Rule 56, was properly granted because, while the father resumed support of and contact with the child before the child's death, support had to be resumed at least one year before the end of the father's legal obligation to support the child, which ended at age 18, to apply the exception to G.S. 31A-2's preclusion, found in G.S. 31A-2(1), so that exception did not apply to the father. McKinney v. Richitelli, 357 N.C. 483, 586 S.E.2d 258, 2003 N.C. LEXIS 1097 (2003).

Ruling Simultaneous to Class Certification. — Trial court did not err in granting summary judgment prior to ruling on the credit cardholder's pending motion for class certification because the parties had stipulated that both motions could be considered simultaneously. Gaynoe v. First Union Corp., 153 N.C. App. 750, 571 S.E.2d 24, 2002 N.C. App. LEXIS 1259 (2002), cert. denied, 356 N.C. 671, 577 S.E.2d 118 (2003).

Trial court did not err in declaring that a county ordinance that pertained to employment discrimination and its enabling statute, G.S. 160A-492, were unconstitutional acts because they violated the provisions of N.C. Const. art. II, § 24(1)(j); thus, summary judgment in favor of employer was proper. Williams v. Blue Cross Blue Shield, 357 N.C. 170, 581 S.E.2d 415, 2003 N.C. LEXIS 595 (2003).

Trial court properly granted summary judgment to a retailer in its declaratory judgment action against a tenant, the landlord, and the landlord's successor in interest because, while a restrictive covenant in a deed between the retailer and the landlord created a real covenant running with the land transferred in the deed and barred the retailer's use of that tract of land for a grocery store, the trial court correctly determined that the restrictive covenant did not impose upon the retailer the five-mile radius restriction to which the landlord earlier agreed in a negotiated commercial lease with the tenant. Wal-Mart Stores, Inc. v. Ingles Mkts., Inc., 158 N.C. App. 414, 581 S.E.2d 111, 2003 N.C. App. LEXIS 1175 (2003).

Contributory Negligence in Use of Steps. — Although issues of negligence and contributory negligence are rarely appropriate for summary judgment, where the uncontroverted evidence indicated that plaintiff failed to use ordinary care and that want of due care was at least one of the proximate causes of the fall at issue, her use of steps rendered her contributorily negligent as a matter of law, making summary judgment in favor of defendants proper. Brooks v. Francis, 57 N.C. App. 556, 291 S.E.2d 889 (1982).

Summary judgment was appropriate where defendants set forth no specific facts to support their allegation that the plaintiff represented to them that their loans would be refinanced. Lexington State Bank v. Miller, 17 N.C. App. 748, 529 S.E.2d 454, 2000 N.C. App. LEXIS 501 (2000).

Contributory Negligence in a Fast Food Restaurant. — Summary judgment was appropriate although defendant may have been negligent in placing the platform over which plaintiff fell so that it was partially hidden by a counter overhang, where plaintiff admitted that she saw the structure before she tripped over it and that she was not distracted by any action of defendant. Allsup v. McVille, Inc., 139 N.C. App. 415, 533 S.E.2d 823, 2000 N.C. App. LEXIS 905 (2000), aff'd, 353 N.C. 359, 543 S.E.2d 476 (2001).

Contributory Negligence in Construction. — Where injured subcontractor's employee knew that holes left by refrigeration installer remained in flooring, but failed to take precautions and lock scaffold's wheels in place prior to beginning the day's work of installing ceiling tiles, he was contributorily negligent as a matter of law; gross negligence was not present to overcome finding of contributory negligence, and thus summary judgment was proper. Sawyer v. Food Lion, Inc., 144 N.C. App. 398, 549 S.E.2d 867, 2001 N.C. App. LEXIS 429 (2001).

Trial court properly granted summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c), to a developer and a construction company in relation to property owners' claims arising from the installation of allegedly faulty synthetic stucco in a townhouse; considering the indications the owners received that the synthetic stucco was problematic, their failure to engage the services of a qualified inspector to inspect the synthetic stucco before they purchased the townhouse constituted contributory negligence as a matter of law. Swain v. Preston Falls E., L.L.C., 156 N.C. App. 357, 576 S.E.2d 699, 2003 N.C. App. LEXIS 106 (2003).

Contributory Negligence For Building Defects. — There was insufficient evidence to allow a reasonable mind to conclude the county's Certificate of Occupancy proximately caused the buyer's damages, where the buyer proceeded to closing at the urging of the realtor, knowing of home's defects, and based on the promises of the builder to fix said defects after closing, and summary judgment for the county on the buyer's negligent inspection claim was also proper because the buyer was contributorily negligent. Eason v. Union County, 160 N.C. App. 388, 585 S.E.2d 452, 2003 N.C. App. LEXIS 1791 (2003).

Alleged Negligence by Subcontractor. — Subcontractor that was hired by general contractor to install trusses on roofs of two buildings did not have a duty to protect the buildings from rainwater, and the trial court ruled correctly that the subcontractor was entitled to summary judgment on a condominium association's claim alleging that the subcontractor negligently allowed rainwater to damage buildings the association managed. Finley Forest Condo. Ass'n v. Perry, 163 N.C. App. 735, 594 S.E.2d 227, 2004 N.C. App. LEXIS 570 (2004).

No Genuine Issue as to Inflicted Injury. — Where plaintiff took advantage of the discovery procedures available and was still unable to obtain evidence as to when and how injury occurred and who or what caused it, and the record did not reveal that any injury in the nature of an inflicted harm occurred, and plaintiff's condition could just as well have been from a pathological cause, there was an absence of a showing of a genuine issue as to any material fact and summary judgment was appropriate. Hoover v. Gaston Mem. Hosp., 11 N.C. App. 119, 180 S.E.2d 479 (1971).

Summary judgment was appropriate where plaintiff's claim did not meet the test in *Woodson v. Rowland,* 329 N.C. 330, 407 S.E.2d 222 (1991), requiring that the plaintiff show that the defendant engaged in misconduct he knew was substantially certain to cause serious injury. Henderson v. Henderson, 121 N.C. App. 752, 468 S.E.2d 454 (1996).

No Genuine Issue of Material Fact Regarding False Statement or Misrepresentation. — Trial court properly granted the owners' summary judgment motion as to a subcontractor's claim that the owners made a false representation upon which the subcontractor reasonably relied since a genuine issue of material fact did not exist regarding whether an owner made a false statement or misrepresentation about guaranteeing payment. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Affidavit Contained Only General Allegations. — Summary judgment was appropriate where no issue of fact existed as to the outstanding balance on the respective loans because the defendant's affidavit contained only general allegations and conclusions, and no specific facts were provided in it as to the dates of any uncredited payments, their amounts, or any other relevant information. Lexington State Bank v. Miller, 17 N.C. App. 748, 529 S.E.2d 454, 2000 N.C. App. LEXIS 501 (2000).

In an action to recover damages for alleged wrongful suspension or discharge etc. of plaintiff from his employment with defendant, trial court properly entered summary judgment for defendant where defendant's evidence established that, except for a bargaining agreement, plaintiff's contract of employment was for an indefinite period of time, terminable at the will of either party, that defendant suspended plaintiff for cause, and that defendant had the right to do so, conditioned or circumscribed only by the provisions of a collective bargaining agreement. Tucker v. General Tel. Co., 50 N.C. App. 112, 272 S.E.2d 911 (1980).

Summary judgment for defendant was proper in an action alleging wrongful discharge due to a handicapped condition, since plaintiff's rhinitis was not a "physical impairment" under G.S. 168A-3 because his medical records established that his condition was temporary; nor did his condition render him "handicapped" under G.S. 168A-3. Simmons v. Chemol Corp., 137 N.C. App. 319, 528 S.E.2d 368, 2000 N.C. App. LEXIS 311 (2000).

In the former deputy sheriff's retaliatory discharge in violation of G.S. 153A-99 cause of action against the sheriff and the surety, the sheriff and surety were entitled to summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56; the former deputy's assertion that the former deputy was fired due to the former deputy's affiliation with the sheriff's primary election foe was insufficient to establish a nexus between the protected activity and the discharge, because the evidence of the nexus was from the former deputy's deposition testimony that amounted to mere conjecture. Venable v. Vernon, 162 N.C. App. 702, 592 S.E.2d 256, 2004 N.C. App. LEXIS 250 (2004).

Where the plaintiff sought to be reinstated to the same position, pursuant to 25 N.C.A.C. 1B.0428, defendant/state agency which reinstated plaintiff/employee as an auditor, not chief auditor, but within the same pay grade, was entitled to judgment as a matter of law. Hodge v. North Carolina DOT, 137 N.C. App. 247, 528 S.E.2d 22, 2000 N.C. App. LEXIS 334 (2000).

Action for Sexual Assault or Seduction. — Summary judgment was appropriate in an action to recover for sexual assault or seduction where the evidence tended to show that plaintiff willingly went to a field with defendant, willingly drank two alcoholic beverages, and remembered nothing until she found herself back in town, but subsequently discovered that she had had intercourse, since there was no evidence that plaintiff feared or even knew that harmful or offensive contact might occur, which was required to show an assault, and since there was no evidence that defendant deceived or enticed plaintiff in any way, which was required to show seduction. McCraney v. Flanagan, 47 N.C. App. 498, 267 S.E.2d 404 (1980).

Vicarious Alienation of Affection. — Summary judgment was proper on plaintiff's alienation of affection claim against defendant moving company which he alleged was vicariously liable where moving company's field representative's involvement with plaintiff's wife was not done in furtherance of the moving company's business, the agent's actions were not within the scope of his employment, and the company did not ratify the allegedly wrongful acts. Mercier v. Daniels, 139 N.C. App. 588, 533 S.E.2d 877, 2000 N.C. App. LEXIS 989 (2000).

Animal Attack. — Summary judgment was properly granted to the cat owners in the victim's action seeking compensation for injuries caused by the cat, as the victim failed to establish that the cat exhibited vicious propensities in past, or that the owners had any reason to suspect that the cat would attack the victim. Ray v. Young, 154 N.C. App. 492, 572 S.E.2d 216, 2002 N.C. App. LEXIS 1445 (2002).

Where materials presented in support of defendant's motion for summary judgment showed that plaintiff had suffered no compensable injury or damage, the entry of summary judgment was proper, since there appeared to be no genuine issue as to any material fact. Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971).

Insurance Claim. — Summary judgment for plaintiff was appropriate where the estate of plaintiff's son could recover under his parents' automobile insurance policy although they placed the policy in the name of a piece of property they owned which was incapable of being legally classified as an individual or as an entity, commercial or otherwise, as the insured; the court resolved the ambiguity created by designating a place as the insured in favor of the plaintiff who paid the premiums and obtained the family coverage. Stockton v. North Carolina Farm Bureau Mut. Ins. Co., 139 N.C. App. 196, 532 S.E.2d 566, 2000 N.C. App. LEXIS 799 (2000).

Plaintiffs, whose home burned down just before it was completed, were entitled to summary judgment against defendant insurer where, under the plain language of the policy, plaintiffs were entitled to recover the full limit of liability. Rouse v. Williams Realty Bldg. Co., 143 N.C. App. 67, 544 S.E.2d 609, 2001 N.C. App. LEXIS 219 (2001), aff'd, 354 N.C. 357, 554 S.E.2d 337 (2001).

In an insured's action against an insurer, summary judgment was properly granted to the insurer because another state's judgment in a class action against the insurer, which the insured did not opt out of, was entitled to full faith and credit and barred the insured's action. Freeman v. Pac. Life Ins. Co., 156 N.C. App. 583, 577 S.E.2d 184, 2003 N.C. App. LEXIS 190 (2003).

When an insured sued an insurer for breach of contract and unfair and deceptive practices for negotiating his premium payment on a life insurance policy and then refunding it, stating that no coverage ever existed, summary judgment was properly granted to the insured, because (1) the insurer's negotiation of the insured's payment, after it knew of the insured's health problems, was inconsistent with enforcing a "good health" provision of the policy and waived that provision, (2) the insurer could not claim accord and satisfaction based on the insured's negotiation of the refund check, because that negotiation was based on the insurer's misrepresentation that the insured was never covered, when it knew he was, (3) and this conduct was an unfair and deceptive practice under G.S. 75-1.1 and G.S. 58-63-15(1). Cullen v. Valley Forge Life Ins. Co., 161 N.C. App. 570, 589 S.E.2d 423, 2003 N.C. App. LEXIS 2273 (2003).

Summary judgment was properly granted in favor of the insurer where the husband's homeowner's policy for personal liability did not apply to a named insured or insured; the wife was both a named insured and an insured under the policy such that there was no coverage for the injuries that she received from the husband, and there was no reasonable expectation that the insurer would pay costs incurred for a lawsuit for which there was no coverage.

N.C. Farm Bureau Mut. Ins. Co. v. Fowler, 162 N.C. App. 100, 589 S.E.2d 911, 2004 N.C. App. LEXIS 55 (2004).

Summary judgment was properly granted in favor of an insurer in a breach of contract action because two insureds admitted there was no breach of an insurance contract by failing to make a timely response to requests for admissions; moreover, the fact that the insureds' attorney failed to provide the discovery documents to the insureds did not provide a basis for relief from the judgment. Brown v. Foremost Affiliated Ins. Servs., 158 N.C. App. 727, 582 S.E.2d 335, 2003 N.C. App. LEXIS 1222 (2003).

Trial court properly granted summary judgment to an administratrix on her claims against two uninsured motorist insurers because, on the date of the insolvency of the third insurer with whom the administratrix settled following the work related death of her husband, the two uninsured motorist insurers became liable to the administratrix for the unfunded amount of the settlement with the insolvent insurer. Jones v. N.C. Ins. Guaranty Ass'n, 163 N.C. App. 105, 592 S.E.2d 600, 2004 N.C. App. LEXIS 302 (2004), cert. denied, 358 N.C. 544, 598 S.E.2d 382 (2004), cert. denied, — N.C. —, 598 S.E.2d 381 (2004).

Insurance company was entitled to summary judgment in homeowners' action seeking payment under a policy that the company issued to a contractor that built a retaining wall because the policy was not in force when the contractor built the wall and damage which occurred to the wall after water seeped into the ground occurred outside the policy period. Hutchinson v. Nationwide Mut. Fire Ins. Co., 163 N.C. App. 601, 594 S.E.2d 61, 2004 N.C. App. LEXIS 407 (2004).

Release of Tortfeasor in Insurance Claim. — Insureds were entitled to summary judgment in an insurer's declaratory judgment action against them to determine the insureds' rights to pursue underinsured motorist benefits when they released the tortfeasor, because the release was clearly limited to the tortfeasor, and the release did not have to contain a covenant not to enforce judgment or to expressly reserve the insureds' rights against the insurer. N.C. Farm Bureau Mut. Ins. Co. v. Edwards, 154 N.C. App. 616, 572 S.E.2d 805, 2002 N.C. App. LEXIS 1514 (2002).

Insurance Claim. — In an insured's action against an insurer, summary judgment was properly granted to the insurer because another state's judgment in a class action against the insurer, which the insured did not opt out of, was entitled to full faith and credit and barred the insured's action. Freeman v. Pac. Life Ins. Co., 156 N.C. App. 583, 577 S.E.2d 184, 2003 N.C. App. LEXIS 190 (2003).

Public duty doctrine did not bar a negligent home inspection claim as the public duty doctrine applied only to law enforcement officers and the county's purchase of a liability insurance policy covering law officers did not waive sovereign immunity as building inspectors were not officers; thus, summary judgment for the county was proper. Kennedy v. Haywood County, 158 N.C. App. 526, 581 S.E.2d 119, 2003 N.C. App. LEXIS 1174 (2003).

Duty of Insurer to Defend. — The trial court correctly entered summary judgment for real estate company on the issue of whether insurer had a duty to defend it in an underlying action, where real estate company's failure to set up a mobile home did not fit under any of the insurer's contract exclusions, because the real estate company had not completed its work and since one of the exclusions was ambiguous and a reasonable person reading the contract would have understood the contract to cover all ordinary business operations of the company. Lambe Realty Inv., Inc. v. Allstate Ins. Co., 137 N.C. App. 1, 527 S.E.2d 38, 2000 N.C. App. LEXIS 261 (2000).

Summary judgment was properly granted to an insurer in its claim for declaratory judgment wherein it was determined that it had no duty to defend its insured nor any duty to reimburse it for expenses of the insured in defending against a claim by an equipment company for breach of contract and indemnification, because the contract between the insured and the company had been found to be invalid. Pa. Nat'l Mut. Cas. Ins. Co. v. Associated Scaffolders & Equip. Co., 157 N.C. App. 555, 579 S.E.2d 404, 2003 N.C. App. LEXIS 749 (2003).

There was no genuine issue as to any material fact in an action under an airplane insurance policy where defendant insurance company effectively canceled the policy under the terms of the contract by notice to plaintiff insured when plaintiff failed to make premium payments on time and had not waived the right of cancellation by past acceptance of late payments which conformed to the conditions of cancellation, and where tender or refund of the unearned portion of the premium payments was not a condition precedent to cancellation. Klein v. Avemco Ins. Co., 289 N.C. 63, 220 S.E.2d 595 (1975).

In an insurance case, the trial court correctly granted summary judgment dismissing an insured's claim for insurance coverage of a vehicle destroyed by a fire because the vehicle was being prepared for racing and the insurance policy clearly excluded coverage of racing vehicles. Barnes v. Erie Ins. Exch., 156 N.C. App. 270, 576 S.E.2d 681, 2003 N.C. App. LEXIS 103 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

In an insurance case, the trial court correctly granted summary judgment dismissing an insured's claim against the bailee of the insured's vehicle, whose alleged negligence caused a fire which destroyed the vehicle, because the insured attempted to assert that claim as a third-party claim, under G.S. 1A-1, N.C. R. Civ. P. 14(a), after an insurer answered the insured's original complaint, effectively amending that complaint without complying with G.S. 1A-1, N.C. R. Civ. P. 15, which was improper. Barnes v. Erie Ins. Exch., 156 N.C. App. 270, 576 S.E.2d 681, 2003 N.C. App. LEXIS 103 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

Summary judgment dismissing plaintiff's action against defendant insurance company under an uninsured motorists endorsement to a policy was proper where the admitted facts established that at the time the action was instituted a claim for wrongful death was no longer within the coverage provided by the policy. Brown v. Lumbermens Mut. Cas. Co., 19 N.C. App. 391, 199 S.E.2d 42 (1973), aff'd, 285 N.C. 313, 204 S.E.2d 829 (1974).

The trial court properly granted summary judgment in favor of plaintiff-insurer where the pleadings, affidavits, and deposition testimony indicated that defendant's use of co-defendant's car constituted "regular use" within the meaning of the insurer's policies thereby excluding coverage. Nationwide Mut. Ins. Co. v. Walters, 142 N.C. App. 183, 541 S.E.2d 773, 2001 N.C. App. LEXIS 33 (2001).

Change of Beneficiary of Insurance Policy. — Trial court properly granted summary judgment for wife of decedent/service member who made her the beneficiary of his insurance policy, although he had earlier entered into a child support agreement promising to make the child of his first marriage the beneficiary; federal law and federal regulations bestowed upon the service member an absolute right to designate the policy beneficiary, even in conflict with state law, and the proceeds were not attachable under the federal Servicemember's Group Life Insurance Act. Lewis v. Estate of Lewis, 137 N.C. App. 112, 527 S.E.2d 340, 2000 N.C. App. LEXIS 250 (2000).

In an action to recover accidental death insurance proceeds, where defendant's evidentiary matter established that cause of death was heart failure and defendant's evidence was not contradicted by plaintiff in response to motion for summary judgment, the motion was properly granted. Hicks v. Old Republic Life Ins. Co., 29 N.C. App. 561, 225 S.E.2d 164 (1976).

Summary judgment was proper under the family purpose doctrine for defendant/father whose son was killed when his automobile collided with plaintiff's, where father did little more than extend credit to his son by providing him with the purchase price of the car and the son made periodic payments and had actual, exclusive control of it after its purchase. Tart v. Martin, 137 N.C. App. 371, 527 S.E.2d 708, 2000 N.C. App. LEXIS 326 (2000).

Commission Agreement. — Where defendant's original contract for the sale of land to a third party was cancelled, and plaintiff submitted no evidentiary materials in opposition to defendant's motion for summary judgment, plaintiff failed to raise any issue of fact as to the nature of an oral agreement by defendant to pay plaintiff one half of any commissions defendant received, since the right to share in commissions under an agreement between brokers to divide commissions does not arise until the commissions have actually been received by the broker charged with liability; thus, summary judgment was appropriate. Chears v. Robert A. Young & Assocs., 49 N.C. App. 674, 272 S.E.2d 402 (1980).

Summary judgment was appropriate on plaintiff's vicarious liability claim where plaintiff submitted an affidavit alleging that the person who tried to repossess her automobile, pushed her to the ground twice and injured her knee but failed to submit any affidavits or other material relating to the question of his status as an independent contractor; none of the evidence before the trial court rebutted the defendant's claim that he was an independent contractor or supported the plaintiff's claim that the company should have known of his alleged penchant for aggressive behavior and the likelihood that he would assault plaintiff. Jiggetts v. Lancaster, 138 N.C. App. 546, 531 S.E.2d 851, 2000 N.C. App. LEXIS 630 (2000).

No Property Right in At-Will Employment. — The trial court erred in failing to grant summary judgment for defendant-state agency where plaintiff, a county extension director, was an employee at-will with no cognizable property right in his employment and, therefore, barred from bringing a due process claim. McCallum v. North Carolina Coop. Extension Serv., 142 N.C. App. 48, 542 S.E.2d 227, 2001 N.C. App. LEXIS 51 (2001), cert. denied, 353 N.C. 452, 548 S.E.2d 527 (2001).

In an action for specific performance of an option contract for the sale of land, where plaintiffs' affidavits and materials in support of their motion for summary judgment, if true, established that upon tender of the deed they were ready, willing and able to pay defendants cash for the property, there were only latent doubts as to the credibility of the affidavits, the affidavits of a disinterested bank president strongly corroborated plaintiffs' affidavits and financial statements, and defendants neither produced any contradictory affidavits, pointed to any specific grounds for impeachment, nor utilized section (f) of this rule, summary judgment against defendants decreeing specific performance was appropriate. Kidd v.

Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Summary Judgment was Proper in Action Involving Church Property. — When church officials sued seceders from the church to recover church property, summary judgment was properly granted to the church officials because the church was a connectional church governed by the national and diocesan church's canons, which provided that the church held its property in trust for the diocese; thus, when the seceders withdrew from the church, the property reverted to the diocese. Daniel v. Wray, 158 N.C. App. 161, 580 S.E.2d 711, 2003 N.C. App. LEXIS 1038 (2003).

Summary judgment in favor of land seller was correct where there was no contract in writing pertaining to the conveyance of the realty as required by G.S. 22-2. Henry v. Shore, 18 N.C. App. 463, 197 S.E.2d 270 (1973).

In a case involving property foreclosure, plaintiff lender was entitled to summary judgment where HUD entity's alleged refusal to recast defendant's debt or discount the mortgage was not arbitrary, capricious, or an abuse of discretion, and violated no applicable law, and there existed, therefore, no material issue of fact. Multifamily Mtg. Trust 1996-1 v. Century Oaks Ltd., 139 N.C. App. 140, 532 S.E.2d 578, 2000 N.C. App. LEXIS 802 (2000).

Summary Ejectment Actions. — Trial court properly granted summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c), to a railway in a summary ejectment action; an oil company's sublease of property from an advertising company terminated when the lease between the railway and the advertising company terminated, and the oil company's claim for betterments under G.S. 1-340 failed based on the company's status as a tenant. Atl. & E. Carolina Ry. Co. v. Wheatly Oil Co., 163 N.C. App. 748, 594 S.E.2d 425, 2004 N.C. App. LEXIS 579 (2004), cert. denied, 358 N.C. 542, 599 S.E.2d 38 (2004).

Credit Card Contract Claim. — Trial court did not err in granting summary judgment for the bank on the breach of contract claim because the trial court correctly interpreted the cardholder agreement and determined that there were no triable issues of fact entitling the bank to summary judgment. Gaynoe v. First Union Corp., 153 N.C. App. 750, 571 S.E.2d 24, 2002 N.C. App. LEXIS 1259 (2002), cert. denied, 356 N.C. 671, 577 S.E.2d 118 (2003).

Where evidence against a check cashing business established that it executed contracts for usurious loans, it used its alternative business purpose of providing Internet access to consumers as a guise to cover this illegal activity, and no evidentiary basis existed upon which a reasonable fact-finder could reach a contrary conclusion, the State's claims of usury and violations of the Consumer Finance Act were established as a matter of law; moreover, the contracts which customers had with the business were cancelled pursuant to G. S. 75-15.1, requiring all funds collected by the business pursuant to such contracts to be refunded to the customers. State ex rel. Cooper v. NCCS Loans, Inc., 174 N.C. App. 630, 624 S.E.2d 371, 2005 N.C. App. LEXIS 2588 (2005).

Lender was properly granted summary judgment in a lender's action because the borrower failed to show any improper conduct on lender's part where there was no requirement for an in-person interview, there was no evidence of a forged signature, the lender disclosed all fees, there was no evidence of harm from allegedly backdated documents, there was no requirement that the lender recommend a reverse mortgage, and there was no violation in the same closing attorney representing both the borrower and the lender. Melton v. Family First Mortg. Corp., 156 N.C. App. 129, 576 S.E.2d 365, 2003 N.C. App. LEXIS 67 (2003).

Purchasing bank was properly granted summary judgment in a lender's action because the bank, in buying a mortgage that the borrower alleged was improperly obtained in the borrower's name, had no dealings with the borrower and had simply purchased the subject mortgage soon after its execution. Melton v. Family First Mortg. Corp., 156 N.C. App. 129, 576 S.E.2d 365, 2003 N.C. App. LEXIS 67 (2003).

To recover damages on a claim alleging unfair and deceptive trade practices, a plaintiff must show, inter alia, actual injury as a result of the defendant's unfair and deceptive act; where, in a claim brought by mobile home owners alleging unfair and deceptive trade practices by the manufacturers of the homes in the manufacturers' recommendations for use of an allegedly defective mobile home tie down system, summary judgment for the manufacturers was proper and was affirmed where, in his deposition, one owner admitted that he did not rely on the manufacturers' recommendation to use the tie-down system at issue when he bought his mobile home, that did not read the manual which specified the system, that the manufacturers did not make any representations about the system before he bought his mobile home, that his home withstood two hurricanes without damage to the system, and that he had not suffered any damages. Belcher v. Fleetwood Enters., 162 N.C. App. 80, 590 S.E.2d 15, 2004 N.C. App. LEXIS 9 (2004).

Action for Fraud. — Where plaintiff failed to prove that defendant car dealership knew or had reason to know of used car's history, and did not even forecast that she could produce such evidence at trial, there was no genuine issue regarding the dealership's knowledge and summary judgment was correct as to charge of fraud. Ramsey v. Keever's Used Cars, 92 N.C. App. 187, 374 S.E.2d 135 (1988).

Summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c) was properly granted in child's claim against the father alleging fraud, among other things; because the claim accrued when the child was a minor, the child was required under G.S. 1-17(a), G.S. 1-52 to file the claim within three years of reaching majority, which the child failed to do, as the summons and complaint, which began the lawsuit pursuant to G.S. 1A-1, N.C. R. Civ. P. 3, were not issued until after the deadline passed. Beall v. Beall, 156 N.C. App. 542, 577 S.E.2d 356, 2003 N.C. App. LEXIS 188 (2003).

Summary judgment in favor of a newspaper corporation, a publishing company, the publishing company's president, a newspaper editor, and a newspaper staff writer in a litigant's action for, inter alia, fraud was proper because the litigant stated in a deposition that she had not relied on any statements by defendants in regard to an article by the writer. Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003).

Unfair Trade Practice. — Trial court properly granted the owners' summary judgment motion as to a subcontractor's claim for treble damages under G.S. 75-1.1 of the North Carolina Unfair and Deceptive Trade Practices Act, G.S. 75-1 et seq., as the subcontractor failed to plead a viable fraud claim, and failed to show substantial aggravating circumstances attending to a breach of contract. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Failure to Prove Essential Elements of Fraud Claim. — Trial court properly granted summary judgment in favor of a corporation and its stockholder as the former employee, who was required by an agreement to sell his stock to the corporation for which he worked upon the termination of his employment, could not prove essential elements of his claims for for fraud, constructive fraud, negligent misrepresentation, violating the North Carolina Securities Act (G.S. 78A-56(b)), and punitive damages. Sullivan v. Mebane Packaging Group, Inc., 158 N.C. App. 19, 581 S.E.2d 452, 2003 N.C. App. LEXIS 944 (2003), cert. denied, 357 N.C. 511, 588 S.E.2d 473 (2003).

Fraud Claim Was Properly Dismissed on Summary Judgment. — Plaintiff's claim that its former customer's employee revealed to plaintiff's competitor confidential information from plaintiff's bid that allowed the competitor to underbid, thereby committing fraud and violating G.S. 66-152(3) and G.S. 75-1.1, was properly dismissed on summary judgment; plaintiff, by submitting information to its customer and allowing it to use and disclose bid information at its sole discretion, did not act reasonably to maintain the secrecy of its bid information, so that it was not a "trade secret." Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 586 S.E.2d 507, 2003 N.C. App. LEXIS 1825 (2003).

In an action for fraud based upon alleged misrepresentation of acreage in a land sale, summary judgment was properly granted for defendants who successfully carried the burden of negating an element of fraud by showing that any representations on their part were made neither with knowledge of their falsity nor in culpable ignorance of their truth. Russo v. Mountain High, Inc., 38 N.C. App. 159, 247 S.E.2d 654 (1978).

Fraudulent Inducement of Real Estate Purchase. — Summary judgment was properly granted in favor of the real estate agents on the purchasers' fraud and unfair and deceptive trade practices claims because the purchasers failed to make a sufficient showing that they suffered damages. Wall v. Fry, 162 N.C. App. 73, 590 S.E.2d 283, 2004 N.C. App. LEXIS 61 (2004).

Buyers' misrepresentation claims against defendant seller and real estate agent were properly dismissed on summary judgment because defendants' affidavits, in which they stated they did not know the land sold to the buyers was in a flood zone, negated the element of "intent to deceive" and the buyers did not produce conflicting evidence. Taylor v. Gore, 161 N.C. App. 300, 588 S.E.2d 51, 2003 N.C. App. LEXIS 2054 (2003), cert. denied, 358 N.C. 380, 597 S.E.2d 775 (2004).

Buyers' negligent misrepresentation claims against the seller and his real estate agent failed, as the agent was entitled to rely on a surveyor's representation that the property sold to the buyers was not in a flood zone. Taylor v. Gore, 161 N.C. App. 300, 588 S.E.2d 51, 2003 N.C. App. LEXIS 2054 (2003), cert. denied, 358 N.C. 380, 597 S.E.2d 775 (2004).

Negligent Failure to Maintain Sidewalk. — Summary judgment was appropriate where the plaintiff failed to offer any evidence that the city had either actual or constructive notice of any alleged defect in its sidewalk, as required to support a negligence claim under G.S. 160A-296(a), and so as to create a genuine issue of material fact. Willis v. City of New Bern, 137 N.C. App. 762, 529 S.E.2d 691, 2000 N.C. App. LEXIS 499 (2000).

Slander Per Se Against Reporter of Child Abuse. — Summary judgment for the defendant on the issue of slander per se was appropriate where the plaintiff's description of retaliatory motives for defendant's report failed to rebut the statutory presumption created in favor of the defendant by the child abuse reporting provisions of G.S. 7B-301 and 7B-309 which together provide immunity not merely conditional upon proof of good faith, but a "good faith" immunity which endows the reporter with the mandatory presumption that he or she acted in good faith. Dobson v. Harris, 352 N.C. 77, 530 S.E.2d 829, 2000 N.C. LEXIS 433 (2000).

Slander of Title Claim. — Summary judgment in favor of a newspaper corporation, a publishing company, the publishing company's president, a newspaper editor, and a newspaper staff writer in a litigant's action for, inter alia, slander of title was proper because the statement that title to the litigant's property was held in trust for the litigant's children was true and there were no damages shown. Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003).

Summary judgment was appropriate on the plaintiffs' defamation claim where, taken as a whole, newspaper article was a substantially accurate report of the allegations in the arrest warrant; although a disputed semicolon was admittedly misused in a sentence, its use did not cause the article to fail the substantial accuracy test when compared to the warrant. Lacomb v. Jacksonville Daily News Co., 142 N.C. App. 511, 543 S.E.2d 219, 2001 N.C. App. LEXIS 148 (2001), cert. denied, 353 N.C. 727, 550 S.E.2d 778 (2001).

Libel Claim. — Trial court did not err in granting defendants' motion for summary judgment on plaintiffs' libel claim. Martin Marietta Corp. v. Wake Stone Corp., 111 N.C. App. 269, 432 S.E.2d 428 (1993), aff'd, 339 N.C. 602, 453 S.E.2d 146 (1995).

Where trial court determined that plaintiffs were limited-purpose public figures and the plaintiffs failed to show malice on the part of defendants vis-a-vis their statements in a newspaper story, the trial court did not err in granting summary judgment to the defendants on plaintiffs' defamation claims. Gaunt v. Pittaway, 135 N.C. App. 442, 520 S.E.2d 603, 1999 N.C. App. LEXIS 1147 (1999).

Union was entitled to summary judgment on the members' libel claims since the union was entitled to a qualified privilege with regard to the statements it made in the newsletter and the members failed to show sufficient evidence of actual damages. Priest v. Sobeck, 160 N.C. App. 230, 584 S.E.2d 867, 2003 N.C. App. LEXIS 1730 (2003), cert. denied, 358 N.C. 155, 592 S.E.2d 694 (2004).

Summary judgment in favor of a newspaper corporation, a publishing company, the publishing company's president, a newspaper editor, and a newspaper staff writer in a litigant's action for, inter alia, libel, was proper because the writer's article about the litigant's 30-year litigation with a former spouse contained statements that were not susceptible of only one defamatory meaning as a matter of law, notwithstanding the litigant's interpretation of the statements. Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003).

Action for Breach of Contract by Failing to Pay for Goods. — Company that ordered telephone equipment accepted the equipment because it did not reject it within three weeks after the equipment was installed, pursuant to a contract it signed to purchase the equipment; because the general notice which the company gave that the equipment did not conform to its requirements did not revoke its acceptance, the trial court properly granted summary judgment for a company that sold the equipment on its claim that the company which bought the equipment wrongfully failed to pay for it. Business Communs., Inc. v. Ki Networks, Inc., 157 N.C. App. 710, 580 S.E.2d 77, 2003 N.C. App. LEXIS 937 (2003).

Breach of Contract Claim. — Trial court properly granted the owners' summary judgment motion as to a subcontractor's claim of breach of contract, as the subcontractor neither claimed that it had a direct contract with the owners nor produced evidence tending to show that the owners ratified the contract between the contractor and the subcontractor. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Trial court properly granted partial summary judgment to a businessman against a shareholder and a corporation because the merger of a company into the corporation without any prior notice to or consent by the businessman resulted in a breach of a stock option and restriction agreement between the businessman and the company and its sole shareholder, because the merger clearly effected a change in the capitalization of the company. Lee v. Scarborough, 162 N.C. App. 674, 592 S.E.2d 43, 2004 N.C. App. LEXIS 259 (2004).

Corporation's approval of a merger pursuant to G.S. 55-11-01 to 55-11-10 constituted a change in the capitalization of the corporation and violated the terms of its option agreement with a consultant who had a five-year option to purchase 50 percent of the shares of the corporation; thus, summary judgment under G.S. 1A-1, N.C. R. Civ. P. 56(c) was properly entered for the consultant on the issue of breach of contract against both the corporation and its principal. Lee v. Scarborough, 164 N.C. App. 357, 595 S.E.2d 729, 2004 N.C. App. LEXIS 812 (2004).

Summary judgment was properly granted to buyers on their breach of contract suit against a seller because, under the plain language of the agreement entered into between the parties, which stated that the seller would "cause" enumerated repairs to be made, the seller was required to fully complete the enumerated repairs, not just pay for them; since it was undisputed that the repairs had not been performed and since the buyers had not frustrated any effort made by the seller to complete the repairs, the evidence showed that the seller was in breach despite the fact that she had deposited a sum for the repairs in escrow. Cater v. Barker, 172 N.C. App. 441, 617 S.E.2d 113, 2005 N.C. App. LEXIS 1799 (2005), aff'd, 360 N.C. 357, 625 S.E.2d 778 (2006).

Trial court properly held that buyers were entitled to a return of their earnest money deposited in escrow upon the signing of a contract for the purchase of the sellers' house, and thus properly granted summary judgment to the buyers, because the buyers promptly exercised their right to terminate the contract, as provided in an addendum to the contract, when an inspection revealed that repairs were necessary in an amount exceeding $10,000. Dysart v. Cummings, 181 N.C. App. 641, 640 S.E.2d 832, 2007 N.C. App. LEXIS 402 (2007).

In an action to recover on a note which was guaranteed, by defendants, summary judgment was properly entered for plaintiff where the record did not indicate any doubts, other than latent doubts, as to the credibility of plaintiff's affiant, defendants failed to introduce any materials in their favor or point to any specific areas of impeachment or contradiction, and no genuine issue of material fact was raised. United Va. Bank v. Woronoff, 50 N.C. App. 160, 272 S.E.2d 618 (1980), cert. denied, 302 N.C. 629, 280 S.E.2d 449 (1981).

The bank was entitled to summary judgment since the record failed to show that the bank had actual notice or knowledge that the trustee was breaching the trust agreement and his fiduciary duty when he entered into the substitution of collateral agreement with the bank. FNB Southeast v. Lane, 160 N.C. App. 535, 586 S.E.2d 530, 2003 N.C. App. LEXIS 1821 (2003), cert. denied, 358 N.C. 153, 592 S.E.2d 558 (2004).

In an action brought by plaintiff, a subcontractor, to recover payment for materials provided on apartment construction projects, summary judgment for defendants was proper; affidavits plaintiff submitted did no more than set forth plaintiff's unsubstantiated allegations. Smiley's Plumbing Co. v. PFP One, Inc., 155 N.C. App. 754, 575 S.E.2d 66, 2003 N.C. App. LEXIS 16 (2003), cert. denied, 357 N.C. 166, 580 S.E.2d 698 (2003).

Where plaintiff, in her deposition, repudiated the allegations of her complaint in an unequivocal manner, a motion for summary judgment in defendant's favor would be proper, since a directed verdict in defendant's favor would be called for at trial on the basis of plaintiff's testimony. Woods v. Smith, 297 N.C. 363, 255 S.E.2d 174 (1979).

Inability to Serve Process. — Plaintiff's failure to demonstrate that her inability to serve process upon a codefendant was excusable, or that it prejudiced her case against the defendant at bar, would not constitute grounds for reversing summary judgment as to the present defendant. Ramsey v. Keever's Used Cars, 92 N.C. App. 187, 374 S.E.2d 135 (1988).

Summary judgment on the basis of governmental immunity was appropriate where the defendants, the city and the police officer who drove the van which struck the plaintiff's vehicle, were both immune from liability because the officer's negligence took place while he was engaged in the repair and subsequent return of the van to the city's garage, a governmental function. Dobrowolska v. Wall, 138 N.C. App. 1, 530 S.E.2d 590, 2000 N.C. App. LEXIS 539 (2000).

Property owners' negligent misrepresentation claim against county agencies was barred by sovereign immunity. Tabor v. County of Orange, 156 N.C. App. 88, 575 S.E.2d 540, 2003 N.C. App. LEXIS 28 (2003).

When an injured party sued a rural fire department and one of its firemen for injuries he received from one of the department's vehicles after the department responded to a fire in the injured party's neighborhood, the department and the fireman were entitled to summary judgment because they were statutorily immune under G.S. 58-82-5 as they met the statutory definitions of a rural fire department and a fireman, and the injury occurred when they were responding to and in the process of suppressing a fire. Luhmann v. Hoenig, 161 N.C. App. 452, 588 S.E.2d 550, 2003 N.C. App. LEXIS 2187 (2003).

Sovereign Immunity. — County had not waived sovereign immunity by means of either the State Building Code or its purchase of liability insurance, and summary judgment in favor of the county in a claim alleging failure to properly inspect a house and negligent issuance of permits relating to the house was affirmed. Norton v. SMC Bldg., 156 N.C. App. 564, 577 S.E.2d 310, 2003 N.C. App. LEXIS 206 (2003).

When an assistant principal was sued for a student's injuries when an automobile struck the student as she walked to her school bus stop, assistant principal was entitled to summary judgment because, under G.S. 115C-42, he only waived sovereign immunity to the extent he purchased liability coverage, his insurance policy contained an exclusion of coverage for incidents arising from the use of a motor vehicle, and an exception to this exclusion for supervising students entering and exiting a school bus required the assistant principal's personal presence before his sovereign immunity was waived, and, as he was not present when the student was injured, his sovereign immunity was not waived, whether or not he changed the student's bus stop after she was assaulted on the school bus. Herring v. Liner, 163 N.C. App. 534, 594 S.E.2d 117, 2004 N.C. App. LEXIS 422 (2004).

Estoppel. — Where plaintiff asserts estoppel against defendants, summary judgment is appropriate when the defendants as the moving parties establish the absence of any genuine issue of fact as a complete defense to the opponent's claim. If the factual evidence, taken in the light most favorable to the nonmovant, allows no inferences inconsistent with the defense, the movant has satisfied his burden, and summary judgment in its favor will be affirmed, and this is true even when the facts raise difficult questions of law. Thomas v. Ray, 69 N.C. App. 412, 317 S.E.2d 53 (1984).

In an action by a commercial landlord for damages occasioned by a default by a company on a lease, summary judgment was proper estopping a guarantor of the company's lease from avoiding the guaranty where the guarantor had personally benefitted from the extension of the original lease that he had guaranteed. Sherwin-Williams Co. v. ASBN, Inc., 163 N.C. App. 547, 594 S.E.2d 135, 2004 N.C. App. LEXIS 416 (2004).

Defense of Laches. — Summary judgment was properly granted to buyers on a seller's defense of laches alleged in the buyers' breach of contract suit because the defense was not applicable in that the trial court's entry of summary judgment awarded the buyers damages, a legal remedy, not specific performance; laches is not available in an action at law. Cater v. Barker, 172 N.C. App. 441, 617 S.E.2d 113, 2005 N.C. App. LEXIS 1799 (2005), aff'd, 360 N.C. 357, 625 S.E.2d 778 (2006).

Failure to Assert Specific Facts in Supporting Affidavit. — Summary judgment was appropriate where defendants set forth no specific facts with respect to the various properties' fair values or other relevant information to support their allegation that the plaintiff intentionally paid less than fair market value for all the property at the foreclosure sales. Lexington State Bank v. Miller, 17 N.C. App. 748, 529 S.E.2d 454, 2000 N.C. App. LEXIS 501 (2000).

Alleged Negligence of Veterinarian. — Plaintiff cat owner possessed knowledge that her cat might bite during an attempted catheterization and such knowledge was equal or superior to that of the veterinarian attempting to perform such procedure, and where the cat bit plaintiff during the course of said catheterization, plaintiff failed to establish a breech of duty on the part of the veterinarian, and the veterinarian was entitled to summary judgment as no material fact remained to be resolved at trial. Branks v. Kern, 320 N.C. 621, 359 S.E.2d 780 (1987), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998).

Medical Malpractice. — There was no error in granting defendant's motion for summary judgment in a medical malpractice action where the affidavits of experts relied upon by plaintiff failed to identify the applicable standard of care required for the defendant. Evans v. Appert, 91 N.C. App. 362, 372 S.E.2d 94, cert. denied, 323 N.C. 623, 374 S.E.2d 584 (1988).

Legal Malpractice Action. — Legal malpractice action accrues at the time of the last act of the defendant giving rise to the cause of action, but if the claimant's loss is not readily apparent to the claimant at the time of its origin, and is discovered or should reasonably be discovered by the claimant two or more years after the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made; a legal malpractice case alleging that the lawyers failed to advise the client of use restrictions on land purchased by the client was time barred, and the trial court's order dismissing the case was affirmed, where, in a separate case, the client had failed to specifically deny that he was notified of the land use restrictions approximately two months after closing on the purchase of the land, and over three years before filing the legal malpractice case. Bolton v. Crone, 162 N.C. App. 171, 589 S.E.2d 915, 2004 N.C. App. LEXIS 56 (2004).

Summary judgment in favor of estate of defendant attorney in legal malpractice action alleging his negligent representation of plaintiff in a medical malpractice action held proper. Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 (1985).

Trial court did not err in granting summary judgment to a law firm, that was being sued by a client for malpractice with regard to the law firm's representation of the client in a forfeiture proceeding, because the client failed to demonstrate that his injury proximately resulted from the law firm's alleged negligence. Belk v. Cheshire, 159 N.C. App. 325, 583 S.E.2d 700, 2003 N.C. App. LEXIS 1529 (2003).

In an appeal by outdoor advertising companies of the revocations of their permits for outdoor advertising signs, summary judgment was properly applied to the trial court's finding that the words "height" and "sign" in N.C. Admin. Code tit. 19A, r. 2E.0203(1)(f) were used in their common sense as this interpretation of a regulation was a question of law, rather than of fact, and there was no indication that the words had acquired some technical meaning. Capital Outdoor, Inc. v. Tolson, 159 N.C. App. 55, 582 S.E.2d 717, 2003 N.C. App. LEXIS 1417 (2003), cert. denied, 357 N.C. 504, 587 S.E.2d 662 (2003).

Action Against Police Officers in High-Speed Chase. — Summary judgment was proper where plaintiff failed to demonstrate the existence of a genuine issue of material fact as to gross negligence on the part of the officers who attempted to apprehend a motorist suspected of driving while intoxicated and the actions of the officers were, otherwise, exempt under G.S. 20-145. Norris v. Zambito, 135 N.C. App. 288, 520 S.E.2d 113 (1999).

Summary judgment was proper when only issues were legal ones, namely the effect of a note being erroneously marked "Paid and Satisfied," and the effect of plaintiff's lack of possession on its ability to enforce the note. G.E. Capital Mtg. Servs. v. Neely, 135 N.C. App. 187, 519 S.E.2d 553 (1999).

Where Only a Question of Law was Presented. — Where resolution of an issue presented only questions of law, the case was appropriate for entry of summary judgment, provided the undisputed facts established that one of the parties was entitled to judgment. Smith v. State Farm Mut. Auto. Ins. Co., 157 N.C. App. 596, 580 S.E.2d 46, 2003 N.C. App. LEXIS 933 (2003), cert. denied, 357 N.C. 507, 587 S.E.2d 674 (2003).

Summary Judgment Properly Entered for Defendants. — See Smith v. Association for Retarded Citizens for Hous. Dev. Servs., Inc., 75 N.C. App. 435, 331 S.E.2d 324 (1985).

Trial court did not err in granting summary judgment to a skier's parents on the injured party's negligence claim that they were liable for the actions of their 12-year-old son who ran into the injured party on a beginner's ski slope and injured her, because the injured party did not present a sufficient forecast of evidence to overcome the rebuttable presumption that the 12-year-old skier was incapable of negligence. Frank v. Funkhouser, 169 N.C. App. 108, 609 S.E.2d 788, 2005 N.C. App. LEXIS 515 (2005).

As the evidence before the trial court on a motion for summary judgment filed by a police department did not raise a genuine issue of material fact as to whether numerous current police officers were entitled to a pay increase, because the city council had not approved any pay raise for existing employees of the police department with post-secondary degrees, the trial court properly granted summary judgment in favor of the department and against the contesting officers. City of Asheville v. Bowman, 172 N.C. App. 586, 616 S.E.2d 669, 2005 N.C. App. LEXIS 1808 (2005).

Action to Quiet Title. — Where a city became the record owner of property pursuant to a tax foreclosure sale, and where purported adverse possessors brought their action to quiet title beyond the one year statute of limitation contained in G.S. 105-377, there were no genuine issues of material fact and the city was entitled to summary judgment. Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

Summary judgment quieting title in the seller of lots in a subdivision was properly granted; the seller had sought to quiet title to a parcel adjacent to the subdivision that was discovered when a new survey revealed that the seller and her husband did not convey all of certain real estate when they sold the subdivision lots, and the seller's title to this parcel was superior to that of the owners of lots in the subdivision, who purported to divide the parcel among themselves. Hensley v. Samel, 163 N.C. App. 303, 593 S.E.2d 411, 2004 N.C. App. LEXIS 375 (2004).

Summary judgment was properly granted to the seller of lots in a subdivision finding that she held title to the subdivision's roads because the deeds of the owners of lots in the subdivision did not purport to grant them an ownership interest in the roads and only granted them the right to use the roads to access their lots. Hensley v. Samel, 163 N.C. App. 303, 593 S.E.2d 411, 2004 N.C. App. LEXIS 375 (2004).

Summary judgment was appropriate where the plaintiffs failed to establish the existence of an agency relationship between defendant/franchisor and defendant/cleaning company whose driver ran over a six-year-old boy. Although the franchise agreement was extensive, prescribing standards of attire and appearance of franchisee's employees and the condition of its equipment, the franchisor's involvement functioned largely to ensure uniform service and public good will toward the corporation, and the franchisor retained no control over the hiring, firing, or supervision of the franchisee's personnel and its remedies, in the event of a breach of the Agreement, were limited. Miller ex rel. Bailey v. Piedmont Steam Co., 137 N.C. App. 520, 528 S.E.2d 923, 2000 N.C. App. LEXIS 419 (2000).

In a house owner's suit brought to recover from an employer for the negligence of the employer's employee, occurring when the employee failed to sufficiently extinguish a cigarette while at the owner's house, resulting in the destruction of the owner's home, the trial court properly granted summary judgment to the owner on the issue of respondeat superior. While the employer contended that the employee's act of smoking was not within the scope of her employment, the employee did not depart from the employer's business when she smoked the cigarette and negligently failed to extinguish it when going to answer the phone as the employee was on the employer's premises where she was required to be, able and willing to perform her duties, and the negligence occurred when she went to perform one of those duties, answering the telephone. Estes v. Comstock Homebuilding Cos., — N.C. App. —, 673 S.E.2d 399, 2009 N.C. App. LEXIS 209 (2009).

Summary Judgment Was Appropriate In Tortious Interference With Contract Claim. — Plaintiff's claim of tortious interference with contract against its former customer's employee and a competitor was properly dismissed on summary judgment, as the competitor's bid for a landscaping contract with the customer was a non-malicious motive for its "interference" with plaintiff's contract, and the fact that the competitor's bid was lower than plaintiff's provided a non-malicious business explanation for the employee's actions. Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 586 S.E.2d 507, 2003 N.C. App. LEXIS 1825 (2003).

Third Party Beneficiary. — Trial court properly granted the owners' summary judgment motion as a subcontractor was not a third-party beneficiary of the contractor's agreement with the owners where: (1) even assuming that the owners agreed to pay the contractor additional funds in order to pay various subcontractors, no new consideration flowed to the the owners, (2) under the original contract between the contractor and the owners, the contractor agreed to construct a dialysis center for a fixed price, and any additional money above the fixed price would constitute a contractual modification requiring new consideration, and (3) all claims, including the alleged additional contract, were determined in an arbitration proceeding between the contractor and the owners. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Summary judgment was proper for defendant insurer whose policy excluded the commercial use of a boat; although no member of the public was paying for a parasail ride or was even in the boat at the time of plaintiff's injury, plaintiff was parasailing to attract customers. Bratton v. Oliver, 141 N.C. App. 121, 539 S.E.2d 40, 2000 N.C. App. LEXIS 1294 (2000), review denied, 353 N.C. 369 (2001).

In a private nuisance action against adjacent landowners, one of the defendants presented an affidavit that it was not and had never been an owner of the land in question. By failing to come forward with evidence, by affidavit or otherwise, which would have tended to show an issue of triable fact, the plaintiff's claim was subject to summary judgment. Bjornsson v. Mize, 75 N.C. App. 289, 330 S.E.2d 520, cert. denied, 314 N.C. 537, 335 S.E.2d 13 (1985).

County Swine Farm Regulations. — Summary judgment was appropriate for plaintiff who sued the county claiming that a county swine ordinance and county health board rules were preempted by the General Assembly's "complete and integrated regulatory scheme" of swine farm regulations; counties may not act to zone a swine farm other than as authorized by the limited statutory exception of G.S. 153-340(b)(3). Craig v. County of Chatham, 143 N.C. App. 30, 545 S.E.2d 455, 2001 N.C. App. LEXIS 221 (2001), cert. granted, 354 N.C. 68, 553 S.E.2d 37 (2001).

Tobacco Cooperative Stabilization Corporations Marketing Operations Were Not Improper. — Trial court properly granted summary judgment to a tobacco cooperative stabilization corporation in a restraint of trade claim brought by various tobacco warehouses because the corporation's creation of market centers subsidizing warehouse operations fell within an exemption of North Carolina's antitrust laws under G.S. 54-141; furthermore, the tobacco warehouses could not assert claims under N.C. Const. art. I, §§ 19 and 34 as no action was taken by the corporation as State action. Bailey v. Flue-Cured Tobacco Coop. Stabilization Corp., 158 N.C. App. 449, 581 S.E.2d 811, 2003 N.C. App. LEXIS 1179 (2003).

Property Owners' Association's Assessments. — Summary judgment was proper where no genuine issue of material fact existed as to the application and enforceability of owners' association's assessment provisions against defendant property owners. McGinnis Point Owners Ass'n v. Joyner, 135 N.C. App. 752, 522 S.E.2d 317, 1999 N.C. App. LEXIS 1242 (1999).

Easement Claim. — In an apartment complex owner's action to enjoin a developer and a corporation from parking a 40-foot eight-wheeled construction trailer on a lot on which the owner had an easement for ingress and egress to the complex, a grant of summary judgment on the issue of the existence of an easement across the street and ordering of the removal of the trailer was proper because the owner had acquired an easement by dedication and by prior use and the trailer, which blocked access to the apartments, was an unreasonable interference with the owner's rights. Ferrell v. Doub, 160 N.C. App. 373, 585 S.E.2d 456, 2003 N.C. App. LEXIS 1800 (2003).

When the seller of lots in a subdivision was properly found to have title to a newly-discovered parcel adjacent to the subdivision, it was error to deny her motion for partial summary judgment on the issue of whether seller was entitled to use the roads in the subdivision to access her parcel; seller held title to those roads and could use them as she saw fit, as long as she did not interfere with the easements possessed by the owners of lots in the subdivision to use the roads to access their lots. Hensley v. Samel, 163 N.C. App. 303, 593 S.E.2d 411, 2004 N.C. App. LEXIS 375 (2004).

Obligations Under a Separation Agreement. — Where the facts indicated that the parties executed a separation agreement free from any duress or other illegalities which would invalidate their contract, and the parties negotiated the terms of their agreement at arms-length, there was no genuine issue of material fact to be decided; defendant's obligation to pay support to plaintiff was clear and summary judgment on the issue was proper. Brandt v. Brandt, 92 N.C. App. 438, 374 S.E.2d

663 (1988), aff'd, 325 N.C. 429, 383 S.E.2d 656 (1989).

Railroad Retirement Benefits Under a Marital Separation Agreement. — Trial court properly granted summary judgment in favor of ex-wife in her suit to enforce a separation agreement and did not err in entering an order awarding the ex-wife 29.5 percent of the ex-husband's divisible railroad retirement benefits. Gilmore v. Garner, 157 N.C. App. 664, 580 S.E.2d 15, 2003 N.C. App. LEXIS 942 (2003).

Subrogation. — Summary judgment was proper where the lease contained an explicit waiver by each party of its right to recover against the other for any loss covered by insurance and the defendant insurance company included a clause permitting its insured to contract to release third parties from liability, thus waiving its right to subrogation. Lexington Ins. Co. v. Tires into Recycled Energy & Supplies, Inc., 136 N.C. App. 223, 522 S.E.2d 798, 1999 N.C. App. LEXIS 1312 (1999).

Enforcement of Lien. — Trial court properly granted the owners' summary judgment motion as to a subcontractor's claim for enforcement of lien under G.S. 44A-23, as the subcontractor's claim was by way of subrogation, the contractor's claim against the owners had been arbitrated, and after the contractor's claim was set-off against the owners' claim, the contractor was indebted to the owners for corrected and uncompleted work. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Controlling Statutes of Limitation and Repose. — Although ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending, where the information sought by plaintiff was not material to the pertinent dates under the statutes of limitation and repose which controlled the disposition of the case, plaintiff suffered no prejudice because the court granted defendant's summary judgment motion, based on such statutes, prior to the completion of discovery. Cellu Prods. Co. v. G.T.E. Prods. Corp., 81 N.C. App. 474, 344 S.E.2d 566 (1986).

Action Barred by Statute of Limitations. — Contractor's Insurer's motion for summary judgment was properly granted where the subcontractors' suit was time-barred under G.S. 44A-28(b) because: (1) the contractor had sent a final bill on the project to the City; (2) the project engineer had advised the City that the work was substantially complete and that final payment (less a retainage) should be made, with the retainage balance to be paid after the City was satisfied that the project was 100-percent complete; (3) the City wrote the contractor a check for the final amount less the retainer more than one-year before the suit was filed; (4) the City's Finance Director was confident that the final sum had been determined even though a retainage had been kept; and (5) the City's engineering technician testified that contractors submitted a final bill and that the retainage was usually paid one to three months later. Cencomp, Inc. v. Webcon, Inc., 157 N.C. App. 501, 579 S.E.2d 482, 2003 N.C. App. LEXIS 731 (2003).

Although a deed which a grantor delivered to a grantee as a trustee was void ab initio because it was executed before the trust came into effect, the trial court erred by denying the trustee's motion for summary judgment on the grantor's claim for title to the property because the grantor's claim was based on allegations of fraud and misrepresentation, and was barred by G.S. 1-52(9). Gifford v. Linnell, 157 N.C. App. 530, 579 S.E.2d 440, 2003 N.C. App. LEXIS 744 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 754 (2003).

Contract which a buyer and a seller concluded for the purchase of a mobile home was governed by North Carolina's Uniform Commercial Code because the predominant factor of the contract was the delivery of the mobile home, and services provided to install it were incidental; the trial court ruled correctly that the buyer and seller's contract reduced the time for filing an action for breach of contract from four years to one year, pursuant to G.S. 25-2-725(1), and that the seller was entitled to summary judgment on the buyer's claim for breach of contract because the buyer's action was time-barred. Hensley v. Ray's Motor Co. of Forest City, Inc., 158 N.C. App. 261, 580 S.E.2d 721, 2003 N.C. App. LEXIS 1050 (2003).

To determine if a lawsuit is barred by the three year statute of limitations in G.S. 1-52, a court first determines when the breach occurred that caused the cause of action to accrue; where a counterclaim on a breach of contract action was filed more than three years after the breach allegedly occurred, the counterclaim was barred by the statute of limtations and was properly dismissed on summary judgment. PharmaResearch Corp. v. Mash, 163 N.C. App. 419, 594 S.E.2d 148, 2004 N.C. App. LEXIS 410 (2004), cert. denied and dismissed, 358 N.C. 733, 601 S.E.2d 858 (2004).

Action Barred By Statute of Repose. — Action alleging faulty construction of a house was barred by the statute of repose where the case was not filed until more than six years after the house was substantial completed and occupied as a residence; the homeowners' allegations that the construction company's conduct and failure to follow the building code constituted more than ordinary negligence were insufficient to establish equitable estoppel to bar the construction company from asserting the statute of limitations defense, and summary judgment in favor of the construction company was affirmed. Moore v. F. Douglas Biddy Constr., Inc., 161 N.C. App. 87, 587 S.E.2d 479 (2003).

Settlement Properly Not Set Aside. — Summary judgment order was proper as the pain clinic and its doctors could not set aside a settlement with the foundation and its trustee that was entered into after the decision was made to not continue the funding of the clinic because: (1) any fiduciary duty was repudiated before the settlement negotiations; (2) the fraud and breach of contract claims were barred by statutes of limitations; and (3) the negligent misrepresentation claim was properly denied as there was no duty owed; furthermore, the clinic and its doctors failed to allege damages under any tort theory as to the foundation's bank and the law firm, therefore, their claims were properly dismissed as to them for failing to allege damage as an essential element of each cause of action. Piedmont Inst. of Pain Mgmt. v. Staton Found. , 157 N.C. App. 577, 581 S.E.2d 68, 2003 N.C. App. LEXIS 934 (2003).

Where plaintiff failed to comply with sections (e) and (f) of this rule and did not point to any specific ground for impeaching defendant's affidavit, which established his right to summary judgment, trial court properly granted summary judgment against plaintiff on its claims against defendant. G & S Bus. Servs., Inc. v. Fast Fare, Inc., 94 N.C. App. 483, 380 S.E.2d 792, appeal dismissed and cert. denied, 325 N.C. 546, 385 S.E.2d 497 (1989).

Party Did Not Request A Continuance To Permit Pre-trial Discovery. — Trial court did not err in proceeding with a summary judgment hearing where the plaintiffs did not move for a continuance of the summary judgment hearing to allow additional time for pretrial discovery to take place. Shroyer v. County of Mecklenburg, 154 N.C. App. 163, 571 S.E.2d 849, 2002 N.C. App. LEXIS 1402 (2002).

Alleged Discrimination in Violation of Constitution. — Summary judgment was proper against plaintiff who alleged that defendant/city discriminated against her in violation of the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the North Carolina Constitution by enforcing its parking requirements against her but not against other businesses in the area, because the plaintiff failed to offer evidence of an essential element of her claim, namely, that the city acted in a consciously evil manner. Brown v. City of Greensboro, 137 N.C. App. 164, 528 S.E.2d 588, 2000 N.C. App. LEXIS 271 (2000).

Intentional Infliction of Emotional Distress. — Where one plaintiff could place no time period in which defendant allegedly intentionally inflicted emotional distress, and where she was unable to place a day, month or year on any of the specific events she alleged, there was simply no evidence to indicate that any of the alleged incidents regarding plaintiff took place within the three-year statute of limitations period, and the trial court did not err in granting summary judgment to defendant against that plaintiff. Waddle v. Sparks, 100 N.C. App. 129, 394 S.E.2d 683 (1990), modified on other grounds, 331 N.C. 73, 412 S.E.2d 22 (1992).

Summary judgment was proper on a nurse's claim for intentional infliction of emotional distress; her co-worker's actions in breaking rules at work and then throwing papers at her when she confronted him were not sufficiently outrageous. Smith-Price v. Charter Behavioral Health Sys., 164 N.C. App. 349, 595 S.E.2d 778, 2004 N.C. App. LEXIS 816 (2004).

Negligent Infliction of Emotional Distress. — Trial court properly granted summary judgment to a funeral company on a claim of negligent infliction of emotional distress by the wife of a decedent; the wife failed to show that she suffered severe emotional distress based on the company's disinterment of the decedent pursuant to a court order obtained by the decedent's mother, and the subsequent reburial of the decedent in Puerto Rico. Pacheco v. Rogers & Breece, Inc., 157 N.C. App. 445, 579 S.E.2d 505, 2003 N.C. App. LEXIS 738 (2003).

Summary judgment was proper against nurse's claim for negligent infliction of emotional distress; she failed to show that her co-worker owed her any duty or that he breached the duty. Smith-Price v. Charter Behavioral Health Sys., 164 N.C. App. 349, 595 S.E.2d 778, 2004 N.C. App. LEXIS 816 (2004).

Invasion of Privacy — Intrusion Claim. — Summary judgment in favor of a newspaper corporation, a publishing company, the publishing company's president, a newspaper editor, and a newspaper staff writer in a litigant's action for, inter alia, invasion of privacy, was proper because the litigant could only have claimed an invasion of privacy claim for intrusion in North Carolina and the writer's use of public records did not constitute an intrusion sufficient to support the claim. Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003).

Failure to Meet Severity Requirement of Negligent Infliction of Emotional Distress. — Summary judgment was appropriate where defendant/stepmother who shot her husband met her burden of demonstrating the absence of an essential element of plaintiffs stepdaughters' claim, i.e., severe emotional distress, and the alleged emotional distress of plaintiffs as described in their responses to defendant's interrogatories failed to meet the requisite level of "severe" emotional distress. Johnson v. Scott, 137 N.C. App. 534, 528 S.E.2d 402, 2000 N.C. App. LEXIS 413 (2000).

Action to Quiet Title Based on Fraud. —

Where the cause of action is in fraud, the defendants would have a basic right to a jury trial. However, judge in action to quiet title based on fraud and on construction of deed considered only the intent of the parties in the deed in question and did not reach the issue of fraud. Once the intent was determined from the four corners of the deed, "fraud" no longer mattered and no jury trial was necessary; therefore, the judge was able to dispose of the case on a judgment on the pleadings. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Trespass to Real Property. — Summary judgment in favor of a newspaper corporation, a publishing company, the publishing company's president, a newspaper editor, and a newspaper staff writer in a litigant's action for, inter alia, trespass was proper because the litigant engaged in "social" conversation with the writer on the litigant's property and did not ask the writer to leave. Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003).

In the State's action seeking to prevent landowners from trespassing on property over which they built a walkway and seeking a declaration of fee simple ownership, summary judgment was properly granted to the State where it was clearly established that the landowners' deed contained no reference to an easement. Moreover, the landowners' claimed ownership of a right to use the property was defeated by a judgment that held a restraint on use of the property was a invalid, which judgment had occurred prior to when the landowners obtained their deed. State v. Willis, 163 N.C. App. 572, 594 S.E.2d 139, 2004 N.C. App. LEXIS 418 (2004), cert. denied, 358 N.C. 549, 600 S.E.2d 467 (2004).

Conspiracy. — Summary judgment proper where plaintiff did not obtain the right to be valedictorian and offered nothing beyond bare assertions that defendants engaged in some conspiracy to keep her from attaining the position. Townsend v. Board of Educ., 118 N.C. App. 302, 454 S.E.2d 817 (1995).

Undue Influence Over Testator. — Trial court did not err in granting partial summary judgment on the issue of undue influence regarding the execution of a will and a codicil as the caveators, who challenged the conveyance of the testator's property to the university which provided care and legal assistance to the testator, failed to prove the existence of undue influence. In re Campbell, 155 N.C. App. 441, 573 S.E.2d 550, 2002 N.C. App. LEXIS 1639 (2002), cert. denied, 357 N.C. 63, 579 S.E.2d 385 (2003).

Application for Certificate of Need. — Where both parties forecast evidence to support recommendation by the administrative law judge and final agency decision which were contrary, a genuine issue of material fact existed regarding hospital's application for a certificate of need, a contested case hearing would be required, and final agency inappropriately granted summary judgment for hospital. Presbyterian-Orthopaedic Hosp. v. North Carolina Dep't of Human Resources, 122 N.C. App. 529, 470 S.E.2d 831 (1996), discretionary review improvidently allowed, 346 N.C. 267, 485 S.E.2d 294 (1997).

An application for certificate of need must comply with all review criteria, and where an application failed to show that it satisfied mandatory criteria, administrative law judge did not err in recommending summary judgment against applicant. Presbyterian-Orthopaedic Hosp. v. North Carolina Dep't of Human Resources, 122 N.C. App. 529, 470 S.E.2d 831 (1996), discretionary review improvidently allowed, 346 N.C. 267, 485 S.E.2d 294 (1997).

Declaratory Judgment as to Right of Way. — Summary judgment for the defendant was proper where the plaintiff's claim was based on an original right of way which was incapable of being described and, therefore, patently ambiguous and void and where based, on their usage, the parties and their predecessors in title accepted a road, other than the original, as the right of way intended to be reserved by the recorded plat. Parrish v. Hayworth, 138 N.C. App. 637, 532 S.E.2d 202, 2000 N.C. App. LEXIS 784 (2000).

Negligent Entrustment Claim. — Summary judgment was proper where there was insufficient evidence to show that car rental agency knew or should have known that driver was an "incompetent or reckless driver who is likely to cause injury to others", an essential element of a negligent entrustment claim. Dwyer v. Margono, 128 N.C. App. 122, 493 S.E.2d 763 (1997), cert. denied, 347 N.C. 670, 500 S.E.2d 85 (1998).

The Court of Appeals erred in reversing the trial court's order granting summary judgment to defendant father of driver who hit plaintiff on the issue of negligent entrustment where the driver's only moving violation, more than two years prior to the collision, and his no-fault involvement in three accidents could not by themselves support a conclusion that he was an incompetent or reckless driver likely to cause injury to others. Tart v. Martin, 353 N.C. 252, 540 S.E.2d 332, 2000 N.C. LEXIS 900 (2000).

Summary judgment on the basis of laches was appropriate in favor of defendant school board which entered into contracts that included options to purchase land for consolidated schools in compliance with the results of its own vote to consolidate and with the passage of school bond issue in a general election while plaintiff taxpayer and citizens group waited to file suit challenging defendant's compliance with G.S. 115C-72. Save our

Schs. of Bladen County, Inc. v. Bladen County Bd. of Educ., 140 N.C. App. 233, 535 S.E.2d 906, 2000 N.C. App. LEXIS 1109 (2000).

No Duty Owed to Plaintiff. — Summary judgment was appropriate where no genuine issue existed as to whether third-party defendants/contractors breached their duty to plaintiffs by failing to attach a 45 m.p.h. speed advisory sign to the "left lane closed ahead" sign; the third-party defendants/Department of Transportation had sole discretion in determining the signage for the construction project, and the only duty of the contractors was to exercise ordinary care in providing and maintaining reasonable warnings. Davis v. J.M.X., Inc., 137 N.C. App. 267, 528 S.E.2d 56, 2000 N.C. App. LEXIS 309 (2000), aff'd, 352 N.C. 662, 535 S.E.2d 356 (2000).

Summary judgment was properly granted to a property owner, dismissing a pedestrian's suit to recover for injuries sustained when she slipped and fell in the owner's icy parking lot, because the pedestrian's own testimony demonstrated that she knew of the hazardous condition of the parking lot, and thus, there was no issue of genuine fact that the owner owed her no duty. Grayson v. High Point Dev. Ltd. P'ship, 175 N.C. App. 786, 625 S.E.2d 591, 2006 N.C. App. LEXIS 270 (2006), cert. denied, 360 N.C. 533, 633 S.E.2d 681 (2006), cert. dismissed, 360 N.C. 533, 633 S.E.2d 681 (2006).

No Showing of Breach of Legal Duty or Proximate Causation in a Wrongful Death Claim. — Where a personal representative could not show that an assistant coach breached a legal duty or proximately caused a decedent's death from heatstroke during a football practice, the personal representative could not prove a wrongful death claim; therefore, the assistant coach was entitled to summary judgment under G.S. 1A-1, Rule 56(c). Draughon v. Harnett County Bd. of Educ., 158 N.C. App. 705, 582 S.E.2d 343, 2003 N.C. App. LEXIS 1227 (2003), aff'd, without op., 358 N.C. 137, 591 S.E.2d 520 (2004).

In an action for negligent misrepresentation filed by employees of a corporation who lost their jobs when the plant where they worked was closed, the trial court properly granted summary judgment in favor of the corporation that owned the plant and its former parent corporation because the corporation's chief executive officer did not breach a fiduciary duty to the employees when he told them their jobs were secure, the employees failed to show that the CEO knew the plant would close when he made that statement or that the employees relied on the statement to their detriment, and as a result, the essential elements of negligent misrepresentation were missing. Jordan v. Earthgrains Baking Cos., 155 N.C. App. 762, 576 S.E.2d 336, 2003 N.C. App. LEXIS 25 (2003), cert. denied, 357 N.C. 461, 585 S.E.2d 761 (2003).

Evidence Not Sufficient. — Where plaintiff's evidence was properly excluded because service was not timely and plaintiff offered nothing to counter defendant's evidence, summary judgment for the defendant was proper. Precision Fabrics Group, Inc. v. Transformer Sales & Serv., Inc., 120 N.C. App. 866, 463 S.E.2d 787 (1995).

Quantum Meruit. — Trial court properly granted the owners' summary judgment motion as to a subcontractor's claim for damages under quantum meruit; even though the owners were enriched by the work performed by the subcontractor, a genuine issue of material fact did not exist as to whether any such enrichment was unjust because the owners made regular payments to the contractor. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

In a landowner's action to compel construction of a grade crossing, In a landowner's action to compel construction of a grade crossing, summary judgment was properly granted because a railroad company was not required to construct a grade between the landowner's tracts of land for the landowner's sole access under G.S. 136-194 where the landowner's property was not fenced or enclosed. Summerlin v. Norfolk S. Ry. Co., 161 N.C. App. 170, 588 S.E.2d 30, 2003 N.C. App. LEXIS 2000 (2003).

Premarital Agreement Barred Claims for Postseparation Support, Alimony And Equitable Distribution. — Summary judgment was appropriate where a premarital agreement signed by the parties irrefutably barred the wife's claims for postseparation support, alimony and equitable distribution; the language in the subject Agreement—drafted by the wife's attorney—was sufficiently "express" to constitute a valid and enforceable waiver of the wife's claims for postseparation support pursuant to G.S. 50-16.2A and alimony pursuant to G.S. 50-16.3A. Stewart v. Stewart, 141 N.C. App. 236, 541 S.E.2d 209, 2000 N.C. App. LEXIS 1439 (2000).

Negligent Sale of Alcohol. — The trial court properly granted summary judgment in favor of defendant-store on plaintiff's negligence claim where the record did not contain substantial evidence that the minor who purchased beer for his friends was "noticeably intoxicated" at the time of his purchase; the sole fact that the minor entered the defendant's store and purchased alcoholic beverages twice on the same afternoon did not give rise to an inference that the minor was "noticeably intoxicated" at the time of the second purchase. Smith v. Winn-Dixie Charlotte, Inc., 142 N.C. App. 255, 542 S.E.2d 288, 2001 N.C. App.

LEXIS 87 (2001), cert. denied, 353 N.C. 452, 548 S.E.2d 528 (2001).

No Issue As To Train Depot. — The trial court properly granted summary judgment for defendants-railroad et al where no genuine issue existed as to whether a disputed depot was located within an easement granted by an 1847 deed which was not extinguished and where the land, therefore, did not revert to the plaintiffs. Fisher v. Carolina S.R.R., 141 N.C. App. 73, 539 S.E.2d 337, 2000 N.C. App. LEXIS 1282 (2000).

Action Under Americans With disabilities Act and Rehabilitation Act. — Summary judgment was properly granted in favor of two employers in a case brought under the Americans with Disabilities Act, 42 U.S.C.S § 12101 et seq., and the Rehabilitation Act of 1973 because a former employee was unable to show that the side effects of medication for attention deficit disorder substantially impaired the employee's ability to work; the evidence showed that the employee did not complain of any side effects, and an accommodation was only requested on the date of termination. Wilkins v. Guilford County, 158 N.C. App. 661, 582 S.E.2d 74, 2003 N.C. App. LEXIS 1224 (2003).

Summary judgment was properly granted in favor of two former employers in an action brought under 42 U.S.C.S. § 1983 based on a violation of procedural due process because there was no property interest in employment where the evidence showed that a personnel rule was not adopted with the same formalities and characteristics of an ordinance. Wilkins v. Guilford County, 158 N.C. App. 661, 582 S.E.2d 74, 2003 N.C. App. LEXIS 1224 (2003).

Unlicensed Contractor. — In an action in which a construction company sued property owners to collect the amount of a lien against the owners' property, the trial court properly entered summary judgment in favor of the owners; the company was barred from recovering on a contract to build a house on the property because the company did not have a valid license at the time the contract was formed. Currin & Currin Constr., Inc. v. Lingerfelt, 158 N.C. App. 711, 582 S.E.2d 321 (2003).

Trial court improperly dismissed, upon the City's N.C. Civ. P. 12(b)(1), (b)(6), and (b)(2) motion to dismiss for lack of subject matter jurisdiction, an employee's appeal of a decision by the Asheville Civil Service Board as the employee had a right to de novo review of the Board's decision; however, the appellate court considered the City's summary judgment motion and the evidence presented to the Board, as there were no factual issues and whether the Board had subject matter jurisdiction was a question of law, and concluded that the employee had not met his burden to prove subject matter jurisdiction as he resigned and had not been fired. Harper v. City of Asheville, 160 N.C. App. 209, 585 S.E.2d 240, 2003 N.C. App. LEXIS 1760 (2003).

Obstruction of Justice. — Summary judgment in favor of a newspaper corporation, a publishing company, the publishing company's president, a newspaper editor, and a newspaper staff writer in a litigant's action for, inter alia, obstruction of justice was proper because there was no evidence that defendants' acts, including the writer's article about the litigant's protracted litigation with a former spouse, had judicially impeded the litigant's lawsuit. Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003).

Summary Judgment Proper Where There Was No Right to Contribution. — In plaintiff general contractor's complaint against defendant architect, the only negligence alleged flowed from the architect to the contractor; since there were no joint tort-feasors, there was no right to contribution under G.S. 1B-1 against the architect; the trial court properly granted summary judgment to the architect under G.S. 1A-1, Rule 56. Kaleel Builders, Inc. v. Ashby, 161 N.C. App. 34, 587 S.E.2d 470, 2003 N.C. App. LEXIS 1993 (2003), cert. denied, 358 N.C. 235, 595 S.E.2d 152 (2004).

Failure to Provide Lienholder With Notice of Tax Sale. — Notice that a county would conduct a tax sale at a "storage location" to collect taxes due on a mobile home did not provide specificity required by G.S. 1-339.51, and the trial court properly invalidated the sale of a mobile home that was valued at $50,000, but was sold for $5,000. Oakwood Acceptance Corp., LLC v. Massengill, 162 N.C. App. 199, 590 S.E.2d 412, 2004 N.C. App. LEXIS 118 (2004).

Department of Revenue Granted Summary Judgment on its Claim That Transfer Considered a Taxable Gift. — As a property owner's deed of property to his uncle was an unconditional transfer in fee simple, and the owner did not show any exception to the parol evidence rule, his claim that he transferred it in trust for his own benefit failed and the defendant North Carolina Department of Revenue was properly granted summary judgment on its claim that the transfer was a taxable gift. Joines v. Anderson, 161 N.C. App. 321, 587 S.E.2d 926, 2003 N.C. App. LEXIS 2053 (2003).

County, municipalities, and a contractor were entitled to summary judgment on a utility's claims of wrongful interference with easement, trespass to chattels, and negligence all resulting from damage occuring to the utility's underground pipelines during excavation; the evidence failed to establish a genuine issue of material fact regarding the county's and the municipalities' direct liability for the utility's damages and failed to demonstrate that the contractor was an agent of the county or the municipalities so as to support liability under respondeat superior. Coastal Plains Utils., Inc. v. New Hanover County, 166 N.C. App. 333, 601 S.E.2d 915, 2004 N.C. App. LEXIS 1745 (2004).

Continuing Trespass. — Electric membership corporation's acts in erecting power poles, lowering a power line, and removing vegetation from a property owner's land were not authorized by the property owner's request to repair a downed line, or by his membership in the corporation, and thus amounted to a continuing trespass; a trial court's denial of the corporation's summary judgment motion in the property owner's trespass action, as well as the trial court's grant of partial summary judgment in favor of the property owner, were affirmed. Singleton v. Haywood Elec. Mbrshp. Corp., 357 N.C. 623, 588 S.E.2d 871, 2003 N.C. LEXIS 1418 (2003).

Summary Judgment Proper in Trust Case. — Trustee properly administered a couple's separate trusts and distributed the residue of the surviving spouse's trust to two universities rather than to a heir because the conditions stated in the trust for the heir to receive the residue had not occurred; thus, a grant of summary judgment in favor of the trustee was proper. Davenport v. Cent. Carolina Bank & Trust Co., 161 N.C. App. 666, 589 S.E.2d 367, 2003 N.C. App. LEXIS 2275 (2003).

In an action challenging collection of landfill fees by a county, summary judgment was properly granted for the county on the basis of res judicata where campground owners had paid the county in full for the landfill fees when faced with a prior suit for collection of those fee. The county's voluntary dismissal of the suit upon payment of the fees was res judicata to the owners' later attempt to challenge the constitutionality of charging the fees. Stafford v. County of Bladen, 163 N.C. App. 149, 592 S.E.2d 711, 2004 N.C. App. LEXIS 305 (2004), appeal dismissed sub nom. Stafford v. Bladen Co., cert. denied, 358 N.C. 545, 599 S.E.2d 409 (2004).

Interpretation of a holographic will. — In a dispute arising out of a holographic will drafted by the first decedent's adoptive father, because the heirs of the second of two decedents, who was the first decedent's grantee, failed to present any evidence that the land described in a holographic will and deeded to a grantee, was the land that they were entitled to as that grantee's heirs, summary judgment was properly granted against them. Cameron v. Bissette, 190 N.C. App. 614, 661 S.E.2d 32, 2008 N.C. App. LEXIS 1017 (2008).

D. Cases in Which Summary Judgment Held Improper.

Explosion of Water Heater. — Defendants were not entitled to judgment as a matter of law where the record did not clearly establish the inapplicability of the doctrine of res ipsa loquitur, where the evidentiary materials tended to show that the water heater in question was under the exclusive control and management of the defendants, as explosion of a water heater does not ordinarily happen if those who have the management of it use proper care. Under those circumstances the explosion itself would be some evidence of negligence on the part of those in control and would tend to establish a prima facie case requiring its submission to the jury. Evidence tending to explain the cause of the explosion merely accentuated the jury's role in the controversy and the unwisdom of summary judgment. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972).

Medical Malpractice. — In an action for medical malpractice, alleging that defendant negligently caused and continued plaintiff's addiction to narcotics, there was sufficient evidence presented at the hearing to raise material issues of fact as to whether standard practice still regarded addiction as necessary in the treatment of plaintiff's disease, and whether defendant knew or should have known that narcotics were not necessary to control plaintiff's pain, so as to overcome a motion for summary judgment on the grounds that there was no negligence as a matter of law. Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978).

In an action for medical malpractice, alleging that defendant negligently caused and continued plaintiff's addiction to narcotics, the evidence was sufficient to withstand defendant's motion for summary judgment based on contributory negligence, even though plaintiff knowingly continued his addiction, where plaintiff believed it was necessary to be addicted for the rest of his life because defendant had told him so. Ballenger v. Crowell, 38 N.C. App. 50, 247 S.E.2d 287 (1978).

Trial court erred by finding that a healthcare company which bought a hospital from a county was immune from suit by a minor who claimed that he suffered serious permanent injuries when he was born at the hospital, at a time when the hospital was owned and operated by the county. Odom v. Lane, 161 N.C. App. 534, 588 S.E.2d 548, 2003 N.C. App. LEXIS 2180 (2003).

Trial court erred in granting summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56, to defendants in a patient's medical malpractice action; contrary to the findings of the trial court, the doctrine of res ipsa loquitur applied to the action, in which a doctor allegedly left a surgical sponge in the patient's body following child birth. Fox v. Green, 161 N.C. App. 460, 588 S.E.2d 899, 2003 N.C. App. LEXIS 2193 (2003).

Intentional Tort. — Summary judgment was inappropriate where the defendant's act of shooting the plaintiff, although she intended only to hit his tire, was not only an intentional tort but also gave rise to a claim of negligence, which was not barred by the one year statute of limitation. Lynn v. Burnette, 138 N.C. App. 435, 531 S.E.2d 275, 2000 N.C. App. LEXIS 618 (2000).

Alienation of Affections. — Summary judgment was improperly granted dismissing a former wife's claim for alienation of affections filed in April 2003 on the ground that it was barred by the statute of limitations in G.S. 1-52(5) because, while the husband and the wife separated in 1998, the wife's allegations in her sworn affidavit and verified complaint, to the effect that the husband expressed his desire to return to the marriage multiple times in October 1999 and September 2000, that the couple purchased a car together in May 1999, that the couple maintained joint finances after their separation, that they participated in marriage counseling until February 2001, and that the husband told the wife during their last counseling session that he was not planning on divorcing her. presented a genuine issue of material fact as to whether there was love and affection following the wife's separation from the husband. Since a jury could determine that alienation did not occur until as late as February 2001 when the husband made the final decision to end the marriage and because the wife filed her complaint within three years of his decision, her claim for alienation of affections was not barred by § 1-52(5). McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620, 2006 N.C. LEXIS 2 (2006).

Trial court erred in dismissing a former wife's claim of alienation of affections for lack of subject matter jurisdiction. There was an issue of fact as to the whether the alienation of affections occurred in North Carolina, which recognized the tort, or South Carolina, which did not, as the evidence showed that the paramour made clandestine phone calls from North Carolina to the husband in South Carolina, that sexual acts occurred at the paramour's North Carolina condominium, and that the paramour and the husband took a trip to North Carolina during which they admitted to engaging in sexual intercourse. Jones v. Skelley, — N.C. App. —, 673 S.E.2d 385, 2009 N.C. App. LEXIS 212 (2009).

Criminal Conversation. — Former wife's criminal conversation claim filed against the paramour of the wife's former husband was improperly dismissed on summary judgment. Instead, the trial court should have granted summary judgment in the wife's favor as the evidence conclusively showed that the paramour engaged in sexual intercourse with the wife's husband in North Carolina while the wife and the husband were still married and prior to the execution of a separation agreement. Jones v. Skelley, — N.C. App. —, 673 S.E.2d 385, 2009 N.C. App. LEXIS 212 (2009).

Deed of Trust. — Where there was a genuine issue of fact as to the extent to which deed of trust secured amounts additional to purchase price of shopping center property summary judgment was improper. Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Deed Interpretation. — Order denying part of a soccer field developer's summary judgment motion was reversed, given that pursuant to the unambiguous language of the deed, in which he was a successor or assign of the grantor, he could use both easements to access an extension of the subdivision, of which the soccer fields were included. Terres Bend Homeowners Ass'n v. Overcash, 185 N.C. App. 45, 647 S.E.2d 465, 2007 N.C. App. LEXIS 1686 (2007).

Gift Tax. — Summary judgment was improperly granted in favor of taxpayers who sought refunds of gift taxes they paid under protest on their transfers of interests in their residences to irrevocable trusts, retaining the rights to occupy the residences for five years or their lifetimes, whichever was shorter, as the Secretary of Revenue had, under G.S. 105-195 [repealed], discretion to determine how to value the interests retained by the taxpayers, and there was no showing that this discretion was abused, nor was it shown, under G.S. 105-267 [repealed] that the taxpayers were entitled to refunds because the taxes were assessed for improper purposes or were otherwise invalid or excessive. Downs v. State, 159 N.C. App. 220, 582 S.E.2d 638, 2003 N.C. App. LEXIS 1440 (2003), aff'd, 358 N.C. 213, 593 S.E.2d 763 (2004).

Insurance Claim. — In the declaratory judgment action, an issue of material fact pursuant to G.S. 1A-1, Rule 56, remained as to whether the pilot was an insured party under the airport policies issued by the insurer to the pilot's corporations; coverage was dependent upon the pilot acting on behalf of the corporations while flying the plane, and it was not clear if he was acting on the corporations' behalf or as an independent contractor. Carlson v. Old Republic Ins. Co., 160 N.C. App. 399, 585 S.E.2d 497, 2003 N.C. App. LEXIS 1796 (2003).

When an insured was sued for refusing to give a party to whom it had rented a beach house access to the house, insurance policy coverage for the insured's "invasion of the right of private occupancy" covered the insured's conduct, as the phrase was ambiguous and would be interpreted against the insurer, even though the party to whom the house was rented had not taken possession of the house: thus, in the insured's suit to require its insurer to defend and indemnify it, the insurer was improperly granted summary judgment. Hobbs Realty & Constr. Co. v. Scottsdale Ins. Co., 163 N.C. App. 285, 593 S.E.2d 103, 2004 N.C. App. LEXIS 373 (2004), cert. dismissed, 358 N.C. 543, 599 S.E.2d 47 (2004), cert. denied, — N.C. —, 599 S.E.2d 907 (2004).

Action Seeking to Void Deeds to Land. — Trial court erred in granting partial summary judgment to plaintiffs pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c), and in voiding defendants' deeds to land; while it was true that a power of attorney granted to one of the defendants, a decedent's niece, did not expressly grant her the right to make gifts of real property on behalf of the decedent, and the deeds would be void pursuant to G.S. 32A-14.1(b) if the conveyances were determined to be gifts, genuine issues of material fact existed on whether the conveyances were gifts or were transferred for consideration in the form of services to the decedent as recited in the deeds, as the trial court failed to consider those issues during the summary judgment hearing. Estate of Graham v. Morrison, 156 N.C. App. 154, 576 S.E.2d 355, 2003 N.C. App. LEXIS 81 (2003).

Easement by Prescription. — The absence of evidence establishing the requisite hostile nature of the use of the extensions over the defendants' lands entitled the defendants to summary judgment. Yadkin Valley Land Co. v. Baker, 141 N.C. App. 636, 539 S.E.2d 685, 2000 N.C. App. LEXIS 1406 (2000), cert. denied, 353 N.C. 399, 547 S.E.2d 432 (2001).

Because the evidence was in conflict as to the use and as to whether the alleged use of the land in question was hostile, property owners were not entitled to summary judgment under G.S. 1A-1, N.C. R. Civ. P. 56(c) based on an easement by prescription. Keener v. Arnold, 161 N.C. App. 634, 589 S.E.2d 731, 2003 N.C. App. LEXIS 2278 (2003), cert. denied, 358 N.C. 376, 598 S.E.2d 136 (2004).

Trial court improperly granted summary judgment to defendants, adjoining property owners and a water company, under G.S. 1A-1-56, holding that they held an underground easement for a waterline on plaintiff property owner's land because, inter alia: (1) defendants did not satisfy the requisite period for an easement by prescription and were not entitled to rely upon the shorter period provided by the doctrine of color of title, which would have reduced the period of adverse possession from 20 to seven years under G.S. 1-38(a); and (2) defendants failed to forecast sufficient evidence that they were entitled to an easement by estoppel. Woodring v. Swieter, 180 N.C. App. 362, 637 S.E.2d 269, 2006 N.C. App. LEXIS 2387 (2006).

Dispute Over Width of Easement. — While the location of an easement was known, the precise width of the easement was not defined in the deeds; thus, the reasonableness of the amount of space needed to effectuate the easement's purpose as set forth in the deeds raised a question of fact that precluded summary judgment under G.S. 1A-1, N.C. R. Civ. P. 56(c) in favor of property owners who claimed the easement. Keener v. Arnold, 161 N.C. App. 634, 589 S.E.2d 731, 2003 N.C. App. LEXIS 2278 (2003), cert. denied, 358 N.C. 376, 598 S.E.2d 136 (2004).

Property Listed in Settlement Agreement. — Summary judgment for plaintiff ex-wife granting her certain disputed property was inappropriate where husband died before bequeathing the property to the children as promised, and the settlement agreement specifically provided for this scenario by allowing her, her father or her brother the option to purchase it should he fail to will it. Williamson v. Bullington, 139 N.C. App. 571, 534 S.E.2d 254, 2000 N.C. App. LEXIS 987 (2000), aff'd, 353 N.C. 363, 544 S.E.2d 221 (2001).

Specific Performance. — Summary judgment in an action seeking specific performance of vendor's offer to purchase property was precluded by an issue of material fact as to whether an agreement was reached between the parties for the sale of two lots. Williford v. Atlantic Am. Properties, Inc., 129 N.C. App. 409, 498 S.E.2d 852 (1998).

Trial court erred in granting summary judgment to estate representative and second wife on the first wife and minor grandchild's breach of contract action to execute a will because decedent's failure to execute a will as he agreed to do in his separation agreement meant that part of the farm property that the decedent was going to pass to the son went to the second wife instead; had decedent done what he promised to do, that interest would have passed to the minor grandchild upon the death of the decedent who died after the son, and, thus, the minor grandchild had an action for specific performance of decedent's promise to execute a will devising that property to the son, and summary judgment should have been granted in favor of the first wife and the minor grandchild. Tyndall-Taylor v. Tyndall, 157 N.C. App. 689, 580 S.E.2d 58, 2003 N.C. App. LEXIS 926 (2003).

In an action to determine whether plaintiff lender was entitled to possession of personal property, used to secure a loan, which was subsequently sold to a third party, the trial court erred in granting summary judgment for plaintiff where a genuine issue of fact existed as to whether plaintiff and defendant borrower intended their loan transaction of June, 1977, to renew, enlarge or extinguish note executed in April, 1976, by borrower which was secured by the property in question, since the nature of the second loan determined whether it was a future advance within the meaning of G.S. 25-9-307(3) and thus whether defendant purchaser from defendant borrower took the property in question free from plaintiff lender's security interest. Spector United Employees Credit Union v. Smith, 45 N.C. App. 432, 263 S.E.2d 319 (1980).

Promissory Note. — Where, in an action to recover on a promissory note, defendant's affidavit in support of her motion for summary judgment merely reiterated the allegations in her answer, and plaintiff's note verified the complaint, the evidence, when viewed in the light most favorable to the plaintiff, showed the existence of a triable issue, and defendant was not entitled to judgment as a matter of law. Liberty Loan Corp. v. Miller, 15 N.C. App. 745, 190 S.E.2d 672 (1972).

Parol Agreement as to Payment of Notes. — Where defendant's evidence, taken in the light most favorable to him, established the execution of certain notes and security instruments accompanied by a prior or contemporaneous parol agreement as to the mode of payment and the fund from which it would be paid, evidence tending to show a continued course of dealings pursuant to this oral agreement was sufficient to have affected the result of the action, thereby creating a conflict between plaintiff's evidence and defendant's evidence as to a material fact; a jury question was thus presented and the trial judge erred when he granted plaintiff's motion for summary judgment. North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976).

Insurance Claim. — Summary judgment in favor of plaintiff/insurer was appropriate where the plaintiff's policy language excluded coverage for injury or damage "which may reasonably be expected to result from the intentional act ...." and the evidence showed that the defendant fired multiple shots from a rifle at night in the direction of a prowler, approximately fifty feet away. A person, under such circumstances, could reasonably expect injury or damage to result from the intentional act. North Carolina Farm Bureau Mut. Ins. Co. . Austin, 138 N.C. App. 530, 530 S.E.2d 93, 2000 N.C. App. LEXIS 625 (2000).

Summary judgment was inappropriate where a genuine issue of material fact existed as to whether the policy covering a dump truck met any of the statutory definitions of a "private passenger motor vehicle" under G.S. 58-40-10(b) and could be stacked with the other policies under G.S. 20-279.21(b)(4). Erwin v. Tweed, 142 N.C. App. 643, 544 S.E.2d 803, 2001 N.C. App. LEXIS 175 (2001), review denied, 353 N.C. 724, 551 S.E.2d 437 (2001).

Antistacking Provision in Insurance Policy. — Trial court erred in granting an insurer summary judgment on the issue of interpolicy stacking, under G.S. 58-40-10(1)(b)(1), as a genuine issue of material fact existed as to whether a truck's gross vehicle weight as specified by the manufacturer was less than 10,000 pounds. Erwin v. Tweed, 159 N.C. App. 579, 583 S.E.2d 717, 2003 N.C. App. LEXIS 1532 (2003), cert. denied, 358 N.C. 234, 593 S.E.2d 780 (2004), aff'd, 359 N.C. 64, 602 S.E.2d 359 (2004).

Immunity Waived through Insurance Purchase. — To the extent that defendant town waived its immunity through the purchase of liability insurance, defendant town, and defendant police officer, as sued in his official capacity, were not immune from suit for his alleged negligent acts, and summary judgment was properly denied for such claims. Thompson v. Town of Dallas, 142 N.C. App. 651, 543 S.E.2d 901, 2001 N.C. App. LEXIS 191 (2001).

Subrogation Claim. — In an insurance case, the trial court incorrectly granted summary judgment dismissing an insurance company's subrogation claim against an alleged bailee, finding there was no bailment, because there was a genuine issue as to the existence of a bailment, given the alleged bailee's testimony that he was in the process of performing work on the allegedly bailed vehicle at the time of its loss. Barnes v. Erie Ins. Exch., 156 N.C. App. 270, 576 S.E.2d 681, 2003 N.C. App. LEXIS 103 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

School board was considered a "person" for purposes of an action brought by a student and her parents against it, pursuant to 42 U.S.C.S. § 1983, wherein it was claimed that the board had paid some claims while asserting immunity on others in violation of equal protection and due process rights, and accordingly, the board could not assert immunity against that claim; although such was not a determination that the student and her parents were necessarily entitled to relief in the action, the trial court's grant of summary judgment was error. Ripellino v. N.C. Sch. Bds. Ass'n, 158 N.C. App. 423, 581 S.E.2d 88, 2003 N.C. App. LEXIS 1184 (2003), cert. denied, 358 N.C. 156, 592 S.E.2d 694 (2004).

Foreclosure. — Where trial judge's resolution against plaintiffs of the issue of fact as to whether or not they were in default in their payments under a deed of trust at the time of foreclosure made it impossible for plaintiffs to prevail and clearly affected the result of their action, summary judgment in favor of defendants would be reversed. Lowman v. Huffman, 15 N.C. App. 700, 190 S.E.2d 700 (1972).

Summary judgment was inappropriate

where the evidence was sufficient to create an issue of fact with respect to the delivery date of the foreclosure deeds; the plaintiff submitted affidavits indicating that the action was timely under G.S. 1-54(6) and the defendants submitted affidavits indicating that it was not, but neither submitted dated copies of the foreclosure deeds. Lexington State Bank v. Miller, 17 N.C. App. 748, 529 S.E.2d 454, 2000 N.C. App. LEXIS 501 (2000).

City's Demolition of a House. — Trial court erred in granting summary judgment to the city on the homeowner's claim for violation of her due process rights because, although the homeowner's house was in severe disrepair, the city violated her due process rights by demolishing the home without giving her notice, as the condition of the house did not pose an imminent threat to the public warranting its immediate demolition. Monroe v. City of New Bern, 158 N.C. App. 275, 580 S.E.2d 372, 2003 N.C. App. LEXIS 1053 (2003), cert. denied, 357 N.C. 461, 586 S.E.2d 93 (2003).

Municipality was not entitled to partial summary judgment on a utility's nuisance claim against the municipality for drilling wells that allegedly adversely affected the utility's wells because the documents expressing an intent to convey ownership of all of the assets of the waterworks, specifically including the wells, were sufficient to give rise to a genuine issue of material fact as to whether the utility had the necessary property interest to assert a nuisance claim. Coastal Plains Utils., Inc. v. New Hanover County, 166 N.C. App. 333, 601 S.E.2d 915, 2004 N.C. App. LEXIS 1745 (2004).

Evidence of Negotiations with Defendant Insurer. — Evidence tending to show that insurer offered to pay for loss, continually negotiated with plaintiff as to the amount thereof, and repeatedly assured plaintiff that her claim would be paid, was sufficient to show that there was a genuine triable issue as to whether defendants waived the requirements of the insurance policy relating to filing formal proof of loss and institution of the action within 12 months. Pennell v. Security Ins. Co., 18 N.C. App. 465, 197 S.E.2d 240 (1973).

Where a question of fact existed as to when a breach of an agreement occurred and the statute of limitations began to run, summary judgment on the basis of the statute of limitations was inappropriate. Snyder v. Freeman, 300 N.C. 204, 266 S.E.2d 593 (1980).

Conversion. — Summary judgment is inappropriately granted in an action for conversion when the evidence raises a genuine issue as to whether defendant's possession of plaintiff's property is authorized or wrongful. Gadson v. Toney, 69 N.C. App. 244, 316 S.E.2d 320 (1984).

Trespass to Chattel. — No genuine issue of material fact existed where plaintiff logger, who held an option to purchase lumber, admitted intentional interference with the defendants loggers' valid possessory interest by entering the property and removing the timber without authorization; thus, plaintiff was not entitled to summary judgment on defendants' counter-claim for trespass. Fordham v. Eason, 351 N.C. 151, 521 S.E.2d 701 (1999).

Burden of Resale. — In an action by sellers of securities under a contract for sale to recover the purchase price of securities not accepted by buyer, the question of whether efforts to resell the securities would be unduly burdensome, or whether there was a readily available market for resale required weighing facts, rather than solely applying legal principles. Such facts do not lend themselves to disposition by summary judgment and must be resolved by a trier of fact. Atkins v. Mitchell, 91 N.C. App. 730, 373 S.E.2d 152 (1988).

Dispute over Validity of Contractor's License. — On appeal from summary judgment, where plaintiff contractor was licensed up to $175,000.00 when contract was executed and two months later secured an unlimited license, but plaintiff began construction during the two-month period, and where he presented his affidavit that he had passed the unlimited general contractor examination when the contract with the defendants was executed and that he had done approximately $2,800.00 worth of work before he was issued his unlimited license, so that the value of the work done by plaintiff was never in excess of his license limit and plaintiff was not, as evidenced by his license, incompetent to perform the work, plaintiff should have been allowed to prove his case if he could and was entitled if successful to recover to the extent of his unlimited license and defend the counterclaim. Dellinger v. Michal, 92 N.C. App. 744, 375 S.E.2d 698, cert. denied, 324 N.C. 432, 379 S.E.2d 240 (1989).

Breach of Contract Action. — Summary judgment was improperly granted in favor of the real estate agents on the purchasers' breach of contract claim where the purchasers presented sufficient evidence that the contract included a promise by the agents to provide access to the lake so as to withstand summary judgment. Wall v. Fry, 162 N.C. App. 73, 590 S.E.2d 283, 2004 N.C. App. LEXIS 61 (2004).

Trial court erred in granting summary judgment to seller on the buyers' claim that a sales contract was based mistake of fact; the buyers could assert claims of mutual and unilateral mistake because the seller supplied a flawed survey that erroneously stated that the land sold to the buyers was not in flood zone, and the mistake of one party was sufficient to avoid a contract when the other party caused the mistake. Taylor v. Gore, 161 N.C. App. 300, 588 S.E.2d 51, 2003 N.C. App. LEXIS

2054 (2003), cert. denied, 358 N.C. 380, 597 S.E.2d 775 (2004).

Breach of Bailment Relationship. — Where a paving company left equipment with a lot owner under an agreement for the lot owner to store the equipment, but the company did not have access to the equipment without the owner's presence, the company relinquished exclusive possession of the equipment to the lot owner, and the lot owner moved the equipment without notice to the company and damaged it, summary judgment was inappropriate on the company's bailment claim since the company showed that a bailment relationship may have existed and may have been breached. Atl. Contr. & Material Co. v. Adcock, 161 N.C. App. 273, 588 S.E.2d 36, 2003 N.C. App. LEXIS 2046 (2003).

Construction Contract. — Where plaintiff asserted that it was entitled to summary judgment because it had substantially performed its contract but had not been paid as agreed, but even if all the claims made by plaintiff in support of his motion were accepted as true, questions of whether the incomplete performance by plaintiff was substantial performance and of the amount plaintiff was entitled to recover remained, summary judgment for plaintiff as to its claim against defendant would be reversed. Almond Grading Co. v. Shaver, 74 N.C. App. 576, 329 S.E.2d 417 (1985).

Because the language of the agreement is susceptible to differing yet, reasonable interpretations, the one broad, the other narrow, the contract was ambiguous and summary judgment was inappropriate. To resolve this ambiguity, the case was remanded to the superior court for the trier of fact to determine the intent of the parties. Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs., P.C., 362 N.C. 269, 658 S.E.2d 918, 2008 N.C. LEXIS 337 (2008).

Dispute over Broker's Commission. — In a dispute over a broker's entitlement to a commission, where the subject property was not actually leased until after the expiration of the listing and grace periods, even though the broker's efforts procured the lease, while it was apparent that the broker and the property owner intended to contract around the general rule that a broker was entitled to a commission upon procuring a willing and able lessee for the property, summary judgment was not proper because there were genuine fact questions as to the property owner's waiver of the listing period and the broker's entitlement to a commission on a quantum meruit basis. Carolantic Realty, Inc. v. Matco Group, Inc., 151 N.C. App. 464, 566 S.E.2d 134, 2002 N.C. App. LEXIS 767 (2002).

Covenant Not to Compete. — Where there was a genuine issue as to whether a covenant not to compete between the parties was supported by valuable consideration, summary judgment was improvidently entered. Stevenson v. Parsons, 96 N.C. App. 93, 384 S.E.2d 291 (1989), cert. denied, 326 N.C. 366, 389 S.E.2d 819 (1990).

Use of Road Where Dedication in Issue. — Where plaintiff brought an action against her neighbor to enjoin his use of a road which ran against plaintiff's property to defendant's property, the material issue of whether road dedication had ever been accepted or rejected by an appropriate authority precluded summary judgment as a matter of law. Cavin v. Ostwalt, 76 N.C. App. 309, 332 S.E.2d 509 (1985).

Town's Duty to Maintain Annexed Roads. — The trial court erred in granting summary judgment as to whether defendant-town had fulfilled its duty to maintain a street it annexed where the record was undeveloped as to the current state of repair of the street and the customary maintenance provided by defendant on similar streets. Buckland v. Town of Haw River, 141 N.C. App. 460, 541 S.E.2d 497, 2000 N.C. App. LEXIS 1307 (2000).

Sovereign Immunity of Housing Authority. — Court of appeals found that the trial court erroneously granted summary judgment in favor of the housing authority where the operation of low-income housing was a proprietary function and the housing authority could not assert sovereign immunity. Fisher v. Hous. Auth. of Kinston, 155 N.C. App. 189, 573 S.E.2d 678, 2002 N.C. App. LEXIS 1607 (2002), cert. granted, 356 N.C. 670, 577 S.E.2d 117 (2003).

Separation Agreement Did Not Bar Divorce Action Where Issue of Duress Raised. — Since plaintiff's affidavit, averring duress or fear, raised a genuine issue of material fact as to the validity of a separation agreement asserted by defendant in bar of action for absolute divorce and an equitable distribution of marital property, the court improvidently granted defendant's motion for summary judgment. Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985).

Action for Fraud. — Summary judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c) was improperly granted in a child's claim against the father alleging fraud, among other things, as the action was not barred by res judicata and collateral estoppel, and the youngest child filed the action within three years of when the child reached the age of majority, as was required under G.S. 1-52 and G.S. 1-17(a). Beall v. Beall, 156 N.C. App. 542, 577 S.E.2d 356, 2003 N.C. App. LEXIS 188 (2003).

Fraudulent Inducement of Real Estate Purchase. — Where evidence was introduced to indicate that plaintiff purchasers of real estate had been induced through defendant's fraudulent actions to forego inquiry regarding the property's condition, it was improper for the trial court to grant defendant real estate company's motion for summary judgment. Bolick v. Townsend Co., 94 N.C. App. 650, 381 S.E.2d 175, cert. denied, 325 N.C. 545, 385 S.E.2d 495 (1989).

Summary judgment was improperly granted against a buyer alleging fraudulent inducement where the buyer's motion to compel discovery was pending before the trial court, and the depositions the buyer had noticed had not been held, because the buyer's pursuit of discovery was not dilatory and could lead to relevant evidence. Ussery v. Taylor, 156 N.C. App. 684, 577 S.E.2d 159, 2003 N.C. App. LEXIS 326 (2003).

In a fraudulent concealment claim, conclusionary, self-serving denials of fraud contained in the defendant's affidavits were clearly insufficient to show that the defendant was entitled to summary judgment. Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), rev'd on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986).

Automobile Accident. — In action for damages arising out of automobile accident, trial court erred in granting defendant's motion for summary judgment. Mobley v. Estate of Johnson, 111 N.C. App. 422, 432 S.E.2d 425 (1993).

Plaintiff's evidence set out a prima facie case of negligence against the defendant, and summary judgment in favor of the latter was inappropriate, where a reasonable jury could find that plaintiff entered the intersection first and obtained the right-of-way, that the defendant breached the duty to yield to plaintiff or to keep a proper lookout by proceeding through the intersection, and that such breach was a proximate cause of injury to plaintiff. Cucina v. City of Jacksonville, 138 N.C. App. 99, 530 S.E.2d 353, 2000 N.C. App. LEXIS 547 (2000), review denied, 352 N.C. 588, 544 S.E.2d 778 (2000).

Although it found that the maintenance of stop signs constituted a discretionary function, thereby entitling the city to the defense of governmental immunity, the court reversed the grant of summary judgment in the city's favor where it appeared from the record the city was covered by a liability insurance policy at the time of the collision at issue, thereby waiving immunity from suit. Cucina v. City of Jacksonville, 138 N.C. App. 99, 530 S.E.2d 353, 2000 N.C. App. LEXIS 547 (2000), review denied, 352 N.C. 588, 544 S.E.2d 778 (2000).

Summary judgment was inappropriate where a reasonable jury could find that plaintiff entered the intersection first and obtained the right-of-way, that defendant breached the duty to yield to plaintiff or to keep a proper lookout by proceeding through the intersection, and that such breach was a proximate cause of injury to plaintiff; similarly, question as to plaintiff's contributory negligence because she knew that the stop sign controlling defendant's direction of travel had been knocked down in an accident earlier that morning was for the jury. Cucina v. City of Jacksonville, 2000 N.C. App. LEXIS 310 (N.C. App. Apr. 4, 2000).

Trial court erred in granting defendant's motion for summary judgment based on a finding as a matter of law that plaintiff was contributorily negligent, where plaintiff's evidence, considered in the light most favorable to her, indicated that: (1) plaintiff was driving at a reasonable speed; (2) the weather conditions were rainy, cloudy, with poor visibility; (3) the road was wet, hilly and curvy; (4) plaintiff observed defendant's vehicle in the road when she was some 400-500 feet away; however, there was another car moving between them and she believed defendant's vehicle to be moving; (5) when the vehicle between them turned off the road, and plaintiff realized she was much closer to defendant's vehicle, she applied her brakes but could not stop; (6) plaintiff would have gone around defendant's vehicle to the left, but there was oncoming traffic; (7) defendant's vehicle had no lights burning to warn approaching traffic that it was stopped in the middle of the road; (8) when plaintiff attempted to go to the right, she ran into the truck parked there; and, (9) defendant was behind the wheel of his vehicle while plaintiff's vehicle was approaching. Blue v. Canela, 139 N.C. App. 191, 532 S.E.2d 830, 2000 N.C. App. LEXIS 813 (2000).

The trial court erred in granting summary judgment for plaintiff-insurer where the statute of limitations for tort claims had no impact on the notification provisions of G.S. 20-279.21(b)(4), and the defendants, therefore, were not required to notify the insurer within that SOL, and where questions existed for the jury as to (1) whether the accident victims-defendants acted in good faith when they failed to give timely notice of their claim for underinsured motorist benefits and (2) whether the insurer's ability to investigate and defend was materially prejudiced by the delay. Liberty Mut. Ins. Co. v. Pennington, 141 N.C. App. 495, 541 S.E.2d 503, 2000 N.C. App. LEXIS 1441 (2000), aff'd, 356 N.C. 571, 573 S.E.2d 118 (2002).

Injured motorcyclist's attempt to avoid crashing into an alleged tortfeasor's car was foreseeable after the alleged tortfeasor abruptly came to a standstill as the action would have likely resulted in some injury to the injured motorcyclist; thus, summary judgment in favor of the alleged tortfeasor was inappropriate. Pintacuda v. Zuckeberg, 159 N.C. App. 617, 583 S.E.2d 348, 2003 N.C. App. LEXIS 1512 (2003), cert. denied, 357 N.C. 507, 587 S.E.2d 672 (2003).

Trial court erred in granting injured persons' summary judgment motion (and in denying an insurance company's sum-

mary judgment motion) in a case seeking a declaration that the injured persons were allowed to stack the UIM coverage of their two policies; stacking of underinsured motorist (UIM) coverages is permitted where each of the multiple policies providing stackable UIM coverages were written at limits that exceeded the statutorily-required minimum liability amount, but where one of two policies at issue provided liability coverage with limits equal to the statutorily-required minimum amount of $25,000/$50,000, under G.S. 20-279.21(b)(4), no UIM coverage was available with that policy — thus, there was no additional UIM coverage available to be stacked with the $100,000 UIM coverage provided by the first policy, which was equal to the amount already paid under the tortfeasor's exhausted liability policy. Purcell v. Downey, 162 N.C. App. 529, 591 S.E.2d 556, 2004 N.C. App. LEXIS 186 (2004).

Notice of Involvement of Underinsured Motorist. — Summary judgment was inappropriate as to whether an insured's late notice to an insurer of a possible underinsured motorist coverage claim barred recovery because there was a genuine issue of material fact as to whether the insured's failure to timely notify the insurer was in good faith, as the insured was not aware that a tortfeasor was underinsured until shortly before notifying the insurer. Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573 S.E.2d 118, 2002 N.C. LEXIS 1252 (2002).

Single-Car Automobile Accident Which Only Driver Survived. — Summary judgment was inappropriate although the defendant testified that decedent put his foot on hers, pushed the accelerator down and, thus, caused the accident that killed him, because a genuine issue of material fact existed as to whether the defendant's driving, specifically her steering overcorrection, was willful and wanton and because it was inappropriate for the court to assign credibility to defendant's sworn statements as a matter of law where the jury should have been allowed to consider the credibility of the accident reconstructionist. Thompson v. Bradley, 142 N.C. App. 636, 544 S.E.2d 258, 2001 N.C. App. LEXIS 169 (2001).

Summary judgment was improper under the theory of negligent entrustment where the evidence of son's moving violation and three accidents created a material issue of fact as to whether his parents/defendants knew or should have known that their son was an unsafe driver. Tart v. Martin, 137 N.C. App. 371, 527 S.E.2d 708, 2000 N.C. App. LEXIS 326 (2000).

Construction of Subdivision Access Roads. — The trial court's grant of summary judgment for defendant, implicitly finding as a matter of law that defendant could compel plaintiffs to construct access roads, was error where defendant had no authority under this section to require plaintiffs to pave, curb and gutter streets abutting their subdivision because these streets were not within plaintiffs' subdivision, where plaintiffs were not fee simple owners of the roads deeded as a right-of-way to the State Highway Commission, and where there was no evidence that the defendants sought funds from the plaintiffs for road construction although they had that option. Buckland v. Town of Haw River, 141 N.C. App. 460, 541 S.E.2d 497, 2000 N.C. App. LEXIS 1307 (2000).

Slip and Fall Accident. — Summary judgment was inappropriate for defendant-store where the plaintiff, a slip-and-fall victim, presented sufficient evidence to raise an inference that the liquid detergent had been leaking for such a length of time that defendant should have known of its existence in time to have removed the danger or to have given proper warning of its presence; the plaintiff presented evidence that the liquid on which he slipped was detergent that had leaked from a container onto a shelf, down the side of the shelving structure, and onto the floor and that the liquid on the tops and sides of the shelves had already dried and become pink at the time of his fall. Furr v. K-Mart Corp., 142 N.C. App. 325, 543 S.E.2d 166, 2001 N.C. App. LEXIS 86 (2001), cert. denied, 353 N.C. 450, 548 S.E.2d 525 (2001).

Premises Liability. — Summary judgment was improperly granted to a store, dismissing a customer's suit to recover for injuries she sustained when she was struck by a buffer machine being operated in the store, because there were genuine issues of fact pertaining to whether the store properly warned the customer of the presence of the machine and whether the customer exercised care for her own safety. Freeman v. Food Lion, LLC, 173 N.C. App. 207, 617 S.E.2d 698, 2005 N.C. App. LEXIS 1919 (2005).

Summary judgment was properly granted to two contractors, dismissing a store customer's suit to recover for injuries sustained when she was struck by a buffer machine being operated in the store by an employee of a floor cleaning company, because neither contractor owned or operated the store in which the customer's injury occurred and because the customer failed to allege that the contractors were agents of the store; thus, the contractors had no duty to the customer and could not be held liable under a theory of premises liability. Freeman v. Food Lion, LLC, 173 N.C. App. 207, 617 S.E.2d 698, 2005 N.C. App. LEXIS 1919 (2005).

Negligence Action. — Trial court erred in granting summary judgment to a retailer in a personal injury action where there was an issue of fact as to whether an employee of a floor maintenance subcontractor created a dangerous condition which caused the injured party's fall. Robinson v. Wal-Mart Stores, Inc., 158 N.C. App. 299, 580 S.E.2d 426, 2003 N.C. App. LEXIS 1040 (2003).

Failure to Erect Traffic Sign. — Summary judgment was inappropriate where genuine issues existed as to whether third-party defendants/Department of Transportation breached a duty by failing to have an advisory speed sign attached to the post of a "left lane closed ahead" sign and whether the signage was a proximate cause of the accident. Davis v. J.M.X., Inc., 137 N.C. App. 267, 528 S.E.2d 56, 2000 N.C. App. LEXIS 309 (2000), aff'd, 352 N.C. 662, 535 S.E.2d 356 (2000).

Negligently Erected Traffic Sign. — North Carolina Industrial Commission erred in granting partial summary judgment to an injured party and in failing to remand the case to a deputy commissioner for an evidentiary hearing once the Commission determined that genuine issues of material fact remained as to whether the North Carolina Department of Transportation negligently erected a confusing stop sign at a railroad intersection. Norman v. N.C. DOT, 161 N.C. App. 211, 588 S.E.2d 42, 2003 N.C. App. LEXIS 2043 (2003), review dismissed, review denied, 358 N.C. 235, 595 S.E.2d 153 (2004), cert. denied, 358 N.C. 545, 599 S.E.2d 404 (2004).

Permission to Drive Vehicle. — Although driver of truck involved in accident did not have owner's permission to drive truck and did not have a valid driver's license, and owner's insurance policy excluded coverage for persons using insured vehicle without reasonable belief that he or she was entitled to do so, insurance company was not entitled to summary judgment on its claim denying coverage as there was a question as to the driver's subjective belief of being entitled to drive the vehicle. Aetna Cas. & Sur. Co. v. Nationwide Mut. Ins. Co., 95 N.C. App. 178, 381 S.E.2d 874 (1989).

Negligence of Fire Truck Driver. — Summary judgment was improper in case based upon fire truck driver's alleged negligence, where there was conflicting evidence as to whether or not the siren was on, whether or not the driver's election of traffic lanes was prudent, and whether or not the speed at which the fire truck was travelling was excessive. Lopez v. Snowden, 96 N.C. App. 480, 386 S.E.2d 65 (1989).

Suits Against Public Officials. — Insurance policy purchased by Chatham County, North Carolina did not allow law enforcement employees to recover damages from the County, and because the County had not waived immunity from suit by law enforcement employees, the trial court properly ruled that a school resource officer (SRO) who worked for a sheriff's department could not sue the sheriff or a chief deputy sheriff in their official capacities. However, the SRO engaged in a protected activity when he cooperated with federal agents who were investigating the sheriff, and the trial court erred when it dismissed a claim for wrongful discharge which the SRO filed against the sheriff in his individual capacity. Phillips v. Gray, 163 N.C. App. 52, 592 S.E.2d 229, 2004 N.C. App. LEXIS 248 (2004), cert. denied, 358 N.C. 545, 599 S.E.2d 406 (2004).

Fire Chief. — Summary judgment in favor of defendant fire chief, in his official capacity, was inappropriate as the public duty doctrine is not available as a defense for a fire chief in his official capacity. Willis v. Town of Beaufort, 143 N.C. App. 106, 544 S.E.2d 600, 2001 N.C. App. LEXIS 227 (2001).

Wrongful Acts of Law Enforcement Officer. — Language of the insuring agreement section of a law enforcement liability policy defined coverage for "wrongful acts" which were caused by an occurrence and arising out of the performance of an insured officer's duties to provide law enforcement activities; since any ambiguity in the policy was to have been resolved in favor of the insured, claims based on sexual assaults committed by an insured police officer which arose out of his performance of law enforcement duties were covered under the policy, and a trial court's summary judgment in favor of the insurance company was reversed. Young v. Great Am. Ins. Co., 162 N.C. App. 87, 590 S.E.2d 4, 2004 N.C. App. LEXIS 6 (2004).

Failure to Repair Garbage Truck. — Trial court erred in granting summary judgment to municipal defendants in an action by the administrator's of a decedent's estate alleging gross negligence and wanton misconduct in the death of the decedent while employed by defendants; the decedent was killed when a dumpster on a garbage truck came partially detached and swung loose and pinned the decedent against the side of the garbage truck. Whitaker v. Town of Scotland Neck, 154 N.C. App. 660, 572 S.E.2d 812, 2002 N.C. App. LEXIS 1526 (2002), cert. granted, 356 N.C. 696, 579 S.E.2d 104 (2003).

Burning Boat. — Summary judgment in favor of defendant town was inappropriate, as the public duty doctrine no longer applies as a defense for the municipal provision of fire protection services. Willis v. Town of Beaufort, 143 N.C. App. 106, 544 S.E.2d 600, 2001 N.C. App. LEXIS 227 (2001).

Equitable Distribution. — On appeal from summary judgment, the record did not provide basis for determination of whether defendant's equitable distribution action would allow redress of injury complained of in her constructive trust proceeding, thus barring the constructive trust action under the doctrine of election of remedies; nonetheless, as the equitable distribution action had not been prosecuted to a final judgment, the trial court erred in entering summary judgment for the plaintiff and dismissing defendant's counterclaim for a constructive trust. Lamb v. Lamb, 92 N.C. App. 680, 375 S.E.2d 685 (1989).

Resulting Trust. — The trial court erred in granting summary judgment for the plaintiff heirs of nonpaying cotenant, where a genuine issue of material fact existed as to whether plaintiffs were entitled to a beneficial interest in property held jointly by their father and paying defendant tenants. Keistler v. Keistler, 135 N.C. App. 767, 522 S.E.2d 338, 1999 N.C. App. LEXIS 1226 (1999).

Wills. — Where the caveators could not produce the revocatory writing, and where the decedent's attorney could not recall writing the will, the trial court erred in granting the caveators summary judgment on the ground that the will revoked an earlier will that had excluded the caveators as beneficiaries. In re Will of McCauley, 356 N.C. 91, 565 S.E.2d 88, 2002 N.C. LEXIS 550 (2002).

Conflict in Forecasts of Evidence as to Causation. — In a private nuisance action, where there was a conflict in the forecasts of evidence as to causation offered by the parties' affidavits, the question of causation was a question of fact and the court erred in granting summary judgment. Bjornsson v. Mize, 75 N.C. App. 289, 330 S.E.2d 520, cert. denied, 314 N.C. 537, 335 S.E.2d 13 (1985).

While it is not advisable to make findings of fact in a summary judgment proceeding, such findings do not render summary judgment invalid. Summey Outdoor Adv., Inc. v. County of Henderson, 96 N.C. App. 533, 386 S.E.2d 439 (1989).

Validity of Right of First Refusal Provision as Question for Court. — On a motion for summary judgment, whether a right of first refusal provision is valid or void is a question of law for the trial court. Pinehurst v. Regional Invs., 97 N.C. App. 114, 387 S.E.2d 222 (1990), aff'd, 330 N.C. 725, 412 S.E.2d 645 (1992).

In an action for constructive fraud and constructive trust, summary judgment for defendant attorney was precluded by a genuine issue of material fact as to the existence of an attorney-client relationship at the time a referral fee arrangement was made. Booher v. Frue, 98 N.C. App. 585, 392 S.E.2d 105 (1990).

Intentional Infliction of Emotional Distress. — Where plaintiff's allegations were sufficient to establish that defendant's behavior constituted more than insults or unflattering opinions the trial court erred in granting summary judgment in favor of defendant with regard to suit alleging intentional inflictions of emotional distress, as there were sufficient facts alleged to raise a question of whether defendant's conduct was extreme and outrageous. Waddle v. Sparks, 100 N.C. App. 129, 394 S.E.2d 683 (1990).

Libel and Slander. — There was ample evidence to withstand summary judgment in the record of libel and slander case that defendant's statement was false and made with actual malice; defendant's firing of plaintiff within days after newspaper published a letter from plaintiff's mother in support of defendant's political opponent, and the vehement character of the statement to the newspaper were some evidence of defendant's ill-will toward plaintiff. Plaintiff also introduced evidence that he was competent at his job as assistant district attorney. Clark v. Brown, 99 N.C. App. 255, 393 S.E.2d 134 (1990).

Genuine issues of material fact remained to be decided in a nurse's claim for slander against her co-worker, where the co-worker filed a sexual harassment suit against her and there was conflicting evidence as to whether the nurse had harassed the co-worker; therefore, summary judgment was improperly granted. Smith-Price v. Charter Behavioral Health Sys., 164 N.C. App. 349, 595 S.E.2d 778, 2004 N.C. App. LEXIS 816 (2004).

Oral Guaranty. — Trial court erred in granting the owners' summary judgment motion as to an oral guaranty, as there were genuine issues of material fact concerning whether an oral guaranty was given and whether the main purpose rule was applicable, which would take the agreement out of the North Carolina Statute of Frauds, G.S. 22-1. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Summary judgment was improper where plaintiffs forecast evidence that purchasing corporation was a "mere continuation" of the old corporation. Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), cert. denied, 339 N.C. 736, 454 S.E.2d 647 (1995).

Electronic Surveillance. — Summary judgment was improperly granted on the husband's claim that the wife illegally videotaped the husband's in-home actions; because the husband did not establish that the videotaping included sound recordings, an issue of fact remained, as only oral communications were covered by G.S. 15A-287. Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760, 2002 N.C. App. LEXIS 915 (2002), cert. denied, 356 N.C. 673, 577 S.E.2d 120 (2003).

Where plaintiffs had reasonable notice that their agreement to charge pharmaceuticals to defendant's open account was terminated, defendant was entitled to judgment as a matter of law; thus, the order of the trial court granting summary judgment in plaintiff's favor was reversed. J.M. Smith Corp. v. Matthews, 123 N.C. App. 771, 474 S.E.2d 798 (1996).

Mitigation of Damages. — Defendant's affidavit presented a genuine issue of material fact as to the adequacy of plaintiff's attempted mitigation of damages; therefore, the trial court incorrectly granted summary judgment on the issue of damages. RC Assocs. v. Regency Ventures, Inc., 111 N.C. App. 367, 432 S.E.2d 394 (1993).

Piercing the Corporate Veil. — Because only one of several factors that can justify a court in piercing the corporate veil and treating a corporation as the alter ego of its officers or stockholders was established without contradiction by the materials in the record, the court correctly denied plaintiff's motion for summary judgment on the issue of piercing the corporate veil. Hoots v. Toms & Bazzle, 100 N.C. App. 412, 396 S.E.2d 820 (1990).

In former board members' derivative action suit against a non-profit corporation and current members of its board of directors, summary judgment in the current members' favor was proper as G.S. 55A-7-40(a) did not include language allowing former directors to file a derivative action. Morris v. Thomas, 161 N.C. App. 680, 589 S.E.2d 419, 2003 N.C. App. LEXIS 2271 (2003), cert. denied, 357 N.C. 510, 588 S.E.2d 379 (2003).

Partnership Agreements. — Trial court properly denied one partner's motion for summary judgment as the other partners presented sufficient evidence of the partner's breach of a partnership agreement, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices to withstand the motion. Compton v. Kirby, 157 N.C. App. 1, 577 S.E.2d 905, 2003 N.C. App. LEXIS 369 (2003).

Grant of summary judgment was reversed and remanded because (1) it was unclear whether the trial court applied the newly adopted appropriate standard for judicial estoppel in determining that a partnership was judicially estopped from asserting ownership in stock based on a position taken by one of the partners in a bankruptcy proceeding; and (2) the trial court needed to address whether there was privity between the partner and the partnership. Whitacre P'ship v. BioSignia, Inc., 358 N.C. 1, 591 S.E.2d 870, 2004 N.C. LEXIS 16 (2004).

Contributory Negligence of Paper Mill Operator. — Genuine issues of fact, precluding summary judgment, existed as to whether a paper mill owner was contributorily negligent in operating a continuous digester system which the owner alleged had been improperly designed and installed by the system's manufacturer. Federal Paper Bd. Co. v. Kamyr, Inc., 101 N.C. App. 329, 399 S.E.2d 411 (1991), discretionary review denied, 328 N.C. 570, 403 S.E.2d 510 (1991).

Action for Attorney's Fees. — Where there was a genuine issue of material fact as to whether a nurse anesthetist's attorney fees were actually and necessarily incurred in connection with any threatened action seeking to hold her liable, summary judgment was not proper. Gregorino v. Charlotte-Mecklenburg Hosp. Auth., 121 N.C. App. 593, 468 S.E.2d 432 (1996).

Summary judgment was inappropriate where there were genuine issues of material fact with respect to plaintiff's claim for attorney's fees, specifically, the forecast of evidence produced by both parties did not establish whether plaintiff complied with the statutory notice requirement in N.C. Gen. Stat. G.S. 6-21.2(5). Davis Lake Cmty. Ass'n v. Feldmann, 138 N.C. App. 292, 530 S.E.2d 865, 2000 N.C. App. LEXIS 598 (2000).

Trial court erred in entering summary judgment in favor of ex-wife defendant on her cross-claim against ex-husband defendant for indemnity for plaintiffs's attorneys' fees in an underlying equitable distribution matter and for the expenses of litigation where genuine issues existed as to whether the ex-wife breached an agreement by failing to cooperate in the culmination of a settlement and whether she was solely liable for the contingency fee contract fees. Robinson, Bradshaw & Hinson, P.A. v. Smith, 139 N.C. App. 1, 532 S.E.2d 815, 2000 N.C. App. LEXIS 812 (2000).

For additional case in which summary judgment was held improper, see Wilkes County Vocational Workshop, Inc. v. United Sleep Prods., Inc., 321 N.C. 735, 365 S.E.2d 292 (1988).

On State Constitutional Claims Not Included in Complaint. — It was improper for the trial court to include a reference to plaintiff/bus driver's state constitutional claims in its order granting summary judgment in favor of defendant/police officer where her amended complaint alleged North Carolina constitutional claims against the defendant/city through the police officer in his official capacity, not against him in his individual capacity. Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000).

False Arrest and Excessive Force. — Summary judgment was improper on the plaintiff/bus driver's claims of false arrest and excessive force where, although the defendant/police officer exited her bus and did not take her into custody, his "application of physical force," coupled with his proclamation that she was under arrest, and her allegations that her exit was blocked, raise at least a genuine issue of material fact as to whether plaintiff was "arrested" for purposes of the Fourth Amendment. Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000).

Probable Cause. — The defendant/police officer who stated that the plaintiff/bus driver was under arrest for violating G.S. 20-90(11) (now repealed) could later justify that arrest by reference to G.S. 20-114.1 because the offenses were sufficiently related; nevertheless, summary judgment was still not proper where he may have lacked probably cause to arrest her, even under this section; the facts tended to show that plaintiff was approached by an "angry," "out of control" man wearing shorts, a plain t-shirt, and boots who "flashed something" at her "quickly;" asserted he was both a truck driver and a police officer; boarded her bus; ordered her to move her bus; grabbed her arm, unfastened her seatbelt, and told her she was under arrest; then exited her bus without writing her a citation or formally taking her into custody; furthermore, at no point did plaintiff acknowledge his status as a police officer nor was she even looking in his direction when he attempted to show her his badge at the window of the bus. Glenn-Robinson v. Acker, 140 N.C. App. 606, 538 S.E.2d 601, 2000 N.C. App. LEXIS 1258 (2000).

Assault, Battery and Negligence. — Summary judgement was inappropriate for defendant-nephew who shoved and injured plaintiff-uncle where the record plainly reflected that defendant (through his attorney) approached plaintiff during the criminal suit stating that he did not intend the injurious act against plaintiff while, in the civil suit, defendant argued that he did intend the actions against plaintiff. Keech v. Hendricks, 141 N.C. App. 649, 540 S.E.2d 71, 2000 N.C. App. LEXIS 1399 (2000).

Assault and Battery. — Summary judgment was not warranted on the basis that plaintiff's suit was barred by the G.S. 1-54 statute of limitations for assault and battery where a genuine issue of material fact existed as to whether defendant intended to injure the plaintiff when he backed his vehicle into plaintiff's truck on the highway. Britt v. Hayes, 142 N.C. App. 190, 541 S.E.2d 761, 2001 N.C. App. LEXIS 31 (2001), cert. granted, 353 N.C. 450, 548 S.E.2d 523 (2001).

Operation of a Coliseum. — The defendant was not entitled to summary judgment on the basis of governmental immunity where, when viewed in the light most favorable to plaintiffs, the evidence demonstrates that defendant's operation of a coliseum was a commercial enterprise and the operation of the Coliseum was a proprietary function. Pierson v. Cumberland County Civic Ctr. Comm'n, 141 N.C. App. 628, 540 S.E.2d 810, 2000 N.C. App. LEXIS 1394 (2000).

Claims Involving Multiple Defendants. — In an action which an investor filed against an accountant, who worked for the investor's former wife's corporation, alleging that the accountant led him to believe the corporation was profitable so he would sign personal guarantees in favor of a bank that loaned the corporation money, the appellate court reversed the trial court's judgment in favor of the accountant because there were questions of fact about whether a settlement the investor negotiated in a separate action against his former wife fully compensated the investor for his losses such that he was no longer entitled to recover damages from the accountant. Kogut v. Rosenfeld, 157 N.C. App. 487, 579 S.E.2d 400, 2003 N.C. App. LEXIS 741, cert. granted, 357 N.C. 461, 585 S.E.2d 762 (2003).

Breach of Contract Claim in Employment Case. — Motion for partial summary judgment was properly denied in a breach of contract case because an at-will employee was permitted to bring a breach of contract action against an employer and its surety for deciding to terminate the employee in violation of public policy; the employee could have also brought a tort action for wrongful discharge if the employer had waived sovereign immunity. Hill v. Medford, 158 N.C. App. 618, 582 S.E.2d 325, 2003 N.C. App. LEXIS 1225 (2003).

Unsafe Employment Conditions. — Trial court did not err in denying the owner and operator's motions for summary judgment and directed verdict regarding the case of the worker who fell while working at their facility; since the owners controlled the facility they owed the employee a duty to see to it that the place where she fell was safe for passage, they did not show that she was contributorily negligent, and they did not show that the water on which she fell was an "open and obvious" condition that she should have discovered and avoided. Nelson v. Novant Health Triad Region, 159 N.C. App. 440, 583 S.E.2d 415, 2003 N.C. App. LEXIS 1492 (2003).

IV. BURDEN ON MOTION FOR SUMMARY JUDGMENT.

Movant Must Establish Lack of a Triable Issue. — The burden is on the moving party to establish the lack of a triable issue of fact. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971); Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971); Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971); Lineberger v. Colonial Life & Accident Ins. Co., 12 N.C. App. 135, 182 S.E.2d 643 (1971); Brevard v. Barkley, 12 N.C. App. 665, 184 S.E.2d 370 (1971); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897 (1972); Hinson v. Jefferson, 20 N.C. App. 204, 200 S.E.2d 812 (1973); Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975);

Shook Bldrs. Supply Co. v. Eastern Assocs., 24 N.C. App. 533, 211 S.E.2d 472 (1975); Freeman v. Sturdivant Dev. Co., 25 N.C. App. 56, 212 S.E.2d 190 (1975); Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976); North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976); Cameron-Brown Capital Corp. v. Spencer, 31 N.C. App. 499, 229 S.E.2d 711 (1976), cert. denied, 291 N.C. 710, 232 S.E.2d 203 (1977); Five Star Enters., Inc. v. Russell, 34 N.C. App. 275, 237 S.E.2d 859 (1977); Wachovia Mtg. Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 S.E.2d 727 (1978), aff'd, 297 N.C. 696, 256 S.E.2d 688 (1979); Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979); Moye v. Thrifty Gas Co., 40 N.C. App. 310, 252 S.E.2d 837, cert. denied, 297 N.C. 611, 257 S.E.2d 219 (1979); Lula Conrad Hoots Mem. Hosp. v. Hoots, 40 N.C. App. 595, 253 S.E.2d 330, cert. denied, 297 N.C. 609, 257 S.E.2d 218 (1979); Smith v. Currie, 40 N.C. App. 739, 253 S.E.2d 645, cert. denied, 297 N.C. 612, 257 S.E.2d 219 (1979); English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979); Baumann v. Smith, 41 N.C. App. 223, 254 S.E.2d 627, rev'd on other grounds, 298 N.C. 778, 260 S.E.2d 626 (1979); Oliver v. Roberts, 49 N.C. App. 311, 271 S.E.2d 399 (1980); Brenner v. Little Red Sch. House, Ltd., 302 N.C. 207, 274 S.E.2d 206 (1981); Stanback v. Stanback, 53 N.C. App. 243, 280 S.E.2d 498, cert. denied, 304 N.C. 197, 285 S.E.2d 101 (1981); Moore v. Crumpton, 306 N.C. 618, 295 S.E.2d 436 (1982); Sharpe v. Quality Educ., Inc., 59 N.C. App. 304, 296 S.E.2d 661 (1982); Seay v. Allstate Ins. Co., 59 N.C. App. 220, 296 S.E.2d 30 (1982); Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, cert. denied as to additional issues, 312 N.C. 495, 322 S.E.2d 558 (1984); Carlton v. Carlton, 74 N.C. App. 690, 329 S.E.2d 682 (1985); Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985); Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738 (1985); Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985); Land-of-Sky Regional Council v. County of Henderson, 78 N.C. App. 85, 336 S.E.2d 653 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986); Hatfield v. Jefferson Std. Life Ins. Co., 85 N.C. App. 438, 355 S.E.2d 199 (1987); Hall v. Post, 85 N.C. App. 610, 355 S.E.2d 819, reversed on other grounds, 323 N.C. 259, 372 S.E.2d 711 (1988); Higgins v. Higgins, 86 N.C. App. 513, 358 S.E.2d 553 (1987); Brawley v. Brawley, 87 N.C. App. 545, 361 S.E.2d 759 (1987); White v. Hunsinger, 88 N.C. App. 382, 363 S.E.2d 203 (1988); Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

The party moving for summary judgment has the burden of showing that there is no genuine issue as to any material fact. Miller v. Snipes, 12 N.C. App. 342, 183 S.E.2d 270, cert. denied, 279 N.C. 619, 184 S.E.2d 883 (1971); Liberty Loan Corp. v. Miller, 15 N.C. App. 745, 190 S.E.2d 672 (1972); Brawley v. Heymann, 16 N.C. App. 125, 191 S.E.2d 366, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Butler v. Berkeley, 25 N.C. App. 325, 213 S.E.2d 571 (1975); Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978); Carson v. Sutton, 35 N.C. App. 720, 242 S.E.2d 535 (1978); Dixie Chem. Corp. v. Edwards, 68 N.C. App. 714, 315 S.E.2d 747 (1984); Campbell v. Board of Educ., 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986); Uzzell v. Integon Life Ins. Corp., 78 N.C. App. 458, 337 S.E.2d 639 (1985), cert. denied, 317 N.C. 341, 346 S.E.2d 149 (1986).

When the party bringing the cause of action moves for summary judgment, he must establish that all of the facts on all of the essential elements of his claim are in his favor and that there is no genuine issue of material fact with respect to any one of the essential elements of his claim. Steel Creek Dev. Corp. v. Smith, 300 N.C. 631, 268 S.E.2d 205 (1980).

In order to bear its burden of showing that it was entitled to summary judgment, a defendant is required to present a forecast of the evidence which is available at trial and which shows that there is no material issue of fact concerning an essential element of the plaintiff's claim and that such element could not be proved by the plaintiff through the presentation of substantial evidence. Jenkins v. Stewart & Everett Theatres, Inc., 41 N.C. App. 262, 254 S.E.2d 776, cert. denied, 297 N.C. 698, 259 S.E.2d 295 (1979).

A defendant must show as a matter of law that he is entitled to summary judgment in his favor by showing that there is no genuine issue of material fact concerning an essential element of the plaintiff's claim for relief and that the plaintiff cannot prove the existence of that element. Blue Ridge Sportcycle Co. v. Schroader, 60 N.C. App. 578, 299 S.E.2d 303 (1983).

A defendant is entitled to summary judgment only when he can produce a forecast of evidence, which when viewed most favorably to plaintiff would, if offered by plaintiff at trial, without more, compel a directed verdict in defendant's favor, or if defendant can show through discovery that plaintiff cannot support his claim. Coats v. Jones, 63 N.C. App. 151, 303 S.E.2d 655, aff'd, 309 N.C. 815, 309 S.E.2d 253 (1983).

The moving party has the burden of establishing that there is no genuine issue as to any material fact, entitling him to judgment as a matter of law. This motion requires the movant and the opponent to produce a forecast of the evidence he will present at trial. Normile v.

Miller, 63 N.C. App. 689, 306 S.E.2d 147 (1983), modified and aff'd, 313 N.C. 98, 326 S.E.2d 11 (1985).

The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. His papers are meticulously scrutinized and all inferences are resolved against him. Joel T. Cheatham, Inc. v. Hall, 64 N.C. App. 678, 308 S.E.2d 457 (1983); Boyce v. Meade, 71 N.C. App. 592, 322 S.E.2d 605 (1984), cert. denied, 313 N.C. 506, 329 S.E.2d 390 (1985).

The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 329 S.E.2d 350 (1985).

The party moving for summary judgment has the burden of clearly establishing a lack of any triable issue of fact by the record proper before the court. Jennings Communications Corp. v. PCG of Golden Strand, Inc., 126 N.C. App. 637, 486 S.E.2d 229 (1997).

The moving party has the burden of clearly establishing the lack of any triable issue of fact; his papers are carefully scrutinized while those of the nonmoving party are indulgently regarded. Town of West Jefferson v. Edwards, 74 N.C. App. 377, 329 S.E.2d 407 (1985); Almond Grading Co. v. Shaver, 74 N.C. App. 576, 329 S.E.2d 417 (1985).

The party moving for summary judgment has the burden of showing the lack of any genuine issue of material fact. If the movant is also the party bringing the action, he must establish his claim beyond any genuine dispute with respect to any material fact. Lambe-Young, Inc. v. Austin, 75 N.C. App. 569, 331 S.E.2d 293 (1985).

A party moving for summary judgment must establish that there is no genuine issue of material fact or that it has a complete defense as a matter of law. Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985), cert. denied, 315 N.C. 597, 341 S.E.2d 39 (1986).

As the movants for summary judgment, plaintiffs had the burden of clearly establishing by the record presented to the court that there was no triable issue of fact in regard to defendants' counterclaim. Rose v. Lang, 85 N.C. App. 690, 355 S.E.2d 795 (1987).

Insurance and securities broker was properly granted summary judgment on investors' vicarious liability claims against the broker because, assuming arguendo that an agent and a subagent committed torts in selling investments to the investors, the investors could not show that the broker was vicariously liable for the torts as the agent and subagent were independent contractors of the broker, and the investors knew that the agent and the subagent were not acting as agents of the broker. Estate of Redding v. Welborn, 170 N.C. App. 324, 612 S.E.2d 664, 2005 N.C. App. LEXIS 1001 (2005).

By the Record Before the Court. — The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact by the record properly before the court. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972); Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Wall v. Flack, 15 N.C. App. 747, 190 S.E.2d 671 (1972); Houck v. Overcash, 282 N.C. 623, 193 S.E.2d 905 (1973); Kiser v. Snyder, 17 N.C. App. 445, 194 S.E.2d 638, cert. denied, 283 N.C. 257, 195 S.E.2d 689 (1973); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975); Furst v. Loftin, 29 N.C. App. 248, 224 S.E.2d 641 (1976); Executive Leasing Assocs. v. Rowland, 30 N.C. App. 590, 227 S.E.2d 642 (1976); Pitts v. Village Inn Pizza, Inc., 296 N.C. 81, 249 S.E.2d 375 (1978); Robinson v. Duszynski, 36 N.C. App. 103, 243 S.E.2d 148 (1978); Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980); Branch Banking & Trust Co. v. Creasy, 301 N.C. 44, 269 S.E.2d 117 (1980); Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651, cert. denied, 300 N.C. 195, 269 S.E.2d 622 (1980); Heritage Communities of N.C., Inc. v. Powers, Inc., 49 N.C. App. 656, 272 S.E.2d 399 (1980); Miller v. Triangle Volkswagen, Inc., 55 N.C. App. 593, 286 S.E.2d 608 (1982).

And Must Show Entitlement to Judgment. — The moving party must clearly establish that there is no triable issue of fact and that it is entitled to judgment as a matter of law. Edwards v. Akion, 52 N.C. App. 688, 279 S.E.2d 894, aff'd, 304 N.C. 585, 284 S.E.2d 518 (1981); Derrick v. Ray, 61 N.C. App. 218, 300 S.E.2d 721 (1983).

Every party moving for summary judgment has the burden of proving that it is entitled to judgment in its favor. Olney Paint Co. v. Zalewski, 29 N.C. App. 149, 223 S.E.2d 573 (1976).

A party moving for summary judgment must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976); Hicks v. Old Republic Life Ins. Co., 29 N.C. App. 561, 225 S.E.2d 164 (1976); Stancill v. City of Washington, 29 N.C. App. 707, 225 S.E.2d 834 (1976); Boone v. Fuller, 30 N.C. App. 107, 226 S.E.2d 191 (1976); Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E.2d 54 (1980); Rockingham Square Shopping Center, Inc. v. Town of Madison, 45 N.C. App. 249, 262 S.E.2d 705 (1980); Southern Nat'l Bank v. B & E Constr. Co., 46 N.C. App. 736, 266 S.E.2d 1 (1980); General Greene Inv. Co. v. Greene, 48 N.C. App. 29, 268 S.E.2d 810, cert. denied, 301

N.C. 235, 283 S.E.2d 132 (1980); Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980); O'Neal v. Kellett, 55 N.C. App. 225, 284 S.E.2d 707 (1981); Ind-Com Elec. Co. v. First Union Nat'l Bank, 58 N.C. App. 215, 293 S.E.2d 215 (1982); Kaimowitz v. Duke L.J., 68 N.C. App. 463, 315 S.E.2d 82 (1984); Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985); Bjornsson v. Mize, 75 N.C. App. 289, 330 S.E.2d 520, cert. denied, 314 N.C. 537, 335 S.E.2d 13 (1985); Branch Banking & Trust Co. v. Kenyon Inv. Corp., 76 N.C. App. 1, 332 S.E.2d 186; Pardue v. Northwestern Bank, 77 N.C. App. 834, 336 S.E.2d 456 (1985); Surrette v. Duke Power Co., 78 N.C. App. 647, 338 S.E.2d 129 (1986); Lyles v. City of Charlotte, 120 N.C. App. 96, 461 S.E.2d 347 (1995).

Once movant establishes that there is no genuine issue of material fact, he must further prove that he is entitled to judgment as a matter of law. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976).

Because the burden is on the moving party to establish the lack of a triable issue of fact, the motion may only be granted where he shows that he is entitled to a judgment as a matter of law. Long v. Long, 15 N.C. App. 525, 190 S.E.2d 415 (1972).

Movant for summary judgment must make it perfectly clear that he was entitled to judgment as a matter of law. Shook Bldrs. Supply Co. v. Eastern Assocs., 24 N.C. App. 533, 211 S.E.2d 472 (1975); Lambert v. Duke Power Co., 32 N.C. App. 169, 231 S.E.2d 31, cert. denied, 292 N.C. 265, 233 S.E.2d 392 (1977).

In order to prevail on a summary judgment motion, defendant must carry the burden of establishing the lack of a genuine issue as to any material fact and entitlement to judgment as a matter of law. Clodfelter v. Bates, 44 N.C. App. 107, 260 S.E.2d 672 (1979), cert. denied, 299 N.C. 329, 265 S.E.2d 394 (1980); Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982).

Regardless of Who Has Burden of Proof at Trial. — Irrespective of who has the burden of proof at trial upon issues raised by the pleadings, upon a motion for summary judgment the burden is upon the party moving therefor to establish that there is no genuine issue of fact remaining for determination and that he is entitled to judgment as a matter of law. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972); Whitley v. Cubberly, 24 N.C. App. 204, 210 S.E.2d 289 (1974); Keith v. S.S. Kresge Co., 29 N.C. App. 579, 225 S.E.2d 135 (1976).

The burden is on the party moving for summary judgment to show that there is no genuine issue of material fact, regardless of who will have the burden of proof on the issue at trial. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976).

The burden to show that there is no genuine issue of material fact rests on the party moving for summary judgment, whether he or his opponent would at trial have the burden of proof on the issue concerned, and rests on him whether he is by it required to show the existence or nonexistence of facts. Whitley v. Cubberly, 24 N.C. App. 204, 210 S.E.2d 289 (1974).

The movant must meet his burden of proof even when he does not have the burden of proof at trial. Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974).

When the party with the burden of proof moves for summary judgment, he must show that there are no genuine issues of fact, that there are no gaps in his proof, that no inferences inconsistent with his recovery arise from the evidence, and that there is no standard that must be applied to the facts by the jury. The party with the burden of proof who moves for summary judgment supported only by his own affidavits will ordinarily not be able to meet these requirements and thus will not be entitled to summary judgment. Parks Chevrolet, Inc. v. Watkins, 74 N.C. App. 719, 329 S.E.2d 728 (1985).

If a defendant moves for summary judgment, he assumes the burden of producing evidence of the necessary certitude which negatives plaintiff's claim. The burden of proof is reversed from what it would be if the case were at the trial stage. Clodfelter v. Bates, 44 N.C. App. 107, 260 S.E.2d 672 (1979), cert. denied, 299 N.C. 329, 265 S.E.2d 394 (1980).

A defendant who moves for summary judgment assumes the burden of positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. A defendant may meet this burden by (1) proving that an essential element of the plaintiff's case is nonexistent; or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim; or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim. Once the defendant satisfies his or her burden of proof, the burden shifts to the plaintiff to present a forecast of evidence which shows that a genuine issue of fact exists, or to provide an excuse for not so doing. Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), rev'd on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986).

A defendant who moves for summary judgment may meet his burden by showing either that (1) an essential element of plaintiff's claim is nonexistent; (2) plaintiff cannot produce evidence to support an essential element of its claim; or (3) plaintiff cannot surmount an affirmative defense raised in bar of its claim. Lyles v. City of Charlotte, 120 N.C. App. 96, 461 S.E.2d 347 (1995).

Party moving for summary judgment must establish the lack of any triable issue of material fact by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim; the burden then shifts to the nonmoving party to produce a forecast of evidence demonstrating that the nonmoving party will be able to make out at least a prima facie case at trial. Smith-Price v. Charter Behavioral Health Sys., 164 N.C. App. 349, 595 S.E.2d 778, 2004 N.C. App. LEXIS 816 (2004).

Movant Must Negative Opponent's Claim in Its Entirety. — The party moving for summary judgment carries the burden of producing evidence of the necessary certitude to negative plaintiff's claim in its entirety and thereby demonstrate a lack of genuine issues of material fact. Caldwell v. Deese, 26 N.C. App. 435, 216 S.E.2d 452, rev'd on other grounds, 288 N.C. 375, 218 S.E.2d 379 (1975).

And Establish Own Claim Beyond Dispute. — The moving party must establish his claim beyond any genuine dispute with respect to any of the material facts. Steel Creek Dev. Corp. v. Smith, 300 N.C. 631, 268 S.E.2d 205 (1980).

Movant Shifted Burden by Showing Opponent Lacked Standing. — Because defendant met its summary judgment burden by showing that there was no genuine issue of material fact due to lack of standing, the burden shifted to plaintiff. Landfall Group Against Paid Transferability v. Landfall Club, Inc., 117 N.C. App. 270, 450 S.E.2d 513 (1994).

Burden of Proof on Movant. — The burden on the party moving for summary judgment may be carried by proving that an essential element of the opposing party's claim is nonexistent. Executive Leasing Assocs. v. Rowland, 30 N.C. App. 590, 227 S.E.2d 642 (1976).

When the party without the burden of proof on the substantive claim or defense moves for summary judgment he is entitled to it if he can meet the burden of proving that any one or more of the essential elements of the opposing party's claim or defense is nonexistent. Steel Creek Dev. Corp. v. Smith, 300 N.C. 631, 268 S.E.2d 205 (1980).

A defendant-movant must produce evidence of the necessary certitude which negatives any one or more of the essential elements of plaintiff's claim. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979), aff'd, 53 N.C. App. 492, 281 S.E.2d 86 (1981).

In order to prevail, a movant must establish the absence of any material issue of fact. One way he can meet this burden is by showing the nonexistence of an essential element of the plaintiff's claim for relief. Southerland v. Kapp, 59 N.C. App. 94, 295 S.E.2d 602 (1982).

The party moving for summary judgment meets its burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of the claim. Estate of Mullis v. Monroe Oil Co., 349 N.C. 196, 505 S.E.2d 131 (1998).

Showing That Opponent Cannot Produce Evidence to Support Its Claim Satisfies Burden. — The movant can satisfy his burden either by proving that an essential element of the opposing party's claim is nonexistent or by showing, through discovery, that the opposing party cannot produce evidence to support an essential element of its claim. Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Harris v. Barham, 35 N.C. App. 13, 239 S.E.2d 717 (1978); Wachovia Mtg. Co. v. AutryBarker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 S.E.2d 727 (1978), aff'd, 297 N.C. 696, 256 S.E.2d 688 (1979); Durham v. Vine, 40 N.C. App. 564, 253 S.E.2d 316 (1979); Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 414 S.E.2d 339 (1992), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); City of Thomasville v. Lease-Afex, Inc., 300 N.C. 651, 268 S.E.2d 190 (1980), overruled on other grounds; Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E.2d 54 (1980); Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651, cert. denied, 300 N.C. 195, 269 S.E.2d 622 (1980); Spivey v. White Motor Corp., 46 N.C. App. 313, 264 S.E.2d 772, appeal dismissed, 300 N.C. 559, 270 S.E.2d 111 (1980); Gregory v. Perdue, Inc., 47 N.C. App. 655, 267 S.E.2d 584 (1980); Oliver v. Roberts, 49 N.C. App. 311, 271 S.E.2d 399 (1980); Gelder & Assocs. v. Huggins, 52 N.C. App. 336, 278 S.E.2d 295 (1981); Tyson v. North Carolina Nat'l Bank, 53 N.C. App. 189, 280 S.E.2d 478 (1981), modified and aff'd, 305 N.C. 136, 286 S.E.2d 561 (1982); Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984); Herbert v. Browning-Ferris Indus. of S. Atl., Inc., 90 N.C. App. 339, 368 S.E.2d 416 (1988); Evans v. Appert, 91 N.C. App. 362, 372 S.E.2d 94, cert. denied, 323 N.C. 623, 374 S.E.2d 584 (1988).

A party moving for summary judgment may prevail if it meets the burden (1) of proving that an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Taylor v. Greensboro News

Co., 57 N.C. App. 426, 291 S.E.2d 852, discretionary review improvidently granted and appeal dismissed, 307 N.C. 459, 298 S.E.2d 385 (1983); 53 N.C. App. 492, 281 S.E.2d 86 (1981); Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976); Olney Paint Co. v. Zalewski, 29 N.C. App. 149, 223 S.E.2d 573 (1976); Carson v. Sutton, 35 N.C. App. 720, 242 S.E.2d 535 (1978), rev'd on other grounds, Whitley v. Cubberly, 24 N.C. App. 204, 210 S.E.2d 289 (1974).

To succeed in a summary judgment motion, the movant has the burden of showing, based on pleadings, depositions, answers, admissions, and affidavits, there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Defendant may meet this burden by showing either (1) an essential element of the nonmovant's claim is nonexistent, (2) the nonmovant cannot produce evidence to support an essential element of his claim, (3) or the nonmovant cannot surmount an affirmative defense which would bar his claim. Taylor v. Ashburn, 112 N.C. App. 604, 436 S.E.2d 276 (1993), cert. denied, 336 N.C. 77, 445 S.E.2d 46 (1994).

The party seeking summary judgment must establish the absence of any triable issue; this burden may be met by (1) proving the nonexistence of an essential element of the opposing party's claim, (2) establishing through discovery that the opponent cannot produce evidence supporting an essential element, or (3) showing that the opposing party cannot overcome an affirmative defense that would bar the claim. North Carolina Farm Bur. Mut. Ins. Co. v. Allen, 146 N.C. App. 539, 553 S.E.2d 420, 2001 N.C. App. LEXIS 988 (2001).

Or to Surmount an Affirmative Defense. — A defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981); Town of West Jefferson v. Edwards, 74 N.C. App. 377, 329 S.E.2d 407 (1985); Walker v. Durham Life Ins. Co., 90 N.C. App. 191, 368 S.E.2d 43 (1988).

Defendant may meet its burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim or cannot surmount an affirmative defense which would bar the claim. Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982); Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (1985); Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Denials In Unverified Answer Insufficient To Withstand Motion For Summary Judgment. — As defendant's answer to the complaint was not verified, the denials contained in that answer were insufficient to defeat plaintiffs' motion for summary judgment. Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005), cert. denied, — U.S. —, 126 S. Ct. 2972, 165 L. Ed. 2d 954 (2006).

Question of when the burden will shift to the opposing party may depend on the type of proof utilized by the moving party. Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978).

Failure to Respond Not Always Fatal. — Not every failure of the opposing party to respond to a motion for summary judgment will require the entry of summary judgment. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Under some circumstances the trial judge may properly deny the motion for summary judgment even when the nonmoving party fails to offer competent counter-affidavits or other evidence. Baumann v. Smith, 298 N.C. 778, 260 S.E.2d 626 (1979).

Granting of summary judgment where the adverse party does not respond to the motion "by affidavits or as otherwise provided in this rule" is proper only "if appropriate" under all of the circumstances of the case. Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147, cert. denied, 279 N.C. 395, 183 S.E.2d 243 (1971); Brevard v. Barkley, 12 N.C. App. 665, 184 S.E.2d 370 (1971).

On a motion for summary judgment the moving party has the burden of establishing that there is no genuine issue as to any material fact. Once the moving party has met its burden, the opposing party may not rest on the mere allegations or denials of his pleading. Instead, the opposing party must set forth specific facts showing that there is a genuine issue for trial, either by affidavits or as otherwise provided in this rule. If the opposing party is unable to present the necessary opposing material he may seek the protection of section (f) of this rule, which gives the trial court the discretion to refuse the motion for judgment or order a continuance. Gillis v. Whitley's Disct. Auto Sales, Inc., 70 N.C. App. 270, 319 S.E.2d 661 (1984).

Mere failure of the nonmoving party to respond with opposing affidavits or depositions does not automatically mean that summary judgment is appropriate. The moving party must still succeed on the strength of its evidence, and when that evidence contains material contradictions or leaves questions of credibility unanswered the movant has failed to satisfy its burden. Perry v. Aycock, 68 N.C. App. 705, 315 S.E.2d 791 (1984).

The mere failure of the nonmoving party to respond with opposing affidavits or depositions does not automatically mean that summary judgment is appropriate, and the moving party must still succeed on the strength of its evidence. Cellu Prods. Co. v. G.T.E. Prods. Corp., 81 N.C. App. 474, 344 S.E.2d 566 (1986).

If movant fails to carry his burden of proof, the opposing party does not have to respond and summary judgment is not proper regardless of whether he responds or not. Steel Creek Dev. Corp. v. Smith, 300 N.C. 631, 268 S.E.2d 205 (1980); Almond Grading Co. v. Shaver, 74 N.C. App. 576, 329 S.E.2d 417 (1985).

If the moving party fails in his showing, summary judgment is not proper regardless of whether the opponent responds. Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982); Brown v. Fulford, 311 N.C. 205, 316 S.E.2d 220 (1984).

On motion for summary judgment, movant has the burden of showing the absence of a genuine issue as to any material fact. When movant fails to carry this burden, summary judgment should be denied, even though no opposing evidence is presented. Durham v. Vine, 40 N.C. App. 564, 253 S.E.2d 316 (1979), overruled on other grounds, Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 414 S.E.2d 339 (1992), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

If the movant's forecast of evidence which he has available for presentation at trial fails to establish that there is no genuine issue of fact remaining for determination, summary judgment is not proper, whether or not the opponent responds. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

Until defendant-movant meets his initial burden, the opposing party, even though he may bear the burden of proof at trial, need not respond with evidence showing further support for his claim and a grant of summary judgment in defendant's favor is improper. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979), aff'd, 53 N.C. App. 492, 281 S.E.2d 86 (1981).

Motion for summary judgment should ordinarily be denied even though the opposing party makes no response, if: (1) the movant's supporting evidence is self-contradictory or circumstantially suspicious or the credibility of a witness is inherently suspect either because he is interested in the outcome of the case and the facts are peculiarly within his knowledge or because he has testified as to matters of opinion involving a substantial margin for honest error, (2) there are significant gaps in the movant's evidence or it is circumstantial and reasonably allows inferences inconsistent with the existence of an essential element, or (3) although all the evidentiary or historical facts are established, reasonable minds may still differ over their application to some principle such as the prudent man standard for negligence cases. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976); Carson v. Sutton, 35 N.C. App. 720, 242 S.E.2d 535 (1978).

Nonmovant does not have burden of coming forward until movant produces evidence of the necessary certitude which negatives the claim of the party opposing the motion against it in its entirety. Whitley v. Cubberly, 24 N.C. App. 204, 210 S.E.2d 289 (1974); Butler v. Berkeley, 25 N.C. App. 325, 213 S.E.2d 571 (1975); Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

The burden rests on the movant to make a conclusive showing; until then, the nonmovant has no burden to produce evidence. VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

If the moving party satisfies its burden of proof, then the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. The nonmoving party may not rest upon the mere allegations of his pleadings. Taylor v. Greensboro News Co., 57 N.C. App. 426, 291 S.E.2d 852, discretionary review improvidently granted and appeal dismissed, 307 N.C. 459, 298 S.E.2d 385 (1983); 316 N.C. 374, 342 S.E.2d 889 (1986); White v. Hunsinger, 88 N.C. App. 382, 363 S.E.2d 203 (1988).

Once the movant for summary judgment demonstrates that no material issues of fact exist, the burden shifts to the nonmovant to set forth specific facts showing that genuine issues of fact remain for trial. Orient Point Assocs. v. Plemmons, 68 N.C. App. 472, 315 S.E.2d 366 (1984); Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986); Walker v. Durham Life Ins. Co., 90 N.C. App. 191, 368 S.E.2d 43 (1988); Ward v. Durham Life Ins. Co., 90 N.C. App. 286, 368 S.E.2d 391 (1988), aff'd, 325 N.C. 202, 381 S.E.2d 698 (1989).

When a party moves for summary judgment on a claim and properly supports all the essentials of that claim with evidence, it falls to the opposing party to present contradictory evidence or to show by facts that the movant's evidence is insufficient or unreliable. And when the opposing party fails to do that and it plainly appears from the pleadings and evidence presented that the movant is entitled to recover on the claim, summary judgment is proper. Blackwell v. Massey, 69 N.C. App. 240, 316 S.E.2d 350 (1984).

The moving party has the burden of showing that no material issues of fact exist. In rebuttal, the nonmovant must then set forth specific facts showing that genuine issues of fact remain for trial. Southeastern Asphalt & Concrete Co. v. American Defender Life Ins. Co., 69 N.C. App. 185, 316 S.E.2d 311 (1984).

If the movant's burden is carried, the burden is on the opposing party to show that there is a question of material fact that can only be resolved by proceeding to trial. Branch Banking & Trust Co. v. Kenyon Inv. Corp., 76 N.C. App. 1, 332 S.E.2d 186, cert. denied, 314 N.C. 662, 335 S.E.2d 902 (1985).

The burden is upon the party moving for summary judgment to show that there is no genuine issue of law. If the movant meets this burden, the burden then shifts to the nonmovant to set forth specific facts showing that there is a genuine issue of material fact for trial. BM & W of Fayetteville, Inc. v. Barnes, 75 N.C. App. 600, 331 S.E.2d 308 (1985).

Once the moving party has submitted materials in support of the motion the burden shifts to the opposing party to produce evidence establishing that the motion should not be granted. Campbell v. Board of Educ., 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

When Nonmovant Must Come Forward with Forecast of Evidence. — On a motion for summary judgment, it is only when the movant's evidence, considered alone, is sufficient to establish his right to judgment as a matter of law that the nonmovant must come forward with a forecast of his own evidence. Durham v. Vine, 40 N.C. App. 564, 253 S.E.2d 316 (1979), overruled on other grounds, Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 414 S.E.2d 339 (1992), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998).

When movant presents an argument or defense supported by facts which would entitle him to judgment as a matter of law, the party opposing the motion must present a forecast of the evidence which will be available for presentation at trial and which will tend to support his claim for relief. Cone v. Cone, 50 N.C. App. 343, 274 S.E.2d 341, cert. denied, 302 N.C. 629, 280 S.E.2d 440 (1981).

If the moving party forecasts such evidence as would require a directed verdict for the movant at trial, the party opposing the motion must file papers which forecast evidence which would prevent a directed verdict at trial in order to prevent summary judgment in favor of the movant. Buck v. Tweetsie R.R., 44 N.C. App. 588, 261 S.E.2d 517 (1980).

Until defendant has forecast evidence tending to establish his right to judgment as a matter of law, claimant is not required to present any evidence to support his claim for relief. However, once defendant forecasts evidence which will be available to him at trial and which tends to establish his right to judgment as a matter of law, claimant must present a forecast of the evidence which will be available for presentation at trial and which will tend to support his claim for relief. If claimant does not respond at that time with a forecast of evidence which will be available at trial to show that defendant is not entitled to judgment as a matter of law, summary judgment should be entered in favor of defendant. Best v. Perry, 41 N.C. App. 107, 254 S.E.2d 281 (1979).

If the party moving for summary judgment successfully carries its burden of proof of showing that there is no genuine issue as to any material fact, the opposing party, by affidavits or otherwise, as provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. Hillman v. United States Liab. Ins. Co., 59 N.C. App. 145, 296 S.E.2d 302 (1982), cert. denied, 307 N.C. 468, 299 S.E.2d 221 (1983).

In addition to no issue of fact being present, to grant summary judgment a court must find "that on the undisputed aspects of the opposing evidential forecasts the party given judgment is entitled to it as a matter of law." Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983); Elmore's Feed & Seed, Inc. v. Patrick, 62 N.C. App. 715, 303 S.E.2d 394 (1983).

Once a defendant has properly pleaded the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 329 S.E.2d 350 (1985); Boundreau v. Baughman, 86 N.C. App. 165, 356 S.E.2d 907 (1987), rev'd in part, modified and aff'd in part, 322 N.C. 331, 368 S.E.2d 849 (1988).

When the moving party presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment. Campbell v. Board of Educ., 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

Once plaintiff has made and supported its motion for summary judgment, under section (e) of this rule, the burden is then on the defendant to introduce evidence in opposition to the motion setting forth specific facts showing that there is a genuine issue for trial. The defendant then must come forward with a forecast of his own evidence. Amoco Oil Co. v. Griffin, 78 N.C. App. 716, 338 S.E.2d 601, cert. denied, 316 N.C. 374, 342 S.E.2d 889 (1986).

When defendant has adduced evidence negating an essential element of plaintiff's proof, plaintiff must at a minimum come forward with competent evidence that raises a genuine issue of material fact on that element. White v. Hunsinger, 88 N.C. App. 382, 363 S.E.2d 203 (1988).

By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial. Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849 (1988).

Where the moving party offers facts and the opposing party offers mere allegations, there is no genuine issue as to a material fact. Moore v. Fieldcrest Mills, Inc., 36 N.C. App. 350, 244 S.E.2d 208 (1978), aff'd, 296 N.C. 467, 251 S.E.2d 419 (1979).

Unsupported allegations in pleadings are insufficient to create a genuine issue as to a material fact where the moving adverse party supports his motion by allowable evidentiary matter showing the facts to be contrary to that alleged in the pleadings. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Gudger v. Transitional Furn., Inc., 30 N.C. App. 387, 226 S.E.2d 835 (1976).

Section (e) of this rule clearly precludes any party from prevailing against a motion for summary judgment through reliance on conclusory allegations unsupported by facts. Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

Hence when a motion for summary judgment is properly supported, the adverse party may not rest upon the mere allegations or denials of his pleading. Five Star Enters., Inc. v. Russell, 34 N.C. App. 275, 237 S.E.2d 859 (1977).

If the defendant moving for summary judgment successfully carries his burden of proof, the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact. Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971); Brevard v. Barkley, 12 N.C. App. 665, 184 S.E.2d 370 (1971); Jarrell v. Samsonite Corp., 12 N.C. App. 673, 184 S.E.2d 376, cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1971); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972); Moore v. Galloway, 35 N.C. App. 394, 241 S.E.2d 386 (1978); Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651, cert. denied, 300 N.C. 195, 269 S.E.2d 622 (1980).

Plaintiff may not rely on the bare allegations of his complaint where defendants' motions for summary judgment are supported as provided in this rule. Peterson v. Winn-Dixie of Raleigh, Inc., 14 N.C. App. 29, 187 S.E.2d 487 (1972).

Upon a motion for summary judgment the adverse party may not rest upon his complaint and wait for trial to present his evidence, if any, when the moving party has presented affidavits or other matter indicating that summary judgment is appropriate. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 14 N.C. App. 567, 188 S.E.2d 661, rev'd on other grounds, 282 N.C. 44, 191 S.E.2d 683 (1972).

Section (e) of this rule requires an adverse party to do more than merely rely on his pleading if the movant supports his motion by affidavit or otherwise. Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978).

If the party moving for summary judgment successfully carries his burden of proof, the opposing party must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial, and he cannot rest upon the bare allegations or denials of his pleading. Hillman v. United States Liab. Ins. Co., 59 N.C. App. 145, 296 S.E.2d 302 (1982), cert. denied, 307 N.C. 468, 299 S.E.2d 221 (1983).

When the party moving for summary judgment presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment. Wachovia Bank & Trust Co. v. Grose, 64 N.C. App. 289, 307 S.E.2d 216 (1983), cert. denied, 311 N.C. 309, 317 S.E.2d 908 (1984).

Not every failure to respond to a motion for summary judgment will require the entry of summary judgment. The moving party must satisfy his burden of proving that there is no genuine issue of any material fact. However, when the moving party presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment. Whitley v. Coltrane, 65 N.C. App. 679, 309 S.E.2d 712 (1983).

The moving party has the burden of establishing a lack of triable issues of fact but the nonmoving party may not rest upon mere allegations of his pleadings. Cashion v. Texas Gulf, Inc., 79 N.C. App. 632, 339 S.E.2d 797 (1986).

The moving party, through his forecast of the evidence, has the burden of establishing a lack of triable issues of fact, but the nonmoving party may not rest upon the mere allegations of his pleadings. Johnson v. Builder's Transp., Inc., 79 N.C. App. 721, 340 S.E.2d 515 (1986).

A party may not withstand a motion for summary judgment by simply relying on its pleadings; the non-moving party must set forth specific facts by affidavits or as otherwise provided by G.S. 1A-1, N.C. R. Civ. P. 56(e), showing that there is a genuine issue of material fact for trial. The other methods for setting forth specific facts under Rule 56 are through depositions, answers to interrogatories, admissions on file, documentary materials, further affidavits, or oral testimony in some circumstances. If a party does not so respond, summary judgment, if appropriate, shall be entered against him. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

But Must Demonstrate Existence of a Genuine Issue. — A party against whom the motion for summary judgment is made may not rest upon the allegations or denials of his pleadings, but must demonstrate that there is a genuine issue for trial. Coakley v. Ford Motor Co., 11 N.C. App. 636, 182 S.E.2d 260, cert. denied, 279 N.C. 393, 183 S.E.2d 244 (1971); Pierce Concrete, Inc. v. Cannon Realty & Constr. Co., 75 N.C. App. 411, 335 S.E.2d 30 (1985).

When a movant makes out a convincing showing that genuine issues of fact are lacking, it is required that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists, and he does not do that by mere denial or holding back evidence. Patrick v. Hurdle, 16 N.C. App. 28, 190 S.E.2d 871, cert. denied, 282 N.C. 304, 192 S.E.2d 195 (1972).

If the moving party files papers, including testimonial affidavits, which show there is not a triable issue, the opposing party, pursuant to sections (e) and (f) of this rule, must file papers which show that there is a triable issue, or the moving party will be entitled to summary judgment. Nye v. Lipton, 50 N.C. App. 224, 273 S.E.2d 313, cert. denied, 302 N.C. 630, 280 S.E.2d 441 (1981); Town of Atlantic Beach v. Young, 58 N.C. App. 597, 293 S.E.2d 821 (1982), rev'd on other grounds, 307 N.C. 422, 298 S.E.2d 686, appeal dismissed, 462 U.S. 1101, 103 S. Ct. 2446, 77 L. Ed. 2d 1328 (1983).

Where a party has shown that he is entitled to relief and the opposing party offers not even the slightest suggestion of a genuine issue of fact, a motion for summary judgment should be granted. Carson v. Sutton, 35 N.C. App. 720, 242 S.E.2d 535 (1978).

Once the moving party meets his burden, the burden is then on the opposing party to show that a genuine issue of material fact exists. If the opponent fails to forecast such evidence, then the trial court's entry of summary judgment is proper. White v. Hunsinger, 88 N.C. App. 382, 363 S.E.2d 203 (1988).

Internet company failed to demonstrate a genuine issue of material fact for trial under G.S. 1A-1, N.C. R. Civ. P. 56(e), so the trial court did not err in granting summary judgment for a publishing company on the publishing company's claim for possession of computer servers that were in the internet company's possession. Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

Or Provide an Excuse for Not So Showing. — If the movant carries his burden of establishing prima facie that he is entitled to summary judgment, then his motion should be granted, unless the opposing party responds and shows either that a genuine issue of material fact exists or that he has an excuse for not so showing. Steel Creek Dev. Corp. v. Smith, 300 N.C. 631, 268 S.E.2d 205 (1980).

If the moving party meets his burden of proof, the party who opposes the motion for summary judgment must either show that a genuine issue of material fact for trial does exist or provide an excuse for not so doing. Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974); Vassey v. Burch, 301 N.C. 68, 269 S.E.2d 137 (1980); Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E.2d 54 (1980); Spivey v. White Motor Corp., 46 N.C. App. 313, 264 S.E.2d 772, cert. denied and appeal dismissed, 300 N.C. 559, 270 S.E.2d 111 (1980); Quality Inns Int'l, Inc. v. Booth, Fish, Simpson, Harrison & Hall, 58 N.C. App. 1, 292 S.E.2d 755 (1982); Bernick v. Jurden, 306 N.C. 435, 293 S.E.2d 405 (1982); Town of West Jefferson v. Edwards, 74 N.C. App. 377, 329 S.E.2d 407 (1985).

On motion for summary judgment, the burden on the moving party is to establish that there is no genuine issue as to any material fact remaining to be determined, and if the movant carries this burden by showing that an essential element of the opposing party's claim is nonexistent, then the burden shifts to the nonmoving party to either show that a genuine issue of material fact does exist or provide an excuse for not so doing. Blue Jeans Corp. v. Pinkerton, Inc., 51 N.C. App. 137, 275 S.E.2d 209 (1981).

Nonmovant Must Evince Existence of Triable Issue of Material Fact. — The party opposing summary judgment is not entitled to have the motion denied on the mere hope that at trial he will be able to discredit the movant's evidence; he must, at the hearing upon the motion for summary judgment, be able to evince the existence of a triable issue of material fact. Wachovia Bank & Trust Co. v. Grose, 64 N.C. App. 289, 307 S.E.2d 216 (1983), cert. denied, 311 N.C. 309, 317 S.E.2d 908 (1984).

Trial court did not err by granting summary judgment in favor of the defendants because, viewing the evidence in the light most favorable to the plaintiffs, there were no issues of material fact regarding the plaintiffs' claims. Furthermore, the plaintiffs offered only cursory legal support for the arguments but did not address how the evidence supported the elements of each of their claims. Kitchin v. Halifax County, — N.C. App. —, 665 S.E.2d 760, 2008 N.C. App. LEXIS 1624 (2008).

Nonmovant Must Set Forth Specific Facts. — This rule provides that the adverse party, when responding to a motion for summary judgment, must set forth specific facts showing that there is a genuine issue for trial. Beeson v. Moore, 31 N.C. App. 507, 229 S.E.2d

703 (1976), cert. denied, 291 N.C. 710, 232 S.E.2d 203 (1977).

An adequately supported motion for summary judgment triggers the opposing party's responsibility to come forward with facts, as distinguished from allegations, sufficient to indicate that he will be able to sustain his claim at trial. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

When the moving party presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978); Ballinger v. North Carolina Dep't of Revenue, 59 N.C. App. 508, 296 S.E.2d 836 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 645 (1983).

Outdoor advertising companies appealing the revocations of their permits for certain billboards, who were opposing a motion for summary judgment, did not meet the requirement of G.S. 1A-1, Rule 56(e) that they set forth specific facts because they made only extremely conclusory statements about their expenses to repair and improve their signs, their long-term contracts with customers wishing to rent space on the billboards, and unspecified business decisions made in reliance on the billboards being legal. Capital Outdoor, Inc. v. Tolson, 159 N.C. App. 55, 582 S.E.2d 717, 2003 N.C. App. LEXIS 1417 (2003), cert. denied, 357 N.C. 504, 587 S.E.2d 662 (2003).

By Affidavits or Otherwise. — Once a motion for summary judgment has been made and supported as provided by this rule, the opposing party may not rest upon the mere allegations and denials of his pleadings, but must come forth, by affidavits or as otherwise provided in this rule, with specific facts showing that a genuine issue for trial exists. Brice v. Moore, 30 N.C. App. 365, 226 S.E.2d 882 (1976); Cameron-Brown Capital Corp. v. Spencer, 31 N.C. App. 499, 229 S.E.2d 711 (1976), cert. denied, 291 N.C. 710, 232 S.E.2d 203 (1977); First Citizens Bank & Trust Co. v. Holland, 51 N.C. App. 529, 277 S.E.2d 108 (1981); Atkins v. Beasley, 53 N.C. App. 33, 279 S.E.2d 866 (1981).

When a motion for summary judgment is made and supported as provided in this rule, the response of an adverse party, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. Brevard v. Barkley, 12 N.C. App. 665, 184 S.E.2d 370 (1971); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972); Five Star Enters., Inc. v. Russell, 34 N.C. App. 275, 237 S.E.2d 859 (1977).

If the defendant moving for summary judgment successfully carries his burden of proof, the plaintiff must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial. Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970); Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971); Jarrell v. Samsonite Corp., 12 N.C. App. 673, 184 S.E.2d 376, cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1971); Caldwell v. Deese, 26 N.C. App. 435, 216 S.E.2d 452, rev'd on other grounds, 288 N.C. 375, 218 S.E.2d 379 (1975); Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975); Bentley v. Langley, 39 N.C. App. 20, 249 S.E.2d 481 (1978), cert. denied, 296 N.C. 735, 254 S.E.2d 176 (1979); Neihage v. Kittrell Auto Parts, Inc., 41 N.C. App. 538, 255 S.E.2d 315, cert. denied, 298 N.C. 298, 259 S.E.2d 914 (1979); Cockerham v. Ward, 44 N.C. App. 615, 262 S.E.2d 651, cert. denied, 300 N.C. 195, 269 S.E.2d 622 (1980).

Where a defendant seeking summary judgment carries his burden of proving a lack of genuine issue of fact for trial by evidentiary presumption or otherwise, the plaintiff may not rely on his bare allegations to the contrary but must, by affidavits or otherwise, set forth specific facts showing a genuine issue of fact for trial to defeat defendants' motion. Clifton v. Fesperman, 50 N.C. App. 178, 272 S.E.2d 624 (1980).

General Denial by Nonmovant Is Insufficient. — Once plaintiff has made and supported its motion for summary judgment, under section (e) of this rule the burden is on defendant to introduce evidence in opposition to the motion setting forth "specific facts showing that there is a genuine issue for trial." An answer filed by defendant which only generally denies the allegations of the complaint fails to do this. Stroup Sheet Metal Works, Inc. v. Heritage, Inc., 43 N.C. App. 27, 258 S.E.2d 77 (1979).

In order to resist a motion for summary judgment, it is incumbent upon the opposing party to show that he has, or will have, evidence sufficient to raise an issue of fact. This rule does not contemplate the use of affidavits merely to deny allegations in the pleadings. N.C. Monroe Constr. Co. v. Coan, 30 N.C. App. 731, 228 S.E.2d 497, cert. denied, 291 N.C. 323, 230 S.E.2d 676 (1976).

An answer filed by defendant as nonmovant which only generally denies the allegations of the complaint fails to raise a genuine issue of fact. An affidavit which merely reaffirms the allegations of the defendant's answer is also insufficient. Amoco Oil Co. v. Griffin, 78 N.C. App. 716, 338 S.E.2d 601, cert. denied, 316 N.C. 374, 342 S.E.2d 889 (1986).

Unverified Responses to Request for Admissions Do Not Constitute Affidavit. — Where defendant's responses to plaintiffs' request for admissions were not verified, they could not be deemed to be an affidavit; and as they were not in the category of "depositions, answers to interrogatories, and admissions on file" specified in G.S. 1A-1, Rule 56 as material that could be considered, they were insufficient to defeat plaintiffs' motion for summary judgment. Dixon v. Hill, 174 N.C. App. 252, 620 S.E.2d 715, 2005 N.C. App. LEXIS 2393 (2005), cert. denied, — U.S. —, 126 S. Ct. 2972, 165 L. Ed. 2d 954 (2006).

But party opposing motion for summary judgment does not have to establish that he would prevail on the issue involved, but merely that the issue exists. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976); Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985); Ward v. Durham Life Ins. Co., 90 N.C. App. 286, 368 S.E.2d 391, cert. granted, 322 N.C. 838, 371 S.E.2d 284 (1988), aff'd, 325 N.C. 202, 381 S.E.2d 698 (1989).

And Nonmovant Is Not Required to Make Out Prima Facie Case for Jury. — On a motion for summary judgment, the nonmovant is not required to come forward and make a prima facie case for the jury, as he would on a motion for directed verdict at trial. He is only required to show that he has evidence to contest such evidentiary matters as the movant may have produced in support of the motion that would, standing alone, defeat the action. Durham v. Vine, 40 N.C. App. 564, 253 S.E.2d 316 (1979), overruled on other grounds, Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 414 S.E.2d 339 (1992), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Rorrer v. Cooke, 69 N.C. App. 305, 317 S.E.2d 34 (1981), rev'd on other grounds, 313 N.C. 338, 329 S.E.2d 355 (1985).

Summary judgment is a device by which a defending party may force the claimant to produce a forecast of the claimant's evidence demonstrating that the claimant will, at trial, be able to make out at least a prima facie case, or that he will be able to surmount an affirmative defense; the claimant need not present all the evidence available in his favor, but only that necessary to rebut the defendant's showing that an essential element of his claim is nonexistent or that he cannot surmount an affirmative defense. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

In a hearing on a motion for summary judgment the nonmovant, unlike a plaintiff at trial, does not have to automatically make out a prima facie case, but only has to refute any showing made that his case is fatally deficient. Riddle v. Nelson, 84 N.C. App. 656, 353 S.E.2d 866 (1987).

Nor to Present Evidence as to All Elements of Claim. — As nonmovants at a hearing on a motion for summary judgment, defendants did not have to automatically present evidence as to all the elements of their counterclaim as they would at trial; they only had to refute any showing by plaintiffs that the claim was fatally deficient. Rose v. Lang, 85 N.C. App. 690, 355 S.E.2d 795 (1987).

Burden on Defendant-Movant in Cases Dependent on State of Mind. — Defendant-movant has a particularly difficult burden to carry in a case in which plaintiff's claim is dependent on proof that defendant acted with a particular state of mind, e.g., cases involving fraud, conspiracy, or bad faith. In such a case defendant-movant, in order to meet his initial burden on a motion for summary judgment, must at least produce more than a mere denial by affidavits that he acted with the state of mind alleged by plaintiff. His evidence in support of his motion must be of the necessary certitude to negative any one or more of the essential elements of plaintiff's claim. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979), aff'd, 53 N.C. App. 492, 281 S.E.2d 86 (1981).

Defendant's Response Held Inadequate. — In a suit against defendant as guarantor of payment on a promissory note, where defendant filed an affidavit in opposition to plaintiff's motion for summary judgment, but in it merely referred to the question of a material change made in the terms of the note, which issue had been raised in his answer, and did not set forth any specific facts to support his allegation of material alteration, his response to plaintiff's motion for summary judgment was inadequate. Better Adv., Inc. v. Peace, 43 N.C. App. 534, 259 S.E.2d 359 (1979), cert. denied, 299 N.C. 328, 265 S.E.2d 393 (1980).

Where in opposition to plaintiff's evidence, defendant's sole and only support was verified denial upon information and belief of forgery allegations in complaint, this was not sufficient to rebut affidavits based on personal knowledge, and since no excuse was offered for defendant's failure of proof, and the court was given no reason to believe that her position in the case would ever be stronger than it then was, judgment against her was correctly entered. Blackwell v. Massey, 69 N.C. App. 240, 316 S.E.2d 350 (1984).

Defendant's affidavit, which only restated the unsupported allegations previously made by the defendant in his answer and in his answers to plaintiff's interrogatories, was insufficient to withstand plaintiff's motion for summary judgment. Dixie Chem. Corp. v. Edwards, 68 N.C. App. 714, 315 S.E.2d 747 (1984).

Affiliated corporations' general denial as to the amount owed to a services provider contained in their answer, coupled with their general denial in their affidavit that they owed the provider anything, was insufficient to raise a genuine issue of material fact as to the amount of the debt; the trial court, therefore, did not err in granting partial summary judgment in favor of the services provider on its breach of contract claim and awarding damages. Excel Staffing Serv. v. HP Reidsville, Inc., 172 N.C. App. 281, 616 S.E.2d 349, 2005 N.C. App. LEXIS 1582 (2005).

Party may succeed on summary judgment motion upon the strength of his own evidence or the weakness of the opposing party's evidence when such a forecast of that evidence can be obtained in discovery or in response to movant's prima facie showing on the motion. Steel Creek Dev. Corp. v. Smith, 300 N.C. 631, 268 S.E.2d 205 (1980).

For summary judgment to be appropriate for the party with the burden of persuasion he must still succeed on the strength of his own evidence, even though his affidavits and supporting material are not challenged as provided by sections (e) and (f) of this rule. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

V. FUNCTION OF TRIAL COURT.

Court Is Not Authorized to Decide Issues of Fact. — This rule does not authorize the court to decide an issue of fact. Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975).

Under section (c) of this rule the trial judge does not sit as fact finder as is true under G.S. 1A-1, Rule 52. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

In ruling on a motion for summary judgment, the court should not decide issues of fact. However, summary judgments should be looked upon with favor where no genuine issue of material fact is presented. Joel T. Cheatham, Inc. v. Hall, 64 N.C. App. 678, 308 S.E.2d 457 (1983).

The court is not authorized to decide an issue of fact but to determine if such an issue exists. Campbell v. Board of Educ., 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

In ruling on a motion for summary judgment, the court does not resolve issues of fact, and must deny the motion if there is any genuine issue of material fact. Warren v. Rosso & Mastracco, Inc., 78 N.C. App. 163, 336 S.E.2d 699 (1985).

Nor to Make Findings of Facts and Conclusions of Law. — It is not a part of the function of the court on a motion for summary judgment to make findings of fact and conclusions of law. Capps v. City of Raleigh, 35 N.C. App. 290, 241 S.E.2d 527 (1978); Sainz v. Sainz, 36 N.C. App. 744, 245 S.E.2d 372 (1978); Marshall v. Keaveny, 38 N.C. App. 644, 248 S.E.2d 750 (1978).

There is no necessity for findings of fact where facts are not at issue, and summary judgment presupposes that there are no triable issues of material fact. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

The court went far beyond the purview of summary judgment when it treated the hearing on the motion as a nonjury trial of the case on the merits, found facts on conflicting evidence, made conclusions of law, and entered final judgment between the parties. Stonestreet v. Compton Motors, Inc., 18 N.C. App. 527, 197 S.E.2d 579 (1973).

Findings of fact in a summary judgment order are ill advised because they indicate that a question of fact was presented and resolved by the trial court. Amoco Oil Co. v. Griffin, 78 N.C. App. 716, 338 S.E.2d 601, cert. denied, 316 N.C. 374, 342 S.E.2d 889 (1986).

A trial judge is not required to make findings of fact for summary judgment. Amoco Oil Co. v. Griffin, 78 N.C. App. 716, 338 S.E.2d 601, cert. denied, 316 N.C. 374, 342 S.E.2d 889 (1986).

A trial judge is not required to make findings of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. White v. Town of Emerald Isle, 82 N.C. App. 392, 346 S.E.2d 176, cert. denied, 318 N.C. 511, 349 S.E.2d 874 (1986).

When the trial court granted a motion for summary judgment, it was inappropriate for the trial court to set forth findings addressing issues upon which evidence was conflicting. Upon a motion for summary judgment it was no part of the trial court's function to decide issues of fact but solely to determine whether there was an issue of fact to be tried. Craddock v. Craddock, 188 N.C. App. 806, 656 S.E.2d 716, 2008 N.C. App. LEXIS 273 (2008).

But to Determine Whether Genuine Issues of Material Fact Exist. — It is not the duty of the court hearing a motion for summary judgment to decide an issue of fact, but rather to determine whether a genuine issue as to any material fact exists. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970); Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971); Clear Fir Sales Co. v. Carolina Plywood Distrib., Inc., 13 N.C. App. 429, 185 S.E.2d 737 (1972); Keith v. G.D. Reddick, Inc., 15 N.C. App. 94, 189 S.E.2d 775 (1972); Long v. Long, 15 N.C. App. 525, 190 S.E.2d 415 (1972); Lowman v. Huffman, 15 N.C. App. 700, 190 S.E.2d 700 (1972); Graham v. Northwestern Bank, 16 N.C. App. 287, 192 S.E.2d 109, cert. denied, 287 N.C. 426, 192 S.E.2d 836 (1972); Houck v. Overcash, 282 N.C. 623, 193 S.E.2d 905 (1973); Stonestreet v. Compton Motors, Inc., 18 N.C. App. 527, 197 S.E.2d 579 (1973); Nationwide Mut. Ins. Co. v. Chantos, 25 N.C. App. 482, 214 S.E.2d 438, cert. denied, 287 N.C. 465, 215 S.E.2d 624 (1975); Reavis v. Campbell, 27 N.C. App. 231, 218 S.E.2d 873 (1975); Lambert v. Duke Power Co., 32 N.C. App. 169, 231 S.E.2d 31, cert. denied, 292 N.C. 265, 233 S.E.2d 392 (1977); Vassey v. Burch, 301 N.C. 68, 269 S.E.2d 137 (1980); Flippin v. Jarrell, 301 N.C. 108, 270 S.E.2d 482 (1980), rehearing denied, 301 N.C. 727, 274 S.E.2d 228 (1981); Thompson v. Northwestern Sec. Life Ins. Co., 44 N.C. App. 668, 262 S.E.2d 397, cert. denied, 300 N.C. 202, 269 S.E.2d 620 (1980); Bone Int'l, Inc. v. Brooks, 51 N.C. App. 183, 275 S.E.2d 556, rev'd on other grounds, 304 N.C. 371, 283 S.E.2d 518 (1981); Gore v. Hill, 52 N.C. App. 620, 279 S.E.2d 102, cert. denied, 303 N.C. 710 (1981); Texaco, Inc. v. Creel, 57 N.C. App. 611, 292 S.E.2d 130, aff'd, 310 N.C. 695, 314 S.E.2d 506 (1984); Shew v. Southern Fire & Cas. Co., 58 N.C. App. 637, 294 S.E.2d 233 (1982), rev'd on other grounds, 307 N.C. 438, 298 S.E.2d 380 (1983); Godwin Sprayers, Inc. v. Utica Mut. Ins. Co., 59 N.C. App. 497, 296 S.E.2d 843 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 646 (1983); Narron v. Hardee's Food Sys., 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985); Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986), cert. granted as to additional issues, 315 N.C. 390, 338 S.E.2d 879 (1986); Barnes v. Wilson Hdwe. Co., 77 N.C. App. 773, 336 S.E.2d 457 (1985); Johnson v. Builder's Transp., Inc., 79 N.C. App. 721, 340 S.E.2d 515 (1986).

In ruling on a motion for summary judgment, the court does not resolve issues of fact, but goes beyond the pleadings to determine whether there is a genuine issue of material fact. Zimmerman v. Hogg & Allen, 286 N.C. 24, 209 S.E.2d 795 (1974).

It is not the province of the court to find the facts upon a motion for summary judgment. Its province is to determine whether there are genuine issues of material fact in dispute. Eggimann v. Wake County Bd. of Educ., 22 N.C. App. 459, 206 S.E.2d 754, cert. denied, 285 N.C. 756, 209 S.E.2d 280 (1974).

In passing upon a motion for summary judgment, the court does not decide facts, but makes a determination as to whether an issue exists which is germane to the action. Furst v. Loftin, 29 N.C. App. 248, 224 S.E.2d 641 (1976), overruled on other grounds, Connolly v. Potts, 63 N.C. App. 547, 306 S.E.2d 123 (1983); Nytco Leasing, Inc. v. Dan-Cleve Corp., 31 N.C. App. 634, 230 S.E.2d 559 (1976), cert. denied, 292 N.C. 265, 233 S.E.2d 393 (1977); Wachovia Bank & Trust Co. v. Peace Broadcasting Corp., 32 N.C. App. 655, 233 S.E.2d 687, cert. denied, 292 N.C. 734, 235 S.E.2d 788 (1977); Reid v. Reid, 32 N.C. App. 750, 233 S.E.2d 620 (1977).

The judge's role in ruling on a motion for summary judgment is to determine whether any material issues of fact exist that require trial. Wachovia Mtg. Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 S.E.2d 727 (1978), aff'd, 297 N.C. 696, 256 S.E.2d 688 (1979); Stroup Sheet Metal Works, Inc. v. Heritage, Inc., 43 N.C. App. 27, 258 S.E.2d 77 (1979); Reed's Jewelers, Inc. v. ADT Co., 43 N.C. App. 744, 260 S.E.2d 107 (1979); DeCarlo v. Gerryco, Inc., 46 N.C. App. 15, 264 S.E.2d 370; Stanback v. Stanback, 53 N.C. App. 243, 280 S.E.2d 498, cert. denied, 304 N.C. 197, 285 S.E.2d 101 (1981); Land-of-Sky Regional Council v. County of Henderson, 78 N.C. App. 85, 336 S.E.2d 653 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

Summary judgment does not authorize the court to decide an issue of fact. It authorizes the court to determine whether a genuine issue of fact exists. Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983); Elmore's Feed & Seed, Inc. v. Patrick, 62 N.C. App. 715, 303 S.E.2d 394 (1983); Justus v. Deutsch, 62 N.C. App. 711, 303 S.E.2d 571, cert. denied, 309 N.C. 821, 310 S.E.2d 349 (1983).

The judge's role is to determine from the forecast of the evidence if there is a material issue of fact that is triable. Lawson v. Lawson, 84 N.C. App. 51, 351 S.E.2d 794, rev'd on other grounds, 321 N.C. 274, 362 S.E.2d 269 (1987).

In determining whether summary judgment is appropriate, the judge's function is not to decide the truth of issues raised by the pleadings and other materials of record, but to determine whether any genuine issue of material fact exists that requires adjudication. Avriett v. Avriett, 88 N.C. App. 506, 363 S.E.2d 875, aff'd, 322 N.C. 468, 368 S.E.2d 377 (1988).

Appellate court's standard to review the grant of a motion for summary judgment is whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law, in accordance with G.S. 1A-1, N.C. R. Civ. P. 56(c). McGlynn v. Duke Univ., 165 N.C. App. 250, 598 S.E.2d 424, 2004 N.C. App. LEXIS 1151 (2004).

And Whether a Party Is Entitled to Judgment as a Matter of Law. — Function of trial judge is to examine the materials, determine what facts are established and conclude whether there is a genuine issue as to any material fact and if a party is entitled to judgment as a matter of law. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

Section 1A-1, Rule 52(a)(2) does not apply to the decision on a summary judgment motion, because if findings of fact are necessary to resolve an issue summary judgment is improper. Mosley v. National Fin. Co., 36 N.C. App. 109, 243 S.E.2d 145, cert. denied, 295 N.C. 467, 246 S.E.2d 9 (1978); Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760, cert. denied, 301 N.C. 105, 273 S.E.2d 310 (1980); White v. Town of Emerald Isle, 82 N.C. App.

392, 346 S.E.2d 176, cert. denied, 318 N.C. 511, 349 S.E.2d 874 (1986).

Unless Hearing Is Extended into Court Trial. — If the summary judgment hearing is a protracted hearing, in effect a trial to determine that a trial must be held, and if all the parties desire to and do turn the summary judgment into a court trial, they cannot be heard to object. In that event the court should make findings of fact and conclusions of law in accordance with G.S. 1A-1, Rule 52. Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975); Nytco Leasing, Inc. v. Dan-Cleve Corp., 31 N.C. App. 634, 230 S.E.2d 559 (1976), cert. denied, 292 N.C. 265, 233 S.E.2d 393 (1977); Moore v. Galloway, 35 N.C. App. 394, 241 S.E.2d 386 (1978); PMB, Inc. v. Rosenfeld, 48 N.C. App. 736, 269 S.E.2d 748 (1980), cert. denied, 301 N.C. 722, 274 S.E.2d 231 (1981).

If the facts are not in dispute, there is no need to "find facts." If there is a need to "find facts," then summary judgment will not be appropriate if those facts are material. Capps v. City of Raleigh, 35 N.C. App. 290, 241 S.E.2d 527 (1978); Strickland v. Tant, 41 N.C. App. 534, 255 S.E.2d 325, cert. denied, 298 N.C. 304, 259 S.E.2d 917 (1979).

However, findings of fact and conclusions of law do not render a summary judgment void or voidable, and may be helpful, if the facts are not at issue and support the judgment. Mosley v. National Fin. Co., 36 N.C. App. 109, 243 S.E.2d 145, cert. denied, 295 N.C. 467, 246 S.E.2d 9 (1978); Stone v. Conder, 46 N.C. App. 190, 264 S.E.2d 760, cert. denied, 301 N.C. 105 (1980); PMB, Inc. v. Rosenfeld, 48 N.C. App. 736, 269 S.E.2d 748 (1980), cert. denied, 301 N.C. 722, 274 S.E.2d 231 (1981).

Although a trial judge was not required to make and enter into the record detailed findings of fact in ruling on a motion for summary judgment, it was not error for the court to do so, where there was plenary evidence in the record to support his findings. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972).

Although trial court's detailed findings of fact on granting summary judgment were irregular and unnecessary, nevertheless plaintiff was not prejudiced by such findings, even assuming arguendo that some of them were erroneous, where the materials before the court established without contradiction that plaintiff's action was fatally deficient. Avriett v. Avriett, 88 N.C. App. 506, 363 S.E.2d 875, aff'd, 322 N.C. 468, 368 S.E.2d 377 (1988).

As a Summary of Undisputed Facts Justifying Entry of Judgment. — Although findings of fact are not necessary on a motion for summary judgment, it is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

The action by the trial judge in making findings of fact was without error where his stated findings were merely a summary of the material facts not at issue which he thought justified entry of judgment. Wachovia Bank & Trust Co. v. Peace Broadcasting Corp., 32 N.C. App. 655, 233 S.E.2d 687, cert. denied, 292 N.C. 734, 235 S.E.2d 788 (1977).

In rare situations it can be helpful for the trial court to set out the undisputed facts which form the basis for his summary judgment. When that appears helpful or necessary, the court should let the judgment show that the facts set out therein are the undisputed facts. Capps v. City of Raleigh, 35 N.C. App. 290, 241 S.E.2d 527 (1978).

In ruling on a motion for summary judgment the trial judge does not make findings of fact, which are decisions upon conflicting evidence, but he may properly list the uncontroverted material facts which are the basis of his conclusions of law and judgment. Rodgerson v. Davis, 27 N.C. App. 173, 218 S.E.2d 471, cert. denied, 288 N.C. 731, 220 S.E.2d 351 (1975); A-S-P Assocs. v. City of Raleigh, 38 N.C. App. 271, 247 S.E.2d 800 (1978), rev'd on other grounds, 298 N.C. 207, 258 S.E.2d 444 (1979).

Orders granting summary judgment under this rule do not normally contain detailed findings of fact. However, if the findings of fact are actually the trial court's summation of the undisputed facts which support the judgment, findings of fact and conclusions of law do not render a summary judgment void or voidable. Noel Williams Masonry, Inc. v. Vision Contractors, 103 N.C. App. 597, 406 S.E.2d 605 (1991).

Granting of a Continuance. — Review of the record failed to reveal an abuse of discretion on the part of the trial court in denying defendants' motion for continuance. HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc., 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

Consideration of Findings on Appeal. — Findings of fact on summary judgment entered by the trial judge, insofar as they may resolve issues as to a material fact, have no effect on appeal and are irrelevant to appeal decision. Hyde Ins. Agency, Inc. v. Dixie Leasing Corp., 26 N.C. App. 138, 215 S.E.2d 162 (1975).

A trial judge is not required to make findings of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal.

Mosley v. National Fin. Co., 36 N.C. App. 109, 243 S.E.2d 145, cert. denied, 295 N.C. 467, 246 S.E.2d 9 (1979).

VI. EVIDENCE ON MOTION.

A. In General.

What Evidence May Be Considered on Motion for Summary Judgment. — Evidence which may be considered under this rule includes admissions in the pleadings, depositions on file, answers to interrogatories under G.S. 1A-1, Rule 33, admissions on file whether obtained under G.S. 1A-1, Rule 36 or in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); Riggins v. County of Mecklenburg, 14 N.C. App. 624, 188 S.E.2d 749 (1972); Jernigan v. State Farm Mut. Auto. Ins. Co., 16 N.C. App. 46, 190 S.E.2d 866 (1972).

On a motion for summary judgment the court may consider admissions in the pleadings, depositions, answers to interrogatories, affidavits, admissions on file, oral testimony, documentary materials, facts which are subject to judicial notice, such presumptions as would be available upon trial, and any other materials which would be admissible in evidence at trial. Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897, rehearing denied, 281 N.C. 516 (1972); Booe v. Hall, 24 N.C. App. 276, 210 S.E.2d 293 (1974); Butler v. Berkeley, 25 N.C. App. 325, 213 S.E.2d 571 (1975); Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978).

When the motion for summary judgment comes on to be heard, the court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials; and the court may also consider facts which are subject to judicial notice and any presumptions that would be available at trial. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975); Gebb v. Gebb, 67 N.C. App. 104, 312 S.E.2d 691 (1984).

On a motion for summary judgement the court may consider affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice and any other materials which would be admissible in evidence at trial. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

The court may consider, at the hearing on the motion for summary judgment, pleadings, affidavits which meet the requirements of section (e) of this rule, depositions, answers to interrogatories, admissions, oral testimony, documentary material, facts subject to judicial notice and such presumptions as would be available at trial. Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 204 (1977).

This rule does not limit consideration of a motion for summary judgment to the pleadings; the court may consider depositions, answers to interrogatories, admissions on file and affidavits. Ridings v. Ridings, 55 N.C. App. 630, 286 S.E.2d 614, cert. denied, 305 N.C. 586, 292 S.E.2d 571 (1982).

As a document properly served and filed in a case, the trial court was entitled to consider a memorandum in which the plaintiff withdrew one of its causes of action as a matter outside the pleading when it ruled on a motion for summary judgment. Shroyer v. County of Mecklenburg, 154 N.C. App. 163, 571 S.E.2d 849, 2002 N.C. App. LEXIS 1402 (2002).

Affidavits submitted at summary judgment must meet the requirements of G.S. 1A-1, N.C. R. Civ. P. 56(e). Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

Facts required to support summary judgment must be established by pleadings, depositions, answers to interrogatories, admissions or affidavits. Cieszko v. Clark, 92 N.C. App. 290, 374 S.E.2d 456 (1988).

Deposition Denied Where Not Relevant to Limited Issues of Immunity of School Board. — Where a trial court had bifurcated issues in an action by a student and her parents against a school board and other school board entities, arising from a traffic control gate having come down on the student's car as she was departing the school, such that the initial issues on a motion for summary judgment by the school boards related to whether they had immunity and, if so, whether such immunity was waived, it was proper to deny the parents' and student's request to depose an individual, pursuant to subsection (f) of this rule; the deposition was sought for purposes of showing the extent of claims made and paid against the school boards, but since the boards had already provided that information through other discovery devices, no new information relevant to the limited issues was presented that justified the deposition. Ripellino v. N.C. Sch. Bds. Ass'n, 158 N.C. App. 423, 581 S.E.2d 88, 2003 N.C. App. LEXIS 1184 (2003), cert. denied, 358 N.C. 156, 592 S.E.2d 694 (2004).

A motion for summary judgment allows one party to force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. Dixie Chem. Corp. v. Edwards, 68 N.C. App. 714, 315 S.E.2d 747 (1984).

Summary judgment is a device by which a

defending party may force the claimant to produce a forecast of claimant's evidence demonstrating that claimant will, at trial, be able to make out at least a prima facie case or that he will be able to surmount an affirmative defense. Snipes v. Jackson, 69 N.C. App. 64, 316 S.E.2d 657, cert. denied and appeal dismissed, 312 N.C. 85, 321 S.E.2d 899 (1984).

Affidavits Must Be Served Prior to Hearing. — Because affidavit was not served prior to the day of hearing, the trial court abused its discretion in failing to exclude it. Wells v. Consolidated Judicial Retirement Sys., 136 N.C. App. 671, 526 S.E.2d 486, 2000 N.C. App. LEXIS 162 (2000), aff'd, 354 N.C. 313, 553 S.E.2d 877 (2001).

Trial court did not abuse its discretion by excluding an affidavit that was submitted less than two business days before the hearing on the summary judgment motion. HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc., 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

But Other Evidence Need Not Be Served Prior to Hearing. — Because this rule does not specify that forms of evidence, other than affidavits, be presented at any particular time, much less prior to the hearing, the court could not conclude that plaintiffs violated this section by presenting excerpts from a publication in opposition to the motion while the summary judgment hearing was underway. Pierson v. Cumberland County Civic Ctr. Comm'n, 141 N.C. App. 628, 540 S.E.2d 810, 2000 N.C. App. LEXIS 1394 (2000).

Affidavits, etc., Setting Forth Inadmissible Facts Not to Be Considered. — The converse of the requirement set forth in section (e) of this rule is that affidavits or other material offered which set forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment. Borden, Inc. v. Brower, 17 N.C. App. 249, 193 S.E.2d 751, rev'd on other grounds, 284 N.C. 54, 199 S.E.2d 414 (1973).

Unless Unchallenged. — Uncertified or otherwise inadmissible documents may be considered by the court if not challenged by means of a timely objection. Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978).

Affidavits Must Be Based on "Personal Knowledge." — Affidavits submitted by senior vice president for medical staff affairs in support of defendant/hospital's motion for summary judgment were based on a review of facts with which he was familiar, not on the requisite "personal knowledge," and their admission was, therefore, error. Hylton v. Koontz, 138 N.C. App. 511, 530 S.E.2d 108, 2000 N.C. App. LEXIS 787 (2000).

Supporting and opposing affidavits at summary judgment shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. G.S. 1A-1, N.C. R. Civ. P. 56(e). The converse of this requirement is that affidavits or other material offered which set forth facts which would not be admissible in evidence should not be considered when passing on a motion for summary judgment. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

Affidavit statements based on hearsay would not be admissible in evidence and should not be considered in passing on a motion for summary judgment. Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970).

If an affidavit at summary judgment contains hearsay matters or statements not based on an affiant's personal knowledge, a court should not consider those portions of the affidavit. Similarly, if an affidavit sets forth facts that would be inadmissible in evidence, such portions should be struck by the trial court. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

Legal Conclusions are Inadmissible. — An affiant's legal conclusions, as opposed to facts as would be admissible in evidence, are not to be considered by a trial court on a motion for summary judgment. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

Trial court correctly struck plaintiff's affidavits supporting her motion for summary judgment where portions of each of her affidavits were inadmissible hearsay, irrelevant, or violative of the parole evidence rule, while the portions that would remain after striking the improper statements provided no support to the motion for summary judgment. Williamson v. Bullington, 139 N.C. App. 571, 534 S.E.2d 254, 2000 N.C. App. LEXIS 987 (2000), aff'd, 353 N.C. 363, 544 S.E.2d 221 (2001).

Statements by a private investigator as to what a witness to an accident told him about the accident did not meet the requirements of G.S. 1A-1, N.C. R. Civ. P. 56(e); therefore, these portions of the plaintiff's affidavits were properly stricken as inadmissible hearsay, irrelevant, or violative of the parole evidence rule, and the portions of the affidavits that remained provided no support to the plaintiff at summary judgment. Furthermore, the plaintiff offered no evidence that the proffered statement possessed certain circumstantial guarantees of trustworthiness that would justify its admission. Therefore, the trial court properly granted summary judgment to the defendants. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

Oral Testimony Is Admissible. — Oral testimony at a hearing on a motion for summary judgment is admissible by virtue of G.S. 1A-1, Rule 43(e). Walton v. Meir, 14 N.C. App. 183, 188 S.E.2d 56, cert. denied, 281 N.C. 515, 189 S.E.2d 35 (1972).

Oral testimony on a motion for summary judgment may be admissible in proper cases under G.S. 1A-1, Rule 43(e). Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

Oral testimony may be introduced into the record at the summary judgment hearing as long as it is not used overzealously. Propst Constr. Co. v. North Carolina Dep't of Transp., 56 N.C. App. 759, 290 S.E.2d 387, modified, 307 N.C. 124, 296 S.E.2d 295 (1982).

While under G.S. 1A-1, Rule 43(e) oral testimony is permissible on a motion for summary judgment, the admission of such testimony is in the court's discretion. Hillman v. United States Liab. Ins. Co., 59 N.C. App. 145, 296 S.E.2d 302 (1982), cert. denied, 307 N.C. 468, 299 S.E.2d 221 (1983).

In limited cases, oral testimony at a hearing on a motion for summary judgment may be offered; however, a trial court is only to rely on such testimony in a supplementary capacity, to provide a small link of required evidence, but not as the main evidentiary body of the hearing. A trial court may also consider arguments of counsel as long as the arguments are not considered as facts or evidence. Strickland v. Doe, 156 N.C. App. 292, 577 S.E.2d 124, 2003 N.C. App. LEXIS 115 (2003), cert. denied, 357 N.C. 169, 581 S.E.2d 447 (2003).

But Should Be Used Only in Supplementary Capacity. — Under G.S. 1A-1, Rule 43(e), oral testimony offered at a hearing on a motion for summary judgment should be used only in a supplementary capacity, to provide a small link of required evidence, and not as the main evidentiary body of the hearing. Nationwide Mut. Ins. Co. v. Chantos, 21 N.C. App. 129, 203 S.E.2d 421 (1974).

Although G.S. 1A-1, Rule 43(e) permits the court to hear oral testimony in ruling on a motion for summary judgment, this procedure should normally be utilized only if a small link of evidence is needed, and not for a long drawn out hearing to determine whether there is to be a trial. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

Nonexpert opinion on ultimate issues may not be relied on to defend against summary judgment. Whether expert opinion on ultimate issues so presented may be relied on is not clear. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Unpled affirmative defenses may be heard for the first time on motion for summary judgment even though not asserted in the answer, at least where both parties are aware of the defense. Gillis v. Whitley's Disct. Auto Sales, Inc., 70 N.C. App. 270, 319 S.E.2d 661 (1984).

The nature of summary judgment procedure coupled with the generally liberal rules relating to amendment of pleadings, require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment. C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 66 N.C. App. 170, 310 S.E.2d 615, rev'd on other grounds, 311 N.C. 170, 316 S.E.2d 298 (1984).

Arguments of Counsel. — On a motion for summary judgment the court may consider the arguments of counsel as long as the arguments are not considered as facts or evidence. Gebb v. Gebb, 67 N.C. App. 104, 312 S.E.2d 691 (1984).

Information adduced from counsel during oral arguments cannot be used to support a motion for summary judgment. Huss v. Huss, 31 N.C. App. 463, 230 S.E.2d 159 (1976).

A certified arbitration award and confirmation order may be considered by the trial judge in ruling on plaintiff's motion for summary judgment on the amount of its lien in an action to enforce a mechanics' lien, and absent any evidence to the contrary, would be sufficient to show that there is no material issue of fact as regards the amount owing plaintiff under the contract. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

Court Must Consider All Evidence Before It. — The procedure under this rule being designed to allow a preview or forecast of evidence or proof of the parties in order to determine whether a jury trial is necessary and to allow the trial court to "pierce the pleadings" to determine whether any genuine factual controversy exists, it is therefore incumbent on the trial court to consider all of the papers before it on hearing the motion in order to make an appropriate disposition of the motion. Seay v. Allstate Ins. Co., 59 N.C. App. 220, 296 S.E.2d 30 (1982).

Striking of Inadmissible Evidence Because of Parole Evidence Rule. — Where pleadings, affidavits, and deposition offered by defendant did not set forth facts that would be admissible in evidence because of the parole evidence rule, such evidence was properly stricken. Borden, Inc. v. Brower, 284 N.C. 54, 199 S.E.2d 414 (1973); North Carolina Nat'l Bank v. Gillespie, 291 N.C. 303, 230 S.E.2d 375 (1976).

Where the record did not show that plaintiff objected to parol evidence in the form of affidavits submitted by the defendants, the facts set out in these affidavits were competent evidence to be considered by the trial court in ruling upon motions for summary judgment. Lindsey v. North Carolina Farm Bureau Mut. Ins. Co., 103 N.C. App. 432, 405 S.E.2d 803 (1991).

Unopposed Evidence Supporting Motion May Not Be Sufficient. — The evidentiary matter supporting the moving party's motion may not be sufficient to satisfy his burden of proof, even though the opposing party fails to present any competent counteraffidavits or other materials. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972).

Acceptance of Statements in Affidavits Dependent on Credibility. — Affidavits in a motion for summary judgment do not supply all the needed proof. The statements in the affidavits may not suffice, because their acceptance as proof depends on credibility. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

And Court Need Not Find Uncontradicted Affidavits and Proof Credible. — The trial court is not required to assign credibility to a party's affidavits merely because they are uncontradicted. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Movant's uncontradicted and unimpeached proofs in support of his motion for summary judgment do not import veracity merely because they are uncontradicted by the opposing party. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Courts are slow to grant summary judgment when movant presents his own affidavit concerning facts peculiarly within his knowledge. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Summary judgment may not be granted in favor of the party having the burden of proof when his right to recover depends upon credibility of his witnesses. Shearin v. National Indem. Co., 27 N.C. App. 88, 218 S.E.2d 207 (1975).

When Motion May Be Granted on Basis of Party's Own Affidavits. — Summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits: (1) When there are only latent doubts as to affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize section (f) of this rule; and (3) when summary judgment is otherwise appropriate. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976); Taylor v. City of Raleigh, 290 N.C. 608, 227 S.E.2d 576 (1976); Wachovia Bank & Trust Co. v. Peace Broadcasting Corp., 32 N.C. App. 655, 233 S.E.2d 687, cert. denied, 292 N.C. 734, 235 S.E.2d 788 (1977); Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978); Carson v. Sutton, 35 N.C. App. 720, 242 S.E.2d 535 (1978); Fitzgerald v. Wolf, 40 N.C. App. 197, 252 S.E.2d 523 (1979); Courtney v. Courtney, 40 N.C. App. 291, 253 S.E.2d 2 (1979); Lula Conrad Hoots Mem. Hosp. v. Hoots, 40 N.C. App. 595, 253 S.E.2d 330, cert. denied, 297 N.C. 609, 257 S.E.2d 218 (1979); Stroup Sheet Metal Works, Inc. v. Heritage, Inc., 43 N.C. App. 27, 258 S.E.2d 77 (1979); Brooks v. Mount Airy Rainbow Farms Center, Inc., 48 N.C. App. 726, 269 S.E.2d 704 (1980).

Summary judgment may be proper even where based in part upon the affidavits of the movant and his witnesses where there are only latent doubts as to the credibility of the affiants. North Carolina State Bd. of Registration v. IBM Corp., 31 N.C. App. 599, 230 S.E.2d 552 (1976).

Effect of Prior Judicial Admissions by Party. — Vehicular passenger's prior testimony in two lawsuits, in which the passenger stated that the driver of another vehicle was at fault for an auto accident, unequivocally and unambiguously repudiated the allegations in the passenger's complaint and affidavit against the driver of the vehicle in which the passenger was riding. Therefore, the passenger's prior statements constituted judicial admissions by which the passenger was bound. Hash v. Estate of Henley, 190 N.C. App. 645, 661 S.E.2d 52, 2008 N.C. App. LEXIS 1229 (2008).

Reliance on Uncontradicted Affidavit as to Nonexistence of Genuine Issue. — Party with the burden of proof may be entitled to summary judgment where he relies on the uncontradicted affidavit of a witness to establish that a genuine issue does not exist as to a material fact. If the circumstances show, however, that a material issue exists, the motion should be denied. Lacy J. Miller Mach. Co. v. Miller, 58 N.C. App. 300, 293 S.E.2d 622, cert. denied, 306 N.C. 743, 295 S.E.2d 478 (1982).

Court should not resolve an issue of credibility or conduct a "trial by affidavits" at a hearing on a motion for summary judgment, especially in cases where knowledge of the fact is largely under the control of the movants. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

A "trial by affidavits" at a hearing on a motion for summary judgment is clearly impermissible. Wall v. Flack, 15 N.C. App. 747, 190 S.E.2d 671 (1972).

The trial court, upon motion for summary judgment under this rule, should not undertake to resolve an issue of credibility. Commercial Credit Corp. v. McCorkle, 19 N.C. App. 397, 198 S.E.2d 736 (1973).

If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); City of Thomasville v. Lease-Afex, Inc., 300 N.C. 651, 268 S.E.2d 190 (1980).

Credibility Not to Be Determined by Paper Affirmations or Denials. — Absent an unequivocal waiver of a trial on oral testimony, credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness' demeanor. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

Credibility of Testimony of Interested Witnesses to Be Submitted to Jury. — The fact that a witness is interested in the result of the suit has been held to be sufficient to require the credibility of his testimony to be submitted to the jury. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

Where plaintiffs' interest necessarily raises a question of the credibility of their testimony in support of their motion for summary judgment, and their testimony cannot, under any circumstances, be accorded credibility as a matter of law, summary judgment would be inappropriate. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Party may not defeat summary judgment by presenting deposition testimony which contradicts prior judicial admissions of his pleadings. Rollins v. Junior Miller Roofing Co., 55 N.C. App. 158, 284 S.E.2d 697 (1981).

Testimony contained in an affidavit of nonmovant which contradicts his prior sworn testimony may not be used by him to defeat a summary judgment motion where the only issue of fact raised by the affidavit is the credibility of the affiant. Wachovia Mtg. Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 S.E.2d 727 (1978), aff'd, 297 N.C. 696, 256 S.E.2d 688 (1979).

Prima Facie Evidence of Negligent Supervision. — Plaintiff's forecast of evidence was sufficient to demonstrate that she could make out a prima facie case of negligent supervision. Rouse v. Pitt County Mem. Hosp., 116 N.C. App. 241, 447 S.E.2d 505 (1994), aff'd, 343 N.C. 186, 470 S.E.2d 44 (1996).

If different material conclusions can be drawn from the evidence, summary judgment should be denied, even though the evidence is uncontradicted. Durham v. Vine, 40 N.C. App. 564, 253 S.E.2d 316 (1979), overruled on other grounds, Roumillat v. Simplistic Enters., Inc., 331 N.C. 57, 414 S.E.2d 339 (1992), overruled on other grounds, Nelson v. Freeland, 349 N.C. 615, 507 S.E.2d 882 (1998); Spector United Employees Credit Union v. Smith, 45 N.C. App. 432, 263 S.E.2d 319 (1980).

Where the evidence of the party to be awarded summary judgment is self-contradictory or allows reasonable inferences inconsistent with conclusions necessary to entitle that party to summary judgment, the trial court should not enter summary judgment and should allow the case to proceed to trial. A-S-P Assocs. v. City of Raleigh, 38 N.C. App. 271, 247 S.E.2d 800 (1978), rev'd on other grounds, 298 N.C. 207, 258 S.E.2d 444 (1979).

Summary judgment should be denied if different material conclusions can be drawn from the evidence. Godwin Sprayers, Inc. v. Utica Mut. Ins. Co., 59 N.C. App. 497, 296 S.E.2d 843 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 646 (1983); Carlton v. Carlton, 74 N.C. App. 690, 329 S.E.2d 682 (1985); Warren v. Rosso & Mastracco, Inc., 78 N.C. App. 163, 336 S.E.2d 699 (1985); Herbert v. Browning-Ferris Indus. of S. Atl., Inc., 90 N.C. App. 339, 368 S.E.2d 416 (1988).

As Where Moving Papers Affirmatively Disclose a Material Controversy. — Where the moving papers affirmatively disclose that the nature of the controversy presents a good faith and actual, as distinguished from formal, dispute on one or more material issues, summary judgment cannot be used. Page v. Sloan, 281 N.C. 697, 190 S.E.2d 189 (1972); Pitts v. Village Inn Pizza, Inc., 296 N.C. 81, 249 S.E.2d 375 (1978).

Motion for summary judgment must be denied if the opposing party submits material which casts doubts upon the existence of a material fact or upon the credibility of a material witness, or if such doubts are raised by movant's own evidentiary material. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Summary judgment is appropriate when movant shows through discovery that the opposing party cannot produce evidence to support an essential element of his claim. Dellinger v. Belk, 34 N.C. App. 488, 238 S.E.2d 788 (1977), cert. denied, 294 N.C. 182, 241 S.E.2d 517 (1978).

When an insured sued an insurer for negotiating his life insurance premium payment and then refunding that payment and stating that coverage had never existed, and the insured moved for summary judgment, the insurer's affidavit under G.S. 1A-1, N.C. R. Civ. P. 56(f) that discovery was incomplete did not preclude the trial court from granting summary judgment because nothing sought by the insurer in its pending discovery requests bore on the questions of its waiver of the "good health" provision of the policy, whether the insurer completed an accord and satisfaction by negotiating the insurer's refund check, or whether the insurer had committed unfair and deceptive practices. Cullen v. Valley Forge Life Ins. Co., 161 N.C. App. 570, 589 S.E.2d 423, 2003 N.C. App. LEXIS 2273 (2003).

Lack of Cause of Action or Defense Supports Grant of Judgment. — Where the pleadings or proof disclose that no cause of action or defense exists, summary judgment may be granted. Kessing v. National Mtg.

Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Nat Harrison Assocs. v. North Carolina State Ports Auth., 280 N.C. 251, 185 S.E.2d 793 (1972); Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 209 S.E.2d 734 (1974); Barrett v. Phillips, 29 N.C. App. 220, 223 S.E.2d 918 (1976).

Where the pleadings or proof disclose that no cause of action exists, summary judgment may be granted. Davenport v. Davenport, 25 N.C. App. 621, 214 S.E.2d 294 (1975); Williams v. Congdon, 43 N.C. App. 53, 257 S.E.2d 677 (1979); Rockingham Square Shopping Center, Inc. v. Town of Madison, 45 N.C. App. 249, 262 S.E.2d 705 (1980).

Summary judgment is appropriately entered if the movant establishes that an essential part or element of the opposing party's claim is nonexistent. Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 (1985).

Where the pleadings or proof of the plaintiff disclose that no claim exists, summary judgment for defendant is proper. Colonial Bldg. Co. v. Justice, 83 N.C. App. 643, 351 S.E.2d 140 (1986), cert. denied, 319 N.C. 402, 354 S.E.2d 711 (1987).

When the only issues to be decided are issues of law, summary judgment is proper. Wachovia Mtg. Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 S.E.2d 727 (1978), aff'd, 297 N.C. 696, 256 S.E.2d 688 (1979); Brawley v. Brawley, 87 N.C. App. 545, 361 S.E.2d 759 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 918 (1988).

And Presence of Difficult Questions of Law Is No Barrier. — Where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment. Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Wachovia Mtg. Co. v. Autry-Barker-Spurrier Real Estate, Inc., 39 N.C. App. 1, 249 S.E.2d 727 (1978), aff'd, 297 N.C. 696, 256 S.E.2d 688 (1979).

Summary judgment is appropriate where there is no genuine issue of material fact and the case presents only questions of law. This is true even if the questions of law are complex. VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986).

Movant Entitled to Summary Judgment Where Directed Verdict Would Be Required. — If the materials before the court at the summary judgment hearing would require a directed verdict for defendants at trial, defendants are entitled to summary judgment. Whitaker v. Blackburn, 47 N.C. App. 144, 266 S.E.2d 763 (1980).

If a verdict would be directed for the movant on the evidence presented at the hearing on the motion for summary judgment, the motion for summary judgment may properly be granted. Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975); Haskins v. Carolina Power & Light Co., 47 N.C. App. 664, 267 S.E.2d 587 (1980).

On motion for summary judgment, the test is whether the moving party presents materials which would require a directed verdict in his favor if offered as evidence at trial. Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971); Coakley v. Ford Motor Co., 11 N.C. App. 636, 182 S.E.2d 260, cert. denied, 279 N.C. 393, 183 S.E.2d 244 (1971); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972); Fitzgerald v. Wolf, 40 N.C. App. 197, 252 S.E.2d 523 (1979).

Unless Nonmovant Shows a Triable Issue of Fact. — Where a motion for summary judgment is supported by proof which would require a directed verdict in his favor at trial, movant is entitled to summary judgment, unless the opposing party comes forward to show a triable issue of material fact. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976); Old S. Life Ins. Co. v. Bank of N.C., 36 N.C. App. 18, 244 S.E.2d 264 (1978); Watson v. Watson, 49 N.C. App. 58, 270 S.E.2d 542 (1980).

The opposing party is not entitled to have the motion for summary judgment denied on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact. Kidd v. Early, 289 N.C. 343, 222 S.E.2d 392 (1976).

Or Shows Unavailability of Affidavits. — If the party moving for summary judgment by affidavit or otherwise presents materials which would require a directed verdict in his favor if presented at trial, he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him or comes forward with affidavits or other materials that show there is a triable issue of fact. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 14 N.C. App. 567, 188 S.E.2d 661, rev'd on other grounds, 282 N.C. 44, 191 S.E.2d 683 (1972); Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, cert. denied, 281 N.C. 623, 190 S.E.2d 466 (1972); Brooks v. Smith, 27 N.C. App. 223, 218 S.E.2d 489 (1975).

If plaintiff's claim is barred by the statute of limitations, defendant is entitled to judgment as a matter of law and summary judgment is appropriate. Brantley v. Dunstan, 10 N.C. App. 706, 179 S.E.2d 878 (1971); Poston v. Morgan-Schultheiss, Inc., 46 N.C. App. 321, 265 S.E.2d 615 (1980).

Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate. Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 329 S.E.2d 350 (1985).

The statute of limitations, if properly pled, and if all the facts with reference thereto are admitted or established, may act as an affirmative defense, barring plaintiff's claims and entitling defendants to summary judgment as a matter of law. Lackey v. Bressler, 86 N.C. App. 486, 358 S.E.2d 560 (1987); Rowan County Bd. of Educ. v. United States Gypsum Co., 87 N.C. App. 106, 359 S.E.2d 814, cert. denied, 321 N.C. 298, 362 S.E.2d 782 (1987).

When the statute of limitations is properly pleaded and the facts of the case are not in dispute, resolution of the question becomes a matter of law, and summary judgment may be appropriate. Marshburn v. Associated Indem. Corp., 84 N.C. App. 365, 353 S.E.2d 123, cert. denied, 319 N.C. 673, 356 S.E.2d 779, petition for reconsideration denied, 320 N.C. 170, 358 S.E.2d 53 (1987); Boundreau v. Baughman, 86 N.C. App. 165, 356 S.E.2d 907 (1987), rev'd in part, modified and aff'd in part, 322 N.C. 331, 368 S.E.2d 849 (1988).

The failure of the defendant to plead res judicata is not a bar to that issue being raised at hearing on summary judgment. County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

When defendant establishes a complete defense to plaintiff's claim, he is entitled to the quick and final disposition of that claim which summary judgment provides. Ballinger v. North Carolina Dep't of Revenue, 59 N.C. App. 508, 296 S.E.2d 836 (1982), cert. denied, 307 N.C. 576, 299 S.E.2d 645 (1983).

The court may grant summary judgment if the movant conclusively establishes every element of its claim or conclusively establishes a complete defense or legal bar to the nonmovant's claim. VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

A defending party is entitled to summary judgment if he can show that no claim for relief exists or that the claimant cannot overcome an affirmative defense to the claim. Rolling Fashion Mart, Inc. v. Mainor, 80 N.C. App. 213, 341 S.E.2d 61 (1986).

A defending party is entitled to summary judgment if it can establish that no claim for relief exists or that the claimant cannot overcome an affirmative defense or legal bar to the claim. Wilder v. Hobson, 101 N.C. App. 199, 398 S.E.2d 625 (1990).

Motive, like intent or other states of mind, is rarely susceptible to direct proof and almost always depends on inferences drawn from circumstantial evidence. Consequently, summary judgment should rarely be granted in cases in which it is at issue. Burrow v. Westinghouse Elec. Corp., 88 N.C. App. 347, 363 S.E.2d 215, cert. denied, 322 N.C. 111, 367 S.E.2d 910 (1988).

Constitutional Arguments Susceptible to Summary Judgment. — Since the general rule is that the constitutionality of a statute is to be determined merely from an examination of the statute itself and of only those matters of which the court may take judicial notice, plaintiff's constitutional arguments presented a question of law and were properly susceptible to summary judgment. Baugh v. Woodard, 56 N.C. App. 180, 287 S.E.2d 412, appeal dismissed and cert. denied, 305 N.C. 759, 292 S.E.2d 574 (1982).

Summary judgment is not a proper remedy for failure to join a necessary party. Dildy v. Southeastern Fire Ins. Co., 13 N.C. App. 66, 185 S.E.2d 272 (1971).

Summary judgment procedure is available to both plaintiff and defendant. Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971); Clear Fir Sales Co. v. Carolina Plywood Distrib., Inc., 13 N.C. App. 429, 185 S.E.2d 737 (1972); McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972).

A defending party may show as a matter of law that he is entitled to summary judgment in his favor by showing that there is no genuine issue of material fact concerning an essential element of the claimant's claim for relief and that the claimant cannot prove the existence of that element. Best v. Perry, 41 N.C. App. 107, 254 S.E.2d 281 (1979); Ramsey v. Rudd, 49 N.C. App. 670, 272 S.E.2d 162 (1980), cert. denied, 302 N.C. 220, 276 S.E.2d 917 (1981).

If defendants clearly establish that there is no genuine issue as to the nonexistence of material facts which are necessary as an essential element of any cause of action against them, then they are entitled to summary judgment on that action. Clodfelter v. Bates, 44 N.C. App. 107, 260 S.E.2d 672 (1979), cert. denied, 299 N.C. 329, 265 S.E.2d 394 (1980).

A defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986).

Party Need Not Move for Judgment in Order to Be Entitled to It. — Section (c) of this rule does not require that a party move for summary judgment in order to be entitled to it. Greenway v. North Carolina Farm Bureau Mut. Ins. Co., 35 N.C. App. 308, 241 S.E.2d 339 (1978); McNair Constr. Co. v. Fogle Bros. Co., 64 N.C. App. 282, 307 S.E.2d 200 (1983), cert.

denied, 312 N.C. 84, 321 S.E.2d 897 (1984).

Summary judgment may be granted in favor of a nonmoving party in proper cases. A-S-P Assocs. v. City of Raleigh, 38 N.C. App. 271, 247 S.E.2d 800 (1978), rev'd on other grounds, 298 N.C. 207, 258 S.E.2d 444 (1979).

Summary judgment in favor of the nonmovant is appropriate when the evidence presented demonstrates that no material issues of fact are in dispute, and the nonmovant is entitled to entry of judgment as a matter of law. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

In an appropriate case, summary judgment may be rendered against the moving party. Candid Camera Video World, Inc. v. Mathews, 76 N.C. App. 634, 334 S.E.2d 94 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 879 (1980).

After Movant Is Given Opportunity to Show Existence of a Genuine Issue. — Summary judgment for the nonmoving party should be granted only when the moving party has been given adequate opportunity to show in opposition that there is a genuine issue of fact to be resolved. A-S-P Assocs. v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

Granting of Summary Judgment by Judge on Own Motion. — The granting of summary judgment or judgment on the pleadings by the trial judge on his own motion is a practice not to be commended, and is clearly erroneous where there is a factual question to be answered. Crews v. Taylor, 21 N.C. App. 296, 204 S.E.2d 193 (1974).

Rarely is it proper to enter summary judgment in favor of the party having the burden of proof. Blackwell v. Massey, 69 N.C. App. 240, 316 S.E.2d 350 (1984).

Summary judgment may be granted for a party with the burden of proof on his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize section (f) of this rule; and (3) when summary judgment is otherwise appropriate. Almond Grading Co. v. Shaver, 74 N.C. App. 576, 329 S.E.2d 417 (1985); Valdese Gen. Hosp. v. Burns, 79 N.C. App. 163, 339 S.E.2d 23 (1986).

Plaintiff's bare assertions in unverified complaint, which were denied by defendant, held insufficient to support entry of summary judgment for plaintiff. Smith v. Rushing Constr. Co., 84 N.C. App. 692, 353 S.E.2d 692 (1987).

Where plaintiff made a motion for summary judgment, which was denied, and later plaintiff filed a second motion for summary judgment involving the same issue as presented by the initial motion, the trial court erred by granting plaintiff's second motion for summary judgment. Taylorsville Fed. Savs. & Loan Ass'n v. Keen, 110 N.C. App. 784, 431 S.E.2d 484 (1993).

Appellate Conclusion Improper. — Where Court of Appeals majority opinion included a paragraph that concluded that a balancing of the equities favored denial of relief to plaintiff, such a conclusion was improper at the summary judgment stage. Roberts v. Madison County Realtors Ass'n, 344 N.C. 394, 474 S.E.2d 783 (1996).

Not All Parts of Distributer's Affidavits and Complaint Were Based on Personal Knowledge. — Despite a distributor's claims that his manufacturer's export agent, who lived in Great Britain, had tortiously interfered with the distributor-manufacturer relationship, in that the agent hired the distributor's salesman with the intention of establishing his own distributorship, a trial court did not err in ruling that under the Due Process Clause, no personal jurisdiction existed over the manager. The personal knowledge requirement for documents and affidavits, as contained in G.S. 1A-1, N.C. R. Civ. P. 56(e), applied to motions to dismiss under G.S. 1A-1, N.C. R. Civ. P. 12(b)(2), not all parts of the distributor's affidavits and complaint were based on personal knowledge, and only those parts based on personal knowledge, which were insufficient to show personal jurisdiction, could be considered. Deer Corp. v. Carter, 177 N.C. App. 314, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006).

Affidavit Statements Based on Hearsay Would Not be Admissible. — Trial court erred in granting summary judgment to an employer because the statements in the affidavits made by three affiants to establish an employee's on-call pay rate, and in the exhibits submitted in support of their affidavits, were hearsay under G.S. 8C-1, N.C. R. Evid. 801(c) and were inadmissible under G.S. 1A-1, N.C. R. Civ. P. 56(e) to prove the employee's on-call pay rate. Further, none of the affidavits addressed the foundational requirements for the admission of evidence through a business record, and thus did not present personal knowledge setting forth facts admissible in evidence under G.S. 8C-1, N.C. R. Evid. 803(6). Gilreath v. N.C. HHS, 177 N.C. App. 499, 629 S.E.2d 293, 2006 N.C. App. LEXIS 1077 (2006).

Inadmissible Averments in Affidavit Properly Disregarded. — Decedent's estate's contention that the trial court erred by allegedly considering an affidavit because it contained statements made by a decedent and her deceased sister was without merit since to the extent the challenged affidavit contained averments that would violate N.C. R. Evid. 601(c) if admitted as evidence at a later trial, the appellate court assumed the trial court properly disregarded them. Forbis v. Neal, 361 N.C. 519, 649 S.E.2d 382, 2007 N.C. LEXIS 813 (2007).

Striking of Affidavits and Deposition. — Testimony contained in four affidavits and a deposition submitted by the decedent's son regarding the intent of the decedent to disinherit one of the other beneficiaries in a will was properly stricken under G.S. 1A-1 because the declarations in the affidavits were incompetent to establish the decedent's intent and were inadmissible for that purpose. Hammer v. Hammer, 179 N.C. App. 408, 633 S.E.2d 878, 2006 N.C. App. LEXIS 1906 (2006).

Rule 57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to Article 26, Chapter 1, General Statutes of North Carolina, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a prompt hearing of an action for a declaratory judgment and may advance it on the calendar. (1967, c. 954, s. 1.)

COMMENT

This rule tracks the language of federal Rule 57, changed only by reference to the state statutory law, which spells out in detail the scope, procedure for obtaining, and effect of declaratory judgment. The comparable federal statutory law is 28 U.S.C.A. §§ 2201, 2202, a much more general statute than the state statute. The North Carolina Declaratory Judgment Act, to which reference is made, is essentially the Uniform Declaratory Judgment Act. The Commission felt that except for one minor change in respect of jury trial, the need for which is developed below, it should retain this basic statutory law and not substitute the more general federal type formulation. Professor Borchard, father of both, felt that state declaratory judgment acts should be more specific and detailed than the basic federal statutory authority needed to be. This separate practice rule simply refers to the basic act and in effect says (what is perhaps not strictly necessary in view of the coverage rule, Rule 1) that action for this relief as other actions shall be governed by these rules.

This rule does also make specific the right to jury trial as in other actions. Although this reflects a background of separate law and equity administration with resulting problems of jury right in the federal system in "new" kinds of actions, problems not presented in the North Carolina completely fused code practice, it does no harm to leave in this reference. Indeed, the North Carolina act itself, in § 1-261, states the basic right to jury trial of fact issues in this type of action.

The provision that, "The existence of another adequate remedy does not preclude a judgment for declaratory relief. . ." merely states more plainly and bolsters what is implicit in the act itself when in § 1-253 it is provided that the power to grant declaratory relief exists "whether or not further relief is or could be claimed." The federal act contains similar language in § 2201, but the federal rules draftsman thought it expedient to solidify this in the rule itself. No reason appears to depart from this. The critical substantive point here is that this language preserves the discretionary right of the court when asked to declare rights to decline to do so, possibly on the basis of existence of another remedy, but not necessarily to do so.

The provision for advancing trial of declaratory actions seems wise and would not apparently violate any State procedural customs or rules, within which peremptory settings are familiar practice.

Legal Periodicals. — For an article discussing "reverse bad faith," the concept of allowing an insurer to assert a counterclaim for affirmative relief against an insured who brings a frivolous, bad faith action, see 19 Campbell L. Rev. 43 (1996).

CASE NOTES

Basic Statutory Provisions Retained. — The basic statutory provisions for obtaining declaratory judgments have been retained. This rule simply provides that the procedure for this remedy shall be in accordance with the new Rules of Civil Procedure. Reeves Bros. v. Town of Rutherfordton, 15 N.C. App. 385, 190 S.E.2d 345 (1972), rev'd on other grounds, 282

N.C. 559, 194 S.E.2d 129 (1973).

Scope of Relief in Declaratory Judgment Actions Not Limited by G.S. 110-104. — The spirit and intent of G.S. 110-104, relating to injunctive relief against continuing operation of day-care facilities, do not permit, much less compel, a conclusion that the Day-Care Facilities Act is intended to restrict the general statewide jurisdiction of the superior court or to limit the scope of relief normally available in declaratory judgment actions. The mere existence of an alternate adequate remedy under G.S. 110-104 will not be held to bar an appropriate action for declaratory judgment. State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908, aff'd on rehearing, 299 N.C. 731, 265 S.E.2d 387, appeal dismissed, 449 U.S. 807, 101 S. Ct. 55, 66 L. Ed. 2d 11 (1980).

Declaratory Judgment Held Proper. — Trial court properly entered declaratory judgment in favor of a corporation and found that the sale of pre-paid phone cards with game pieces was not an illegal lottery where the inclusion of game pieces was merely a marketing system, the phone card was sufficiently compatible with the price being charged and had sufficient value and utility to support the conclusion that it, and not the associated game of chance, was the object being purchased, and consumers could receive free game pieces via written request without purchasing the phone card. Am. Treasures, Inc. v. State, 173 N.C. App. 170, 617 S.E.2d 346, 2005 N.C. App. LEXIS 1928 (2005).

Summary judgment is an appropriate procedure in a declaratory judgment action. Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

The propriety of a summary judgment in declaratory judgment actions is governed by the same rules applicable to other actions. North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Underwriters Nat'l Assurance Co., 48 N.C. App. 508, 269 S.E.2d 688, cert. denied and appeal dismissed, 301 N.C. 527, 273 S.E.2d 453 (1980), rev'd on other grounds, 455 U.S. 691, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982).

Applied in Citizens Nat'l Bank v. Grandfather Home for Children, Inc., 280 N.C. 354, 185 S.E.2d 836 (1972); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972); Travelers Ins. Co. v. Curry, 28 N.C. App. 286, 221 S.E.2d 75 (1976); Alphatronix, Inc. v. Pinnacle Micro, Inc., 814 F. Supp. 455 (M.D.N.C. 1993).

Cited in North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971); Biltmore Co. v. Hawthorne, 32 N.C. App. 733, 233 S.E.2d 606 (1977); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984); Pierce v. Associated Rest & Nursing Care, Inc., 90 N.C. App. 210, 368 S.E.2d 41 (1988).

Rule 58. Entry of judgment.

Subject to the provisions of Rule 54(b), a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. The party designated by the judge or, if the judge does not otherwise designate, the party who prepares the judgment, shall serve a copy of the judgment upon all other parties within three days after the judgment is entered. Service and proof of service shall be in accordance with Rule 5. If service is by mail, three days shall be added to the time periods prescribed by Rule 50(b), Rule 52(b), and Rule 59. All time periods within which a party may further act pursuant to Rule 50(b), Rule 52(b), or Rule 59 shall be tolled for the duration of any period of noncompliance with this service requirement, provided however that no time period under Rule 50(b), Rule 52(b), or Rule 59 shall be tolled longer than 90 days from the date the judgment is entered. Subject to the provisions of Rule 7(b)(4), consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard.

Notwithstanding any other law to the contrary, any judgment entered by a magistrate in a small claims action pursuant to Article 19 of Chapter 7A shall be entered in accordance with this Rule except judgments announced and signed in open court at the conclusion of a trial are considered to be served on the parties, and copies of any judgment not announced and signed in open court at the conclusion of a trial shall be served by the magistrate on all parties in accordance with this Rule, within three days after the judgment is entered. If service is by mail, three days shall be added to the time periods prescribed by G.S. 7A-228. All time periods within which a party may further act pursuant to G.S. 7A-228 shall be tolled for the duration of any period of noncompliance of this service requirement, provided that no time period shall be tolled longer than 90 days from the date judgment is entered. (1967, c. 954, s. 1; 1993 (Reg. Sess., 1994), c. 594, s. 1; 2005-163, s. 2.)

COMMENT

Entry of judgment, as distinguished from rendition of judgment, is a critical moment under these rules. Time periods for the filing of certain motions are keyed to the moment of entry. It is therefore highly desirable that the moment of entry of judgment be easily identifiable and it is also desirable that fair notice be given all parties of the entry of judgment. The rule is drawn to achieve these objectives.

The first paragraph deals with the simple case when judgment is rendered in open court. Presumably all parties will have notice. There is no necessity for the judge to sign the judgment. This is in keeping with prior law. See former § 1-205. Of course, the rule recognizes in the judge a power to give a "contrary direction" to that contained in the rule. Accordingly, if a lawyer wishes the judgment to incorporate particular matters, or to be delayed, he may make a motion to this effect.

The second paragraph deals with the more complex judgment but again one rendered in open court. Here approval by the judge of the form of the judgment filed is necessary. Presumably, he would indicate this approval by signing the judgment but this approval is not necessary to the "entry" of judgment.

The third paragraph deals with all judgments, simple or not, "not rendered in open court." In such cases, specific notice is required to be given before a judgment will be deemed to have been entered.

CASE NOTES

Editor's Note. — *Most of the cases below were decided prior to the 1993 (Reg. Sess., 1994) amendment, which rewrote this section.*

Entry of Judgments After Oct. 1, 1994. — Amended version of rule applies to all judgments subject to entry on or after October 1, 1994 and applies to orders as well as judgments. West v. Marko, 130 N.C. App. 751, 504 S.E.2d 571, 1998 N.C. App. LEXIS 1165 (1998).

Contention that the Federal Rules should be consulted in defining "entry of judgment" is without merit. Harrington v. Harrington, 38 N.C. App. 610, 248 S.E.2d 460 (1978).

The purpose of requirements for notations required by this rule is to provide a basis for making the time of entry of judgment easily identifiable and to give fair notice to all the parties of the entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Results of Failure to Meet Requirements of This Rule. — A consent agreement entered into after a judge's ruling denying the specific performance of a mediated settlement agreement took precedence over that ruling where the ruling was never entered in accordance with this section. Price v. Dobson, 141 N.C. App. 131, 539 S.E.2d 334, 2000 N.C. App. LEXIS 1285 (2000).

Objectives of Rule. — This rule is designed to achieve the objectives of (1) making the moment of the entry of judgment easily identifiable, and (2) furnishing fair notice to all parties of the entry of judgment. Barringer & Gaither, Inc. v. Whittenton, 22 N.C. App. 316, 206 S.E.2d 301 (1974); John T. Council, Inc. v. Balfour Prods. Group, Inc., 74 N.C. App. 668, 330 S.E.2d 6, cert. denied, 314 N.C. 538, 335 S.E.2d 316 (1985).

The objectives of this rule are to make the moment of entry of judgment easily identifiable and to give fair notice to all parties. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568, cert. denied, 290 N.C. 309, 225 S.E.2d 829 (1976).

Since many rights relating to the appeals process are "keyed" to the time of "entry of judgment," it is imperative that the judge's decisions become part of the court's records and that all interested persons know the exact date on which judgment is entered. State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984).

There are no cases which have construed G.S. 15A-101(4a), which governs "entry of judgment" in criminal cases. However, this rule is sufficiently analogous to provide guidance in the area. State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984).

The purpose of requirements for notations required by this rule is to provide a basis for making the time of entry of judgment easily identifiable and to give fair notice to all the parties of the entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

The purpose of this rule is to make the time of entry of judgment identifiable so that all parties are given notice of the entry of judgment. Behar v. Toyota of Fayetteville, Inc., 90 N.C. App. 603, 369 S.E.2d 618 (1988).

The purpose of this rule is to provide notice of the entry of judgment to all parties and to identify the moment of entry of judgment. Ives v. Real-Venture, Inc., 97 N.C. App. 391, 388 S.E.2d 573 (1990), cert. denied, 327 N.C. 139, 394 S.E.2d 174 (1990), reconsideration denied, 328 N.C. 271, 400 S.E.2d 452 (1991).

Employee's appeal of an order and judgment dismissing his complaint against employers involuntarily, whereby the employee argued that the order and judgment was never served pursuant to G.S. 1A-1, N.C. R. Civ. P. 58, was dismissed because the employee's notice of appeal was untimely, and the employee waived the benefit of N.C. R. App. P. 3(c) by failing to take timely action with regard to his notice of appeal; the purposes of Rule 58 are not served by allowing a party with actual notice to file a notice of appeal and allege timeliness based on lack of proper service when almost three years have passed since the party had filed its G.S. 1A-1, N.C. R. Civ. P. 60(b) motion and the entry of an order denying it. Huebner v. Triangle Research Collaborative, — N.C. App. —, 667 S.E.2d 309, 2008 N.C. App. LEXIS 1805 (2008).

This rule applies to judgments and orders entered in civil cases in district and superior court. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

This rule has no application to a confession of judgment. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568, cert. denied, 290 N.C. 309, 225 S.E.2d 829 (1976).

Requirements for Completed Entry of Judgment. — Paragraph three of this rule specifies three separate events which must occur before entry of judgment is complete. First, the clerk must receive an order from the trial judge for the entry of judgment. Second, the judgment must be filed. Third, the clerk must mail notice of filing to all parties. Darcy v. Osborne, 101 N.C. App. 546, 400 S.E.2d 95 (1991).

The Court of Appeals is without authority to entertain appeal of a case which lacks entry of judgment. Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997).

Where defendants' motion for directed verdict was not reduced to writing and filed with the clerk of the court as required by this section, the court of appeals had no jurisdiction to consider the merits of the appeal. Mastin v. Griffith, 133 N.C. App. 345, 515 S.E.2d 494 (1999).

Filing of Injunction Required for Contempt Purposes. — A party could not be held in contempt for violations of a preliminary injunction that occurred after the order for the injunction was issued, but before it was filed with the county clerk. Onslow County v. Moore, 129 N.C. App. 376, 499 S.E.2d 780 (1998).

Contrary Direction. — An instruction by the court that the prevailing party's attorney is to draft the order is a contrary direction. Therefore, because of the trial court's contrary direction, the automatic entry provisions of paragraph one of this rule do not operate to determine when entry of judgment occurred. In re Hayes, 106 N.C. App. 652, 418 S.E.2d 304 (1992).

Application of Third Paragraph. — The third paragraph of this rule applies to instances where the trial judge directs the clerk to prepare and file judgment. It is inapplicable when the trial judge prepares and signs the judgment. Barringer & Gaither, Inc. v. Whittenton, 22 N.C. App. 316, 206 S.E.2d 301 (1974).

Better Practice for Trial Judge to Direct Clerk to Enter Judgment. — The inattention of the trial bench to the directory mandate of the second paragraph of this rule has resulted in conflicting decisions on the dismissal of appeals for failure to give timely notice following entry of judgment. Obviously, the better practice is for the trial judge to specifically direct the clerk as to entry of judgment, and for the parties to ensure that the provisions of such direction are included in the record on appeal. Gates v. Gates, 69 N.C. App. 421, 317 S.E.2d 402 (1984), aff'd, 312 S.E.2d 620, 323 S.E.2d 920 (1985).

It is essential that the notation of entry of judgment include at least the names of the parties, the prevailing party, the relief awarded, and the date the verdict was returned. The notation here lacks these specifics and is therefore insufficient to constitute entry of judgment under Rule 58. Reed v. Abrahamson, 331 N.C. 249, 415 S.E.2d 549 (1992).

Inadequate Notation. — In order to make a notation of "such verdict" as was returned in this case, the clerk had to specify more than the mere words "jury verdict." An adequate notation would have reflected much of the information on the actual jury verdict form, including, at minimum, the names of the parties, the prevailing party, the relief awarded, and the date the verdict was returned. Reed v. Abrahamson, 331 N.C. 249, 415 S.E.2d 549 (1992).

Entry of Magistrate's Judgment. — This rule specifically controls the determination of the magistrate's "entry" of a small claims court judgment in the court minutes for purposes of appeal under G.S. 7A-228. Under this rule, where the magistrate "rendered" his judgment in open court, and the evidence was clear that he announced the judgment in open court both dismissing plaintiff's action and awarding defendants a sum certain on their counterclaim, entry of the magistrate's judgment was deemed to occur at the time of rendition. Provident Fin. Co. v. Locklear, 89 N.C. App. 353, 366 S.E.2d 599 (1988).

Entry of magistrate's judgment for purposes of this rule was not less automatic simply because the magistrate himself (rather than a clerk) noted the judgment in the court minutes. Provident Fin. Co. v. Locklear, 89 N.C. App. 353, 366 S.E.2d 599 (1988).

Section 7A-224 does not control the manner of "rendering" magistrate's judgments under this rule; it merely requires the magistrate's judgment to be rendered in writing in order to be deemed a judgment of the district court entitled to recording and indexing as any other district court judgment. The statement that "entry is made as soon as practicable after rendition" merely refers to the entry of that judgment in the records and indexes of the general courts. Thus, G.S. 7A-224 simply sets forth the requirements for filing a magistrate's judgment as a judgment of the district court. Provident Fin. Co. v. Locklear, 89 N.C. App. 353, 366 S.E.2d 599 (1988).

Requirements for Entry of Judgments Not Rendered in Open Court. — Under this rule there are three requirements necessary for the entry of judgments which are not rendered in open court. First, an order for the entry of judgment must be given to the clerk by the judge. Second, the judgment must be filed. Third, the clerk must mail notice to all parties, and entry of judgment is deemed to have been made at the time of the mailing of the notice. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568, cert. denied, 290 N.C. 309, 225 S.E.2d 829 (1976).

Although there are situations where it would be more convenient for a judge to mail his ruling to the clerk, and then allow the clerk to notify the respective parties of the judge's decision, the better practice, in criminal cases, is for the judge to announce his rulings in open court and direct the clerk to note the ruling in the minutes of the court. When the judge's ruling is not announced in open court, the order or judgment containing the ruling must be signed and filed with the clerk in the county, in the district and during the session when and where the question is presented. These rules serve to protect the interests of the defendant, the State, and the public, by allowing all interested persons to be informed as to when a judgment or order has been rendered in a particular matter. State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984).

Applicability to Probate Matters Before Clerk. — This rule had no application in a case involving the denial of a motion made before the clerk of superior court pursuant to G.S. 28A-9-1 to revoke the letters testamentary of an executor. In re Estate of Trull, 86 N.C. App. 361, 357 S.E.2d 437 (1987).

Evidence of Mailing. — The clerk's notation on the judgment of the time of the mailing is prima facie evidence of the mailing and the time of the mailing. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568, cert. denied, 290 N.C. 309, 225 S.E.2d 829 (1976).

Mailing to Counsel as Effective Notice. — Effective notice of the filing of judgment was afforded to defendants by the mailing to counsel of a true copy of the judgment. Barringer & Gaither, Inc. v. Whittenton, 22 N.C. App. 316, 206 S.E.2d 301 (1974).

Where the trial court possessed no independent recollection of what had occurred at a hearing for alimony held more than a year earlier and no judgment had been entered at the conclusion of that hearing in accordance with the provisions of this rule, the trial court did not err in refusing to sign the judgment and order proposed and tendered by the plaintiff. Wise v. Wise, 42 N.C. App. 5, 255 S.E.2d 570, cert. denied, 298 N.C. 305, 259 S.E.2d 300 (1979).

Effectiveness of Oral Notice of Appeal. — Where written judgment did not determine any issue different from those dealt with in judgment announced in open court, defendant's oral notice of appeal, though given in open court prior to the entry of judgment, was effective to give notice of appeal to the written judgment under G.S. 1-279. Morris v. Bailey, 86 N.C. App. 378, 358 S.E.2d 120 (1987).

Entry of judgment in open court by another district court judge without notice to the parties that the judgment was entered was error, but as the notice of appeal was timely filed, there was no prejudice. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Entry of Written Judgment After Notice of Appeal in Open Court. — A notice of appeal entered in open court immediately after entry of oral judgment does not remove the authority of the trial court to enter its written judgment which conforms substantially with the court's oral announcement. Morris v. Bailey, 86 N.C. App. 378, 358 S.E.2d 120 (1987).

Written Order of Judgment in Compliance With Oral Order. — Written order of a trial court was valid under G.S. 1A-1-58 because, as evidenced by the transcript, the written order conformed with the oral judgment pronounced in open court. Edwards v. Taylor, — N.C. App. —, 643 S.E.2d 51, 2007 N.C. App. LEXIS 805 (2007).

Under this rule, a judge may make an oral entry of a juvenile order, provided the order is subsequently reduced to written form as required by G.S. 7A-651 [see now G.S. 7B-905 and 7B-2512]. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Written dispositional order entered by juvenile court, which conformed generally with oral announcement of the order in open court, was valid. In re Bullabough, 89 N.C. App. 171, 365 S.E.2d 642 (1988).

Announcement in Open Court Not Entry of Judgment Where Review of Written Judgment Anticipated. — Trial judge did not render judgment in open court on June 13, 1988, for the purpose of entry of judgment under this rule when he indicated the nature of his decision and ordered counsel for third-party defendants to draft a judgment to be entered after both the judge and opposing counsel had opportunity to review it. Although the effect of the judgment was to dismiss the defendants' claim against the third-party defendants and to award sums certain on all other claims, the parties were entitled to rely on the judge's indication that he would not enter judgment until all parties had opportunity to review the written judgment. Thus, notice of appeal filed three days after judge's written judgment of June 27, 1988, was timely. Ives v. Real-Venture, Inc., 97 N.C. App. 391, 388 S.E.2d 573, cert. denied, 327 N.C. 139, 394 S.E.2d 174 (1990), reconsideration denied, 328 N.C. 271, 400 S.E.2d 452 (1991).

Announcement in Open Court Is Not Entry of Judgment. — Announcement of judgment in open court merely constitutes the rendition of judgment, not its entry; the court of appeals has no authority to hear an appeal where there has been no entry of judgment. In re Estate of Walker, 113 N.C. App. 419, 438 S.E.2d 426 (1994).

Trial court's announcement of judgment in open court, where the judgment was rendered after October 1, 1994, was the mere rendering of judgment, not the entry of judgment. Entry of judgment occurred when the judgment was reduced to writing, signed by the judge, and filed with the clerk of court; thus, the judgment was not appealable and also not enforceable. Worsham v. Richbourg's Sales & Rentals, Inc., 124 N.C. App. 782, 478 S.E.2d 649 (1996).

Announcement of judgment in open court merely constitutes "rendering" of judgment, not entry of judgment. Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997).

Where, although a trial court announced its initial decision granting joint custody in open court, there was no written order signed before the wife filed her motion to modify custody, and the written order granting joint custody was eventually entered on the same day that the trial court heard the motion to modify, an appellate court reversed the order modifying custody because there was nothing to modify since there was no order when the mother filed her motion to modify; even if it were proper for the trial court to hear the motion, it was impossible for there to have been a change in circumstances between the time the order was entered and the time it was modified on the same day, and in deciding whether a change of circumstances had occurred, the trial court should not have considered the events that transpired between the time it announced its joint custody decision and the date of the entry of the order. Carland v. Branch, 164 N.C. App. 403, 595 S.E.2d 742, 2004 N.C. App. LEXIS 809 (2004).

Trial court erred in granting a husband's motion to dismiss a wife's motion for equitable distribution, pursuant to G.S. 50-20, in a divorce action where the wife filed the motion on the day before the judgment was signed by the judge and filed, at which point the judgment became final pursuant to G.S. 1A-1-58; therefore, G.S. 50-11(e) did not destroy the wife's right to seek equitable distribution as the motion was filed before an absolute divorce was granted. Santana v. Santana, 171 N.C. App. 432, 614 S.E.2d 438, 2005 N.C. App. LEXIS 1204 (2005).

Oral Order Was Not Judgment For Civil Contempt Purposes. — When the trial court orally ordered defendants in a summary ejectment proceeding to pay a certain amount but did not reduce a judgment to writing as required by N.C. R. Civ. P. 58, it was error to hold defendants in civil contempt under G.S. 5A-21, as there was no properly entered judgment of the trial court at the time defendants were found in civil contempt. Carter v. Hill, 186 N.C. App. 464, 650 S.E.2d 843, 2007 N.C. App. LEXIS 2189 (2007).

A custody order remained binding and effective, where the trial court entered a written order setting aside the entry of default obtained by the father of a minor child against the mother, but this order did not purport to set aside the subsequent default judgment that was entered against the mother awarding custody of their minor child to the father, and the trial court's oral order purporting to set aside the default judgment was ineffective to do so. West v. Marko, 130 N.C. App. 751, 504 S.E.2d 571 (1998).

Judgment Entered in Open Court Held Not Subject to Repudiation. — Judgment entered on June 13, 1986, in open court, based on consent of the parties, and memorialized on September 8, 1986, when the judge signed the formal judgment, could not be repudiated by one of the parties on June 17, 1986. Blee v. Blee, 89 N.C. App. 289, 365 S.E.2d 679 (1988).

Order Dismissing Receiver Not Entered When Mere Instruction to Prepare Order Given. — An order dismissing a receiver from his duties was entered and notice given when entry of the order was given to the clerk, the order filed, and notice of its filing mailed to all parties, and not when, at an earlier hearing, the court "merely instructed" the receiver to prepare an appropriate order. John T. Council, Inc. v. Balfour Prods. Group, Inc., 74 N.C. App. 668, 330 S.E.2d 6, cert. denied, 314 N.C. 538, 335 S.E.2d 316 (1985).

Authority to Make Findings of Fact and Conclusions of Law. — Pursuant to the provisions of this rule, after "entry" of judgment in open court, a trial court retains the authority to approve the judgment and direct its prompt preparation and filing. Such authority necessarily includes making appropriate findings of fact and entering appropriate conclusions of law, and the giving of notice of appeal in open court after "entry" of judgment does not divest the trial court of such authority. Hightower v. Hightower, 85 N.C. App. 333, 354 S.E.2d 743, cert. denied, 320 N.C. 792, 361 S.E.2d 76 (1987).

The stay under G.S. 1-294 does not prevent the trial court from approving the form of its judgment and making those findings and conclusions necessary to prepare and file its judgment under this rule. Truesdale v. Truesdale, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

This rule does not authorize the trial court to file findings and conclusions which contradict those rendered prior to the notice of appeal. Thus, the trial court had no authority to prepare and file an order increasing the amount of defendant's alimony over that amount ordered in open court prior to plaintiff's notice of appeal. Truesdale v. Truesdale, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

Where court failed to make any findings as to whether the trial judge directed entry of judgment or if and when the clerk noted entry of judgment, and the record revealed that the clerk marked the judgment in her minutes but from the record it could not be ascertained whether the writings constituted a notation of the entry of judgment, when the notation was made, or whether it was directed by the trial judge, therefore the order dismissing the appeal had to be vacated and the case remanded to the trial court for further proceedings. Behar v. Toyota of Fayetteville, Inc., 90 N.C. App. 603, 369 S.E.2d 618 (1988).

Withdrawal of a motion under § 1A-1, Rule 59 did not entitle defendants to ten days from their withdrawal to file notice of appeal from judgment; to hold otherwise would thwart the tolling provision of N.C.R.A.P. Rule 3(c), and circumvent this rule, i.e., to give all interested parties a definite fixed time of a judicial determination they can point to as the time of entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Judgment Deemed Entered. — Where the trial judge announced his ruling in open court, which ruling was noted without instruction by the court, in the minutes by the clerk of court, in early April, and where the trial judge signed the written order that had been drafted by respondent's counsel at the end of the month, the order was deemed entered when the judge signed the written order. Cobb v. Rocky Mount Bd. of Educ., 102 N.C. App. 681, 403 S.E.2d 538 (1991), aff'd, 331 N.C. 280, 415 S.E.2d 554 (1992).

Transmission by Fax. — After a judgment was reduced to writing, signed by the judge, and filed with the clerk, it was "entered"; the plaintiffs' use of a fax to provide the defendant with a copy of the judgment did not render it void. Durling v. King, 146 N.C. App. 483, 554 S.E.2d 1, 2001 N.C. App. LEXIS 973 (2001).

Notice of Appeal. — It was evident that the parties only had fair notice of the judgment at the time the written judgment was filed where only after that time did the parties take action to settle the record on appeal. In re Hawkins, 120 N.C. App. 585, 463 S.E.2d 268 (1995).

Appeal Dismissed in Absence of Record of Notice. — Where a judgment was prepared and filed in this case but there was no evidence in the record on appeal that notice of filing was mailed to the parties and the judgment does not exhibit a time of mailing constituting prima facie evidence of mailing notice, judgment was not properly entered and appeal was dismissed for lack of jurisdiction. Darcy v. Osborne, 101 N.C. App. 546, 400 S.E.2d 95 (1991).

Judgment Incomplete for Purposes of Appeal Until Entry. — Not only does the trial court have the authority to subsequently enter a written judgment which conforms to its rendered judgment, entry of judgment by the trial court is the event which vests jurisdiction in the appellate court, and the judgment is not complete for the purpose of appeal until its entry. Searles v. Searles, 100 N.C. App. 723, 398 S.E.2d 55 (1990); In re Estate of Walker, 113 N.C. App. 419, 438 S.E.2d 426 (1994).

Where the trial judge retired before the order in the custody modification case was signed, entered, or filed with the clerk of court, the judgment was not properly entered pursuant to this rule. Lange v. Lange, 157 N.C. App. 310, 578 S.E.2d 677, 2003 N.C. App. LEXIS 542 (2003), cert. denied, 357 N.C. 251, 582 S.E.2d 272 (2003), cert. dismissed, 357 N.C. 251, 582 S.E.2d 273 (2003).

Notice of appeal given after the general terms of the judgment are announced in open court is, alone, not sufficient to vest jurisdiction in the appellate court. Searles v. Searles, 100 N.C. App. 723, 398 S.E.2d 55 (1990).

Where the jury announced its verdict in open court, it "rendered judgment" according to G.S. 1A-1, Rule 3(a) and this rule, and oral notice of appeal was a proper procedure. Stimpson Hosiery Mills, Inc. v. Pam Trading Corp., 98 N.C. App. 543, 392 S.E.2d 128 (1990).

Factors in Analysis of Whether an Entry of Judgment Has Occurred. — The language of this rule clearly establishes that entry of judgment occurs when the clerk makes some notation in the minutes. In cases where the procedures used do not fit within the express provisions of the rule or where there is no evidence to indicate when or whether such notation was made, the spirit and purpose of the rule should determine when entry of judgment occurs. Relevant factors in this analysis are: (1) an easily identifiable point at which entry occurred, such that (2) the parties have fair notice of the court's judgment and the time thereof, and that (3) the matters for adjudication have been finally and completely resolved so that the case is suitable for appellate review. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Interrelationship Between Rules. — The importance of finality to the timing of entry of judgment is apparent more from the interrelationship between G.S. 1A-1, Rule 54 and this rule than from the express language of this rule itself. The principal concern regarding finality is that all matters for determination be resolved. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Rendering of Judgment Held Not Entry of Judgment. — In a custody case, where the trial court announced in open court that the previous decree would receive full faith and credit and custody would not change, the court rendered judgment that day on the custody issue, but the court did not enter judgment, as the court directed counsel for defendant to draw the order and the parties continued to negotiate on visitation so the rendering of judgment did not constitute entry of judgment. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Entry of judgment occurred when the trial court adopted and signed the proposed judgment submitted by plaintiff's counsel, not when the jury returned its verdict and the assistant clerk wrote "jury verdict" on the court calendar. Reed v. Abrahamson, 331 N.C. 249, 415 S.E.2d 549 (1992).

Where judge instructed clerk to note judgment on children's paternity in minutes, valid entry of judgment occurred at this time, not at later date when judge signed written order of paternity. In re Estates of Barrow, 122 N.C. App. 717, 471 S.E.2d 669 (1996).

Adoption of Draft Order and Proposed Findings. — In a custody case, where trial court directed counsel for defendant to draft an order reflecting its decision, this order required findings of fact supporting the court's conclusion that there had been no material change of circumstances warranting a modification of the custody order. Fair notice concerns would dictate that entry of judgment occurred when the court adopted the draft order and proposed findings. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Each of the three paragraphs in this rule declares that entry of judgment occurs when the clerk makes some notation in the minutes. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

In cases where entry of judgment cannot be determined from the express language of this rule, fair notice concerns indicate that "entry" occurs only after draft orders or judgments are submitted to and adopted by the court. Stachlowski v. Stach, 328 N.C. 276, 401 S.E.2d 638 (1991).

Entry of Judgment in a Divorce Action. — Because the pronouncement of divorce judgment was not entered within the explicit meaning of this Rule, and judgment can be entered only after the requisite findings of fact have been adopted in a divorce action under G.S. 50-10, entry of judgment of absolute divorce did not occur until counsel submitted the judgment to the court and the court signed the judgment. Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994).

Trial court did not err when it used the 1998 version of the North Carolina Child Support Guidelines to determine the amount of child support a father owed because, even though it entered its judgment after the 2002 version of the Guidelines became effective on October 1, 2002, it announced its judgment in open court before October 1, 2002. State v. Williams, 163 N.C. App. 353, 593 S.E.2d 123, 2004 N.C. App. LEXIS 365 (2004).

A memo of consent judgment, signed by the parties and judge and entered into the court record, was valid as a final judgment on the issue of child custody. Buckingham v. Buckingham, 134 N.C. App. 82, 516 S.E.2d 869, 1999 N.C. App. LEXIS 657 (1999), cert. denied, 351 N.C. 100, 540 S.E.2d 353 (1999).

Failure to Object to Entry of Order Out of Session. — In a negligence action by plaintiff daughter, as the personal representative of her father's estate and individually, there was no basis for the daughter's argument on appeal that the trial court lacked subject matter jurisdiction to enter an order which required the daughter, as personal representative of the estate, to post $20,000 in prosecution bonds even though the trial court took the issue under advisement and later rendered its decision out of session because the daughter was deemed to have consented to the entry of the order out of session by failing to object when the trial court informed the parties of its intention to render a decision on the issue at a later date and out of session. Dalenko v. Wake County Dep't of Human Servs., 157 N.C. App. 49, 578 S.E.2d 599, 2003 N.C. App. LEXIS 371 (2003), cert. denied, 357 N.C. 458, 585 S.E.2d 386 (2003), cert. denied, 540 U.S. 1178, 124 S. Ct. 1411, 158 L. Ed. 2d 79 (2004).

Consent Presumed When Inadequate Objection to Order Out of Session. — Plaintiff filed an objection to the entry of a judgment out of session on April 20th, and the trial court found, on May 7th, that there was no objection. Because plaintiff did not raise that finding as error on appeal, the finding was binding on the appellate court; thus, plaintiff failed to lodge a timely objection to the entry of the order out of session, and her consent was presumed under G.S. 1A-1, N.C. R. Civ. P. 58. Dalenko v. Collier, 191 N.C. App. 713, 664 S.E.2d 425, 2008 N.C. App. LEXIS 1500 (2008).

Objection Held Inadequate. — Defendant debtors' objection to certain language in a proposed order submitted by a creditor was not specific enough to comply with G.S. 1A-1, Rule 58, as it did not object to the fact that the judgment was signed out of session, but rather, to its contents, and would therefore be rejected. Conseco Fin. Servicing Corp. v. Dependable Hous., Inc., 150 N.C. App. 168, 564 S.E.2d 241, 2002 N.C. App. LEXIS 368 (2002).

Applied in Story v. Story, 27 N.C. App. 349, 219 S.E.2d 245 (1975); Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975); Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977); Condie v. Condie, 51 N.C. App. 522, 277 S.E.2d 122 (1981); Byrd v. Byrd, 51 N.C. App. 707, 277 S.E.2d 472 (1981); In re Moore, 306 N.C. 394, 293 S.E.2d 127 (1982); In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982); Loye v. Loye, 93 N.C. App. 328, 377 S.E.2d 804 (1989); Stem v. Richardson, 350 N.C. 76, 511 S.E.2d 1 (1999); State v. Smith, 138 N.C. App. 605, 532 S.E.2d 235, 2000 N.C. App. LEXIS 778 (2000); Coppley v. PPG Indus., Inc., 142 N.C. App. 196, 541 S.E.2d 743, 2001 N.C. App. LEXIS 37 (2001); In re Pittman, 151 N.C. App. 112, 564 S.E.2d 899, 2002 N.C. App. LEXIS 642 (2002); J.M. Dev. Group v. Glover, 151 N.C. App. 584, 566 S.E.2d 128, 2002 N.C. App. LEXIS 757 (2002); In re J.B., 172 N.C. App. 1, 616 S.E.2d 264, 2005 N.C. App. LEXIS 1589 (2005); McClure v. County of Jackson, 185 N.C. App. 462, 648 S.E.2d 546, 2007 N.C. App. LEXIS 1814 (2007); Baxter v. Danny Nicholson, Inc., 191 N.C. App. 168, 661 S.E.2d 892, 2008 N.C. App. LEXIS 1149 (2008); Fisher v. Anderson, — N.C. App. —, 667 S.E.2d 292, 2008 N.C. App. LEXIS 1806 (2008).

Cited in Capital Outdoor Adv., Inc. v. City of Raleigh, 337 N.C. 150, 446 S.E.2d 289; Helms v. Rea, 282 N.C. 610, 194 S.E.2d 1 (1973); Cochrane v. Sea Gate, Inc., 42 N.C. App. 375, 256 S.E.2d 504 (1979); Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345 (1980); North Carolina State Bar v. DuMont, 52 N.C. App. 1, 277 S.E.2d 827 (1981); Woodworth v. Woodworth, 58 N.C. App. 237, 292 S.E.2d 774 (1982); Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Day v. Coffey, 68 N.C. App. 509, 315 S.E.2d 96 (1984); Vick v. Vick, 80 N.C. App. 697, 343 S.E.2d 245 (1986); Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986); L. Harvey & Son Co. v. Shivar, 83 N.C. App. 673, 351 S.E.2d 335 (1987); Patel v. Mid S.W. Elec., 88 N.C. App. 146, 362 S.E.2d 577 (1987); Bunting v. Bunting, 100 N.C. App. 294, 395 S.E.2d 713 (1990); Custom Molders, Inc. v. Roper Corp., 101 N.C. App. 606, 401 S.E.2d 96 (1991); Saieed v. Bradshaw, 110 N.C. App. 855, 431 S.E.2d 233 (1993); Smith v. Gupton, 110 N.C. App. 482, 429 S.E.2d 737 (1993); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994); Watson v. Dixon, 130 N.C. App. 47, 502 S.E.2d 15 (1998); Fallis v. Watauga Med. Ctr., Inc., 132 N.C. App. 43, 510 S.E.2d 199, 1999 N.C. App. LEXIS 37 (1999); Schnitzlein v. Hardee's Food Sys., 134 N.C. App. 153, 516 S.E.2d 891, 1999 N.C. App. LEXIS 679 (1999); Stevens v. Guzman, 140 N.C. App. 780, 538 S.E.2d 590, 2000 N.C. App. LEXIS 1273 (2000); Collins v. St. George Physical Therapy, 141 N.C. App. 82, 539 S.E.2d 356, 2000 N.C. App. LEXIS 1286 (2000); Staton v. Russell, 151 N.C. App. 1, 565 S.E.2d 103, 2002 N.C. App. LEXIS 688 (2002); Miller v. Miller, 153 N.C. App. 40, 568 S.E.2d 914, 2002 N.C. App. LEXIS 1070 (2002); In re I.S., 170 N.C. App. 78, 611 S.E.2d 467, 2005 N.C. App. LEXIS 888 (2005); Wilson v. Wilson, 183 N.C. App. 267, 644 S.E.2d 379, 2007 N.C. App. LEXIS 1042 (2007); Faison & Gillespie v. Lorant, 187 N.C. App. 567, 654 S.E.2d 47, 2007 N.C. App. LEXIS 2566 (2007); Sellers v. Morton, 191 N.C. App. 75, 661 S.E.2d 915, 2008 N.C. App. LEXIS 1167 (2008); In re Will of Harts, 191 N.C. App. 807, 664 S.E.2d 411, 2008 N.C. App. LEXIS 1491 (2008).

Rule 59. New trials; amendment of judgments.

(a) *Grounds.* — A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

(1) Any irregularity by which any party was prevented from having a fair trial;
(2) Misconduct of the jury or prevailing party;
(3) Accident or surprise which ordinary prudence could not have guarded against;
(4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;

(5) Manifest disregard by the jury of the instructions of the court;
(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
(8) Error in law occurring at the trial and objected to by the party making the motion, or
(9) Any other reason heretofore recognized as grounds for new trial.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for motion.* — A motion for a new trial shall be served not later than 10 days after entry of the judgment.

(c) *Time for serving affidavits.* — When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 30 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On initiative of court.* — Not later than 10 days after entry of judgment the court of its own initiative, on notice to the parties and hearing, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to alter or amend a judgment.* — A motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment. (1967, c. 954, s. 1.)

COMMENT

Section (a). — Here, in listing the grounds for new trial, the rule goes beyond the prior statutory law as set forth in former § 1-207 to include all those grounds for new trial which have been approved by North Carolina case law. Former § 1-207 made express mention of only three grounds for new trial — exceptions, insufficient evidence, and excessive damages. But the court has approved new trial in a number of other situations: Where the damages are inadequate, Hinton v. Cline, 238 N.C. 136, 76 S.E.2d 162 (1953); Where the verdict is defective, Vandiford v. Vandiford, 215 N.C. 461, 2 S.E.2d 364 (1939); Where there is misconduct of or affecting the jury, Keener v. Beal, 246 N.C. 247, 98 S.E.2d 19 (1957); In re Will of Hall, 252 N.C. 70, 113 S.E.2d 1 (1960); Where there is newly discovered evidence, Crissman v. Palmer, 225 N.C. 472, 35 S.E.2d 422 (1945); Where there are irregularities in the trial, Lupton v. Spencer, 173 N.C. 126, 91 S.E. 718 (1917); Where there is surprise, Hardy v. Hardy, 128 N.C. 178, 38 S.E. 815 (1901); When equity and justice so require, Walston v. Greene, 246 N.C. 617, 99 S.E.2d 805 (1957).

Section (b). — Here there is a new requirement as to the time within which a motion for new trial must be made. It will be observed that the time is keyed to the "entry of judgment." As to what constitutes "entry of judgment," see Rule 58.

Section (c). — While the practice prescribed here did not previously enjoy statutory sanction, a similar practice had been approved by the court. See Brown v. Town of Hillsboro, 185 N.C. 368, 117 S.E. 41 (1923); Allen v. Gooding, 174 N.C. 271, 93 S.E. 740 (1917).

Section (d). — Again, no prior statute is comparable to the section, but the Commission believes the practice has been approved by the Supreme Court. See Walston v. Greene, 246 N.C. 617, 99 S.E.2d 805 (1957).

Section (e). — This section would seem to be self-explanatory.

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1062 (1981).

For comment discussing the abuse of discretion standard of appellate review in light of Worthington v. Bynum, 53 N.C. App. 409, 281 S.E.2d 170, rev'd, 305 N.C. 478, 290 S.E.2d 599 (1982), see 18 Wake Forest L. Rev. 1111 (1982).

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

For note, "Invasion of the Jury's Province: May the Court Determine Damages?," see 68 N.C.L. Rev. (1990).

For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

I. In General.
II. Time for Serving Motions and Affidavits.
III. Altering or Amending Judgments.
IV. Decisions under Prior Law.

I. IN GENERAL.

FRCP, Rule 59 is comparable to this rule. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

A motion for a new trial made under this rule is intended to serve as a substitute for the obligation of counsel to timely object to the jury instructions. Hanna v. Brady, 73 N.C. App. 521, 327 S.E.2d 22, cert. denied, 313 N.C. 600, 332 S.E.2d 179 (1985).

A motion for a new trial is no substitute for timely motions for directed verdict and judgment n.o.v. In re Will of King, 80 N.C. App. 471, 342 S.E.2d 394, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

Motion Directed to Court's Discretion While Motion Under § 1A-1, Rule 50 Presents Question of Law. — A motion to set a verdict aside and for a new trial pursuant to this rule is directed to the discretion of the trial judge, while a motion for judgment notwithstanding the verdict pursuant to G.S. 1A-1, Rule 50 is to be decided as a question of law. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

Grant of Motions for Judgment N.O.V. and New Trial Inconsistent. — The trial court's grant of the plaintiff's motion for judgment notwithstanding the verdict as well as plaintiff's motion for a new trial was inconsistent, where the judgment n.o.v. for the plaintiff after the jury returned a verdict for the defendant in a rear-end collision suit determined the defendant's negligence as a matter of law, while the new trial reinstated the issue for a jury. Streeter v. Cotton, 133 N.C. App. 80, 514 S.E.2d 539 (1999).

Alternative Motion for New Trial. — Under G.S. 1A-1, N.C. R. Civ. P. 50(c)(1), if a motion for a judgment notwithstanding the verdict is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

Healthcare providers' alternative motion for a new trial under G.S. 1A-1, N.C. R. Civ. P. 59, could not be considered on appeal as the healthcare providers failed to obtain a formal trial court ruling on their motion for a new trial under G.S. 1A-1, N.C. R. Civ. P. 50(c)(1), after their motion for a judgment notwithstanding the verdict under Rule 50 was granted, and the healthcare providers did not make any cross-assignments of error as to the trial. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

Defendants Must Obtain Ruling on Conditional Motion for New Trial. — It is the defendants' obligation to ensure that they obtain a ruling on their motion for a conditional new trial; a party gaining judgment notwithstanding the verdict should also ask for a ruling pursuant to G.S. 1A-1, N.C. R. Civ. P. 50(c)(1), on the motion for a new trial if he wishes to allege any error in the trial or to preserve any question other than the sufficiency of the evidence for appellate review. Cox v. Steffes, 161 N.C. App. 237, 587 S.E.2d 908 (2003).

Judge's Traditional Authority to Set Aside Verdict Was Not Diminished by the Rules. — The legislative enactment of the Rules of Civil Procedure in 1967 did not diminish the inherent and traditional authority of the trial judges of the State to set aside a verdict whenever in their sound discretion they believe it necessary to attain justice for all concerned, and the adoption of those rules did not enlarge the scope of appellate review of a trial judge's exercise of that power. Worthington v. Bynum, 305 N.C. 478, 290 S.E.2d 599 (1982); Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985).

But Was Merely Formalized. — The repeal of G.S. 1-207 did not diminish the trial judge's traditional discretionary authority to set aside a verdict. The procedure for exercising this traditional power was merely formalized in this rule, which lists eight specific grounds and one "catch-all" ground found in subsection (a)(9) of this rule on which the judge may grant a new trial. Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977).

The court is not empowered to change a verdict. Industrial Circuits Co. v. Terminal Communications, Inc., 26 N.C. App. 536, 216 S.E.2d 919 (1975).

This section provides wide latitude for the trial judge to award new trials, and it does not require that he set out grounds to support his order. Philco Fin. Corp. v. Mitchell, 26 N.C. App. 264, 215 S.E.2d 823 (1975).

A timely motion for new trial is addressed to the sound judicial discretion of the trial court. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

Grounds for New Trial. — Under this rule, a party may obtain a new trial either for errors of law committed during trial or for a verdict not sufficiently supported by the evidence. Eason v. Barber, 89 N.C. App. 294, 365 S.E.2d 672 (1988).

Remedy for Errors of Law. — Section 1A-1, Rule 60(b) provides no specific relief for "errors of law" and even the broad general language of G.S. 1A-1, Rule 60(b)(6) does not include relief for "errors of law." The appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under subsection (a)(8) of this rule. Hagwood v. Odom, 88 N.C. App. 513, 364 S.E.2d 190 (1988).

When debtors' motion for attorney's fees, pursuant to G.S. 75-16.1, was denied, it was error for a trial court to grant attorney's fees pursuant to a reconsideration of the court's prior denial, under G.S. 1A-1, N.C. R. Civ. P. 60(b)(6), because the motion to reconsider raised alleged errors of law by claiming the trial court applied the wrong legal standard in denying the attorney's fees motion, and such errors could not properly be considered under a motion to reconsider, but, rather, had to be considered either on appeal or pursuant to a new trial motion under G.S. 1A-1, N.C. R. Civ. P. 59. Catawba Valley Bank v. Porter, 188 N.C. App. 326, 655 S.E.2d 473, 2008 N.C. App. LEXIS 77 (2008).

Where errors of law were committed, the trial court is required to grant a new trial. Eason v. Barber, 89 N.C. App. 294, 365 S.E.2d 672 (1988).

And the Court's Decision Is Not Reviewable Absent Abuse. — The court's decision on a motion for a new trial under this rule is not reviewable on appeal, absent manifest abuse of discretion. Mumford v. Hutton & Bourbonnais Co., 47 N.C. App. 440, 267 S.E.2d 511 (1980); Blow v. Shaughnessy, 88 N.C. App. 484, 364 S.E.2d 444 (1988).

A motion for a new trial under this rule is addressed to the sound discretion of the trial judge, whose ruling is not reviewable on appeal absent an abuse of discretion. Hoover v. Kleer-Pak of N.C., Inc., 33 N.C. App. 661, 236 S.E.2d 386, cert. denied, 293 N.C. 360, 237 S.E.2d 848 (1977); Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984); Watts v. Schult Homes Corp., 75 N.C. App. 110, 330 S.E.2d 41, cert. denied, 314 N.C. 548, 335 S.E.2d 320 (1985); State v. Hanes, 77 N.C. App. 222, 334 S.E.2d 444 (1985); Yeargin v. Spurr, 78 N.C. App. 243, 336 S.E.2d 680 (1985).

The decision whether to grant a new trial rests in the sound discretion of the trial judge. Absent record disclosure of abuse of discretion, the order is not subject to review on appeal. Sizemore v. Raxter, 58 N.C. App. 236, 293 S.E.2d 294, cert. denied, 306 N.C. 744, 295 S.E.2d 480 (1982).

A motion under sections (a) and (e) of this rule is addressed to the sound discretion of the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. Hamlin v. Austin, 49 N.C. App. 196, 270 S.E.2d 558 (1980).

A trial court's discretionary order, pursuant to this rule, for or against a new trial upon any ground may be reversed on appeal only when abuse of discretion is clearly shown. State ex rel. Gilchrist v. Cogdill, 74 N.C. App. 133, 327 S.E.2d 647 (1985).

A trial judge's discretionary order made pursuant to this rule for or against a new trial may be reversed only when an abuse of discretion is clearly shown. Hanna v. Brady, 73 N.C. App. 521, 327 S.E.2d 22, cert. denied, 313 N.C. 600, 332 S.E.2d 179 (1985).

An order made under the discretionary power of this rule shall stand unless the reviewing court is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice. Hanna v. Brady, 73 N.C. App. 521, 327 S.E.2d 22, cert. denied, 313 N.C. 600, 332 S.E.2d 179 (1985).

Absent a valid motion pursuant to subsection (a)(8) of this rule and an order granting such motion for errors of law specifically identified, the Court of Appeals erred in reversing the trial judge's conditional grant of a new trial where there was no manifest abuse of discretion on the part of the trial judge. Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985).

A trial court's order under this rule is not to be disturbed absent an affirmative showing of manifest abuse of discretion by the judge or a substantial miscarriage of justice. Branch Banking & Trust Co. v. Home Fed. Sav. & Loan Ass'n, 85 N.C. App. 187, 354 S.E.2d 541 (1987).

Discretion of Trial Judge. — A motion to set aside the verdict and for a new trial is addressed to the sound discretion of the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970); Mangum v. Surles, 12 N.C.

App. 547, 183 S.E.2d 839 (1971), rev'd on other grounds, 281 N.C. 91, 187 S.E.2d 697 (1972); City of Winston-Salem v. Rice, 16 N.C. App. 294, 192 S.E.2d 9, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972); Townsend v. Norfolk & S. Ry., 35 N.C. App. 482, 241 S.E.2d 859, aff'd, 296 N.C. 246, 249 S.E.2d 801 (1978); Currence v. Hardin, 36 N.C. App. 130, 243 S.E.2d 172, aff'd, 296 N.C. 95, 249 S.E.2d 387 (1978); Coletrane v. Lamb, 42 N.C. App. 654, 257 S.E.2d 445 (1979); Horne v. Trivette, 58 N.C. App. 77, 293 S.E.2d 290, cert. denied, 306 N.C. 741, 295 S.E.2d 759 (1982).

The courts have held repeatedly since 1820 in case after case, and no principle is more fully settled in this jurisdiction, that the action of the trial judge in setting aside a verdict in his discretion is not subject to review on appeal in the absence of an abuse of discretion. Worthington v. Bynum, 53 N.C. App. 409, 281 S.E.2d 166 (1981), rev'd on other grounds, 305 N.C. 478, 290 S.E.2d 599 (1982).

A motion under section (a) of this rule is addressed to the sound discretion of the trial judge. Such a ruling raises no question of law. Frye v. Anderson, 86 N.C. App. 94, 356 S.E.2d 370, cert. denied, 320 N.C. 370, 361 S.E.2d 74 (1987).

Generally, a motion for new trial is addressed to the sound discretion of the trial court, and its ruling will not be disturbed absent a manifest abuse of that discretion. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Trial court did not err in denying the airport operators' post-trial motions claiming that they had newly-discovered evidence that the adjoining property owners, who had brought a private nuisance claim against the airport operators, bought additional property adjoining their property and the airport following the jury trial in the private nuisance case; the fact that the adjoining property owners purchased additional property could not be the basis for a new trial because the purchase did not occur until after the trial was completed and, thus, the trial court's denial of the post-trial motions was not an abuse of discretion. Broadbent v. Allison, 176 N.C. App. 359, 626 S.E.2d 758, 2006 N.C. App. LEXIS 524 (2006).

Same Scope of Review Applies to Grants and Denials of New Trial. — Under subdivision (a)(7) of this rule, appellate courts must apply the same standard, namely, whether the record affirmatively demonstrates an abuse of discretion, for reviewing a motion for a new trial for "insufficiency of the evidence to justify the jury verdict" when the trial court grants a new trial as when it denies a new trial; the higher court scrutinizes the discretionary decision of the trial court whose primary focus remains, in either case, whether the verdict represents an injustice and is against the greater weight of the evidence. In re Will of Buck, 350 N.C. 612, 516 S.E.2d 858 (1999).

Refusal to Award New Trial Upheld. — In a civil action in which buyer claimed that sellers committed fraud and unfair or deceptive trade in their sale of a condominium to buyer, award of damages of $33,074.30, which essentially restored buyer to her condition prior to sale, was not excessive, and the trial court did not abuse its discretion in refusing to set aside the award and declare a new trial. Douglas v. Doub, 95 N.C. App. 505, 383 S.E.2d 423 (1989).

Where there was nothing in the record to indicate that jury award was influenced by passion or prejudice, it was not a manifest abuse of discretion for the trial judge to uphold the jury's verdict and to deny plaintiff's motion for a new trial. McFarland v. Cromer, 117 N.C. App. 678, 453 S.E.2d 527 (1995), cert. denied, 340 N.C. 114, 458 S.E.2d 183 (1995), cert. denied, 340 N.C. 114, 456 S.E.2d 317 (1995).

The plaintiff could not rely on this section to get a new trial where his damages were disputed and even his own witness testified that many of his injuries did not result from the accident at issue. Warren v. GMC, 142 N.C. App. 316, 542 S.E.2d 317, 2001 N.C. App. LEXIS 80 (2001).

Trial court did not abuse its discretion in denying a new trial in a condemnation action where the corporate landowner's evidence as to the value of the property that was to be taken, presented in the testimony of two expert appraisers and the president of the corporate landowner, supported the jury's determination of the value of the property, even though the city presented testimony from two expert appraiser's that placed a much lower value on the property. City of Charlotte v. Whippoorwill Lake, Inc., 150 N.C. App. 579, 563 S.E.2d 297, 2002 N.C. App. LEXIS 575 (2002).

In a husband's action against his separated wife's boyfriend for criminal conversation and for alienation of his wife's affections, a jury could have found that the boyfriend's conduct was the effective cause of the alienation of the wife's affections, and his motions for directed verdict, judgment notwithstanding the verdict, and to set aside the compensatory damage verdict for alienation of affection were properly denied; nor did the existence of a separation agreement between the husband and the wife shield the boyfriend from liability for criminal conversation. Nunn v. Allen, 154 N.C. App. 523, 574 S.E.2d 35, 2002 N.C. App. LEXIS 1522 (2002), cert. denied, 356 N.C. 675, 577 S.E.2d 630 (2003).

Injured party was not entitled to a new trial based on the alleged erroneous admission of photographs of her vehicle or the jury's failure to award damages where the photographs were properly admitted after the injured party verified that they depicted her vehicle and were made a day after accident, and the evidence regarding the injured party's injuries was not unequivocal, her assertions to the contrary; thus, credibility of the evidence was exclusively for the jury. Horne v. Vassey, 157 N.C. App. 681, 579 S.E.2d 924, 2003 N.C. App. LEXIS 950 (2003).

Denial of plaintiffs' motion for a new trial in a case against a husband and wife alleging a fraudulent transfer of property was affirmed because the sufficiency of evidence issues presented to the appellate court on appeal were not the issues presented to the trial court in plaintiffs' motion for directed verdict or their motion for judgment notwithstanding the verdict. Tiber Holding Corp. v. DiLoreto, 160 N.C. App. 583, 586 S.E.2d 538, 2003 N.C. App. LEXIS 1823 (2003).

In a trial court's dismissal of a litigant's action against a newspaper staff writer and related defendants by way of summary judgment, there was no error where the trial court denied the litigant's request for a new trial because the trial court properly held against the litigant on her claims of libel per se, invasion of privacy, fraud and misrepresentation, trespass to real property, slander of title, and obstruction of justice. Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 588 S.E.2d 20, 2003 N.C. App. LEXIS 1983 (2003).

Trial court did not abuse its discretion in denying an injured automobile passenger's motion for a new trial as the passenger failed to successfully identify an error in her trial. Griffis v. Lazarovich, 161 N.C. App. 434, 588 S.E.2d 918, 2003 N.C. App. LEXIS 2200 (2003), cert. denied, 358 N.C. 375, 598 S.E.2d 135 (2004).

Denial of defendants' motion for a new was upheld where the admission of evidence concerning the injured party's employment was admissible, the injured party's testimony regarding his own injuries was relevant and the injured party's regarding the level of pain that injured party was experiencing was admissible opinion testimony by a nonexpert. Dunn v. Custer, 162 N.C. App. 259, 591 S.E.2d 11, 2004 N.C. App. LEXIS 112 (2004).

When a trial court entered judgment setting aside an execution sale, the court did not abuse its discretion when it denied a motion under G.S. 1A-1, N.C. R. Civ. P. 59(a)(9) for a new trial or, in the alternative, amendment or alteration of judgment. Beneficial Mortg. Co. v. Peterson, 163 N.C. App. 73, 592 S.E.2d 724, 2004 N.C. App. LEXIS 292 (2004).

Trial court did not abuse its discretion in submitting the issue of contributory negligence to the jury because even though the victim had a green light, she was required to maintain a reasonable and proper lookout for other vehicles in or approaching the intersection. The victim admitted that she did not look left or right before approaching the intersection, there was no obstruction of the victim's view of the intersection, and the victim was unable to provide a reason why she did not notice the driver's car until it was directly in front of her. Kummer v. Lowry, 165 N.C. App. 261, 598 S.E.2d 223, 2004 N.C. App. LEXIS 1146 (2004), cert. denied, 359 N.C. 189, 605 S.E.2d 153 (2004).

Trial judge's discretionary order made pursuant to G.S. 1A-1, N.C. R. Civ. P. 59 for or against a new trial may be reversed only when an abuse of discretion is clearly shown; a trial court's exclusion of the testimony of four witnesses as to the value of property in a condemnation proceeding was proper, and so the trial court did not abuse its discretion by denying the landowners' motion for a new trial. City of Charlotte v. Ertel, 170 N.C. App. 346, 612 S.E.2d 438, 2005 N.C. App. LEXIS 1009 (2005).

In determining whether a school board properly determined not to renew a teacher's contract under G.S. 115C-325(m)(2), the trial court had looked at all of the evidence and determined that there was substantial evidence to support the board's determination, even without inaccurate information contained in a memorandum; in doing so, it had properly applied the whole record test to the evidence presented to the board, and this justified its later denial of the teacher's motion for reconsideration. Davis v. Macon County Bd. of Educ., 178 N.C. App. 646, 632 S.E.2d 590, 2006 N.C. App. LEXIS 1644 (2006).

Trial court properly denied a plaintiff individual's G.S. 1A-1-59 motion where it was clear that the cases referenced by the individual's counsel contained arguments what were not made but could have been at the trial court level and the individual's unclean hands barred her from recovering property from the owner. Sellers v. Ochs, 180 N.C. App. 332, 638 S.E.2d 1, 2006 N.C. App. LEXIS 2305 (2006).

Trial court did not abuse its discretion in denying a realtor's motion for a new trial or to alter or amend the verdict because the jury's failure to follow the court's instructions did not render the verdict improper as the jury was clear that it was rejecting a company's liability and there was competent evidence to support the verdict that the company's vice president was not operating as an agent of the company. Strum v. Greenville Timberline, LLC, 186 N.C. App. 662, 652 S.E.2d 307, 2007 N.C. App. LEXIS 2307 (2007).

Evidence supported punitive damages in a car buyer's fraud action against defendants, a dealership, its owners, and it employees, when defendants: (1) sold a buyer a car that was unfit for operation, in violation of state law by placing a VIN plate, the driver's door with the federal identification decal and an odometer from a newer car into a car sold to the buyer; (2)

made considerable efforts to conceal facts of similar conduct; (3) were well-aware that they were selling unfit vehicles; (4) deliberately concealed information concerning their net worth; and (5) undaunted by the revocation of their motor vehicle dealers' license, reformed their business as a different corporate entity and continued to sell cars; and the jury was properly instructed about the reprehensibility of defendants' motives and conduct, their awareness of their conduct's probable consequences, their conduct's duration, the concealment, similar past conduct, and their profit from the conduct. That the jury concluded its deliberations quickly was hardly evidence of passion and prejudice per se to justify a new trial; thus, defendants were not entitled to a new trial under N.C. R. Civ. P. 59(a)(5), (6). Greene v. Royster, 187 N.C. App. 71, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007).

Trial court did not abuse its discretion in denying defendant former employer's motion for a new trial based on excessive damages under N.C. R. Civ. P. 59, because the jury's award was below the damages estimate given by expert witnesses, whose testimony was competent on the issue of damages. Cameron v. Merisel Props., 187 N.C. App. 40, 652 S.E.2d 660, 2007 N.C. App. LEXIS 2318 (2007).

In a personal injury action, the trial court erred in denying an employer's motion for a new trial. The trial court provided an incorrect instruction regarding the family-purpose doctrine which likely misled the jury; thus, this instruction was erroneous and the trial court's failure to grant a new trial constituted a substantial miscarriage of justice. Jackson v. Carland, — N.C. App. —, 665 S.E.2d 553, 2008 N.C. App. LEXIS 1623 (2008).

Trial court did not abuse its discretion when it denied an accident victim a new trial on the grounds that there was insufficient evidence to support the jury's verdict or that there was err when it failed to grant the victim a new trial on evidentiary grounds. The testimony of the accident victim's doctor was equivocal and the victim did not make a sufficient offer of proof as to two evidentiary issues. Kor Xiong v. Marks, — N.C. App. —, 668 S.E.2d 594, 2008 N.C. App. LEXIS 2016 (2008).

State's argument that it was entitled to a new trial on the basis of alleged errors raised on appeal fails where it is determined on appeal that the trial court did not err in those rulings and therefore did not abuse its discretion in denying the motion for a new trial. City of Wilson Redevelopment Comm'n v. Boykin, — N.C. App. —, 667 S.E.2d 282, 2008 N.C. App. LEXIS 1755 (2008).

With regard to a third civil action filed in Mecklenburg County, North Carolina, by a property association for unpaid maintenance fees against two property owners, the trial court did not err by denying the owners' motion for a new trial since they did not file a timely motion for a new trial or advance any of the grounds for obtaining a new trial specified in G.S. 1A-1, N.C. R. Civ. P. 59, or otherwise establish adequate grounds for an award of appellate relief. Carolina Forest Ass'n v. White, — N.C. App. —, 678 S.E.2d 725, 2009 N.C. App. LEXIS 1066 (July 7, 2009).

Refusal to Award New Trial Held Erroneous. — Bond forfeiture proceeding was a civil matter, and a trial court therefore erred in denying a school board's motion for a new trial, after granting surety's motion for relief from a forfeiture judgment, on the grounds that the board improperly attempted to proceed under the North Carolina Rules of Civil Procedure. State v. Pelletier, 168 N.C. App. 218, 606 S.E.2d 907, 2005 N.C. App. LEXIS 163 (2005).

Discretion Where No Question of Law or Legal Inference Involved. — Where no question of law or legal inference is involved, a motion to set aside the verdict is addressed to the sound discretion of the trial court and its ruling is not subject to review in the absence of an abuse of discretion. In re Will of Herring, 19 N.C. App. 357, 198 S.E.2d 737 (1973).

The trial judge has the discretionary power to set aside a verdict or grant a new trial when, in his opinion, it would work injustice to let the jury's verdict stand; and if no question of law or legal inference is involved in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion. Seaman v. McQueen, 51 N.C. App. 500, 277 S.E.2d 118 (1981).

Appealability of Decision as to New Trial Based on Law or Legal Inference. — When a judge presiding at a trial grants or refuses to grant a new trial because of some question of law or legal inference which the judge decides, the decision may be appealed and the appellate court will review it. In re Will of Herring, 19 N.C. App. 357, 198 S.E.2d 737 (1973).

When a verdict is set aside for error in law, the decision is not a matter of discretion. In such a situation, the aggrieved party may appeal, provided the error is specifically designated. Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977).

Scope of Review of Discretionary Ruling. — An appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion. Worthington v. Bynum, 305 N.C. 478, 290 S.E.2d 599 (1982); Pearce v. Fletcher, 74 N.C. App. 543, 328 S.E.2d 889 (1985); Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985); Yeargin v. Spurr, 78 N.C.

App. 243, 336 S.E.2d 680 (1985).

The decision whether to grant a new trial rests in the sound discretion of the trial judge. Absent record disclosure of abuse of discretion, the order is not subject to review on appeal. Sizemore v. Raxter, 58 N.C. App. 236, 293 S.E.2d 294 (1982), cert. denied, 306 N.C. 744, 295 S.E.2d 479 (1982); Watkins v. Watkins, 83 N.C. App. 587, 351 S.E.2d 331 (1986).

The standard for review of a trial court's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is virtually prohibitive of appellate intervention. Pearce v. Fletcher, 74 N.C. App. 543, 328 S.E.2d 889 (1985).

An appellate court's review of a trial judge's discretionary ruling denying a motion to set aside a verdict and order a new trial is limited to a determination of whether the record clearly demonstrates a manifest abuse of discretion by the trial judge. Pittman v. Nationwide Mut. Fire Ins. Co., 79 N.C. App. 431, 339 S.E.2d 441, cert. denied, 316 N.C. 733, 345 S.E.2d 391 (1986); Thomas v. Dixson, 88 N.C. App. 337, 363 S.E.2d 209 (1988).

Since under this rule motions are addressed to the sound discretion of the trial court, the only question before the court on appeal is whether the trial court abused its discretion in denying the motion. In re Will of King, 80 N.C. App. 471, 342 S.E.2d 394, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

When the trial court grants or denies a motion for a new trial without making findings of fact, appellate review is limited to determining whether the record indicates that the ruling amounts to a manifest abuse of discretion. Strickland v. Jacobs, 88 N.C. App. 397, 363 S.E.2d 229 (1988).

Trial court's ruling on a motion for a new trial does not raise a question of law; because the trial court is vested with the discretionary authority to grant or deny a motion for a new trial pursuant to N.C. R. Civ. P. 59(a), the appellate court's review is limited to whether the trial court has abused its discretion. Guox v. Satterly, 164 N.C. App. 578, 596 S.E.2d 452, 2004 N.C. App. LEXIS 973 (2004), cert. denied, 359 N.C. 188, 606 S.E.2d 906 (2004).

Utilizing an abuse of discretion standard in reviewing a decision denying an ex-wife's Rule 59(a)(9) motion for a new trial, the court found that the "catch-all" provision did not justify a new trial and the setting aside of an equitable distribution judgment for the sole reason that there was a 16-month delay between a hearing on distribution and the distribution order; since the ex-wife suffered no prejudice from the delay, there was no reason to set aside the distribution order. Britt v. Britt, 168 N.C. App. 198, 606 S.E.2d 910, 2005 N.C. App. LEXIS 170 (2005).

Where defendants, a car dealership, its owners, and its employees moved for a new trial on the ground that the jury manifestly disregarded the instructions of the court about punitive damages in a car buyer's fraud action, or alternatively, that the jury awarded excessive punitive damages under the influence of passion or prejudice pursuant to N.C. R. Civ. P. 59(a)(5) and (6), it was plain that the trial judge's discretionary order denying a new trial could be reversed on appeal only in those exceptional cases where an abuse of discretion was clearly shown. Abuse of discretion results where the trial court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision. Greene v. Royster, 187 N.C. App. 71, 652 S.E.2d 277, 2007 N.C. App. LEXIS 2261 (2007).

When Discretionary Order May Be Reversed. — A trial judge's discretionary order pursuant to this rule granting or denying a new trial upon any ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown. Worthington v. Bynum, 305 N.C. 478, 290 S.E.2d 599 (1982); Pearce v. Fletcher, 74 N.C. App. 543, 328 S.E.2d 889 (1985); Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985); Blow v. Shaughnessy, 88 N.C. App. 484, 364 S.E.2d 444 (1988).

An appellate court should not disturb a discretionary order under this rule unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice. Worthington v. Bynum, 305 N.C. 478, 290 S.E.2d 599 (1982); Pearce v. Fletcher, 74 N.C. App. 543, 328 S.E.2d 889 (1985); Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985); Blow v. Shaughnessy, 88 N.C. App. 484, 364 S.E.2d 444 (1988).

A discretionary ruling granting or denying a new trial is reversed only where an abuse of discretion is clearly shown resulting in a substantial miscarriage of justice. Travis v. Knob Creek, Inc., 84 N.C. App. 561, 353 S.E.2d 229 (1987).

New Trial Improperly Granted Where Claim was Barred by Contributory Negligence. — Trial court erred in granting the accident victim's motions for judgment notwithstanding the verdict and for a new trial on a personal injury claim resulting from the property owner's alleged negligence in maintaining a stairs because the issue of the accident victim's contributory negligence was properly left to the jury, which found that the accident victim was contributorily negligent. Cameron v. Canady, 157 N.C. App. 132, 577 S.E.2d 700, 2003 N.C. App. LEXIS 382 (2003).

Trial court's order granting a new trial which contained neither findings nor explication reflecting the grounds for the court's action lacked any basis upon which to conduct appellate review and was reversed. Chiltoski v. Drum, 121 N.C. App. 161, 464 S.E.2d 701 (1995).

Both a motion and an order for new trial filed under subsection (a)(8) of this rule have two basic requirements: First, the errors to which the trial judge refers must be specifically stated; second, the moving party must have objected to the error which is assigned as the basis for the new trial. Barnett v. Security Ins. Co., 84 N.C. App. 376, 352 S.E.2d 855 (1987).

Motion for new trial on the grounds of newly discovered evidence is addressed to trial court's sound discretion and is not subject to review absent a showing of an abuse of discretion. Horne v. Trivette, 58 N.C. App. 77, 293 S.E.2d 290, cert. denied, 306 N.C. 741, 295 S.E.2d 759 (1982).

Because a mother raised only evidence that did not exist when a custody trial occurred, there was no abuse of discretion in a denial of her motion for a new trial under G.S. 1A-1, N.C. R. Civ. P. 59(a)(4). Faulkenberry v. Faulkenberry, 169 N.C. App. 428, 610 S.E.2d 237, 2005 N.C. App. LEXIS 688 (2005).

Discretion of Court as to Motion Claiming Excessive or Inadequate Damages. — A motion for a new trial on the grounds that damages awarded are inadequate or excessive and which appear to have been given under the influence of passion or prejudice is directed to the sound discretion of the trial court. The trial court's decision will not be disturbed on appeal in the absence of a showing of abuse of discretion. Haas v. Kelso, 76 N.C. App. 77, 331 S.E.2d 759 (1985).

A motion for a new trial on the grounds of inadequate damages is addressed to the sound discretion of the trial judge. Blow v. Shaughnessy, 88 N.C. App. 484, 364 S.E.2d 444 (1988).

But Court Must Make Appropriate Findings and Place Burden of Proof Correctly. — Trial court erred in awarding plaintiff a new trial on the issue of damages for personal injury where it made the necessary finding that the damages awarded were inadequate, but failed to make the necessary additional finding that damages were awarded "under the influence of passion or prejudice"; in fact, it specifically deleted that finding from its order. Furthermore, although the court found that defendant did not offer evidence to refute the causal connection between the accident and the injury sustained, the burden should have been on plaintiff to prove the connection between boating accident, his alleged injuries, and his special damages. Page v. Boyles, 139 N.C. App. 809, 535 S.E.2d 561, 2000 N.C. App. LEXIS 1031 (2000), aff'd, 353 N.C. 361, 543 S.E.2d 480 (N.C. 2001).

Partial New Trial Proper Where Liability Uncontroverted. — Trial court did not err in granting the injured party a partial new trial on the issue of damages only where the trial court's finding was supported by uncontroverted evidence establishing the driver's negligence. Loy v. Martin, 156 N.C. App. 622, 577 S.E.2d 407, 2003 N.C. App. LEXIS 235 (2003), cert. denied, 357 N.C. 251, 582 S.E.2d 274 (2003).

Evaluation of Jury Award. — Because a motion for a new trial must be considered on the basis of the jury award, it is error to base an evaluation of the motion on an amount different from that award. Allen v. Beddingfield, 118 N.C. App. 100, 454 S.E.2d 287 (1995).

In deciding a party's motion for a new trial under this Rule, the trial court is limited to a determination of whether the jury's award of damages is inadequate or the jury's verdict is otherwise in error. Allen v. Beddingfield, 118 N.C. App. 100, 454 S.E.2d 287 (1995).

Trial judge has discretionary power to set aside an award of damages if he believes that the damages were excessive and given under the influence of passion or prejudice, or if the evidence was insufficient to justify the verdict. A ruling that is within the discretion of a trial judge may not be set aside except upon a showing of abuse of discretion. Samons v. Meymandi, 9 N.C. App. 490, 177 S.E.2d 209 (1970), cert. denied, 277 N.C. 458, 178 S.E.2d 225 (1972); Griffin v. Griffin, 45 N.C. App. 531, 263 S.E.2d 39 (1980); Maintenance Equip. Co. v. Godley Bldrs., 107 N.C. App. 343, 420 S.E.2d 199 (1992), cert. denied, 333 N.C. 345, 426 S.E.2d 707 (1993).

Remand for New Trial on Damage Issues. — Where the trial judge remarked that the maximum amount of damages that could have been available under the evidence presented was $45,000, but he only remitted the award to $60,000, which was still excessive under the evidence presented and constituted a manifest abuse of discretion, a remand for a new trial on the issue of damages was required. Munie v. Tangle Oaks Corp., 109 N.C. App. 336, 427 S.E.2d 149 (1993).

While the evidence presented at trial set forth with sufficient particularity the compensatory damages suffered by the property owners, the property owners failed to show damages arising from the claim of lien the contractors filed on their real property. Also, the trial court erred in denying the motion for a new trial on the issue of unfair and deceptive trade practices damages and since the contractors did not have an opportunity to present evidence on the issue of punitive damages, they were entitled to a new trial on punitive damages as well. Decker v. Homes, Inc./Constr. Mgmt. & Fin. Group, 187 N.C. App. 658, 654 S.E.2d 495, 2007 N.C. App. LEXIS 2524 (2007).

Damage Award Not Excessive. — Defendants' appeal of the court's denial of their motion for a new trial on the basis that the jury's $2.5 million damage award was excessive failed as there was no evidence that the jury's verdict was the result of passion or prejudice and the driver suffered permanent brain damage. Hawley v. Cash, 155 N.C. App. 580, 574 S.E.2d 684, 2002 N.C. App. LEXIS 1616 (2002).

Failure to state a particular rule number as the basis for a motion is not a fatal error so long as the substantive grounds and relief desired are apparent and the nonmovant is not prejudiced thereby. Garrison v. Garrison, 87 N.C. App. 591, 361 S.E.2d 921 (1987).

Failure to State Specific Grounds as Fatal. — Defendants' motion for a new trial did not meet the requirements of G.S. 1A-1, Rule 7(b)(1) where the defendants merely stated that they were entitled to a new trial under subdivisions (a)(5), (a)(7) and (a)(8) of this rule but did not state any specific basis for granting a new trial. Meehan v. Cable, 135 N.C. App. 715, 523 S.E.2d 419, 1999 N.C. App. LEXIS 1373 (1999).

Court Not Required to State Reasons or Make Findings Absent Request Therefor. — In ruling on a motion for a new trial under section (a) of this rule, absent a specific request made pursuant to G.S. 1A-1, Rule 52(a)(2), a trial court is not required to either state the reasons for its decision or make findings of fact showing those reasons. Strickland v. Jacobs, 88 N.C. App. 397, 363 S.E.2d 229 (1988).

A motion for new trial on the grounds of inadequate damages is addressed to the discretion of the trial judge. Gwaltney v. Keaton, 29 N.C. App. 91, 223 S.E.2d 506 (1976); Southern Ry. v. Jeffco Fibres, Inc., 41 N.C. App. 694, 255 S.E.2d 749, cert. denied, 298 N.C. 299, 259 S.E.2d 302 (1979); Moon v. Bostian Heights Volunteer Fire Dep't, 97 N.C. App. 110, 387 S.E.2d 225 (1990).

As Is a Motion to Limit New Trial to Issue of Damages. — A motion to limit a new trial to the issue of damages is directed to the sound discretion of the trial judge and the appellate courts will not supervise the lower court's judgment except in "extreme circumstances." Lazenby v. Godwin, 40 N.C. App. 487, 253 S.E.2d 489 (1979).

And a ruling by the trial judge on the damage issue will not be set aside except upon a showing of abuse of discretion. Southern Ry. v. Jeffco Fibres, Inc., 41 N.C. App. 694, 255 S.E.2d 749, cert. denied, 298 N.C. 299, 259 S.E.2d 302 (1979).

The courts of this State have no authority to grant remittiturs without consent of the prevailing party. Pittman v. Nationwide Mut. Fire Ins. Co., 79 N.C. App. 431, 339 S.E.2d 441, cert. denied, 316 N.C. 733, 345 S.E.2d 391 (1986).

The practice of remittitur with the successful party's consent is still permissible in our courts under this rule. Redevelopment Comm'n v. Holman, 30 N.C. App. 395, 226 S.E.2d 848, cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976).

Under North Carolina law, a trial court's power to remit damages is not necessarily inherent, as the exercise of that power is specifically authorized and limited by G.S. 1A-1, N.C. R. Civ. P. 59(a)(6). Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004).

As to the constitutionality of remittitur, see Redevelopment Comm'n v. Holman, 30 N.C. App. 395, 226 S.E.2d 848, cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976).

When the jury's verdict exceeds the evidence, the decision to grant a new trial is in the discretion of the trial judge, and the appellate court will review the trial judge only if it appears he grossly abused his discretion. Redevelopment Comm'n v. Holman, 30 N.C. App. 395, 226 S.E.2d 848, cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976).

Authority to Set Aside Verdict Contrary to Credible Testimony. — The trial judge is vested with discretionary authority to set aside a verdict and order a new trial whenever in his opinion the verdict is contrary to the greater weight of the credible testimony, and since a motion to this effect requires the trial judge's appraisal of the testimony, it necessarily invokes the exercise of his discretion and raises no question of law, so that his ruling thereon is irreviewable in the absence of manifest abuse of discretion. Britt v. Allen, 291 N.C. 630, 231 S.E.2d 607 (1977).

Trial court did not abuse its discretion in granting a new trial to passenger suing driver of motorcycle on which both parties were riding where the evidence did not support the jury's verdict and the driver and the owner failed to present evidence of contributory negligence. Roary v. Bolton, 150 N.C. App. 193, 563 S.E.2d 21, 2002 N.C. App. LEXIS 367 (2002).

Showing Required for New Trial on Grounds of Irrelevant Testimony. — In order to receive a new trial in a civil suit on the grounds that defense counsel improperly elicited irrelevant testimony on several occasions, the plaintiff must demonstrate (1) that the evidence did not have any logical tendency to prove a fact in issue, and (2) that its improper admission misled the jury or prejudiced his case. Fisher v. Thompson, 50 N.C. App. 724, 275 S.E.2d 507 (1981).

Order entered by trial judge after verdict, due to his apprehension about the jury being affected by an exhibit that he had excluded, although improperly denominated a mistrial, would not fail merely because it was inadvertently given the wrong nomenclature, and would therefore be considered an order granting a new trial for misconduct by the jury or prevailing party under the provisions of section (a)(2) of this rule. Elks v. Hannan, 68 N.C. App. 757, 315 S.E.2d 553 (1984).

Medical Negligence. — Trial court did not abuse its discretion in denying a motion for a new trial filed by the guardian of an injured child in a medical negligence case because sufficient evidence existed to support the jury's verdict. Suarez v. Wotring, 155 N.C. App. 20, 573 S.E.2d 746, 2002 N.C. App. LEXIS 1594 (2002), cert. denied, 357 N.C. 66, 579 S.E.2d 107, cert. dismissed, 357 N.C. 66, 579 S.E.2d 107 (2003).

It is not an abuse of discretion to require a new trial on all issues, even though the error giving rise to a new trial occurred in only one issue. Lazenby v. Godwin, 40 N.C. App. 487, 253 S.E.2d 489 (1979).

Where the evidence showed that defendants were not misled by plaintiff about its possession of a certificate of authority to transact business in North Carolina, defendants' failure to raise the issue of plaintiff's authority to transact business in North Carolina in a motion prior to trial, as required by G.S. 55-15-02(a), precluded it from doing so in a motion after trial. Spivey & Self, Inc. v. Highview Farms, Inc., 110 N.C. App. 719, 431 S.E.2d 535, cert. denied, 334 N.C. 623, 435 S.E.2d 342 (1993).

Authority to Order New Trial on Only One Issue. — Under section (a) of this rule, the courts of this State have authority to set aside a verdict as to one issue and order a new trial as to it while leaving the verdict for the remaining issues intact. Housing, Inc. v. Weaver, 52 N.C. App. 662, 280 S.E.2d 191, cert. denied, 304 N.C. 390, 285 S.E.2d 832 (1981), aff'd, 305 N.C. 428, 290 S.E.2d 642 (1982).

Granting New Trial Based on Misapprehension of Law. — If trial court granted a motion for new trial on the belief that by admitting fault, defendant had necessarily admitted plaintiff suffered damages which were the proximate result of defendant's fault, the basis of its action would be a misapprehension of law and its order would constitute reversible error. Chiltoski v. Drum, 121 N.C. App. 161, 464 S.E.2d 701 (1995).

Grant of Partial New Trial for Error in Charge on Damages. — Where error in the charge of the court related only to the measure of damages recoverable by the plaintiff and had no bearing upon the jury's determination of the negligence of the defendant as the proximate cause of the plaintiff's injury, only a partial new trial would be granted. Brown v. Neal, 283 N.C. 604, 197 S.E.2d 505 (1973).

Grant of New Trial Based on Erroneous Instruction of Lien Amount. — Instruction of an erroneous amount for workers' compensation lien was an irregularity which prevented defendant from having a fair trial and the court's failure to grant a new trial on these grounds was a substantial miscarriage of justice. Edwards v. Hardy, 126 N.C. App. 69, 483 S.E.2d 724 (1997).

For case upholding court's exercise of discretion, see City of Winston-Salem v. Rice, 16 N.C. App. 294, 192 S.E.2d 9, cert. denied, 282 N.C. 425, 192 S.E.2d 835 (1972).

Section (d) of this rule, requiring a statement of reasons, applies only to cases in which the trial court orders a new trial on its own motion. Edge v. Metropolitan Life Ins. Co., 78 N.C. App. 624, 337 S.E.2d 672 (1985).

Time in Which Court May Act. — Subsection (d) does not require that sua sponte action by the trial court be accompanied by a statement of the reasons therefor only after entry of judgment, but rather sets forth the maximum time following entry of judgment within which the court is statutorily authorized to act upon its own initiative. Chiltoski v. Drum, 121 N.C. App. 161, 464 S.E.2d 701 (1995).

Court Need Not Specify Grounds for Order Allowing Litigant's Motion. — The trial court is not required to specify the grounds for its order allowing a litigant's motion to set aside a verdict and grant a new trial, where the order is not entered on the trial court's own initiative. Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

But Must Specify Grounds for Order Made on Own Initiative. — Order setting aside verdict and granting a new trial for errors of law committed during trial, made on the courts' own initiative, was erroneous in failing to specify the errors upon which it was based. In re Will of Herring, 19 N.C. App. 357, 198 S.E.2d 737 (1973).

The law does not require that trial judge specify his reasons for granting discretionary new trial in the absence of a specific request. Edge v. Metropolitan Life Ins. Co., 78 N.C. App. 624, 337 S.E.2d 672 (1985).

Additional Findings Held Essential to Provide Basis for Review. — Given the defendant's motion specifically asking for findings of fact and conclusions of law on the decision of the plaintiff's motion for a new trial, the insufficiency in the findings of fact in the order granting the motion, and the conflicting evidence in the record, additional findings of fact were essential to provide the appellate court with a basis for a meaningful review. Andrews v. Peters, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985), aff'd, 318 N.C. 133, 347 S.E.2d 409 (1986).

Appeal Divests Trial Court of Jurisdiction. — The general rule that an appeal takes a case out of the jurisdiction of the trial court was not changed by this rule or G.S. 1A-1, Rule

60. Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971); Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

When an appeal is taken the trial court is divested of jurisdiction, except to aid in certifying a correct record. Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971).

The general rule that an appeal takes a case out of the jurisdiction of the trial court was not changed by the enactment of this rule and G.S. 1A-1, Rule 60. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

The trial court did not have jurisdiction to hear motions for new trial where defendants filed notices of appeal at the same time they filed their motions for new trial. Argument that the trial court retained jurisdiction because defendants had filed motions for stay of proceedings one minute before filing their notices of appeal had no merit. Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643, cert. denied, 322 N.C. 113, 367 S.E.2d 917 (1988).

Where defendants moved for a new trial after giving notice of appeal and none of the exceptions set out in Bowen v. Hodge Motor Co., 292 N.C. 633, 234 S.E.2d 748 (1977) applied, the trial court was without jurisdiction to hear the motion for new trial. American Aluminum Prods., Inc. v. Pollard, 97 N.C. App. 541, 389 S.E.2d 589 (1990).

Timing of Judgment on Motion. — This rule requires that a motion for a new trial or to amend a judgment be made within ten days of the judgment, but does not prescribe the time for judicial action on the motion; therefore, when defendant moved to amend the judgment within the ten-day window provided by subsection (e), the trial court had authority to enter its supplemental judgment on that motion nearly a month later. Buford v. GMC, 339 N.C. 396, 451 S.E.2d 293 (1994).

Timely Filing of Motions Tolls Time for Appeal. — Under N.C.R.A.P., Rule 3, timely filing of a motion for judgment notwithstanding the verdict or for a new trial pursuant to G.S. 1A-1, Rule 50(b) and this rule tolls the period for filing and serving written notice of appeal in civil actions. The full time for appeal commences to run and is to be computed from the entry of the order granting or denying the motions under G.S. 1A-1, Rule 50(b) or this rule. Middleton v. Middleton, 98 N.C. App. 217, 390 S.E.2d 453 (1990), cert. denied, 327 N.C. 637, 399 S.E.2d 124 (1990).

But Written Motions Following Denial of Oral Motions Would Not Toll Time for Appeal. — Plaintiffs, who entered their written notice of appeal within 10 days after the entry of June 6 order denying their April 22 written motions for judgment notwithstanding the verdict and for a new trial, were not entitled to make these written motions or to a hearing on these motions, because they had previously made oral motions for judgment notwithstanding the verdict and for a new trial in open court on April 14, and were afforded an opportunity to be heard, which they declined. Their motions under this rule and G.S. 1A-1, Rule 50(b) having been denied in open court at that time, plaintiffs were not entitled to file written motions requesting the same relief and thereby toll the period for filing written notice of appeal. Since the June 13 written notice of appeal was not filed within 10 days of entry of judgment, which by the terms of the judgment was April 14, their appeal was untimely. Middleton v. Middleton, 98 N.C. App. 217, 390 S.E.2d 453 (1990), cert. denied, 327 N.C. 637, 399 S.E.2d 124 (1990).

And Court May Not Order New Trial While Appeal Is Pending. — A trial court has no jurisdiction to enter an order granting defendant a new trial while an appeal of the cause is pending. Jim Walter Homes, Inc. v. Peartree, 24 N.C. App. 579, 211 S.E.2d 457, cert. denied, 286 N.C. 722, 213 S.E.2d 722 (1975).

Where, in support of its petition for certiorari, a bond company sought to include documents, which included a federal indictment and a county district attorney's dismissal of state charges against defendant, that were never presented to the trial court until after it entered its bond forfeiture order, and the bonding company did not make a motion pursuant to either G.S. 1A-1, N.C. R. Civ. P. 59 or 60 to bring the material to the trial court's attention, but rather sought to bring the material to light for the first time while this case was already pending on appeal, the court found that it was further evidence of the bond company's lack of diligence and denied its petition for writ of certiorari. State v. Gonzalez-Fernandez, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

But General Rule Has Exceptions. — The general rule that an appeal takes a case out of the jurisdiction of the trial court is subject to two exceptions and one qualification: The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered, and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that "the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned" and thereby regain jurisdiction of the cause. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

A discretionary new trial order, as opposed to an order granting a new trial as a matter of law, is not reviewable on appeal in the absence of manifest abuse. Edge v. Metropolitan Life Ins. Co., 78 N.C. App. 624, 337 S.E.2d 672 (1985).

Withdrawal of a motion under this rule

did not entitle defendants to ten days from their withdrawal to file notice of appeal from judgment; to hold otherwise would thwart the tolling provision of N.C.R.A.P., Rule 3(c), and circumvent the purpose of G.S. 1A-1. Rule 58, i.e., to give all interested parties a definite fixed time of a judicial determination they can point to as the time of entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

Vacating of Dismissal for Failure to State Claim Not Binding on Later Appeal. — The appellate court's prior decision, in which it "vacated" an order dismissing the plaintiff's complaint for failure to state a claim, was not binding on the court on a later appeal of a judgment notwithstanding the verdict. While the appellate court, in the first appeal, held that the complaint disclosed no insurmountable bar to recover under at least one of the claims for relief, its inquiry in the second appeal was a very different one: Was the evidence introduced at trial, viewed in the light most favorable to the plaintiff, insufficient as a matter of law to support the jury's verdict? Pearce v. American Defender Life Ins. Co., 74 N.C. App. 620, 330 S.E.2d 9, aff'd in part and rev'd in part, 316 N.C. 461, 343 S.E.2d 174 (1986).

False Testimony. — Trial court did not abuse its discretion in denying plaintiffs' motion for a new trial because defendant's witness's alleged false testimony did not relate to a crucial issue in the case and did not prevent a fair trial. Krantz v. Owens, 168 N.C. App. 384, 607 S.E.2d 337, 2005 N.C. App. LEXIS 264 (2005).

New Trial Where Instructions Did Not Reflect Change in Law Only Hours Before. — Although plaintiffs did not object to jury instructions, it was not error for the trial court to grant a new trial on the grounds that the jury had been erroneously charged, where both court and counsel were understandably unaware that the law had changed only hours before the jury was charged. Any objections lodged by the plaintiffs would have been unavailing where the trial judge instructed the jury in accordance with what to him was still established law. Hunnicutt v. Griffin, 76 N.C. App. 259, 332 S.E.2d 525, cert. denied, 314 N.C. 665, 336 S.E.2d 400 (1985).

Trial Court's Denial of Motion for New Trial Upheld. — Where the court found no evidence of passion or prejudice in the jury's assessment of the plaintiff's injury and the amount of her damages, as evidenced by its award of medical costs of less than the amount she claimed, it upheld the trial court's denial of plaintiff's motion for a new trial. Blackmon v. Bumgardner, 135 N.C. App. 125, 519 S.E.2d 335 (1999).

Order denying a motion for a new trial was reversed because it was based upon an error of law, to wit, that the evidence raised an issue of fact as to contributory negligence. The evidence was undisputed and susceptible of only one inference, i.e., no contributory negligence, and the question should have been withdrawn from the jury. Watts v. Schult Homes Corp., 75 N.C. App. 110, 330 S.E.2d 41, cert. denied, 314 N.C. 548, 335 S.E.2d 320 (1985).

Trial court erred in denying a motion for a new trial on the ground of errors of law where encroachment and continuing trespass were shown, as a neighbor was not a quasi-public entity, and landowners were entitled to removal of the encroachment removal as a matter of law. Young v. Lica, 156 N.C. App. 301, 576 S.E.2d 421, 2003 N.C. App. LEXIS 133 (2003).

Order denying a motion for new trial was reversed because since the mother made a notable layman's attempt to stop the proceedings once she realized that the trial had moved in a direction she was unprepared to defend, that of a change custody rather than visitation. Ruth v. Ruth, 158 N.C. App. 293, 580 S.E.2d 383, 2003 N.C. App. LEXIS 1042 (2003).

Trial court erred in denying the passenger's motion for a new trial, pursuant to G.S. 1A-1-59 because the passenger produced more than sufficient evidence to allow a jury to determine whether either of the two defendants, the driver of the car the passenger was riding in or the second driver, were negligent. Campbell v. Ingram, 180 N.C. App. 239, 636 S.E.2d 847, 2006 N.C. App. LEXIS 2312 (2006).

Motion for New Trial Improperly Granted. — Directed verdict was properly granted to a store in a customer's suit against the store to recover for injuries sustained when he fell over a stock cart parked in a store aisle, and thus, the trial court improperly set aside its earlier order granting a directed verdict and, instead, granted the customer's motion for a new trial, because the customer presented no evidence regarding who left the stock cart in the position which caused the customer to fall, when it was placed there, or how long it remained; additionally, the customer did not present evidence that the store failed to correct a dangerous condition after it received actual or constructive notice of the condition. Herring v. Food Lion, LLC, 175 N.C. App. 22, 623 S.E.2d 281, 2005 N.C. App. LEXIS 2754 (2005), aff'd, 360 N.C. 472, 628 S.E.2d 761 (2006).

Issue of whether an anesthesiology provider breached the applicable standard of care to a decedent was not conclusively established at trial, and thus the trial court erred in granting judgment N.O.V. and a new trial on the issue of causation and damages to the decedent's estate, because the statement of the provider's anesthesiologist involved in the case, to the effect that she did not comply with the applicable standard of care, was an evidential admission, not a judicial admission, as the anesthesiologist equivocated on whether she had breached the standard of care. Jones v. Durham Anesthesia Assocs., P.A., 185 N.C. App. 504, 648 S.E.2d 531, 2007 N.C. App. LEXIS 1806 (2007).

New Trial on Basis of Improper Submission of Claims to Jury. — While some of the contract claims raised by a contractor against a county were properly submitted to the jury, other contract claims the contractor raised, which were clearly governed by the terms of the contract, were improperly submitted; therefore, in light of the single-figure jury verdict, the appellate court granted a new trial under G.S. 1A-1, N.C. R. Civ. P. 59 to determine both the question of liability and damages as to the contractor's claims against the county that were properly submitted to the jury. Handex of the Carolinas, Inc. v. County of Haywood, 168 N.C. App. 1, 607 S.E.2d 25, 2005 N.C. App. LEXIS 148 (2005).

New Trial on Basis of Juror Misconduct. — Prior to July 1, 1984, the effective date of the Rules of Evidence, a juror's testimony could not be received even to show that extraneous prejudicial information was improperly brought to the jury's attention. While such evidence could be received in a criminal case because of the constitutional right of confrontation, no such exception to the general anti-impeachment rule applied in civil cases. Therefore, it was error for judge to grant a conditional new trial on the basis of juror misconduct proved solely by the juror's affidavit and testimony. Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

Affidavits of Two Jurors as to Mistake in Recording Verdict Insufficient for New Trial. — The evidence of only two of the jurors that there was a mistake in the recording of the verdict is, as a matter of law, insufficient to support an order for a new trial. Chandler v. U-Line Corp., 91 N.C. App. 315, 371 S.E.2d 717, cert. denied, 323 N.C. 623, 374 S.E.2d 583 (1988).

Punitive Damages Held Not Excessive. — Where plaintiff clearly presented sufficient evidence to prove he was entitled to an award of punitive damages, upon a strict review of the record it could not be said as a matter of law that the trial court erred in denying defendant's motion for a new trial on the grounds of excessive punitive damages. State v. Morrell, 108 N.C. App. 465, 424 S.E.2d 147, appeal dismissed, 333 N.C. 463, 427 S.E.2d 626 (1993).

Punitive damages award against a boyfriend in an alienation of affections claim was warranted pursuant to G.S. 1D-15, where it was shown that the boyfriend had sexual relations on at least two occasions with the husband's wife; additionally, the award was not deemed excessive where it did not go beyond the limits established by G.S. 1D-25(b), and accordingly, the trial court's denial of the boyfriend's motion for a new trial on that issue was proper. Oddo v. Presser, 158 N.C. App. 360, 581 S.E.2d 123, 2003 N.C. App. LEXIS 1196 (2003).

No Abuse of Discretion Found. — No abuse of discretion was found where a jury awarded $225,000.00 against an insurance company for bad faith refusal to settle. Lovell v. Nationwide Mut. Ins. Co., 108 N.C. App. 416, 424 S.E.2d 181, aff'd in part; discretionary review improvidently granted in part, 334 N.C. 682, 435 S.E.2d 71 (1993).

When the trial court fails to comply with § 1A-1, Rule 50 and this rule in ordering a new trial, the general course is to reverse and remand for reinstatement of the verdict. Barnett v. Security Ins. Co., 84 N.C. App. 376, 352 S.E.2d 855 (1987).

Findings on Setting Aside Verdict on Damages. — Findings, when requested, should be made in support of the ultimate conclusion that the damages appear to have been given under the influence of passion or prejudice in order to facilitate meaningful appellate review of an order setting aside a verdict on damages. Andrews v. Peters, 318 N.C. 133, 347 S.E.2d 409 (1986).

When Findings of Fact and Conclusions of Law Required. — Plaintiff's motion for a new trial pursuant to G.S. 1A-1-59(a)(7) and (8) presented questions of law that received de novo review on appeal, and accordingly findings of fact and conclusions of law would not aid appellate review and thus were not required; because the trial court's rulings under Rule 59(a)(5), (6), and (9) were evaluated for an abuse of discretion, however, findings of fact and conclusions of law were necessary to effectuate meaningful appellate review, and therefore the trial court erred in failing to make findings and conclusions as requested by plaintiff. N.C. Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

Evidence may be considered even though no objection at trial. — Trial court that is ruling on a motion for a new trial on the grounds of inadequate damages in accordance with N.C. R. Civ. P. 59(a)(6) is not precluded from considering specific testimony and evidence presented at trial merely because the moving party did not object to that testimony or evidence during the course of the trial. Guox v. Satterly, 164 N.C. App. 578, 596 S.E.2d 452, 2004 N.C. App. LEXIS 973 (2004), cert. denied, 359 N.C. 188, 606 S.E.2d 906 (2004).

Failure of Court to Specify Errors Relied on in Granting Motion. — Where the trial court allowed defendants' motion for a new trial "for errors committed by the court during the course of the trial," but the court's order did not specify the errors, the trial court failed to fulfill the requirements of this rule. Barnett v.

Security Ins. Co., 84 N.C. App. 376, 352 S.E.2d 855 (1987).

Refusal to Consider Affidavit After Hearing on Motion to Amend. — In action for modification of child custody and child support, the trial court did not abuse its discretion in refusing to consider the affidavit of the child, where the affidavit was offered after defendant's motion under G.S. 1A-1, Rule 52 to amend the judgment had been heard and without notice to plaintiff, and defendant sought only to amend the judgment based on the insufficiency of the evidence already offered and errors of law which occurred during trial, under subsections (a)(7) and (8) of this rule respectively. Payne v. Payne, 91 N.C. App. 71, 370 S.E.2d 428 (1988).

Request to Amend Order to Include Findings Not Timely. — A request for the trial court to amend its order to include specific findings of fact after the order has already been issued is not a timely request for findings under G.S. 1A-1, Rule 52(a)(2). Strickland v. Jacobs, 88 N.C. App. 397, 363 S.E.2d 229 (1988).

Notice of appeal from denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for review. Von Ramm v. Von Ramm, 99 N.C. App. 153, 392 S.E.2d 422 (1990).

Child Custody Matters. — Trial court properly granted a mother's motion, pursuant to G.S. 50-13.7, to modify a custody order, and granted primary custody of the parties' two children to the mother; the trial court properly found a substantial change in circumstances based on the father's interference with the mother's relationship with the children, the trial court had jurisdiction pursuant to G.S. 50A-202(a), and the trial court properly denied the father's motions pursuant to G.S. 1A-1, Rule 59 and G.S. 1A-1, Rule 60 to stay the order and for a new trial. Senner v. Senner, 161 N.C. App. 78, 587 S.E.2d 675, 2003 N.C. App. LEXIS 1976 (2003).

Because a mother raised only evidence that did not exist when a custody trial occurred, there was no abuse of discretion in a denial of her motion for a new trial under G.S. 1A-1, N.C. R. Civ. P. 59(a)(4). Faulkenberry v. Faulkenberry, 169 N.C. App. 428, 610 S.E.2d 237, 2005 N.C. App. LEXIS 688 (2005).

Private Nuisance. — Trial court did not err in denying the airport operators' post-trial motion based on the claim that the adjoining property owners did not admit sufficient evidence to prove their claim that operation of the airport was a private nuisance; the adjoining property owners admitted sufficient evidence that the airport had a substantial and unreasonable impact on the adjoining property owners' enjoyment of their property. Broadbent v. Allison, 176 N.C. App. 359, 626 S.E.2d 758, 2006 N.C. App. LEXIS 524 (2006).

Contract Trials. — Judge's skepticism about contract trials, which was directed towards counsel for both parties, did not prevent a surety from having a fair trial under G.S. 1A-1, N.C. R. Civ. P. 59(a)(1) in a subcontractor's action on the payment bonds. Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co., — N.C. App. —, 665 S.E.2d 505, 2008 N.C. App. LEXIS 1628 (2008).

Applied in Horton v. Iowa Mut. Ins. Co., 9 N.C. App. 140, 175 S.E.2d 725 (1970); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974); Board of Transp. v. Harvey, 28 N.C. App. 327, 220 S.E.2d 815 (1976); Howard v. Mercer, 36 N.C. App. 67, 243 S.E.2d 168 (1978); Nationwide Mut. Ins. Co. v. Chantos, 298 N.C. 246, 258 S.E.2d 334 (1979); McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979); Williford v. Williford, 51 N.C. App. 150, 275 S.E.2d 216 (1981); Johnson v. Robert Dunlap & Racing, Inc., 53 N.C. App. 312, 280 S.E.2d 759 (1981); Hensgen v. Hensgen, 53 N.C. App. 331, 280 S.E.2d 766 (1981); Shreve v. Combs, 54 N.C. App. 18, 282 S.E.2d 568 (1981); Rhodes v. Board of Educ., 58 N.C. App. 130, 293 S.E.2d 295 (1982); Goble v. Helms, 64 N.C. App. 439, 307 S.E.2d 807 (1983); State ex rel. Everett v. Hardy, 65 N.C. App. 350, 309 S.E.2d 280 (1983); Wachovia Bank & Trust Co. v. Guthrie, 67 N.C. App. 622, 313 S.E.2d 603 (1984); Elks v. Hannan, 68 N.C. App. 757, 315 S.E.2d 553 (1984); Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984); In re Will of Leonard, 71 N.C. App. 714, 323 S.E.2d 377 (1984); Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 321 N.C. 260, 362 S.E.2d 273 (1987); Lusk v. Case, 94 N.C. App. 215, 379 S.E.2d 651 (1989); Williams v. Randolph, 94 N.C. App. 413, 380 S.E.2d 553 (1989); Kinlaw v. North Carolina Farm Bureau Mut. Ins. Co., 98 N.C. App. 13, 389 S.E.2d 840 (1990); Burgess v. Vestal, 99 N.C. App. 545, 393 S.E.2d 324 (1990); Pate v. Eastern Insulation Serv. of New Bern, Inc., 101 N.C. App. 415, 399 S.E.2d 338 (1991); Mickens v. Robinson, 103 N.C. App. 52, 404 S.E.2d 359 (1991); Beaver v. Hampton, 106 N.C. App. 172, 416 S.E.2d 8 (1992); Scott v. Scott, 106 N.C. App. 379, 416 S.E.2d 583 (1992); Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992); Jones ex rel. Jones v. Hughes, 110 N.C. App. 262, 429 S.E.2d 399 (1993); Heart of Valley Motel, Inc. v. Edwards, 111 N.C. App. 896, 433 S.E.2d 466 (1993); Guilford County Planning & Dev. Dep't v. Simmons, 115 N.C. App. 87, 443 S.E.2d 765 (1994); Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995); Chaney v. Young, 122 N.C. App. 260, 468 S.E.2d 837 (1996); Qurneh v. Colie, 122 N.C. App. 553, 471 S.E.2d 433 (1996); Elrod v. Elrod, 125 N.C. App. 407, 481 S.E.2d 108

(1997); Fallis v. Watauga Med. Ctr., Inc., 132 N.C. App. 43, 510 S.E.2d 199, 1999 N.C. App. LEXIS 37 (1999); Stem v. Richardson, 350 N.C. 76, 511 S.E.2d 1 (1999); Horner v. Byrnett, 132 N.C. App. 323, 511 S.E.2d 342 (1999); Von Pettis Realty, Inc. v. McKoy, 135 N.C. App. 206, 519 S.E.2d 546 (1999); Bahl v. Talford, 138 N.C. App. 119, 530 S.E.2d 347, 2000 N.C. App. LEXIS 537 (2000); Croom v. State Dep't of Commerce, 143 N.C. App. 493, 547 S.E.2d 87, 2001 N.C. App. LEXIS 297 (2001); Scarvey v. First Fed. Sav. & Loan Ass'n., 146 N.C. App. 33, 552 S.E.2d 655, 2001 N.C. App. LEXIS 790 (2001); Garrett v. Smith, 163 N.C. App. 760, 594 S.E.2d 232, 2004 N.C. App. LEXIS 574 (2004); Trent v. River Place, LLC, 179 N.C. App. 72, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006); WRI/Raleigh, L.P. v. Shaikh, 183 N.C. App. 249, 644 S.E.2d 245, 2007 N.C. App. LEXIS 1039 (2007); Hughes v. Rivera-Ortiz, 187 N.C. App. 214, 653 S.E.2d 165, 2007 N.C. App. LEXIS 2372 (2007); Hines v. Wal-Mart Stores East, L.P., 191 N.C. App. 390, 663 S.E.2d 337, 2008 N.C. App. LEXIS 1309 (2008); Harrell v. Sagebrush of N.C., LLC, 191 N.C. App. 381, 663 S.E.2d 444, 2008 N.C. App. LEXIS 1319 (2008); Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., — N.C. App. —, 665 S.E.2d 493, 2008 N.C. App. LEXIS 1555 (2008); Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008); Robinson v. Trantham, — N.C. App. —, 673 S.E.2d 771, 2009 N.C. App. LEXIS 245 (2009).

Cited in Musgrave v. Mutual Sav. & Loan Ass'n, 8 N.C. App. 385, 174 S.E.2d 820 (1970); Mull v. Mull, 13 N.C. App. 154, 185 S.E.2d 14 (1971); Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972); Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972); H & B Co. v. Hammond, 17 N.C. App. 534, 195 S.E.2d 58 (1973); Hoots v. Claway, 282 N.C. 477, 193 S.E.2d 709 (1973); State v. Shelton, 21 N.C. App. 662, 205 S.E.2d 316 (1974); Robertson v. Stanley, 285 N.C. 561, 206 S.E.2d 190 (1974); Foy v. Bremson, 286 N.C. 108, 209 S.E.2d 439 (1974); State v. Hammock, 25 N.C. App. 97, 212 S.E.2d 180 (1975); State v. Johnson, 34 N.C. App. 328, 238 S.E.2d 313 (1977); Bowen v. Hodge Motor Co., 292 N.C. 633, 234 S.E.2d 748 (1977); Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977); Townsend v. Norfolk & S. Ry., 296 N.C. 246, 249 S.E.2d 801 (1978); Gladstein v. South Square Assocs., 39 N.C. App. 171, 249 S.E.2d 827 (1978); Partin v. Carolina Power & Light Co., 40 N.C. App. 630, 253 S.E.2d 605 (1979); Smith v. Beasley, 298 N.C. 798, 259 S.E.2d 907 (1979); Heist v. Heist, 46 N.C. App. 521, 265 S.E.2d 434 (1980); C.C. Woods Constr. Co. v. Budd-Piper Roofing Co., 46 N.C. App. 634, 265 S.E.2d 506 (1980); Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981); Carawan v. Tate, 304 N.C. 696, 286 S.E.2d 99 (1982); Ferguson v. Ferguson, 55 N.C. App. 341, 285 S.E.2d 288 (1982); R.B. Deal Constr. Co. v. Spainhour, 59 N.C. App. 537, 296 S.E.2d 822 (1982); Four Seasons Homeowners Ass'n v. Sellers, 62 N.C. App. 205, 302 S.E.2d 848 (1983); African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983); Marley v. Gantt, 72 N.C. App. 200, 323 S.E.2d 725 (1984); Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 311 S.E.2d 559 (1984); Hinson v. Hinson, 78 N.C. App. 613, 337 S.E.2d 663 (1985); Highway Church of Christ, Inc. v. Barber, 72 N.C. App. 481, 325 S.E.2d 305 (1985); Staples v. Woman's Clinic, 73 N.C. App. 617, 327 S.E.2d 58 (1985); Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985); Appelbe v. Appelbe, 76 N.C. App. 391, 333 S.E.2d 312 (1985); Dewey v. Dewey, 77 N.C. App. 787, 336 S.E.2d 451 (1985); Carver v. Roberts, 78 N.C. App. 511, 337 S.E.2d 126 (1985); Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986); Sanders v. Spaulding & Perkins, Ltd., 82 N.C. App. 680, 347 S.E.2d 866 (1986); Poston v. Morgan, 83 N.C. App. 295, 350 S.E.2d 108 (1986); Colonial Bldg. Co. v. Justice, 83 N.C. App. 643, 351 S.E.2d 140 (1986); Campbell ex rel. McMillan v. Pitt County Mem. Hosp., 84 N.C. App. 314, 352 S.E.2d 902 (1987); Hill v. Hanes Corp., 319 N.C. 167, 353 S.E.2d 392 (1987); Patel v. Mid S.W. Elec., 88 N.C. App. 146, 362 S.E.2d 577 (1987); Andrews v. Peters, 89 N.C. App. 315, 365 S.E.2d 709 (1988); Petty v. Housing Auth., 90 N.C. App. 559, 369 S.E.2d 612 (1988); Cummings v. Snyder, 91 N.C. App. 565, 372 S.E.2d 724 (1988); Polk v. Biles, 92 N.C. App. 86, 373 S.E.2d 570 (1988); Adams v. Adams, 92 N.C. App. 274, 374 S.E.2d 450 (1988); In re Brooks, 93 N.C. App. 86, 376 S.E.2d 250 (1989); New Bern Pool & Supply Co. v. Graubart, 94 N.C. App. 619, 381 S.E.2d 156 (1989); Haywood v. Haywood, 95 N.C. App. 426, 382 S.E.2d 798 (1989); Concrete Supply Co. v. Ramseur Baptist Church, 95 N.C. App. 658, 383 S.E.2d 222 (1989); Schall v. Jennings, 99 N.C. App. 343, 393 S.E.2d 130 (1990); First Am. Bank v. Carley Capital Group, 99 N.C. App. 667, 394 S.E.2d 237 (1990); Daum ex rel. Henderson v. Lorick Enters., Inc., 105 N.C. App. 428, 413 S.E.2d 559 (1992); McClain v. Otis Elevator Co., 106 N.C. App. 45, 415 S.E.2d 78 (1992); Mabry v. Nationwide Mut. Fire Ins. Co., 108 N.C. App. 37, 422 S.E.2d 322 (1992); Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992); Harrison v. Edison Bros. Apparel Stores, 814 F. Supp. 457 (M.D.N.C. 1993); Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d 852 (1993); Giles ex rel. Giles v. Smith, 112 N.C. App. 508, 435 S.E.2d 832 (1993); Tate v. Christy, 114 N.C. App. 45, 440 S.E.2d 858 (1994); Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994); Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Pinckney v. Van Damme, 116 N.C. App. 139, 447 S.E.2d 825 (1994); Green v. Rouse, 116 N.C. App. 647, 448 S.E.2d 846 (1994); Wachovia Bank v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 450 S.E.2d 527 (1994); Chee v. Estes, 117 N.C. App. 450, 451 S.E.2d 349 (1994); Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994); Outen v. Mical, 118 N.C. App. 263, 454 S.E.2d 883 (1995); Gardner v. Harriss, 122 N.C. App. 697, 471 S.E.2d 447 (1996); Jones v. Patience, 121 N.C. App. 434, 466 S.E.2d 720 (1996); Jacobsen v. McMillan, 124 N.C. App. 128, 476 S.E.2d 368 (1996); Curry v. First Fed. Savs. & Loan Ass'n, 125 N.C. App. 108, 479 S.E.2d 286 (1996); Lassiter v. English, 126 N.C. App. 489, 485 S.E.2d 840 (1997); Abels v. Renfro Corp., 126 N.C. App. 800, 486 S.E.2d 735 (1997); Sherrod v. Nash Gen. Hosp., 126 N.C. App. 755, 487 S.E.2d 151 (1997); Sockwell & Assocs. v. Sykes Enters., Inc., 127 N.C. App. 139, 487 S.E.2d 795 (1997); Asfar v. Charlotte Auto Auction, Inc., 127 N.C. App. 502, 490 S.E.2d 598 (1997); Fenz ex rel. Gladden v. Davis, 128 N.C. App. 621, 495 S.E.2d 748 (1998); Condellone v. Condellone, 129 N.C. App. 675, 501 S.E.2d 690 (1998); Barber v. Constien, 130 N.C. App. 380, 502 S.E.2d 912 (1998); Fender v. Deaton, 130 N.C. App. 657, 503 S.E.2d 707 (1998); Albrecht v. Dorsett, 131 N.C. App. 502, 508 S.E.2d 319 (1998); Ollo v. Mills, 136 N.C. App. 618, 525 S.E.2d 213, 2000 N.C. App. LEXIS 110 (2000); Hyde v. Chesney Glen Homeowners Ass'n, Inc., 137 N.C. App. 605, 529 S.E.2d 499, 2000 N.C. App. LEXIS 504 (2000); Kinsey v. Spann, 139 N.C. App. 370, 533 S.E.2d 487, 2000 N.C. App. LEXIS 904 (2000); Stevens v. Guzman, 140 N.C. App. 780, 538 S.E.2d 590, 2000 N.C. App. LEXIS 1273 (2000); Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc., 140 N.C. App. 521, 537 S.E.2d 227, 2000 N.C. App. LEXIS 1212 (2000); Walker v. Walker, 143 N.C. App. 414, 546 S.E.2d 625, 2001 N.C. App. LEXIS 295 (2001); Whaley v. White Consol. Indus., Inc., 144 N.C. App. 88, 548 S.E.2d 177, 2001 N.C. App. LEXIS 333 (2001); Taylor v. Ellerby, 146 N.C. App. 56, 552 S.E.2d 667, 2001 N.C. App. LEXIS 792 (2001); Piedmont Triad Reg'l Water Auth. v. Lamb, 150 N.C. App. 594, 564 S.E.2d 71, 2002 N.C. App. LEXIS 584 (2002); Rich, Rich & Nance v. Carolina Constr. Corp., 153 N.C. App. 149, 570 S.E.2d 212, 2002 N.C. App. LEXIS 1077 (2002); Atchley Grading Co. v. W. Cabarrus Church, 148 N.C. App. 211, 557 S.E.2d 188, 2001 N.C. App. LEXIS 1286 (2001); GMAC v. Wright, 154 N.C. App. 672, 573 S.E.2d 226, 2002 N.C. App. LEXIS 1524 (2002); Ellis v. Whitaker, 156 N.C. App. 192, 576 S.E.2d 138, 2003 N.C. App. LEXIS 77 (2003); Smith v. State Farm Mut. Auto. Ins. Co., 157 N.C. App. 596, 580 S.E.2d 46, 2003 N.C. App. LEXIS 933 (2003); Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1, 2004 N.C. LEXIS 193 (2004); Whisnant v. Herrera, 166 N.C. App. 719, 603 S.E.2d 847, 2004 N.C. App. LEXIS 2028 (2004); Dalgewicz v. Dalgewicz, 167 N.C. App. 412, 606 S.E.2d 164, 2004 N.C. App. LEXIS 2375 (2004); Rhew v. Felton, 178 N.C. App. 475, 631 S.E.2d 859, 2006 N.C. App. LEXIS 1560 (2006); Baxley v. Jackson, 179 N.C. App. 635, 634 S.E.2d 905, 2006 N.C. App. LEXIS 2055 (2006); Williams v. Allen, 182 N.C. App. 121, 641 S.E.2d 391, 2007 N.C. App. LEXIS 483 (2007); Weber, Hodges & Godwin Commer. Real Estate Servs., LLC v. Cook, 186 N.C. App. 288, 650 S.E.2d 834, 2007 N.C. App. LEXIS 2082 (2007); Kerr v. Long, 189 N.C. App. 331, 657 S.E.2d 920, 2008 N.C. App. LEXIS 533 (2008); Crouse v. Mineo, 189 N.C. App. 232, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (2008); Clay v. Monroe, 189 N.C. App. 482, 658 S.E.2d 532, 2008 N.C. App. LEXIS 645 (2008); Cooper v. BHT Enters., — N.C. App. —, 672 S.E.2d 748, 2009 N.C. App. LEXIS 150 (2009); Monaghan, M.D. v. Schilling, MD, — N.C. App. —, 677 S.E.2d 562, 2009 N.C. App. LEXIS 718 (2009).

II. TIME FOR SERVING MOTIONS AND AFFIDAVITS.

Service to Be Made Within 10 Days. — Section (b) of this rule, when construed with G.S. 1A-1, Rule 5(a), means that service must be made within 10 days when service is required. Hennessee v. Cogburn, 39 N.C. App. 627, 251 S.E.2d 623, cert. denied, 297 N.C. 300, 254 S.E.2d 919 (1979).

Because the father's motion for a new trial, following the trial court's award of sole custody to the father's ex-wife, was untimely, as it was served and filed a month after the judgment was entered, rather than within 10 days of the judgment entry, the trial court properly denied the father's motion. Trivette v. Trivette, 162 N.C. App. 55, 590 S.E.2d 298, 2004 N.C. App. LEXIS 40 (2004).

Service Rather Than Filing. — This rule requires that the motion be served, not filed, within ten days after entry of judgment. Muse v. Charter Hosp., 117 N.C. App. 468, 452 S.E.2d 589, cert. denied, 340 N.C. 114, 455 S.E.2d 663, aff'd per curiam, 342 N.C. 403, 464 S.E.2d 44 (1995).

Timeliness Not Affected by Entry of Jury Verdict. — The entry of the jury verdict is not mentioned in the provisions of section (b) of this rule which limit the time period within which motions for a new trial can be made. Sheehan v. Harper Bldrs., Inc., 83 N.C. App. 630, 351 S.E.2d 114 (1986), appeal dismissed and cert. denied, 320 N.C. 171, 357 S.E.2d 927 (1987).

Filing of Motion Before Entry of Judgment. — Though a motion for new trial may be filed before entry of judgment, a trial court does not have jurisdiction to hear and determine the motion until after entry of judgment. Kor Xiong v. Marks, — N.C. App. —, 668 S.E.2d 594, 2008 N.C. App. LEXIS 2016 (2008).

Amendment of Divorce Judgment. — Although not so designated, a motion to have separation agreement incorporated into divorce decree was essentially one made pursuant to this rule to alter or amend the divorce judgment. The trial court had no authority to alter or amend such judgment under this rule pursuant to a motion made more than 10 days after entry of the judgment sought to be altered or amended. Coats v. Coats, 79 N.C. App. 481, 339 S.E.2d 676 (1986).

Second Motion Held Timely. — The plaintiff's appeal was timely filed under the tolling provision of the Rules of Appellate Procedure 3, where the plaintiff filed a timely second motion asserting four additional grounds for a new trial after the first motion was orally denied at the end of a medical malpractice trial, and the plaintiff's appeal was filed within 30 days of the date the court entered an order ruling on the second motion. Sherrod v. Nash Gen. Hosp., 348 N.C. 526, 500 S.E.2d 708 (1998).

Defendant's Motion Held Untimely. — Where, by the express terms of the parties' divorce agreement, defendant had at least constructive knowledge that one of plaintiff's possible alternatives to recover support payments included foreclosure on defendant's property mentioned in the agreement, there was no merit in defendant's contention that this constituted newly discovered evidence which by due diligence he could not have discovered in time to move for a new trial under section (b) of this Rule. Lang v. Lang, 108 N.C. App. 440, 424 S.E.2d 190 (1993).

III. ALTERING OR AMENDING JUDGMENTS.

Purpose of Insuring Speedy Trial on Merits Served by Amendments. — The rules achieve their purpose of insuring a speedy trial on the merits of a case by providing for and encouraging liberal amendments to conform the pleadings and evidence under G.S. 1A-1, Rule 15(a), by pretrial order under G.S. 1A-1, Rule 16, during and after reception of evidence under G.S. 1A-1, Rule 15(b), and after entry of judgment under G.S. 1A-1, Rules 15(b) and 60 and under this rule. Such amendments are made upon motion and with leave of court, by express consent, and by implied consent. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Applicability of § 1A-1, Rule 7(b). — In order to suspend the running of the appeal clock, a motion under section (e) of this rule must not only be timely served, but it must also meet the demands of G.S. 1A-1, Rule 7(b). Dusenberry v. Dusenberry, 87 N.C. App. 490, 361 S.E.2d 605 (1987).

If a motion under section (e) of this rule fails to comply with the requirements of G.S. 1A-1, Rule 7(b), it is ipso facto ineffective to suspend the running of appeal time. Dusenberry v. Dusenberry, 87 N.C. App. 490, 361 S.E.2d 605 (1987).

Failure to State Grounds of Motion. — Trial court properly held that a motion to alter or amend violated G.S. 1A-1-7(b)(1) and was not a proper G.S. 1A-1-59(e) motion because the motion did not make reference to any of the grounds of that rule, did not use any of the language from the rule that gave notice of reliance on any of those grounds, and did not reveal the basis of the motion in terms of that rule; further, because the time for filing an appeal was not tolled by the improper G.S. 1A-1-59 motion, the notice of appeal was not a timely appeal of the order dismissing the petition. N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp., 183 N.C. App. 466, 645 S.E.2d 105, 2007 N.C. App. LEXIS 1105 (2007).

Amendment Following Dismissal under § 1A-1, Rule 12(b)(6). — A motion to dismiss under G.S. 1A-1, Rule 12(b)(6) is not a "responsive pleading" under G.S. 1A-1, Rule 15(a) and so does not itself terminate plaintiff's unconditional right to amend a complaint under G.S. 1A-1, Rule 15(a). However, once the trial court enters its dismissal under G.S. 1A-1, Rule 12(b)(6), plaintiff's right to amend under G.S. 1A-1, Rule 15(a) is terminated. Under certain limited circumstances set forth in section (e) of this rule and G.S. 1A-1, Rule 60(b), a plaintiff may, however, seek to reopen the trial court's judgment and amend the complaint concurrently under G.S. 1A-1, Rule 15(a). Johnson v. Bollinger, 86 N.C. App. 1, 356 S.E.2d 378 (1987).

Amendment upon Motion of the Court. — A trial court has the power to amend its judgment on its own motion within the ten-day period provided by section (e) of this rule. Fox v. Fox, 103 N.C. App. 13, 404 S.E.2d 354 (1991).

Alteration or Amendment of Judgment After Adjournment of Term. — The legislature, in delineating the precise time periods of G.S. 1A-1, Rule 50(b) and section (e) of this rule, did not intend for these specific periods to be curtailed by the adjournment of the term of court at which judgment was rendered; thus a trial court may alter or amend a judgment pursuant to this rule and a trial court may enter judgment n.o.v. pursuant to G.S. 1A-1, Rule 50 (including the alteration of a judgment entered upon such a verdict) after the adjournment of the term during which the judgment was entered. Housing, Inc. v. Weaver, 305 N.C. 428, 290 S.E.2d 642 (1982).

Defendant's motion to amend divorce judgment to permit him to claim the two children of the parties as dependents on his State and federal tax returns was not properly made pursuant to subsection (b)(6) of this rule, which permits motions for relief from judgments, and should have been made pursuant to section (e) of this rule. Coleman v. Arnette, 48 N.C. App. 733, 269 S.E.2d 755 (1980).

Motion under § 1A-1, Rule 59 to amend judgment filed 10 days after judgment by defendant tolled the time for filing and serving a cross-notice of appeal until entry of an order on the motion pursuant to N.C.R.A.P., Rule 3(c). However, where defendants later withdrew their motion under this rule, the 10-day time limit to give notice of appeal under N.C.R.A.P., Rule 3(c) was not tolled, because there was never a judicial determination on defendants' motion. Landin Ltd. v. Sharon Luggage, Ltd., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

This rule is an inappropriate vehicle to challenge the denial of a Rule 60 motion. Garrison ex rel. Chavis v. Barnes, 117 N.C. App. 206, 450 S.E.2d 554 (1994).

Discretion of Trial Court. — A motion under section (e) of this rule to amend the trial court's judgment or order is made subsequent to the judgment and is, itself, a matter within the trial court's discretion. Strickland v. Jacobs, 88 N.C. App. 397, 363 S.E.2d 229 (1988).

Trial court did not abuse its discretion in entering judgment based on the verdict because the sublessee, whom the jury found for on his claim against the landlord for conversion and breach of contract and on his claim of breach of contract against the subtenant, failed to show that the damages awarded by the jury on the two claims were inadequate and were given under the influence of passion or prejudice. Di Frega v. Pugliese, 164 N.C. App. 499, 596 S.E.2d 456, 2004 N.C. App. LEXIS 981 (2004).

Trial court did not abuse its discretion when it denied a guest's motion to alter or amend pursuant to G.S. 1A-1-59(b) the dismissal of the guest's personal injury claims against a motor speedway and a concrete manufacturer as a discovery sanction because evidence of a prior injury, medical records, and a worker's compensation claim did not constitute newly discovered evidence; fact that the guest did not make his attorney aware of the incident until defendants brought it to light was of no relevance, and the guest no attempt to argue in what way he could be considered excusably ignorant of the evidence involved. Baker v. Charlotte Motor Speedway, Inc., 180 N.C. App. 296, 636 S.E.2d 829, 2006 N.C. App. LEXIS 2306 (2006).

Plaintiff Entitled to New Trial on Issue of Damages. — In breach of contract action against university, professor was entitled to a new trial on the issue of damages only where the trial court erred in denying his motion for judgment notwithstanding the verdict or for a new trial based upon a jury award of inadequate damages; the trial court's failure to instruct the jury on whether the professor was ready, willing, and able to perform the contract meant that the jury did not decide that issue, which was critical to determining whether the professor was entitled to nominal damages or substantial damages after the jury found that the university breached the agreement. Munn v. N.C. State Univ., 173 N.C. App. 144, 617 S.E.2d 335, 2005 N.C. App. LEXIS 1931 (2005), rev'd, review improvidently granted, 360 N.C. 353, 626 S.E.2d 270 (2006).

Order entered by trial judge after verdict, due to his apprehension about the jury being affected by an exhibit that he had excluded, although improperly denominated a mistrial, would not fail merely because it was inadvertently given the wrong nomenclature, and would therefore be considered an order granting a new trial for misconduct by the jury or prevailing party under the provisions of subsection (a)(2) of this rule. Elks v. Hannan, 68 N.C. App. 757, 315 S.E.2d 553 (1984).

Judge to Set Aside Verdict Not Alter It. — The trial judge erred when he attempted to change the verdict as to the defendants instead of setting aside the verdict and/or ordering a new trial on the damages issue if he deemed the verdict against the weight of the evidence or considered the damages excessive. Poor v. Hill, 138 N.C. App. 19, 530 S.E.2d 838, 2000 N.C. App. LEXIS 540 (2000).

Trial court erred in not granting motion to amend or open judgment where arbitrator failed to disclose numerous social, business, and professional relationships with partners in law firm representing insurance company. William C. Vick Constr. Co. v. North Carolina Farm Bureau Fed'n, 123 N.C. App. 97, 472 S.E.2d 346 (1996).

The trial court abused its discretion in denying a seller's motion to set the preliminary injunction aside because the seller never received notice of the buyer's intention to seek a preliminary injunction; the lack of notice affected the seller's substantial rights, and the seller's purported attorney of record did not represent the seller in the instant action, thus making service on the attorney insufficient to provide notice to the seller. Perry v. Baxley Dev., Inc., 188 N.C. App. 158, 655 S.E.2d 460, 2008 N.C. App. LEXIS 88 (2008).

JNOV Granted on Appeal Mooted New Trial Motion. — Trial court decision denying JNOV to a city, one of its police officers, and its police department was reversed on appeal, because the plaintiff, an arrestee injured in a squad car, failed to prove gross negligence and only showed simple negligence by evidence that the police officer drove 30 to 35 miles above the legal speed limit although he knew that plaintiff was not wearing a seat belt and had to brake suddenly to avoid a collision causing plaintiff to propel into the metal screen in the squad car. City also did not waive governmental immunity by its voluntary settlement with plaintiff since the city had a liability policy and none of the conditions of waiver, as provided by G.S. 160A-485(a), were met. Clayton v. Branson, 170 N.C. App. 438, 613 S.E.2d 259, 2005 N.C. App. LEXIS 1070 (2005), cert. denied, — N.C. —, 625 S.E.2d 785 (2005).

No Surprise Justifying New Trial. — Defense witness's identification of the type of blood pressure machine used on plaintiff did not come as a "surprise" to plaintiff, as he had been aware for some time that defense counsel had identified the machine at issue and that defense counsel had made the machine available for his inspection. Further, he received a spoliation instruction regarding any evidence intentionally withheld or destroyed by defendants, so, on these facts, there was no irregularity in his trial that would have served as a basis for a new trial under G.S. 1A-1, R. 59(a). Yorke v. Novant Health, Inc., — N.C. App. —, 666 S.E.2d 127, 2008 N.C. App. LEXIS 1620 (2008).

IV. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-207.*

The court is not empowered to change a verdict. Rankin v. Oates, 183 N.C. 517, 112 S.E. 32 (1922); Hyatt v. McCoy, 194 N.C. 760, 140 S.E. 807 (1927); Bundy v. Sutton, 207 N.C. 422, 177 S.E. 420 (1934); Edwards v. Upchurch, 212 N.C. 249, 193 S.E. 19 (1937).

Duty to Set Aside Verdict Where Jury Commits Palpable Error. — When it appears from the evidence, the charge of the court, and the verdict that the jury has committed a palpable error in the answer to one of the issues, it is the duty of the trial judge to set aside to prevent a miscarriage of justice. Hussey v. Atlantic Coast Line R.R., 183 N.C. 7, 110 S.E. 599 (1922).

As to discretion of court and review thereof, see Hoke v. Tilley, 174 N.C. 658, 94 S.E. 446 (1917); Baily v. Dibbrell Mineral Co., 183 N.C. 525, 112 S.E. 29 (1922); Goodman v. Goodman, 201 N.C. 808, 161 S.E. 686 (1931); Strayhorn v. Fidelity Bank, 203 N.C. 383, 166 S.E. 312 (1932); Manufacturers' Fin. Acceptance Corp. v. Jones, 203 N.C. 523, 166 S.E. 504 (1932); Brantley v. Collie, 205 N.C. 229, 171 S.E. 88 (1933); Harrison v. Metropolitan Life Ins. Co., 207 N.C. 487, 177 S.E. 423 (1934); Anderson v. Holland, 209 N.C. 746, 184 S.E. 511 (1936); Hawley v. Powell, 222 N.C. 713, 24 S.E.2d 523 (1943); Alligood v. Shelton, 224 N.C. 754, 32 S.E.2d 350 (1944); Ziglar v. Ziglar, 226 N.C. 102, 36 S.E.2d 657 (1946); King v. Byrd, 229 N.C. 177, 47 S.E.2d 856 (1948); Carolina Coach Co. v. Central Motor Lines, 229 N.C. 650, 50 S.E.2d 909 (1948); Pruitt v. Ray, 230 N.C. 322, 52 S.E.2d 876 (1949).

Rule 60. Relief from judgment or order.

(a) *Clerical mistakes.* — Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* — On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;
(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
(4) The judgment is void;
(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

(c) *Judgments rendered by the clerk.* — The clerk may, in respect of judgments rendered by himself, exercise the same powers authorized in sections (a) and (b). The judge has like powers in respect of such judgments. Where such powers are exercised by the clerk, appeals may be had to the judge in the manner provided by law. (1967, c. 954, s. 1.)

COMMENT

The prior North Carolina law was that the court could correct clerical mistakes at any time by motion in the cause, either in or out of term. The motion to correct a clerical error need not be made to the same judge who tried the cause.

There were two statutes dealing with the subject matter. Former § 1-220 provided in effect that where there had been personal service upon the defendant the court could set aside a judgment for mistake, surprise, inadvertence or excusable neglect within one year from the rendition of the judgment. Section 1-108 formerly provided in effect that where there had been constructive service only the defendant must be allowed to defend even after judgment at any time within one year after notice of the judgment but within five years after rendition of the judgment. In any such case the judge must find the facts concerning the mistake, surprise, etc., and that the defendant had a meritorious defense and he must reduce this information to writing.

In reference to section (b)(3) of the federal rule, North Carolina makes a distinction in extrinsic and intrinsic fraud and in the manner in which such judgment may be attacked.

There is not as much difference between the federal rule and the North Carolina as first blush would indicate. Actually, the federal rule uses very succinct language to incorporate most of the results obtained under the North Carolina statutes and case law. As noted above the prior North Carolina practice distinguished between the rights of a defendant who was personally served and a defendant against whom constructive notice was served.

Legal Periodicals. — For survey of 1976 case law on civil procedure, see 55 N.C.L. Rev. 914 (1977).

For note discussing abandonment of appeal, see 56 N.C.L. Rev. 573 (1978).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For survey of 1980 law on civil procedure, see 59 N.C.L. Rev. 1043 (1981).

For note on default not constituting an admission of facts for purposes of summary judgment, see 17 Wake Forest L. Rev. 49 (1981).

For survey of 1981 law on civil procedure, see 60 N.C.L. Rev. 1214 (1982).

For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

For article, "Functus Officio: Authority of the Trial Court after Notice of Appeal," see 81 N.C.L. Rev. 2331 (2003).

CASE NOTES

I. In General.
II. Relief under Subsection (a).
III. Relief under Subsection (b).
  A. In General.
  B. Mistake, Inadvertence, Surprise and Excusable Neglect.
    1. In General.
    2. Relief Held Proper.
    3. Relief Held Improper.
  C. Newly Discovered Evidence.
  D. Fraud, Misrepresentation and Misconduct of Adverse Party.
  E. Other Reasons Justifying Relief Under Subdivision (b)(6).

F. Void Judgments.

IV. Decisions under Prior Law.
   A. In General.
   B. Relief Held Proper.
   C. Relief Held Improper.

I. IN GENERAL.

The rules achieve their purpose of insuring a speedy trial on the merits by providing for and encouraging liberal amendments to conform pleadings and evidence under G.S. 1A-1, Rule 15(a), by pretrial order under G.S. 1A-1, Rule 16, during and after reception of evidence under G.S. 1A-1, Rule 15(b), and after entry of judgment under G.S. 1A-1, Rules 15(b) and 59 and this rule. Such amendments are made upon motion and with leave of court, by express consent, and by implied consent. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Court May Act Otherwise Than "On Motion". — Although this rule says that the court is to act "on motion," it does not deprive the court of the power to act in the interest of justice in an unusual case where its attention has been directed to the necessity for relief by means other than a motion. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

Motion to Set Aside Arbitration Award. — Arbitration award itself was interlocutory and thus could not have been set aside pursuant to N.C. R. Civ. P. 60(b). Brock & Scott Holdings, Inc. v. West, — N.C. App. —, 679 S.E.2d 507, 2009 N.C. App. LEXIS 1177 (July 21, 2009).

A motion in the cause is not an improper procedure for seeking relief from an execution sale under the judgment. Witten Supply Co. v. Redmond, 11 N.C. App. 173, 180 S.E.2d 487 (1971).

Any reference to or discussion of this rule by defendant in his motion under § 1A-1, Rule 55(d) to set aside and vacate entry of default is unnecessary and surplusage. Hubbard v. Lumley, 17 N.C. App. 649, 195 S.E.2d 330 (1973).

Only a party to an action can seek relief under this section. Watson v. Ben Griffin Realty & Auction, 128 N.C. App. 61, 493 S.E.2d 331 (1997).

Standing to Have Order Set Aside. — Generally, only a party or his legal representative has standing to have an order set aside pursuant to this rule; and a stranger to the action may not obtain such relief. Bowling v. Combs, 60 N.C. App. 234, 298 S.E.2d 754, cert. denied, 307 N.C. 696, 301 S.E.2d 389 (1983).

Erroneous judgment may be corrected only by appeal, and a motion under this rule cannot be used as a substitute for appellate review. Chicopee, Inc. v. Sims Metal Works, Inc., 98 N.C. App. 423, 391 S.E.2d 211, cert. denied, 327 N.C. 426, 395 S.E.2d 674 (1990).

Wording of Judgment Controls. — When it is unclear from looking at a judgment whether a default judgment or a summary judgment was intended, the wording of the body of the judgment itself controls, not the heading. East Carolina Oil Transp., Inc. v. Petroleum Fuel & Term. Co., 82 N.C. App. 746, 348 S.E.2d 165 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 745 (1987).

Judgment Entered in Open Court Held Not Subject to Repudiation. — Judgment entered on June 13, 1986, in open court, based on consent of the parties, and memorialized on September 8, 1986, when the judge signed the formal judgment, could not be repudiated by one of the parties on June 17, 1986. Blee v. Blee, 89 N.C. App. 289, 365 S.E.2d 679 (1988).

Bound by Adverse Findings and Conclusions. — Trial court did not err in granting summary judgment to the alleged wrongdoers, as the allegedly wrong party did not have the right to file a separate action to challenge whether fraud was involved in an earlier suit the allegedly wronged party brought against the one alleged wrongdoer; since intrinsic fraud was allegedly involved, the allegedly wronged party could only attack the earlier judgment by filing, as she did, G.S. 1A-1, Rule 60(b) motion to set aside, and since she withdrew her appeal of the denial of that motion, she was bound by the trial court's findings of fact and conclusions of law that held she was not entitled to have the earlier judgment set aside. Hooks v. Eckman, 159 N.C. App. 681, 587 S.E.2d 352, 2003 N.C. App. LEXIS 1517 (2003).

Claim That Judgment Is Defective Not Permitted After Accepting Its Benefits. — After petitioning the court to enter a default judgment, plaintiff relied upon its validity and force thrice — by executing on it; by retaining the money collected by execution; and by suing defendant in a separate action for future rents. The law does not permit a party to claim that a judgment is defective after relying upon its validity and accepting its benefits. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Invalid Entry of Default. — Trial court erred in denying the driver's motion set aside a default judgment entered in favor of the victim in the victim's personal injury action, as the default judgment was predicated upon an invalid entry of default. McIlwaine v. Williams, 155 N.C. App. 426, 573 S.E.2d 262, 2002 N.C. App. LEXIS 1620 (2002).

Effect of Grant of Relief. — The grant of relief from an order does not overrule the earlier order but relieves the parties of the effect of the order. Charns v. Brown, 129 N.C. App. 635, 502 S.E.2d 7, 1998 N.C. App. 668 (1998), cert. denied, 349 N.C. 228, 515 S.E.2d 701 (1998).

Denial of Relief Proper. — In determining whether a school board properly determined not to renew a teacher's contract under G.S. 115C-325(m)(2), the trial court had looked at all of the evidence and determined that there was substantial evidence to support the board's determination, even without inaccurate information contained in a memorandum; in doing so, it had properly applied the whole record test to the evidence presented to the board, and this justified its later denial of the teacher's motion for reconsideration. Davis v. Macon County Bd. of Educ., 178 N.C. App. 646, 632 S.E.2d 590, 2006 N.C. App. LEXIS 1644 (2006).

Appellant's reliance on an oral motion for a trial judge to reconsider, pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b), a discovery order, which the appellant did not appeal, was misplaced because judgments involving misapplication of the law could be corrected only by appeal and Rule 60(b) motions could not be used as a substitute for appeal. Spangler v. Olchowski, 187 N.C. App. 684, 654 S.E.2d 507, 2007 N.C. App. LEXIS 2575 (2007).

Child Custody Matters. — Trial court properly granted a mother's motion, pursuant to G.S. 50-13.7, to modify a custody order and granted primary custody of the parties' two children to the mother; the trial court properly found a substantial change in circumstances based on the father's interference with the mother's relationship with the children, the trial court had jurisdiction pursuant to G.S. 50A-202(a), and the trial court properly denied the father's motions pursuant to G.S. 1A-1, Rule 59 and G.S. 1A-1, Rule 60 to stay the order and for a new trial. Senner v. Senner, 161 N.C. App. 78, 587 S.E.2d 675, 2003 N.C. App. LEXIS 1976 (2003).

G.S. 1A-1, N.C. R. Civ. P. 60(b) did not apply to an interlocutory order denying a motion to dismiss a medical malpractice case, and a trial court lacked the authority to grant relief from that denial and to dismiss the case; in any event, a decision ruling that G.S 1A-1, N.C. R. Civ. P. 9(j) was constitutional did not affect rights acquired in an earlier holding that the rule was invalid, and the trial court erred in dismissing the malpractice on the basis of G.S. 1A-1, N.C. R. Civ. P. 9(j). Rupe v. Hucks-Follis, 170 N.C. App. 188, 611 S.E.2d 867, 2005 N.C. App. LEXIS 901 (2005).

Substantial Right Held Not Affected, Precluding Immediate Appeal. — Trial court's order granting a motion to set aside a prior voluntary dismissal of a tort lawsuit, and its order denying defendants' motion to dismiss, (1) were interlocutory, (2) were not based on "minimum contacts," and (3) did not involve possible inconsistent jury verdicts; thus, there was no right of immediate appeal because defendants did not demonstrate any substantial right that qualified them for immediate appeal. Robinson v. Gardner, 167 N.C. App. 763, 606 S.E.2d 449, 2005 N.C. App. LEXIS 20 (2005), cert. denied, 359 N.C. 322, 611 S.E.2d 417 (2005).

Burden of Proof. — Trial court did not err in denying the airport operators' post-trial motions claiming that they had newly-discovered evidence that the adjoining property owners, who had brought a private nuisance claim against the airport operators, bought additional property adjoining their property and the airport following the jury trial in the private nuisance case; the fact that the adjoining property owners purchased additional property could not be the basis for a new trial because the purchase did not occur until after the trial was completed and, thus, the trial court's denial of the post-trial motions was not an abuse of discretion. Broadbent v. Allison, 176 N.C. App. 359, 626 S.E.2d 758, 2006 N.C. App. LEXIS 524 (2006).

Appeal Dismissed Due to Trial Court's Inclination to Grant N.C. R. Civ. P. 60(b)(3) Motion. — Appeal was dismissed and the case was remanded to the trial court for the entry of a final order on defendant's N.C. R. Civ. P. 60(b)(3) motion because the trial court entered an inclination to rule in favor of defendant and grant the Rule 60(b) motion. Hall v. Cohen, 177 N.C. App. 456, 628 S.E.2d 469, 2006 N.C. App. LEXIS 977 (2006).

Motion Filed Within One Year After Judgment Entered by Court. — Because an adjudicated father filed his G.S. 1A-1, N.C. R. Civ. P. 60 motion within one year after a judgment, order, or proceeding was entered or taken by the district court, and not from the day that he executed an affidavit of parentage, the district court properly heard the motion. Guilford County ex rel. Hill v. Holbrook, 190 N.C. App. 188, 660 S.E.2d 175, 2008 N.C. App. LEXIS 833 (2008).

Applied in Cheshire v. Bensen Aircraft Corp., 17 N.C. App. 74, 193 S.E.2d 362 (1972); Lowe's Charlotte Hdwe., Inc. v. Howard, 18 N.C. App. 80, 196 S.E.2d 53 (1973); Carolina Paper Co. v. Bouchelle, 19 N.C. App. 697, 200 S.E.2d 203 (1973); Carolina Paper Co. v. Bouchelle, 285 N.C. 56, 203 S.E.2d 1 (1974); Broughton v. Broughton, 22 N.C. App. 233, 206 S.E.2d 302 (1974); Smith v. McClure, 25 N.C. App. 280, 212 S.E.2d 702 (1975); Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172 (1975); Rivers

v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568 (1976); Stokley v. Stokley, 30 N.C. App. 351, 227 S.E.2d 131 (1976); Quaker Furn. House, Inc. v. Ball, 31 N.C. App. 140, 228 S.E.2d 475 (1976); Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976); Arnold v. Varnum, 34 N.C. App. 22, 237 S.E.2d 272 (1977); North Brook Farm Lines v. McBrayer, 35 N.C. App. 34, 241 S.E.2d 74 (1978); Sawyer v. Cox, 36 N.C. App. 300, 244 S.E.2d 173 (1978); Cole v. Cole, 37 N.C. App. 737, 247 S.E.2d 16 (1978); Northwestern Bank v. Robertson, 39 N.C. App. 403, 250 S.E.2d 727 (1979); Barbee v. Walton's Jewelers, Inc., 40 N.C. App. 760, 253 S.E.2d 596 (1979); McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979); Endsley v. Wolfe Camera Supply Corp., 44 N.C. App. 308, 261 S.E.2d 36 (1979); Kavanau Real Estate Trust v. Debnam, 299 N.C. 510, 263 S.E.2d 595 (1980); Fountain v. Patrick, 44 N.C. App. 584, 261 S.E.2d 514 (1980); Chris v. Hill, 45 N.C. App. 287, 262 S.E.2d 716 (1980); Laroque v. Laroque, 46 N.C. App. 578, 265 S.E.2d 444 (1980); In re Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981); Wachovia Bank & Trust Co. v. Bounous, 53 N.C. App. 700, 281 S.E.2d 712 (1981); Overnite Transp. Co. v. Styer, 57 N.C. App. 146, 291 S.E.2d 179 (1982); R.B. Deal Constr. Co. v. Spainhour, 59 N.C. App. 537, 296 S.E.2d 822 (1982); Walker v. Walker, 59 N.C. App. 485, 297 S.E.2d 125 (1982); In re Estate of Heffner, 61 N.C. App. 646, 301 S.E.2d 720 (1983); Beaufort County v. Hopkins, 62 N.C. App. 321, 302 S.E.2d 662 (1983); Braun v. Grundman, 63 N.C. App. 387, 304 S.E.2d 636 (1983); Gardner v. Gardner, 63 N.C. App. 678, 306 S.E.2d 496 (1983); Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983); Briar Metal Prods., Inc. v. Smith, 64 N.C. App. 173, 306 S.E.2d 553 (1983); State ex rel. Miles v. Mitchell, 64 N.C. App. 202, 306 S.E.2d 857 (1983); Carter v. Carr, 68 N.C. App. 23, 314 S.E.2d 281 (1984); Conrad Indus., Inc. v. Sonderegger, 69 N.C. App. 159, 316 S.E.2d 327 (1984); Buie v. Johnston, 69 N.C. App. 463, 317 S.E.2d 91 (1984); Gates v. Gates, 69 N.C. App. 421, 317 S.E.2d 402 (1984); Callaway v. Freeman, 71 N.C. App. 451, 322 S.E.2d 432 (1984); Akzona, Inc. v. American Credit Indem. Co., 71 N.C. App. 498, 322 S.E.2d 623 (1984); United States v. Scott, 45 Bankr. 318 (M.D.N.C. 1984); Buie v. Johnston, 313 N.C. 586, 330 S.E.2d 197 (1985); In re Saunders, 77 N.C. App. 462, 335 S.E.2d 58 (1985); Petty v. Housing Auth., 90 N.C. App. 559, 369 S.E.2d 612 (1988); Lea Co. v. North Carolina Bd. of Transp., 323 N.C. 697, 374 S.E.2d 866 (1989); J.D. Dawson Co. v. Robertson Mktg., Inc., 93 N.C. App. 62, 376 S.E.2d 254 (1989); Hill v. Hill, 97 N.C. App. 499, 389 S.E.2d 141 (1990); Town of Cary v. Stallings, 97 N.C. App. 484, 389 S.E.2d 143 (1990); Theokas v. Theokas, 97 N.C. App. 626, 389 S.E.2d 278 (1990); Pheasant v. McKibben, 100 N.C. App. 379, 396 S.E.2d 333 (1990); Carter v. Carter, 102 N.C. App. 440, 402 S.E.2d 469 (1991); Jackson v. Jackson, 102 N.C. App. 574, 402 S.E.2d 869 (1991); State ex rel. Blossom v. Murray, 103 N.C. App. 653, 406 S.E.2d 302 (1991); Faucette v. Dickerson, 103 N.C. App. 620, 406 S.E.2d 602 (1991); Hoolapa v. Hoolapa, 105 N.C. App. 230, 412 S.E.2d 112 (1992); Loftis v. Reynolds, 105 N.C. App. 697, 414 S.E.2d 378 (1992); John Henry Spainhour & Sons Grading Co. v. Carolina E.E. Homes, Inc., 109 N.C. App. 174, 426 S.E.2d 728 (1993); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 428 S.E.2d 453 (1993); Dobos v. Dobos, 111 N.C. App. 222, 431 S.E.2d 861 (1993); Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994); Jenkins v. Middleton, 114 N.C. App. 799, 443 S.E.2d 110 (1994); Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326; Stephens v. John Koenig, Inc., 119 N.C. App. 323, 458 S.E.2d 233 (1995); Chaney v. Young, 122 N.C. App. 260, 468 S.E.2d 837 (1996); Banner v. Hatcher, 124 N.C. App. 439, 477 S.E.2d 249 (1996); Branch Banking & Trust Co. v. Tucker, 131 N.C. App. 132, 505 S.E.2d 179 (1998); Dunevant v. Dunevant, 142 N.C. App. 169, 542 S.E.2d 242, 2001 N.C. App. LEXIS 47 (2001); Croom v. State Dep't of Commerce, 143 N.C. App. 493, 547 S.E.2d 87, 2001 N.C. App. LEXIS 297 (2001); Chandak v. Electronic Interconnect Corp., 144 N.C. App. 258, 550 S.E.2d 25, 2001 N.C. App. LEXIS 413 (2001); Gibby v. Lindsey, 149 N.C. App. 470, 560 S.E.2d 589, 2002 N.C. App. LEXIS 216 (2002); Bledsole v. Johnson, 150 N.C. App. 619, 564 S.E.2d 902, 2002 N.C. App. LEXIS 652 (2002); Carroll v. Living Ctrs. Southeast, Inc., 157 N.C. App. 116, 577 S.E.2d 925, 2003 N.C. App. LEXIS 379 (2003); L&M Transp. Servs. v. Morton Indus. Group, Inc., 163 N.C. App. 606, 594 S.E.2d 145, 2004 N.C. App. LEXIS 511 (2004); Advanced Wall Sys. v. Highlande Builders. LLC, 167 N.C. App. 630, 605 S.E.2d 728, 2004 N.C. App. LEXIS 2320 (2004); State v. Pelletier, 168 N.C. App. 218, 606 S.E.2d 907, 2005 N.C. App. LEXIS 163 (2005); Adams Creek Assocs. v. Davis, 186 N.C. App. 512, 652 S.E.2d 677, 2007 N.C. App. LEXIS 2302 (2007); Ruiz v. Mecklenburg Utils., Inc., 189 N.C. App. 123, 657 S.E.2d 432, 2008 N.C. App. LEXIS 418 (2008); Hawkins v. Hawkins, — N.C. App. —, 664 S.E.2d 616, 2008 N.C. App. LEXIS 1520 (2008).

Cited in Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970); Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); East v. Smith, 11 N.C. App. 604, 182 S.E.2d 266 (1971); State v. Blalock, 13 N.C. App. 711, 187 S.E.2d 404 (1972); Crotts v. Camel Pawn Shop, Inc., 16 N.C. App. 392, 192 S.E.2d 55 (1972); Smith v. Smith, 17 N.C. App. 416, 194 S.E.2d 568 (1973); Sherman v. Myers, 29 N.C. App. 29, 222 S.E.2d 749 (1976); Carl Rose & Sons Ready Mix Concrete v. Thorp Sales Corp., 30 N.C. App. 526, 227 S.E.2d 301 (1976); Bowen v. Hodge Motor Co., 292 N.C. 633, 234 S.E.2d 748 (1977); Guthrie v. Ray, 293 N.C. 67, 235 S.E.2d 146 (1977); Roland v. W & L Motor Lines, 32 N.C. App. 288, 231 S.E.2d 685 (1977); Lewis Clarke Assocs. v. Tobler, 32 N.C. App. 435, 232 S.E.2d 458 (1977); Jernigan v. Stokley, 34 N.C. App. 358, 238 S.E.2d 318 (1977); Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Great Dane Trailers, Inc. v. North Brook Poultry, Inc., 35 N.C. App. 752, 242 S.E.2d 533 (1978); Wood v. Wood, 37 N.C. App. 570, 246 S.E.2d 549 (1978); McClendon v. Clinard, 38 N.C. App. 353, 247 S.E.2d 783 (1978); Parrish v. Cole, 38 N.C. App. 691, 248 S.E.2d 878 (1978); Gladstein v. South Square Assocs., 39 N.C. App. 171, 249 S.E.2d 827 (1978); O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979); State v. Saults, 299 N.C. 319, 261 S.E.2d 839 (1980); Greenhill v. Crabtree, 301 N.C. 520, 271 S.E.2d 908 (1980); McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980); Hecht Realty, Inc. v. Hastings, 45 N.C. App. 307, 262 S.E.2d 858 (1980); United Leasing Corp. v. Miller, 45 N.C. App. 400, 263 S.E.2d 313 (1980); Stewart v. Stewart, 47 N.C. App. 678, 267 S.E.2d 699 (1980); Macon v. Edinger, 49 N.C. App. 624, 272 S.E.2d 411 (1980); Carr v. Great Lakes Carbon Corp., 49 N.C. App. 631, 272 S.E.2d 374 (1980); Macon v. Edinger, 303 N.C. 274, 278 S.E.2d 256 (1981); Rockingham Square Shopping Center, Inc. v. Integon Life Ins. Corp., 52 N.C. App. 633, 279 S.E.2d 918 (1981); Stevens v. Johnson, 50 N.C. App. 536, 274 S.E.2d 281 (1981); Green v. Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981); DuBose v. Gastonia Mut. Sav. & Loan Ass'n, 55 N.C. App. 574, 286 S.E.2d 617 (1982); Emdur Metal Prods., Inc. v. Super Dollar Stores, Inc., 55 N.C. App. 668, 286 S.E.2d 642 (1982); In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982); In re Allen, 58 N.C. App. 322, 293 S.E.2d 607 (1982); Bailey v. Gooding, 60 N.C. App. 459, 299 S.E.2d 267 (1983); Pettus v. Pettus, 62 N.C. App. 141, 302 S.E.2d 261 (1983); North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983); Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983); Hogan v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983); State v. O'Neal, 67 N.C. App. 65, 312 S.E.2d 493 (1984); DOT v. Combs, 71 N.C. App. 372, 322 S.E.2d 602 (1984); Jackson v. Jackson, 68 N.C. App. 499, 315 S.E.2d 90 (1984); Miller v. Kite, 69 N.C. App. 679, 318 S.E.2d 102 (1984); Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984); Simmons v. Tuttle, 70 N.C. App. 101, 318 S.E.2d 847 (1984); Staples v. Woman's Clinic, 73 N.C. App. 617, 327 S.E.2d 58 (1985); Prevatte v. Prevatte, 74 N.C. App. 582, 329 S.E.2d 413 (1985); Andrews v. Peters, 75 N.C. App. 252, 330 S.E.2d 638 (1985); Appelbe v. Appelbe, 76 N.C. App. 391, 333 S.E.2d 312 (1985); Smith v. Barfield, 77 N.C. App. 217, 334 S.E.2d 487 (1985); Carver v. Roberts, 78 N.C. App. 511, 337 S.E.2d 126 (1985); Harwood v. Harrelson Ford, Inc., 78 N.C. App. 445, 337 S.E.2d 158 (1985); Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986); Weiss v. Woody, 80 N.C. App. 86, 341 S.E.2d 103 (1986); Amick v. Amick, 80 N.C. App. 291, 341 S.E.2d 613 (1986); Hartman v. Hartman, 80 N.C. App. 452, 343 S.E.2d 11 (1986); Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986); Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986); Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986); Andrews v. Peters, 318 N.C. 133, 347 S.E.2d 409 (1986); In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986); Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986); L. Harvey & Son Co. v. Shivar, 83 N.C. App. 673, 351 S.E.2d 335 (1987); Harshaw v. Mustafa, 84 N.C. App. 296, 352 S.E.2d 247 (1987); Petty v. City of Charlotte, 85 N.C. App. 391, 355 S.E.2d 210 (1987); Collar v. Collar, 86 N.C. App. 105, 356 S.E.2d 407 (1987); In re Wheeler, 87 N.C. App. 189, 360 S.E.2d 458 (1987); Harshaw v. Mustafa, 321 N.C. 288, 362 S.E.2d 541 (1987); Home Health & Hospice Care, Inc. v. Meyer, 88 N.C. App. 257, 362 S.E.2d 870 (1987); Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 363 S.E.2d 643 (1988); Andrews v. Peters, 89 N.C. App. 315, 365 S.E.2d 709 (1988); Goff v. Goff, 90 N.C. App. 388, 368 S.E.2d 419 (1988); Lea Co. v. North Carolina Bd. of Transp., 323 N.C. 691, 374 S.E.2d 868 (1989); In re Brooks, 93 N.C. App. 86, 376 S.E.2d 250 (1989); Watson v. Watson, 93 N.C. App. 315, 377 S.E.2d 809 (1989); North Carolina State Bar v. Randolph, 325 N.C. 699, 386 S.E.2d 185 (1989); Fraser v. Littlejohn, 96 N.C. App. 377, 386 S.E.2d 230 (1989); Miller v. Miller, 98 N.C. App. 221, 390 S.E.2d 352 (1990); Wilson v. Wilson, 98 N.C. App. 230, 390 S.E.2d 354 (1990); Von Ramm v. Von Ramm, 99 N.C. App. 153, 392 S.E.2d 422 (1990); Yates Constr. Co. v. Greenleaf Corp., 99 N.C. App. 489, 393 S.E.2d 563 (1990); Waldrop v. Young, 104 N.C. App. 294, 408 S.E.2d 883 (1991); Hill v. Hanes Corp., 102 N.C. App. 46, 401 S.E.2d 768 (1991); Metts v. Piver, 102 N.C. App. 98, 401 S.E.2d 407 (1991); Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991); In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991); Scott v. Scott, 106 N.C. App. 379, 416 S.E.2d 583 (1992); Foy v. Hunter, 106 N.C. App. 614, 418 S.E.2d 299 (1992); In re Hayes, 106 N.C. App. 652, 418 S.E.2d 304 (1992); Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992); Smith v. Gupton, 110 N.C. App. 482, 429 S.E.2d 737 (1993); Smith v. Smith, 334 N.C. 81, 431 S.E.2d 196 (1993); Berkeley Fed. Sav. & Loan Ass'n v. Terra Del Sol, Inc., 111 N.C. App. 692, 433 S.E.2d 449 (1993); Bynum v. Frederickson Motor Express Corp., 112 N.C. App. 125, 434 S.E.2d 241

(1993); Hooper v. Pizzagalli Constr. Co., 112 N.C. App. 400, 436 S.E.2d 145 (1993); Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv., Inc., 113 N.C. App. 476, 439 S.E.2d 221 (1994); Wyatt v. Hollifield, 114 N.C. App. 352, 442 S.E.2d 149 (1994); Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994); Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994); Bullard v. Bader, 117 N.C. App. 299, 450 S.E.2d 757 (1994); In re Estate of Peebles, 118 N.C. App. 296, 454 S.E.2d 854 (1995); Vanburen County Dep't of Social Servs. ex rel. Swearengin v. Swearengin, 118 N.C. App. 324, 455 S.E.2d 161 (1995); Muse v. Charter Hosp., 117 N.C. App. 468, 452 S.E.2d 589 (1995); Benton v. Thomerson, 339 N.C. 598, 453 S.E.2d 161 (1995); Jacobsen v. McMillan, 124 N.C. App. 128, 476 S.E.2d 368 (1996); Sotelo v. Drew, 123 N.C. App. 464, 473 S.E.2d 379 (1996); Hieb v. Lowery, 344 N.C. 403, 474 S.E.2d 323 (1996); VSD Communications, Inc. v. Lone Wolf Publishing Group, Inc., 124 N.C. App. 642, 478 S.E.2d 214 (1996); NationsBank v. American Doubloon Corp., 125 N.C. App. 494, 481 S.E.2d 387 (1997); Smith v. Johnson, 125 N.C. App. 603, 481 S.E.2d 415 (1997); Mitchell County Dep't of Soc. Servs. v. Carpenter, 127 N.C. App. 353, 489 S.E.2d 437 (1997); Vance Constr. Co. v. Duane White Land Corp., 127 N.C. App. 493, 490 S.E.2d 588 (1997); Inland Greens HOA, Inc. v. Dallas Harris Real Estate-Construction, Inc., 127 N.C. App. 610, 492 S.E.2d 359 (1997); Trafalgar House Constr., Inc. v. MSL Enters., Inc., 128 N.C. App. 252, 494 S.E.2d 613 (1998); Condellone v. Condellone, 129 N.C. App. 675, 501 S.E.2d 690 (1998); Rowe v. Rowe, 131 N.C. App. 409, 507 S.E.2d 317 (1998); Buckingham v. Buckingham, 134 N.C. App. 82, 516 S.E.2d 869, 1999 N.C. App. LEXIS 657 (1999); Ollo v. Mills, 136 N.C. App. 618, 525 S.E.2d 213, 2000 N.C. App. LEXIS 110 (2000); Brown v. Lifford, 136 N.C. App. 379, 524 S.E.2d 587, 2000 N.C. App. LEXIS 3 (2000); Hyde v. Chesney Glen Homeowners Ass'n, Inc., 137 N.C. App. 605, 529 S.E.2d 499, 2000 N.C. App. LEXIS 504 (2000); Multifamily Mtg. Trust 1996-1 v. Century Oaks Ltd., 139 N.C. App. 140, 532 S.E.2d 578, 2000 N.C. App. LEXIS 802 (2000); Pearson v. C.P. Buckner Steel Erection, 139 N.C. App. 394, 533 S.E.2d 532, 2000 N.C. App. LEXIS 912 (2000); Belcher v. Averette, 152 N.C. App. 452, 568 S.E.2d 630, 2002 N.C. App. LEXIS 1069 (2002); Rich, Rich & Nance v. Carolina Constr. Corp., 153 N.C. App. 149, 570 S.E.2d 212, 2002 N.C. App. LEXIS 1077 (2002); Atchley Grading Co. v. W. Cabarrus Church, 148 N.C. App. 211, 557 S.E.2d 188, 2001 N.C. App. LEXIS 1286 (2001); Walden v. Vaughn, 157 N.C. App. 507, 579 S.E.2d 475, 2003 N.C. App. LEXIS 727 (2003); Smith v. State Farm Mut. Auto. Ins. Co., 157 N.C. App. 596, 580 S.E.2d 46, 2003 N.C. App. LEXIS 933 (2003); Dalgewicz v. Dalgewicz, 167 N.C. App. 412, 606 S.E.2d 164, 2004 N.C. App. LEXIS 2375 (2004); Lovin v. Byrd, 178 N.C. App. 381, 631 S.E.2d 58, 2006 N.C. App. LEXIS 1395 (2006); Clawser v. Campbell, 184 N.C. App. 526, 646 S.E.2d 779, 2007 N.C. App. LEXIS 1467 (2007); Perry v. Baxley Dev., Inc., 188 N.C. App. 158, 655 S.E.2d 460, 2008 N.C. App. LEXIS 88 (2008); Herring v. Winston-Salem/Forsyth County Bd. of Educ., 188 N.C. App. 441, 656 S.E.2d 307, 2008 N.C. App. LEXIS 231 (2008); In re Winstead, 189 N.C. App. 145, 657 S.E.2d 411, 2008 N.C. App. LEXIS 417 (2008); Kerr v. Long, 189 N.C. App. 331, 657 S.E.2d 920, 2008 N.C. App. LEXIS 533 (2008); Crouse v. Mineo, 189 N.C. App. 232, 658 S.E.2d 33, 2008 N.C. App. LEXIS 546 (2008); Dailey v. Popma, 191 N.C. App. 64, 662 S.E.2d 12, 2008 N.C. App. LEXIS 1134 (2008); Jackson v. Jackson, — N.C. App. —, 665 S.E.2d 545, 2008 N.C. App. LEXIS 1631 (2008); Huebner v. Triangle Research Collaborative, — N.C. App. —, 667 S.E.2d 309, 2008 N.C. App. LEXIS 1805 (2008); In re J.W.S., — N.C. App. —, 669 S.E.2d 850, 2008 N.C. App. LEXIS 2268 (2008); Hospira Inc. v. AlphaGary Corp., — N.C. App. —, 671 S.E.2d 7, 2009 N.C. App. LEXIS 41 (2009); Luke v. Omega Consulting Group, LC, — N.C. App. —, 670 S.E.2d 604, 2009 N.C. App. LEXIS 32 (2009); Boje v. D.W.I.T., L.L.C., — N.C. App. —, 670 S.E.2d 910, 2009 N.C. App. LEXIS 59 (2009).

II. RELIEF UNDER SUBSECTION (A).

Section (a) of this rule simply codifies the body of law in existence in this State at the time the new Rules of Civil Procedure were adopted. H & B Co. v. Hammond, 17 N.C. App. 534, 195 S.E.2d 58 (1973).

Liberal amendment of pleadings is encouraged by the Rules of Civil Procedure and the philosophy of G.S. 1A-1, Rule 15 has been applied to this rule. McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Trial court has inherent power to amend judgments by correcting clerical errors or supplying defects so as to make the record speak the truth. Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

No Substantive Modifications. — Rule does not grant the trial court the authority to make substantive modifications to an entered judgment, thus a change in order was considered substantive and outside the boundaries of the rule when it altered the effect of the original order. Pratt v. Staton, 147 N.C. App. 771, 556 S.E.2d 621, 2001 N.C. App. LEXIS 1232 (2001).

While G.S. 1A-1, N.C. R. Civ. P. 60(a) allowed a trial court to correct clerical mistakes in its order, it did not grant the trial court the authority to make substantive modifications to an entered judgment, and a change in an order was considered substantive and outside the boundaries of Rule 60(a) when it altered the effect of the original order; trial courts did not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions, and attempts to change the substantive provisions of judgments under the guise of clerical error were repeatedly rejected. Spencer v. Spencer, 156 N.C. App. 1, 575 S.E.2d 780, 2003 N.C. App. LEXIS 30 (2003).

Generally, no substantive changes may be corrected by a motion under section (a) of this rule. Howard Schultz & Assocs. v. Ingram, 38 N.C. App. 422, 248 S.E.2d 345 (1978).

Limit on Court's Power. — Subsection (a) permits the courts to correct clerical errors or omissions; however, courts do not have the power under this section to affect the substantive rights of the parties or to correct substantive errors in their decisions. Watson v. Watson, 118 N.C. App. 534, 455 S.E.2d 866 (1995).

Amended order made substantive changes in the original order and was not an attempt to correct clerical errors; therefore, the amended order was hereby vacated as outside the authority of subsection (a) and the original order remained in full force and effect. Buncombe County ex rel. Child Support Enforcement Agency ex rel. Andres v. Newburn, 111 N.C. App. 822, 433 S.E.2d 782 (1993).

The trial court's purported modification of its order entered nine years earlier did not correct a "clerical error," but substantially changed the earlier child support order, thereby prejudicially affecting the plaintiff mother's rights under the South Carolina child support order, and exceeded the court's authority under this rule. South Carolina Dep't of Social Servs. v. Hamlett, 142 N.C. App. 501, 543 S.E.2d 189, 2001 N.C. App. LEXIS 133 (2001).

Trial court erroneously found that a divorce decree's failure to include the parties' agreement to share their child's college expenses was a clerical error correctable under G.S. 1A-1, N.C. R. Civ. P. 60(a), because the decree, on its face, did not contain this requirement, and adding it to the decree was a substantive change in the parties' obligations. Spencer v. Spencer, 156 N.C. App. 1, 575 S.E.2d 780, 2003 N.C. App. LEXIS 30 (2003).

Trial court's corrected order terminating a mother's parental rights was vacated because the trial court was without jurisdiction pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(a) to add an omitted finding of fact, which was substantive, when the presence or absence of the finding of fact that the mother lacked an appropriate alternative child care arrangement altered the effect of the order; the presence of the finding supported termination of parental rights, and in contrast, its absence would have precluded termination of parental rights. In re C.N.C.B., — N.C. App. —, 678 S.E.2d 240, 2009 N.C. App. LEXIS 725 (2009).

The court's authority under section (a) of this rule is limited to the correction of clerical errors or omissions. Courts do not have the power under section (a) to affect the substantive rights of the parties or to correct substantive errors in their decisions. Hinson v. Hinson, 78 N.C. App. 613, 337 S.E.2d 663 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 895 (1986).

Correction of Clerical Errors and Modification, etc., of Judgment Distinguished. — The power to correct clerical errors and supply defects or omissions must be distinguished from the power of the court to modify or vacate an existing judgment. Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

Section (a) of this rule does not authorize the trial court to set aside a previous ruling where the basis is a legal error. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); Utica Mut. Ins. Co. v. Johnson, 41 N.C. App. 299, 254 S.E.2d 643 (1979).

Correction of clerical errors is not limited to the term of court, but may be done at any time upon motion, or the court may on its own motion make the correction when such defect appears. Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

No Time Limit. — Defendant was not barred from seeking correction by the doctrine of laches because subsection (a) provides no time limit for the correction of clerical errors. Gordon v. Gordon, 119 N.C. App. 316, 458 S.E.2d 505 (1995).

Effect of Clerical Correction. — Where plaintiff's unqualified duty under the conclusions of law and the decretal portion of order was to continue making payments to defendant, clerical correction did not alter the effect of the original order. Gordon v. Gordon, 119 N.C. App. 316, 458 S.E.2d 505 (1995).

But power to correct clerical errors after lapse of the term must be exercised with great caution and may not be extended to the correction of judicial errors, so as to make the judgment different from what was actually rendered. Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

While courts have always had the inherent authority to correct clerical errors or errors of expression in a judgment, they have never been deemed to have the authority, outside of a term, to correct an error in a decision or to amend a judgment so as to adversely affect the rights of third parties. H & B Co. v. Hammond, 17 N.C. App. 534, 195 S.E.2d 58 (1973); Vandooren v. Vandooren, 27 N.C. App. 279, 218 S.E.2d 715 (1975).

Vacation of Default Judgment Not Correction of Clerical Mistake. — Court order which vacated a prior order and held that a party was not entitled to have a default judgment against him set aside was not an order correcting a clerical mistake or oversight entered pursuant to section (a) of this rule. Utica Mut. Ins. Co. v. Johnson, 41 N.C. App. 299, 254 S.E.2d 643 (1979).

A motion under section (a) of this rule was proper to reform an order granting a preliminary injunction so as to comply with the requirements of G.S. 1A-1, Rule 65(d), since the correction did not alter the effect of the order, but only clarified the record for appeal. Howard Schultz & Assocs. v. Ingram, 38 N.C. App. 422, 248 S.E.2d 345 (1978).

Notice and Hearing Opportunity Required Where Rights Affected by Amendment, etc., of Judgment for Order. — The courts have always had inherent authority to correct clerical errors in orders and judgments, but they do not have the power to amend or vacate an order or judgment so as to affect the rights of the parties without giving the parties notice and an opportunity to be heard. Utica Mut. Ins. Co. v. Johnson, 41 N.C. App. 299, 254 S.E.2d 643 (1979).

The trial court's failure to allow and tax costs could be considered an oversight or omission in the order, and since the substantive rights of the parties were not affected thereby, the court had authority under section (a) of this rule to correct the inadvertent omission of costs from its order. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

Trial court had jurisdiction to consider a motion filed by a guardian ad litem pursuant to this rule requesting a supplemental order, wherein she alleged that through oversight and inadvertence the district court had failed to order assessment of costs incurred in custody action, including witness fees for out-of-county witnesses as well as for expert witnesses, even though the guardian ad litem's motion was made approximately four months after the order awarding custody was entered and the county Division of Social Services had filed its notice of appeal. In re Scearce, 81 N.C. App. 662, 345 S.E.2d 411, cert. denied, 318 N.C. 415, 349 S.E.2d 590 (1986).

Sufficient evidence existed to support the trial court's order for the wife to pay taxes and fees associated with the distribution of the husband's retirement account that was awarded to her in the parties' divorce and settlement, as it appeared that was merely left out of the distribution order; however, there was insufficient evidence to support the conclusion that the husband was entitled to additional payments made by the wife under the equitable distribution agreement, and that part of the order was remanded for the trial court to receive additional evidence and make further findings. Lee v. Lee, 167 N.C. App. 250, 605 S.E.2d 222, 2004 N.C. App. LEXIS 2189 (2004).

By changing the incorrect date of entry of judgment to a date other than the actual date judgment was entered, the trial court improperly altered the substantive rights of the parties by extending the period in which the parties could file a timely notice of appeal; this rule does not vest the trial court with such authority. Food Serv. Specialists v. Atlas Restaurant Mgt., Inc., 111 N.C. App. 257, 431 S.E.2d 878 (1993).

Change of Date of Accrual of Interest. — A change in the date at which interest begins to accrue is something that the trial court could effectuate through subsection (a) of this rule, because the subject of the litigation was the amount of the distributive award and interest was only incidental and tangential to this matter; therefore, changing the date at which interest accrued did not alter the underlying distributive award itself. Ice v. Ice, 136 N.C. App. 787, 525 S.E.2d 843, 2000 N.C. App. LEXIS 155 (2000).

Rule Does Not Cover Serious Errors. — Section (a) of this rule does allow the trial court by motion of a party or on its own initiative to correct clerical errors, but errors of a serious or substantial nature are not intended to be covered. Rivenbark v. Southmark Corp., 93 N.C. App. 414, 378 S.E.2d 196 (1989).

Granting of Motion Was Proper. — Where the judgment did not state under what legal theory plaintiff was entitled to prevail and where the amended judgment merely corrected that omission, the trial court did not abuse its discretion in granting plaintiff's motion under section (a) of this rule, because the amendment to the judgment did not affect the substantive rights of the parties. Woods v. Shelton, 93 N.C. App. 649, 379 S.E.2d 45 (1989).

Appeal from Denial of Improper Motion. — Where defendant's motion under subsection (a) of this rule was improper to begin with, his appeal from a denial of that motion was necessarily dismissed. Ice v. Ice, 136 N.C. App. 787, 525 S.E.2d 843, 2000 N.C. App. LEXIS 155 (2000).

III. RELIEF UNDER SUBSECTION (B).

A. In General.

Section (b) of this rule is nearly identical to FRCP, Rule 60(b). Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

The nearly identical provisions of section (b) of this rule and FRCP, Rule 60(b) point to the federal decisions for interpretation and enlightenment. Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971).

Use by Industrial Commission. — Section

1A-1, Rule 60(b) may be utilized by the North Carolina Industrial Commission to achieve a just and proper determination of a claim, giving it the ability to set aside a judgment where it finds (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under G.S. 1A-1, Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. Jenkins v. Piedmont Aviation Servs., 147 N.C. App. 419, 557 S.E.2d 104, 2001 N.C. App. LEXIS 1192 (2001).

North Carolina Industrial Commission's authority to modify its orders or the orders of its deputy commissioners is analogous to a court's power to set aside its former judgments. Ward v. Wake County Bd. of Educ., 166 N.C. App. 726, 603 S.E.2d 896, 2004 N.C. App. LEXIS 2031 (2004), cert. denied, 359 N.C. 326, 611 S.E.2d 853 (2005).

Sanctions Upheld. — Plaintiffs, whose suit for summary ejectment was dismissed by a magistrate as baseless, brought a motion under G.S. 1A-1, Rule 60(b) to set aside the sanction the district court imposed upon them; however, the Rule 60(b) motion was denied as the plaintiffs could show no grounds under the enumerated causes for relief under Rule 60(b) for the sanction to be set aside or amended. Chandak v. Electronic Interconnect Corp., 144 N.C. App. 258, 550 S.E.2d 25, 2001 N.C. App. LEXIS 413 (2001).

Burden of Proof. — Consent judgment was not set aside pursuant to G.S. 1A-1, Rule 60(b)(4) because defendants did not overcome their burden of proof as a matter of law; defendants did not object at the hearing to the trial court's exclusion of the attorney's affidavit, nor did they assign as error on appeal the affidavit's exclusion. Royal v. Hartle, 145 N.C. App. 181, 551 S.E.2d 168, 2001 N.C. App. LEXIS 556 (2001).

The purpose of subsection (b) of this rule is to strike a proper balance between the conflicting principles of finality and relief from unjust judgments. Generally, the rule is liberally construed. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

This rule replaces former § 1-220. Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Gregg v. Steele, 24 N.C. App. 310, 210 S.E.2d 434 (1974); Hickory White Trucks, Inc. v. Greene, 34 N.C. App. 279, 237 S.E.2d 862 (1977); Howard v. Williams, 40 N.C. App. 575, 253 S.E.2d 571 (1979).

The provisions of former § 1-220 are now incorporated in this rule. Williams Lumber Co. v. Taylor, 8 N.C. App. 255, 174 S.E.2d 109 (1970).

Procedure under section (b) of this rule is analogous to the former practice under former G.S. 1-220 and under motions to set aside an irregular judgment. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971); Texas W. Fin. Corp. v. Mann, 36 N.C. App. 346, 243 S.E.2d 904 (1978).

And the cases interpreting former § 1-220 are still applicable. Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Gregg v. Steele, 24 N.C. App. 310, 210 S.E.2d 434 (1974); Hickory White Trucks, Inc. v. Greene, 34 N.C. App. 279, 237 S.E.2d 862 (1977); Texas W. Fin. Corp. v. Mann, 36 N.C. App. 346, 243 S.E.2d 904 (1978); Howard v. Williams, 40 N.C. App. 575, 253 S.E.2d 571 (1979).

Grounds under section (b) of this rule for vacation of a prior judgment or order for "mistake, inadvertence, surprise or excusable neglect" are the exact grounds spelled out in former G.S. 1-220, and cases decided under the former statute remain good authority. Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

To proceed under subsection (b) of this rule requires an initial determination of whether a notice of dismissal constitutes a "judgment, order or proceeding." Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

The broad language of subsection (b)(6) of this rule gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice. Flinn v. Laughinghouse, 68 N.C. App. 476, 315 S.E.2d 72, appeal dismissed and cert. denied, 311 N.C. 755, 321 S.E.2d 132 (1984).

Section (b) of this rule provides no specific relief for "errors of law" and even the broad general language of subsection (b)(6) of this rule does not include relief for "errors of law." The appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under G.S. 1A-1, Rule 59(a)(8). Hagwood v. Odom, 88 N.C. App. 513, 364 S.E.2d 190 (1988).

Section (b) of this rule has been described as a grand reservoir of equitable power to do justice in a particular case. Jim Walter Homes, Inc. v. Peartree, 28 N.C. App. 709, 222 S.E.2d 706 (1976).

If the motion does not allege factual allegations corresponding to the specific situations contemplated in subsections (b)(1) through (5) of this rule, subsection (b)(6) of this rule serves as a "grand reservoir of equitable power" by which a court may grant relief from an order or judgment. Oxford Plastics v. Goodson, 74 N.C. App. 256, 328 S.E.2d 7 (1985).

Motion Under Subsection (b) of This Rule Cannot Be a Substitute for Appellate Review. — O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979); Jenkins v. Richmond County, 118 N.C. App. 166, 454 S.E.2d 290 (1995).

Erroneous judgments may be corrected only by appeal, and a motion under this rule cannot be used as a substitute for appellate review. Town of Sylva v. Gibson, 51 N.C. App. 545, 277 S.E.2d 115, appeal dismissed and cert. denied, 303 N.C. 319, 281 S.E.2d 659 (1981); Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

Because defendant attempted to use a subdivision (b)(6) motion as a substitute for appellate review, the trial court's order denying defendant's motion was affirmed. Garrison ex rel. Chavis v. Barnes, 117 N.C. App. 206, 450 S.E.2d 554 (1994).

Applicability of Section (b) to Final Judgments Only. — Section (b) of this rule has no application to interlocutory judgments, orders or proceedings of the trial court. It only applies, by its express terms, to final judgments. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

Section (b) of this rule has no application to interlocutory orders; by its express terms it applies only to final judgments and orders. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

A voluntary dismissal with prejudice is a "final judgment" within the meaning of this rule. Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

Amendment of Voluntary Dismissal. — A voluntary dismissal under G.S. 1A-1, Rule 41(a)(1) can be amended pursuant to section (b) of this rule. Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

Order Transferring Child Custody as Final Order. — An order which transferred child custody from the plaintiff to the defendant was a final order under section (b) of this rule, even though the order could be changed subsequently upon a proper showing of change of circumstances under G.S. 50-13.7. Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

Motion for Relief from Order Under § 1A-1, Rule 12(b)(6) Improper Under Section (b). — Since the denial of a motion to dismiss under G.S. 1A-1, Rule 12(b)(6) is not a final judgment or order, a motion for relief from such an order could not, as a matter of law, be proper under section (b) of this rule. O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 252 S.E.2d 231 (1979).

Provisions relating to the setting aside of a default judgment should be liberally construed so as to give litigants an opportunity to have a case disposed of on the merits, to the end that justice may be done. Howard v. Williams, 40 N.C. App. 575, 253 S.E.2d 571 (1979).

Any doubt should be resolved in favor of setting aside defaults so that the merits of an action may be reached. Howard v. Williams, 40 N.C. App. 575, 253 S.E.2d 571 (1979).

But Provisions Designed to Protect Plaintiffs Cannot Be Ignored. — Statutory provisions designed to protect plaintiffs from defendants who do not give reasonable attention to important business affairs such as lawsuits cannot be ignored. Howard v. Williams, 40 N.C. App. 575, 253 S.E.2d 571 (1979).

Right of Party or Legal Representative to Seek Relief from Final Judgment. — Under this rule, a party or his legal representative may seek relief from a final judgment. Browne v. Catawba County Dep't of Social Servs., 22 N.C. App. 476, 206 S.E.2d 792 (1974).

Relief May Be Granted to Successful Plaintiff. — Section (b) of this rule provides that relief may be granted to "any party" and raises no bar to granting relief to a successful plaintiff when adequate reason is shown. Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

Factors Considered on Hearing of Section (b) Motion. — A trial judge, on hearing motions under section (b) of this rule, should consider such factors as: (1) The general desirability that a final judgment not be lightly disturbed; (2) where relief is sought from a judgment of dismissal or default, the relative interest of deciding cases on the merits and the interest in orderly procedure; (3) the opportunity the movant had to present his claim or defense; and (4) any intervening equities. McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979); Baylor v. Brown, 46 N.C. App. 664, 266 S.E.2d 9 (1980).

Power to Vacate Judgment Conditioned on Showing That Justice Requires It. — While this rule gives the court ample power to vacate a judgment whenever that action is appropriate to accomplish justice, a judge cannot do so without a showing based on competent evidence that justice requires it. Highfill v. Williamson, 19 N.C. App. 523, 199 S.E.2d 469 (1973).

Relief May Be Granted Absent Showing of Changed Circumstances. — The defendant's failure to present evidence of changed circumstances did not render the trial court's order, pursuant to this section, invalid. Condellone v. Condellone, 137 N.C. App. 547,

528 S.E.2d 639, 2000 N.C. App. LEXIS 427 (2000).

When Consent Judgment May Be Changed, etc. — A consent judgment cannot be changed without the consent of the parties or set aside except upon proper allegation and proof that consent was not in fact given or that it was obtained by fraud or mutual mistake, the burden being upon the party attacking the judgment. Blankenship v. Price, 27 N.C. App. 20, 217 S.E.2d 709 (1975).

A consent judgment incorporates the bargained agreement of the parties. Such a judgment can only be attacked on limited grounds. The party attacking the judgment must properly allege and prove that consent was not in fact given, or that it was obtained by mutual mistake or fraud. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

A contract may be avoided based on mutual mistake where the mistake is common to both parties and because of it each has done what neither intended. A unilateral mistake, unaccompanied by fraud, imposition, or like circumstances, is not sufficient to avoid a contract. These contract principles apply to consent judgments. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

Absent a showing of fraud, mutual mistake or a lack of consent, attacks on consent judgments are controlled by Rule 60(b)(6). Thacker v. Thacker, 107 N.C. App. 479, 420 S.E.2d 479, cert. denied, 332 N.C. 672, 424 S.E.2d 407 (1992).

Power to Set Aside Judgment or Order Entered by Another Judge. — A superior court judge had authority, upon motion under this rule, to set aside an order entered in another superior court where that order was entered without power and authority and was a nullity. Charleston Capital Corp. v. Love Valley Enters., Inc., 10 N.C. App. 519, 179 S.E.2d 190 (1971).

One judge can hear a party's motion for rehearing to set aside a judgment entered by another, provided that such is proper and authorized by this rule. Waters v. Qualified Personnel, Inc., 32 N.C. App. 548, 233 S.E.2d 76 (1977), rev'd on other grounds, 294 N.C. 200, 240 S.E.2d 338 (1978).

A superior court judge has the authority to grant relief on a motion under section (b) of this rule without offending the rule that precludes one superior court judge from reviewing the decision of another. Hoglen v. James, 38 N.C. App. 728, 248 S.E.2d 901 (1978).

A judge of the district court cannot modify a judgment or order of another judge of the district court absent mistake, fraud, newly discovered evidence, satisfaction and release, or a showing based on competent evidence that justice requires it. Town of Sylva v. Gibson, 51 N.C. App. 545, 277 S.E.2d 115, appeal dismissed and cert. denied, 303 N.C. 319, 281 S.E.2d 659 (1981).

In ruling on a motion under subsection (b)(6) of this rule to set aside a default judgment, the trial court had no authority to determine whether the defendant had made an appearance in the case where the trial court which entered the default judgment had previously ruled that the defendant had made no appearance. Whitfield v. Wakefield, 51 N.C. App. 124, 275 S.E.2d 263, cert. denied, 303 N.C. 184, 280 S.E.2d 459 (1981).

A superior court judge has authority to grant relief under a subsection (b) motion without offending the rule that precludes one superior court judge from reviewing the decision of another. Hieb v. Lowery, 121 N.C. App. 33, 464 S.E.2d 308 (1995), aff'd, 344 N.C. 403, 474 S.E.2d 323 (1996).

Judge who heard the borrowers' motion to amend, or for alternative relief after the dismissal with prejudice of their complaint, erred in denying the borrowers' motion for relief because the judge's denial of the motion on the grounds that he believed it was more properly in front of the judge who ruled on the motion to dismiss the complaint was a failure to exercise the discretion conferred on him by law; thus, the borrowers did not have the proper hearing on their G.S. 1A-1-60(b) motion to which they were entitled. Trent v. River Place, LLC, 179 N.C. App. 72, 632 S.E.2d 529, 2006 N.C. App. LEXIS 1683 (2006).

Motions under section (b) of this rule must be made within a reasonable time. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971).

What Constitutes Reasonable Time. — While motions pursuant to subsections (b)(1), (b)(2), and (b)(3) of this rule must be made "not more than one year after the judgment, order, or proceeding was entered or taken," as well as "within a reasonable time," motions pursuant to subsections (b)(4), (b)(5), and (b)(6) of this rule must simply be made "within a reasonable time," and what constitutes a "reasonable time" depends upon the circumstances of the individual case. Nickels v. Nickels, 51 N.C. App. 690, 277 S.E.2d 577, cert. denied, 303 N.C. 545, 281 S.E.2d 392 (1981).

Plaintiffs' motion was not made within a reasonable time, and they were not entitled to relief where plaintiffs waited literally an entire year before filing their motion for relief, and this motion followed not only the dismissal of their appeal from the judgment itself, but also the dismissal of their appeal from the order dismissing their appeal from the judgment. Jenkins v. Richmond County, 118 N.C. App. 166, 454 S.E.2d 290 (1995).

Reasonable Time. — Where plaintiff's motion for reconsideration was made after the 15 days allowed under G.S. 97-85, subsection (b) merely requires that a motion for relief from the judgment be filed within a reasonable time. Thus, the commission should have considered the motion as a subsection (b) motion for relief from the judgment. Jones v. Yates Motor Co., 121 N.C. App. 84, 464 S.E.2d 479 (1995).

Delay Held Unreasonable. — Trial court did not abuse its discretion in concluding that delay of one year in filing motion for relief under section (b) of this rule was unreasonable and in denying the motion. Brown v. Windhom, 104 N.C. App. 219, 408 S.E.2d 536 (1991).

Trial court did not abuse its discretion when it found that an injured party's motion for relief from judgment, filed almost 11 months after the judgment from which she sought relief, was untimely, even though it was filed within one year, because complying with the Rule's one-year limitation did not necessarily make the motion timely as that which constituted a reasonable time for filing the motion was determined by examining the circumstances of the individual case, and the injured party offered no explanation for the 11-month delay in filing her motion. Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002).

Section (b) of this rule does not provide that notice be given to any party. Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

Written Motion to Set Aside Default Judgment Not to Be Heard Ex Parte. — Defendant's written motion to set aside a default judgment is not one which might be heard ex parte. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

No Express Provisions for Manner of Service Made by Section (b). — Section (b) of this rule makes no express provisions for the manner in which a motion thereunder must be served. Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

Forum for Relief from Judgment in Magistrate's Court. — The district court is the proper forum to hear and decide a motion made pursuant to section (b) of this rule for relief from a judgment or order entered in a magistrate's court. A new trial is not permitted before the magistrate. Menache v. Atlantic Coast Mgt. Corp., 43 N.C. App. 733, 260 S.E.2d 100 (1979), cert. denied, 299 N.C. 331, 265 S.E.2d 396 (1980).

Nonparties to Original Suit Lack Standing Under Rule. — Where plaintiffs were never made parties to the original suit, they were excluded from using this rule in order to attack a final judgment, since this rule does not apply to nonparties or strangers to the action giving rise to the judgment or order. Lawyers Title Ins. Corp. v. Langdon, 91 N.C. App. 382, 371 S.E.2d 727 (1988), cert. denied, 324 N.C. 335, 378 S.E.2d 793 (1989).

Specification of Subsection (b)(1) or (b)(6) Unnecessary Where Movant Is Uncertain But Motion Is Timely. — When the motion is based on subsection (b)(1) of this rule, the rule requires it to be made not later than one year after the judgment is taken or entered. If movant is uncertain whether to proceed under subsection (b)(1) or (b)(6), he need not specify if his motion is timely and the reason justifies relief. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971); Sides v. Reid, 35 N.C. App. 235, 241 S.E.2d 110 (1978).

A motion for relief under section (b) of this rule is addressed to the sound discretion of the trial court. Burwell v. Wilkerson, 30 N.C. App. 110, 226 S.E.2d 220 (1976); Hoglen v. James, 38 N.C. App. 728, 248 S.E.2d 901 (1978); Oxford Plastics v. Goodson, 74 N.C. App. 256, 328 S.E.2d 7 (1985); Perkins v. Perkins, 88 N.C. App. 568, 364 S.E.2d 166 (1988); Danna v. Danna, 88 N.C. App. 680, 364 S.E.2d 694, cert. denied, 322 N.C. 479, 370 S.E.2d 221 (1988).

And Will Be Disturbed Only for Abuse of Discretion. — Relief under section (b) of this rule is within the discretion of the trial court, and such a decision will be disturbed only for an abuse of discretion. Harrington v. Harrington, 38 N.C. App. 610, 248 S.E.2d 460 (1978); Harris v. Harris, 307 N.C. 684, 300 S.E.2d 369 (1983); Oxford Plastics v. Goodson, 74 N.C. App. 256, 328 S.E.2d 7 (1985); Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985); Vuncannon v. Vuncannon, 82 N.C. App. 255, 346 S.E.2d 274 (1986).

Appellate review of a motion under section (b) of this rule is limited to determining whether the trial court abused its discretion. Burwell v. Wilkerson, 30 N.C. App. 110, 226 S.E.2d 220 (1976); Hilton v. Howington, 63 N.C. App. 717, 306 S.E.2d 196 (1983), cert. denied, 310 N.C. 152, 311 S.E.2d 291 (1984); Thomas M. McInnis & Assocs. v. Hall, 76 N.C. App. 486, 333 S.E.2d 544 (1985), modified on other grounds, 318 N.C. 421, 349 S.E.2d 552 (1986); Stoner v. Stoner, 83 N.C. App. 523, 350 S.E.2d 916 (1986); Cole v. Cole, 90 N.C. App. 724, 370 S.E.2d 272, cert. denied, 323 N.C. 475, 373 S.E.2d 862 (1988); Gallbronner v. Mason, 101 N.C. App. 362, 399 S.E.2d 139., (1991).

A motion for relief under section (b) of this rule is addressed to the sound discretion of the trial court, and appellate review is limited to determining whether the court abused its discretion. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975); Commercial Union Assurance Cos. v. Atwater Motor Co., 35 N.C. App. 397, 241 S.E.2d 334 (1978); Kolendo v. Kolendo, 36 N.C. App. 385, 243 S.E.2d 907 (1978); McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979); Greenhill v. Crabtree, 45 N.C. App. 49, 262 S.E.2d 315, aff'd, 301 N.C. 520, 271 S.E.2d 908 (1980); In re Estate of Snipes, 45 N.C. App. 79, 262 S.E.2d 292 (1980); Peters v. Elmore, 59 N.C. App. 404, 297 S.E.2d 154 (1982); City Fin. Co. v. Boykin, 86 N.C. App. 446, 358 S.E.2d 83 (1987); In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991).

The trial judge's extensive power to afford relief from judgments is accompanied by a corresponding discretion to deny it, and the only question for appellate determination is whether the trial court abused its discretion in denying the motion. Sawyer v. Goodman, 63 N.C. App. 191, 303 S.E.2d 632, cert. denied, 309 N.C. 823, 310 S.E.2d 352 (1983).

Court to Make Findings of Fact. — It is the duty of the judge presiding at a hearing under section (b) of this rule to make findings of fact and to determine from such facts whether the movant is entitled to relief from the final judgment or order in question. Hoglen v. James, 38 N.C. App. 728, 248 S.E.2d 901 (1978); York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

Court Not Required to Make Findings of Fact. — Where the trial court denied the motion to set aside the default judgment without making findings of fact, a better practice would have been to make findings of fact when ruling on a motion under subsection (b); however, the trial court is not required to do so. McLean v. Mechanic, 116 N.C. App. 271, 447 S.E.2d 459 (1994), review denied, 339 N.C. 738, 454 S.E.2d 654, cert. denied, 339 N.C. 738, 454 S.E.2d 653 (1995).

When a trial court denied an injured party's motion for relief from a judgment adopting an arbitrator's award dismissing the injured party's case, the trial court was not required to make findings of fact because the injured party did not request such findings. Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002).

Findings of Fact are Conclusive If Based on Competent Evidence. — The facts found by the judge are conclusive if there is any evidence on which to base such findings of fact. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

Findings of fact made by the trial court upon a motion to set aside a judgment by default are binding on appeal if supported by any competent evidence. Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

But conclusions of law made by the judge upon the facts found by him are reviewable on appeal. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

The trial judge's findings of fact are conclusive on appeal when supported by competent evidence, but the conclusions of law made by the judge upon the facts found are reviewable on appeal. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

When Court Fails to Make Findings of Fact. — Where the trial court does not make findings of fact in its order denying the motion to set aside the judgment, the question on appeal is whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion. Grant v. Cox, 106 N.C. App. 122, 415 S.E.2d 378 (1992).

Amendment Following Dismissal Under § 1A-1, Rule 12(b)(6). — A motion to dismiss under G.S. 1A-1, Rule 12(b)(6) is not a "responsive pleading" under G.S. 1A-1, Rule 15(a) and so does not itself terminate plaintiff's unconditional right to amend a complaint under G.S. 1A-1, Rule 15(a). However, once the trial court enters its dismissal under G.S. 1A-1, Rule 12(b)(6), plaintiff's right to amend under G.S. 1A-1, Rule 15(a) is terminated. Under certain limited circumstances set forth in G.S. 1A-1, Rule 59(e) and section (b) of this rule, a plaintiff may, however, seek to reopen the trial court's judgment and amend the complaint concurrently under G.S. 1A-1, Rule 15(a). Johnson v. Bollinger, 86 N.C. App. 1, 356 S.E.2d 378 (1987).

Order Setting Aside Default Judgment Interlocutory and Not Appealable. — An order of the trial court allowing a motion pursuant to section (b) of this rule to set aside a default judgment was interlocutory and not appealable, and the Court of Appeals should have dismissed the appeal, even though the question of appealability was not raised by the parties. Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980).

Order Setting Aside Dismissal Interlocutory and Appeal Premature. — An order entered pursuant to subsection (b)(1) of this rule, setting aside a judgment which had dismissed plaintiff's action with prejudice for failure of plaintiffs' counsel to appear when the case was called for trial, was interlocutory, and defendants' appeal therefrom was premature. Metcalf v. Palmer, 46 N.C. App. 622, 265 S.E.2d 484 (1980).

Appeal of Denial of Motion for Relief from Judgment Dismissed as Interlocutory. — Appeal of a trial court's denial of clients' G.S. 1A-1, N.C. R. Civ. P. 60(b) motion for relief from judgment in a collateral matter was dismissed as interlocutory because the order did not dispose of the entire case and was thus interlocutory, but the trial court's order did not contain an G.S. 1A-1, N.C. R. Civ. P. 54 certification and the clients failed to address (1) why there was no just reason to delay the appeal, or (2) what substantial right would have been lost absent an immediate appeal;

further, the appeal was a transparent attempt to re-litigate prior orders from several trial courts, prior opinions of the appellate court, and an order denying the clients' previous petition for discretionary review by the Supreme Court of North Carolina, and the same theory posited by the clients in the case sub judice already had been vetted and held to be unpersuasive and incorrect. The lawyers were thus entitled to sanctions pursuant to N.C. R. App. P. 34(c). Pigg v. Massagee, — N.C. App. —, 674 S.E.2d 686, 2009 N.C. App. LEXIS 356 (2009).

Appeal Divests Trial Court of Jurisdiction. — The general rule that an appeal takes the case out of the jurisdiction of the trial court is not changed by G.S. 1A-1, Rule 59 or this rule. Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971); Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

When an appeal is taken the trial court is divested of jurisdiction, except to aid in certifying a correct record. Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971).

The general rule that an appeal takes a case out of the jurisdiction of the trial court was not changed by the enactment of G.S. 1A-1, Rule 59 and this rule. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

The general rule that an appeal takes a case out of the jurisdiction of the trial court is subject to two exceptions and one qualification. The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered, and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that the trial judge, after notice and on proper showing, may adjudge that the appeal has been abandoned and thereby regain jurisdiction of the cause. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Entertainment of Motion by Court of Appeals. — A motion under this rule to set aside the judgment and for a new trial on the ground that a witness for plaintiff had perjured himself, which was filed after the appeal had been scheduled for argument, was properly made in the Court of Appeals. Rhodes v. Henderson, 14 N.C. App. 404, 188 S.E.2d 565 (1972).

Remand for Hearing of Issues Raised by Motion. — Since at the time plaintiff's motion under section (b) of this rule was filed the case was pending on appeal in the Court of Appeals, the motion was properly filed in the appellate court. However, as determination of the motion required resolution of controverted questions of fact which the trial court was in a better position to pass upon than the Court of Appeals, the cause would be remanded to the trial court for the purpose of hearing and passing upon all questions and issues raised by the motion. Swygert v. Swygert, 46 N.C. App. 173, 264 S.E.2d 902 (1980).

Consideration of Section (b) Motion by Trial Court While Appeal Pending. — The general rule is that when one party gives notice of appeal, the jurisdiction of the trial court is ousted and it may take no further action in the case except in aid of the appeal, unless the case is remanded to it by the appellate court. However, the trial court should consider a motion under section (b) of this rule filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending. At the time the motion is made in the lower court, the movant should notify the appellate court, so that it may delay consideration of the appeal until the trial court has considered the motion. Upon an indication of favoring the motion, appellant would be in a position to move the appellate court to remand to the trial court for judgment on the motion and the proceedings would thereafter continue until a final, appealable judgment was rendered. An indication by the trial court that it would deny the motion would be considered binding on that court and appellant could then request appellate court review of the lower court's action. This procedure would allow the trial court to rule in the first instance on the motion and would permit the appellate court to review the trial court's decision on such motion at the same time it considered other assignments of error. Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979), rev'd on other grounds, 299 N.C. 715, 264 S.E.2d 101 (1980).

As a general rule, an appeal divests the trial court of jurisdiction. However, the trial court retains limited jurisdiction to hear a motion under section (b) of this rule and to indicate its probable disposition after the notice of appeal has been entered. Where the trial court indicates that the motion should be denied, the appellate court will review that action along with any other assignments of error raised by the appellant. Hagwood v. Odom, 88 N.C. App. 513, 364 S.E.2d 190 (1988).

Motion Made After Notice of Appeal. — The trial court does not have jurisdiction to rule on a motion pursuant to section (b) of this rule where such motion is made after the notice of appeal has been given. York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

As a general rule, an appeal divests the trial court of jurisdiction of a case and, pending appeal, the trial court is functus officio. However, the trial court retains limited jurisdiction to hear and consider a motion under section (b) of this rule to indicate what action it would be inclined to take were an appeal not pending. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Disciplinary Hearing Commission (DHC) of the North Carolina State Bar did not err in concluding that it lacked jurisdiction to rule upon defendant's motion under G.S. 1A-1, N.C. R. Civ. P. 60(b) because the motion was made after the attorney filed a notice of appeal. N.C. State Bar v. Sossomon, — N.C. App. —, 676 S.E.2d 910, 2009 N.C. App. LEXIS 710 (2009).

Notice of Appeal Filed at Same Time as Motions. — Where notice of appeal from default judgment for defendants with respect to plaintiff's claim and defendants' counterclaim against plaintiff was filed at the same time as plaintiff's motion under G.S. 1A-1, Rule 52(b) for amended and additional findings of fact and his motion under section (b) of this rule for relief from judgment, under the circumstances of the case, the trial court had jurisdiction to rule on plaintiff's motion under section (b) of this rule. York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

Filing and granting of motion of withdrawal and abandonment of appeal served to invest trial judge with jurisdiction over the cause, and hence he had sufficient jurisdictional power to file his order granting plaintiff relief pursuant to subsections (b)(1) and (b)(2) of this rule. Sink v. Easter, 288 N.C. 183, 217 S.E.2d 532 (1975).

Perjured testimony is not usually recognized as a "fraud upon the court" within the meaning of the provision of section (b) of this rule providing that the rule "does not limit the power of a court to entertain an independent action . . . to set aside a judgment for a fraud upon the court." McGinnis v. Robinson, 43 N.C. App. 1, 258 S.E.2d 84 (1979).

Where a movant is uncertain whether to proceed under subsection (b)(1) or (b)(6) of this rule, he need not specify which section if his motion is timely and the reason justifies relief under either. The movant must show that he has a meritorious defense, as it would be a waste of judicial economy to vacate a judgment or order when the movant could not prevail on the merits of the civil action. Oxford Plastics v. Goodson, 74 N.C. App. 256, 328 S.E.2d 7 (1985).

Proceedings Under Chapter 40A. — This Rule applies to proceedings under Chapter 40A in order to provide relief from judgments or orders when necessary to promote the interests of justice. City of Durham v. Woo, 129 N.C. App. 183, 497 S.E.2d 457 (1998), cert. denied, 348 N.C. 496, 518 S.E.2d 380 (1998).

Divorce Decree Regular on Face of Judgment Roll. — Subsection (b)(4) of this rule requires that the judgment be void. A divorce decree, in all respects regular on the face of the judgment roll, is at most voidable, not void. Howell v. Tunstall, 64 N.C. App. 703, 308 S.E.2d 454 (1983).

Alimony Pendente Lite. — Given the interlocutory nature of an order for alimony pendente lite, which allows correction of any error at the district court's final hearing on the matter, such an order is not a "final judgment, order, or proceeding" that can be the proper subject of a motion under section (b) of this rule. Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985).

Child Support. — Like custody orders, child support orders are not "final" orders only in the sense that they may be modified subsequently upon a motion in the cause and a showing of change of circumstances, and thus, like custody orders, a party may seek relief from a child support order pursuant to section (b) of this rule. Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985).

Child Support Judgment Not Voided by Temporary Resumption of Marital Relationship. — Temporary resumption of the marital relationship does not require the court to grant a motion, pursuant to subsection (b)(4) of this rule, to have declared void a judgment ordering payment of child support. Walker v. Walker, 59 N.C. App. 485, 297 S.E.2d 125 (1982).

Applicability to Industrial Commission Motion. — Since the North Carolina Industrial Commission has no rule comparable to section (b) of this rule, and because the Rules of Civil Procedure were applicable, the Industrial Commission should have treated defendant's motion pursuant to G.S. 97-85 and Industrial Commission Rule XXI for a new hearing on the ground that he had not received notice of hearing in which plaintiff was awarded compensation as one made pursuant to section (b) of this rule to be relieved from a judgment. Long v. Reeves, 77 N.C. App. 830, 336 S.E.2d 98 (1985).

Remand to Industrial Commission Following Appeal. — Motion under subsections (b)(2) and (b)(6) of this rule, filed in the Court of Appeals while workers' compensation case was pending therein, whereby defendants moved for a new hearing before the Industrial Commission in the event that the Court of Appeals ruled adversely to defendants on the merits of their appeal, should have been remanded to the Commission for initial determination following decision on the merits of the appeal. Hill v. Hanes Corp., 319 N.C. 167, 353 S.E.2d 392 (1987).

Court's Miscalculation of Ability to Pay Alimony Arrearages Held Error. — Where the trial court understated defendant's monthly expenses by approximately $500.00 per month and failed to include that amount in its calculation of the amount of defendant's present ability to pay alimony arrearages and prospective alimony, while this miscalculation may have had no effect on the trial court's order of specific performance, it may have had an effect on the amount defendant can reasonably afford to pay plaintiff on a monthly basis; the trial court's miscalculation in this situation was of a substantial nature and was a prejudicial error. Edwards v. Edwards, 102 N.C. App. 706, 403 S.E.2d 530, cert. denied, 329 N.C. 787, 408 S.E.2d 518 (1991).

Failure to Address Deficiency in Record. — The court would not rule on the plaintiff's contention that the final judgment reflected an "oversight or omission regarding the proper designation of defendant" where the portion of the court's denial of a new trial mentioning this rule was been marked out and where the plaintiff did not address this fact or seek to have the record properly made up. Collins v. St. George Physical Therapy, 141 N.C. App. 82, 539 S.E.2d 356, 2000 N.C. App. LEXIS 1286 (2000).

Elapsed Time Held Not Unreasonable. — The period of time between November 26, 1984, and April 1, 1985, was not an unreasonable amount of time to elapse so as to preclude relief under subsections (b)(5) and (b)(6) of this rule. Poston v. Morgan, 83 N.C. App. 295, 350 S.E.2d 108 (1986).

Where defendants contended that a mistake was mutual in that both parties settling a wrongful death claim agreed to purchase an annuity for $300,000.00 and that both parties were mistaken as to the actual future payments that the decedent's child would receive from the annuity based on a present value of $300,000.00, as based on incorrect figures received from the annuity company, but where the settlement agreement made no representation as to the cost of the annuity to defendants, and the agreement did not set forth a present value for the settlement, but rather simply set forth the payments to be made by the defendants to decedent's wife and child, the defendants' allegation that the mistake as to the present value of the annuity was mutual was not evident in the settlement agreement. Goodwin v. Cashwell, 102 N.C. App. 275, 401 S.E.2d 840 (1991).

Motions to Set Aside Magistrate's Judgment. — Section 7A-228(a) provides for motions under subsection (b)(1) of this rule to set aside a magistrate's judgment. Provident Fin. Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988).

Where denial of Rule 60(b) motion was in the nature of an interlocutory order because plaintiff's voluntary dismissal resulted in there being no action pending, and defendants would not suffer the loss of a substantial right absent an appeal, in the court's discretion pursuant to Rules 2 and 21, the appeal was treated as a writ of certiorari. Troy v. Tucker, 126 N.C. App. 213, 484 S.E.2d 98 (1997).

Jurisdiction. — Equitable distribution action and ancillary claim for restitution held properly dismissed for lack of personal jurisdiction over defendant where evidence failed to show that defendant purposefully established numerous contacts with this state. Shamley v. Shamley, 117 N.C. App. 175, 455 S.E.2d 435 (1994).

Relief from Paternity Judgment. — Trial court erred in granting a putative father's motion to compel DNA testing before it addressed the putative father's motion, under G.S. 1A-1, Rule 60(b)(1999), for relief from an earlier judgment establishing that he was the father of the child. State ex rel. Bright v. Flaskrud, 148 N.C. App. 710, 559 S.E.2d 286, 2002 N.C. App. LEXIS 58 (2002).

Order for the parties to submit to a paternity test was error because a father's motion to set aside his acknowledgment of paternity was filed over seven years after the acknowledgement was filed, but the one-year time period for seeking relief under G.S. 1A-1-60(b) applied to challenges under G.S. 110-132(a). County of Durham DSS ex rel. Stevons v. Charles, 182 N.C. App. 505, 642 S.E.2d 482, 2007 N.C. App. LEXIS 673 (2007).

Same Standard Used for Setting Aside Summary Judgment and Default Judgment. — Seller's claim that the entry of both a default judgment and a summary judgment simultaneously deprived the seller of the seller's right to move to have the default judgment set aside for good cause was rejected, as the seller's burden would have been the same regardless of which judgment the seller moved to set aside since: (1) the seller never made a G.S. 1A-1-55(d) motion to have the entry of default set aside; and (2) after entry of the default judgment and the summary judgment, the seller could only have sought relief from the trial court pursuant to G.S. 1A-1-60(b). Kniep v. Templeton, 185 N.C. App. 622, 649 S.E.2d 425, 2007 N.C. App. LEXIS 1943 (2007).

Standing to Bring Motion for Relief. — Widow, as the original party in an action brought by the decedent's son to determine title to real property, had standing to bring a motion for relief from the default judgment entered against the widow because the widow was an original party. However, the friend to whom the widow conveyed the property by quitclaim deed, after the entry of the default judgment, lacked standing to bring a motion for relief in the friend's own right because the friend had no interest in the property as the widow had no interest in the property to convey following the entry of the default judgment. Edmunds v. Edmunds, — N.C. App. —, 669 S.E.2d 874, 2008 N.C. App. LEXIS 2258 (2008).

Intervenors had Standing to Seek Relief. — Once paternal grandparents' motion to intervene in a child custody action was granted, they became a "party" for all purposes, and thus had standing to seek relief under G.S./A 1A-1-60(b). Williams v. Walker, 185 N.C. App. 393, 648 S.E.2d 536, 2007 N.C. App. LEXIS 1826 (2007).

Trial Court Should Have Ruled on De-

fendant's Motion to Set Aside Dismissal with Prejudice. — Because a voluntary dismissal with prejudice was a "proceeding" under G.S. 1A-1, N.C. R. Civ. P. 60(b), the trial court should have ruled on defendant deputy's motion to set aside his motion to dismiss with prejudice. Estate of Barber v. Guilford County Sheriff's Dep't, 161 N.C. App. 658, 589 S.E.2d 433, 2003 N.C. App. LEXIS 2256 (2003).

Judicial Admission that Order Was Final. — By filing a G.S. 1A-1-60(b) motion as to a trial court's order determining the parties' settlement terms, an owner's association judicially admitted that the order was final, and therefore its appeal from that order was untimely; also, because the owner's association ratified the order by its actions and acceptance of payment pursuant to the order, it was not permitted to challenge its validity. Sea Ranch II Owners Ass'n v. Sea Ranch II, Inc., 180 N.C. App. 226, 636 S.E.2d 332, 2006 N.C. App. LEXIS 2247 (2006), cert. denied, 361 N.C. 357, 644 S.E.2d 234 (2007).

Relief Not Warranted. — Because a co-trustee failed to demonstrate that a judgment against her was due to excusable neglect where her attorney was allowed to withdraw, was procured by any fraud, misconduct, or misrepresentation, and the record demonstrated that the trial court's denial of the co-trustee's motion was not manifestly unsupported by reason, the relief under N.C. R. Civ. P. 60(b) was properly denied. Milton M. Croom Charitable Remainder Unitrust v. Hedrick, 188 N.C. App. 262, 654 S.E.2d 716, 2008 N.C. App. LEXIS 73 (2008).

B. Mistake, Inadvertence, Surprise and Excusable Neglect.

1. In General.

One Year Filing Period. — The requirement that the motion to set aside a judgment made pursuant to subsection (b)(1) of this rule be made within one year is mandatory. Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987).

Final Adjudication. — Once the one-year period for refiling an action has elapsed and the action can no longer be resurrected, the voluntary dismissal acts as a final adjudication for purposes of section (b). Robinson v. General Mills Restaurants, Inc., 110 N.C. App. 633, 430 S.E.2d 696, cert. granted, 334 N.C. 623, 435 S.E.2d 340, 435 S.E.2d 341 (1993).

Relief Possible Without Motion. — [A]lthough this rule says that the court is to act "on motion," it does not deprive the court of the power to act in the interest of justice in an unusual case where its attention has been directed to the necessity for relief by means other than a motion. Carter v. Clowers, 102 N.C. App. 247, 401 S.E.2d 662 (1991).

Motions to Set Aside Magistrate's Judgment. — Section 7A-228(a) provides for motions under subsection (b)(1) of this rule to set aside a magistrate's judgment. Provident Fin. Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988).

Standard of Review. — Trial judge's decision with regard to whether neglect is excusable or not will not be disturbed on appeal if competent evidence supports the judge's findings and those findings support the conclusion. JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., 169 N.C. App. 199, 609 S.E.2d 487, 2005 N.C. App. LEXIS 509 (2005).

Excusable Neglect Has Long Been Recognized. — Although the ground of excusable neglect is set forth in this rule, it has long been recognized in this jurisdiction and the Supreme Court has spoken on the subject many times. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

What constitutes "excusable neglect" depends on what may be reasonably expected of a party in paying proper attention to his case under all the surrounding circumstances. Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for setting aside a judgment, what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case. Higgins v. Michael Powell Bldrs., 132 N.C. App. 720, 515 S.E.2d 17 (1999).

Excusable neglect is something which must have occurred at or before entry of judgment, and which caused it to be entered. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976); Higgins v. Michael Powell Bldrs., 132 N.C. App. 720, 515 S.E.2d 17 (1999).

Deliberate or willful conduct is not "excusable neglect" within the meaning of this rule. Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

Inadvertent conduct that does not demonstrate diligence is not "excusable neglect" under this rule. Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

Mistakes of legal advice or mistakes of law are not "excusable neglect" under this rule. Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

Findings of Fact. — Under section (b), the trial court is not required to make findings of fact unless requested to do so by a party. Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d 852 (1993).

Trial court is not required to make written findings of fact when ruling on a motion for relief from judgment, unless requested to do so by a party; when no such findings are made, the issue on appeal is whether, on the evidence before the appellate court, the trial court could have made findings of fact sufficient to support its legal conclusion. JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., 169 N.C. App. 199, 609 S.E.2d 487, 2005 N.C. App. LEXIS 509 (2005).

Although negligence and carelessness can support relief from judgment, it is only when such neglect or carelessness is excusable. Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

Trial court properly denied defendants' N.C. R. Civ. P. 60(b) motion to set aside default judgment because defendants made no request for written findings of fact regarding the trial court's order denying their post-trial motions but rather requested the trial court to amend its findings under G.S. 1A-1, N.C. R. Civ. P. 52(b), and defendants could not make a Rule 52(b) request for amended findings of fact regarding a previous order applicable to a Rule 60(b) motion and subsequent order where there was no additional request for findings of fact; the trial court did not err in failing to make findings of fact and conclusions of law as to whether there was a showing of excusable neglect and meritorious defense because the issue of whether there was a showing of a meritorious defense was immaterial when there was sufficient evidence to support the trial court's conclusion that defendants failed to establish excusable neglect. Monaghan, M.D. v. Schilling, MD, — N.C. App. —, 677 S.E.2d 562, 2009 N.C. App. LEXIS 718 (2009).

Finding of Excusable Neglect Required to Set Aside Judgment. — Unless the judge finds that there was excusable neglect, and this finding is correct as a matter of law, he is not authorized to set aside the judgment. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

Along with Finding of a Meritorious Defense. — Even in situations when the facts found justify a conclusion that the neglect was excusable, the court cannot set aside the judgment unless the defendant has a meritorious defense. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

In order to vacate a judgment there must be both excusable neglect and a meritorious defense. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976); Menache v. Atlantic Coast Mgt. Corp., 43 N.C. App. 733, 260 S.E.2d 100 (1979), cert. denied, 299 N.C. 331, 265 S.E.2d 396 (1980); Chaparral Supply v. Bell, 76 N.C. App. 119, 331 S.E.2d 735 (1985); Thomas M. McInnis & Assocs. v. Hall, 76 N.C. App. 486, 333 S.E.2d 544 (1985), aff'd in part and rev'd in part, 318 N.C. 421, 349 S.E.2d 552 (1986).

In order to have a judgment set aside, the movant must show excusable neglect and a meritorious defense. Howard v. Williams, 40 N.C. App. 575, 253 S.E.2d 571 (1979); Higgins v. Michael Powell Bldrs., 132 N.C. App. 720, 515 S.E.2d 17 (1999).

It is the duty of the judge presiding at the hearing on the motion to make findings of fact and upon those facts to determine as a matter of law whether there is a showing of excusable neglect and of a meritorious defense. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

Even if there is evidence from which a finding of excusable neglect can be made, case law requires a finding of a meritorious defense before the judgment may be set aside. Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Davis v. Mitchell, 46 N.C. App. 272, 265 S.E.2d 248 (1980).

In proceeding under subsection (b)(1) of this rule the movant must show that he has a meritorious defense. Sides v. Reid, 35 N.C. App. 235, 241 S.E.2d 110 (1978).

In order for a party to be entitled to relief under section (b) of this rule, he must show excusable neglect and a meritorious defense. East Carolina Oil Transp., Inc. v. Petroleum Fuel & Term. Co., 82 N.C. App. 746, 348 S.E.2d 165 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 745 (1987); Thomas M. McInnis & Assocs. v. Hall, 318 N.C. 421, 349 S.E.2d 552 (1986).

A party moving to set aside a judgment under subdivision (b)(1) must show not only mistake, inadvertence, surprise or excusable neglect, but also the existence of a meritorious defense. Baker v. Baker, 115 N.C. App. 337, 444 S.E.2d 478 (1994).

As It Would Be Idle to Vacate a Judgment Where There Is No Real Defense. — Even when the facts found justify a conclusion that the neglect was excusable, the court cannot set aside the judgment unless there is a meritorious defense, for it would be idle to vacate a judgment where there is no real or substantial defense on the merits. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

Error to Set Aside Judgment Absent Meritorious Defense. — Where defendants contended that judgment was properly set aside under subsection (b)(1) of this rule, for "excusable neglect," but defendants failed to show a meritorious defense, the setting aside of the default judgment was error. First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

Court Determines Only Whether Merito-

rious Defense Pleaded. — As for the defense, the trial court does not hear the facts but determines only whether the movant has pleaded a meritorious defense. Chaparral Supply v. Bell, 76 N.C. App. 119, 331 S.E.2d 735 (1985).

Meritorious Defense Need Not Be Proved. — At the hearing on the motion to set aside a judgment it is not necessary that a meritorious defense be proved, but only that a prima facie defense exists. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 219 S.E.2d 787 (1975).

To merely deny indebtedness and assert the presence of a meritorious defense is not sufficient. This is true even when the facts found justify a conclusion that the movant's neglect was excusable. The trial court cannot set aside the judgment unless there is a meritorious defense, a real or substantial defense on the merits. Chaparral Supply v. Bell, 76 N.C. App. 119, 331 S.E.2d 735 (1985).

A mere denial of indebtedness is not sufficient to constitute a meritorious defense. PYA/Monarch, Inc. v. Ray Lackey Enters., Inc., 96 N.C. App. 225, 385 S.E.2d 170 (1989).

A party served with a summons must give the matter the attention that a person of ordinary prudence would give to his important business. Failure to do so is not excusable neglect under subsection (b)(1) of this rule. East Carolina Oil Transp., Inc. v. Petroleum Fuel & Term. Co., 82 N.C. App. 746, 348 S.E.2d 165 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 745 (1987).

When a party is duly served with a summons, yet fails to give her defense the attention which a person of ordinary prudence usually gives her important business, there is no excusable neglect. In re Hall, 89 N.C. App. 685, 366 S.E.2d 882, cert. denied, 322 N.C. 835, 371 S.E.2d 277 (1988).

Absence of a sufficient showing of excusable neglect renders the question of meritorious defense immaterial. Texas W. Fin. Corp. v. Mann, 36 N.C. App. 346, 243 S.E.2d 904 (1978); Howard v. Williams, 40 N.C. App. 575, 253 S.E.2d 571 (1979).

A court need not make findings as to meritorious defense after a hearing on a motion to set aside a judgment for excusable neglect when it concludes that no excusable neglect was shown. Whether or not there was a meritorious defense is immaterial in such case. Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

And Relief Will Not Be Granted Where Neglect Is Inexcusable. — The exceptional relief of this rule to set aside a judgment for mistake, inadvertence, surprise, or excusable neglect will not be granted where there is inexcusable neglect on the part of the litigant. Holcombe v. Bowman, 8 N.C. App. 673, 175 S.E.2d 362 (1970).

The exceptional relief provided by section (b) of this rule will not be granted where there is inexcusable neglect on the part of the litigant. City of Durham v. Keen, 40 N.C. App. 652, 253 S.E.2d 585, cert. denied, 297 N.C. 608, 257 S.E.2d 217 (1979).

Excusability of the neglect on which relief is granted is that of the litigant, not that of the attorney. Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

In considering granting relief from a court order finding the waiver of exemptions by failure to act, the court must focus on the litigant's excusable neglect, not the attorney's. The negligence of the attorney, in attending to his clients' case, although inexcusable, may still be cause for relief. In re Laughinghouse, 44 Bankr. 789 (Bankr. E.D.N.C. 1984).

Attorney neglect can constitute grounds for relief from judgment on grounds of excusable neglect if the client has been diligent in communicating with his attorney and is not otherwise at fault. Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

Neglect of the attorney will not be imputed to the litigant unless he is guilty of inexcusable neglect. Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

Ordinarily a client is not charged with the inexcusable neglect of his attorney, provided the client himself has exercised proper care. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

Where a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

When the client employs counsel and communicates the merits of his case to such counsel, and the counsel is negligent, it is excusable on the part of the client, who may reasonably rely upon the counsel's doing what may be necessary on his behalf. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

A party may be relieved from a judgment rendered against him as a result of the negligence of his attorney if the litigant himself is not at fault. Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979).

In cases allowing relief from judgments pursuant to subsection (b)(1) of this rule, the courts have pointed out that where the client shows some diligence, and there is no evidence of inexcusable neglect, relief will be granted. This is because the law does not demand that a litigant in effect be his own attorney, when he employs one to represent him. A nonlawyer is not supposed to know the technical steps of a lawsuit and cannot be expected to know what allegations must be pled to prove those facts which the nonlawyer client relates to his attorney. Furthermore, the court must keep in mind that exemption laws must be liberally construed in the debtor's favor. In re Laughinghouse, 44 Bankr. 789 (Bankr. E.D.N.C. 1984).

When Attorney's Neglect Imputed to Defendant. — Where a defendant engages an attorney and thereafter diligently confers with him and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to defendant. If, however, the defendant turns a legal matter over to an attorney upon the latter's assurance that he will handle the matter, and then the defendant does nothing further about it, such neglect will be inexcusable. Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Howard v. Williams, 40 N.C. App. 575, 253 S.E.2d 571 (1979).

Excusable Neglect Not Shown Despite Attorney's Absence. — Although their attorney's failure to appear for defendants at a summary judgment hearing would not be imputed to defendants, where the trial court properly determined that attorney's absence did not cause summary judgment to be entered against defendants, excusable neglect for purposes of setting aside the judgment did not exist. PYA/Monarch, Inc. v. Ray Lackey Enters., Inc., 96 N.C. App. 225, 385 S.E.2d 170 (1989).

Client May Not Abandon His Case on Employment of Counsel. — The mere employment of counsel is not enough. The client may not abandon his case on employment of counsel and when he has a case in court he must attend to it. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

Failure to Comply with Ordinary Prudent Man Standard Not Excusable. — Parties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971); Kirby v. Asheville Contracting Co., 11 N.C. App. 128, 180 S.E.2d 407, cert. denied, 278 N.C. 701, 181 S.E.2d 602 (1971); Engines & Equip., Inc. v. Lipscomb, 15 N.C. App. 120, 189 S.E.2d 498 (1972); Gregg v. Steele, 24 N.C. App. 310, 210 S.E.2d 434 (1974); Boyd v. Marsh, 47 N.C. App. 491, 267 S.E.2d 394 (1980).

The standard of care required of the litigant in his participation in a lawsuit is that which a man of ordinary prudence usually bestows on his important business. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

The test of the negligence of the client or party is whether he has acted as a man of ordinary prudence while engaged in transacting important business. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

No Excusable Neglect Where LLC Failed to Maintain Registered Office to Receive Notice. — Denial of an LLC's motion to set aside a default judgment based on alleged improper substituted service on the Secretary of State was proper because the LLC's failure to receive actual notice of the lawsuit was due to the LLC's own failure to properly maintain a registered office; only after several attempts to serve the LLC by serving the registered agent and by mail failed, was process served on the Secretary of State. Smith v. Jones, — N.C. App. —, 645 S.E.2d 198, 2007 N.C. App. LEXIS 1157 (2007).

As to burden of proof as to negligence of party, see Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

Findings of Fact on Excusable Neglect. — Upon hearing a motion to set aside a judgment on the ground of excusable neglect, the trial court should make findings of fact from which it can determine, as a matter of law, whether excusable neglect has been shown, although absent a request therefor it is not required to do so. Texas W. Fin. Corp. v. Mann, 36 N.C. App. 346, 243 S.E.2d 904 (1978).

What constitutes "excusable neglect" is a question of law, which is fully reviewable on appeal. However, the trial court's decision is final if there is competent evidence to support its findings and those findings support its conclusion. Whether the movant has shown excusable neglect must be determined by his actions at or before entry of judgment. In re Hall, 89 N.C. App. 685, 366 S.E.2d 882, cert. denied, 322 N.C. 835, 371 S.E.2d 277 (1988).

Appellate court declined to reverse a trial court's decision to deny a motion for relief from judgment for excusable neglect based on a failure to make findings of fact because neither party made such a request. Brown v. Foremost Affiliated Ins. Servs., 158 N.C. App. 727, 582 S.E.2d 335, 2003 N.C. App. LEXIS 1222 (2003).

Better Practice Is to Make Findings as to Meritorious Defense Even Where Ex-

cusable Neglect Not Found. — Although it is not necessary that a court make findings as to meritorious defense when it finds adequate notice and concludes that there was no excusable neglect, it would be the better practice to make such findings, since the court may have its conclusion of no excusable neglect reversed, and would then have to make such findings on remand. Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

Determination of whether excusable neglect, inadvertence, or surprise has been shown is a question of law, not a question of fact. Mason v. Mason, 22 N.C. App. 494, 206 S.E.2d 764 (1974).

Whether excusable neglect has been shown is a question of law, not a question of fact. Engines & Equip., Inc. v. Lipscomb, 15 N.C. App. 120, 189 S.E.2d 498 (1972); Texas W. Fin. Corp. v. Mann, 36 N.C. App. 346, 243 S.E.2d 904 (1978); Thomas M. McInnis & Assocs. v. Hall, 318 N.C. 421, 349 S.E.2d 552 (1986).

Upon the facts found the court determines, as a matter of law, whether or not they constitute excusable neglect. Engines & Equip., Inc. v. Lipscomb, 15 N.C. App. 120, 189 S.E.2d 498 (1972).

Whether neglect is excusable or inexcusable is a question of law. JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., 169 N.C. App. 199, 609 S.E.2d 487, 2005 N.C. App. LEXIS 509 (2005).

And Reviewable on Appeal. — Whether the facts found constitute excusable neglect or not is a matter of law and reviewable upon appeal. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971); Texas W. Fin. Corp. v. Mann, 36 N.C. App. 346, 243 S.E.2d 904 (1978); Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978); Higgins v. Michael Powell Bldrs., 132 N.C. App. 720, 515 S.E.2d 17 (1999); Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

Finality of Findings on Excusable Neglect, etc. — Conclusion as to whether excusable neglect, inadvertence, or surprise has been shown is final unless exception is made that there was no evidence to support the findings of fact or that there was a failure to find sufficient material facts to support the conclusion. Mason v. Mason, 22 N.C. App. 494, 206 S.E.2d 764 (1974).

Findings of fact by the judge on a motion to set aside a judgment on the grounds of excusable neglect are final unless excepted to or contentions are made that the evidence does not support the findings of fact. Menache v. Atlantic Coast Mgt. Corp., 43 N.C. App. 733, 260 S.E.2d 100 (1979), cert. denied, 299 N.C. 331, 265 S.E.2d 396 (1980); Chaparral Supply v. Bell, 76 N.C. App. 119, 331 S.E.2d 735 (1985).

The court's findings as to excusable neglect are generally conclusive on appeal if supported by any competent evidence, but findings made under a misapprehension of the law are not binding, and if the findings are insufficient to support the conclusion the order will be reversed. Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

Whether the facts found constitute excusable neglect or not is a matter of law and reviewable on appeal when the trial court's findings are made under a misapprehension of the law, and when the findings are insufficient to support the trial court's conclusion of law. Oxford Plastics v. Goodson, 74 N.C. App. 256, 328 S.E.2d 7 (1985).

What constitutes "excusable neglect" is a question of law, which is fully reviewable on appeal. However, the trial court's decision is final if there is competent evidence to support its findings and those findings support its conclusion. Whether the movant has shown excusable neglect must be determined by his actions at or before entry of judgment. In re Hall, 89 N.C. App. 685, 366 S.E.2d 882, cert. denied, 322 N.C. 835, 371 S.E.2d 277 (1988).

The trial court's ruling on a motion for relief from judgment will not be disturbed on appeal unless the trial court has abused its discretion. Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

Application of Section (b)(1) Standard to Entry of Default Improper. — A judgment by a superior court judge which determined the issue of liability in a personal injury action and ordered a trial on the issue of damages was only an entry of default rather than a default judgment, since it was not a final judgment. Therefore, the trial court erred in applying the "mistake, inadvertence, surprise or excusable neglect" standard of subsection (b)(1) of this rule rather than the "good cause shown" standard of G.S. 1A-1, Rule 55(d) in ruling on defendant's motion to set aside its judgment. Pendley v. Ayers, 45 N.C. App. 692, 263 S.E.2d 833 (1980).

Attacking Consent Judgment on Grounds of Mutual Mistake. — When parties seek to attack a consent judgment on the basis of mutual mistake by way of a motion in the cause, subsection (b)(6) of this rule controls. In re Baity, 65 N.C. App. 364, 309 S.E.2d 515 (1983), cert. denied, 311 N.C. 401, 319 S.E.2d 266 (1984).

Well-reasoned Decision Not Product of Clerical Mistake. — Trial court did not abuse its discretion in denying husband's motion for relief as its award of marital property to the wife of the lower cash surrender value of the husband's life insurance policy rather than the award of that same property at the higher fair market value involved a well-reasoned decision that was not the product of a clerical mistake.

Surles v. Surles, 154 N.C. App. 170, 571 S.E.2d 676, 2002 N.C. App. LEXIS 1400 (2002).

Remand for Hearing and Findings. — Where although a hearing was conducted, at which plaintiff's counsel was not present, the trial court made no findings of fact resolving the critical issues of whether plaintiff was entitled to relief from judgment on the grounds of "mistake, inadvertence, surprise, or excusable neglect" and whether plaintiff had a meritorious defense to defendants' counterclaim, the order denying plaintiff's motion would be vacated and the case would be remanded to the district court for a new hearing and ruling on all issues raised by the motion under section (b) of this rule. York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

Wife's failure to respond to complaint was excusable neglect, where she turned the papers over to her husband upon the assurance from him that the matter had been resolved and that there was no necessity to respond to the complaint. Thomas M. McInnis & Assocs. v. Hall, 76 N.C. App. 486, 333 S.E.2d 544 (1985), aff'd in part and rev'd in part, 318 N.C. 421, 349 S.E.2d 552 (1986).

Workers' Compensation Cases. — A motion made under G.S. 97-47 is not the same as a motion under this rule, and a motion by defendant before the Industrial Commission pursuant to G.S. 97-47 would not afford the same relief as a motion filed pursuant to subsections (b)(2) and (b)(6) of this rule. Hill v. Hanes, 319 N.C. 167, 353 S.E.2d 392 (1987).

North Carolina Industrial Commission erred in granting an employer's motion to dismiss an employee's appeal of the deputy commissioner's award denying his claim for additional benefits because the failure of the employee's attorney to file the appeal within the 15 day period required by G.S. 97-85 was excusable neglect due to the actions of the attorney's agent; based upon the lack of any Commission rules regarding the use of email to announce an award, which could have put the attorney on notice that an opinion and award could arrive by email, it was excusable neglect for the agent to conclude that the attorney had been sent a copy of the award via email and for her not to realize that the employee's right to appeal would depend upon her delivery of the email to the attorney. Egen v. Excalibur Resort Prof'l, 191 N.C. App. 724, 663 S.E.2d 914, 2008 N.C. App. LEXIS 1469 (2008).

Waiver of Errors. — Errors of law alleged to have been committed by the trial court in entering the equitable distribution judgment were issues which could have been raised in the first appeal to the Court of Appeals; therefore, the trial court did not abuse its discretion in denying section (b) motion, as the record could support no other conclusion. Nations v. Nations, 111 N.C. App. 211, 431 S.E.2d 852 (1993).

Attorney Ignorance or Carelessness Not a Ground for Relief. — Although attorney error may qualify as a reason for granting relief from judgment under certain conditions, neither ignorance nor carelessness on the part of an attorney will provide grounds for such relief. Briley v. Farabow, 348 N.C. 537, 501 S.E.2d 649 (1998).

Attorney's Negligent Conduct Not Excusable Neglect. — An attorney's negligent conduct is not "excusable neglect" that would warrant relief from judgment, and in determining such, the court must look at the behavior of the attorney. Briley v. Farabow, 348 N.C. 537, 501 S.E.2d 649 (1998).

Summary judgment was properly granted in favor of an insurer in a breach of contract action because two insureds admitted there was no breach of an insurance contract by failing to make a timely response to requests for admissions; moreover, the fact that the insureds' attorney failed to provide the discovery documents to the insureds did not provide a basis for relief from the judgment. Brown v. Foremost Affiliated Ins. Servs., 158 N.C. App. 727, 582 S.E.2d 335, 2003 N.C. App. LEXIS 1222 (2003).

No Clerical Mistake. — Since a trial court's amendment of an earlier order gave legal custody to the Department of Social Services and physical custody to the relatives, where the earlier order gave legal custody to the relatives prior to filing of the petition to terminate the mother's parental rights, any error could not be said to be clerical. In re D.D.J., 177 N.C. App. 441, 628 S.E.2d 808, 2006 N.C. App. LEXIS 933 (2006).

2. Relief Held Proper.

Plaintiff's failure to appear at a custody hearing was understandable and excusable neglect where, although plaintiff was served with process and notified of the hearing date, she relied on her attorney's advice to disregard the notice. It was the duty of the attorney to notify the court properly that he represented plaintiff and to determine whether the hearing would in fact be held on the date specified in the notice to plaintiff, since the case did not appear on the printed trial calendar but was handwritten onto the add-on calendar, and his failure to do so would not be imputed to plaintiff. Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978).

Where trial court expressly found that defendant was diligent in communicating with his attorneys and providing them with information necessary to prepare an answer, and that the neglect of the attorneys in failing to file an answer within apt time was both excusable and was not to be imputed to defendant, these findings, coupled with the court's finding that defendant had a meritorious defense, fully supported the order setting aside a judgment of default for excusable neglect. Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

Failure to Maintain Agent for Service of Process. — Where defendant corporation failed for more than eight years to maintain a registered agent in North Carolina to receive service of process, and failed, for over eight years, to notify the Secretary of State that its address had changed, there existed competent evidence in the record of inexcusable neglect that led to the entry a default judgment which could not be set aside. Patridge v. Associated Cleaning Consultants & Servs., Inc., 108 N.C. App. 625, 424 S.E.2d 664 (1993).

Council's failure to move for an extension of time in which to produce and deliver transcript supported a finding of excusable neglect. Anuforo v. Dennie, 119 N.C. App. 359, 458 S.E.2d 523 (1995).

Wife's Reliance on Husband's Assurances. — In an action for nonpayment of an open account, excusable neglect was shown where defendant wife relied upon her husband's assurances that he would take care of the matter, and a meritorious defense was shown by the fact that the account ledger was in the name of her husband only, her name did not appear on the open account at all, and she had never received a demand for payment from plaintiff. Hickory White Trucks, Inc. v. Greene, 34 N.C. App. 279, 237 S.E.2d 862 (1977).

Wife's failure or neglect to file an answer in a suit against herself and her husband, upon assurances by her husband that he would be responsible for and assume defense of the action, was excusable neglect. Gregg v. Steele, 24 N.C. App. 310, 210 S.E.2d 434 (1974).

Wife acted within a reasonable time for filing a Rule 60(b)(6) motion to set aside the previous alimony order as the wife testified that the balance owed on the equity line on the marital home was discovered only when the creditor informed the wife that it was instituting a foreclosure action. Sloan v. Sloan, 151 N.C. App. 399, 566 S.E.2d 97, 2002 N.C. App. LEXIS 761 (2002).

When counsel engaged for a case declines to go forward with it, the litigant is entitled both to reasonable notice of that fact and a reasonable opportunity to obtain substitute counsel. And where the record plainly showed that plaintiff had had neither, its failure to attend trial was excusable as a matter of law. Barclays Am. Corp. v. Howell, 81 N.C. App. 654, 345 S.E.2d 228 (1986).

Suit Filed Against Wife Where Judgment Against Husband Had Been Satisfied. — It was not unreasonable for wife to rely on her husband's assurance that the matter raised in the suit filed against her had been taken care of, where a prior action against her husband was based upon the same contract on which she was being sued, and her husband had satisfied the judgment entered against him in that action. Thomas M. McInnis & Assocs. v. Hall, 318 N.C. 421, 349 S.E.2d 552 (1986).

Modification of the qualified domestic relations order (QDRO) was proper where the ex-wife received an additional $ 19,750.31 to which she was not entitled simply due to the wording in the QDRO; the court properly modified the QDRO to reflect the true intent of the parties. Harris v. Harris, 162 N.C. App. 511, 591 S.E.2d 560, 2004 N.C. App. LEXIS 183 (2004).

No Error in Denial of Motion. — Despite a distributor's claims that his manufacturer's export agent, who lived in Great Britain, had tortiously interfered with the distributor-manufacturer relationship, in that the agent hired the distributor's salesman with the intention of establishing his own distributorship, a trial court did not err in denying the distributor's motion, made pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b), to vacate its order in which it had dismissed the complaint on the ground that under the Due Process Clause, the trial court had no personal jurisdiction over the manager. Review under a Rule 60(b) motion was limited to determining whether a trial court had abused its discretion, the documents submitted with the motion would not have changed the trial court's ruling on the motion to dismiss, and the distributor had been given the opportunity to obtain and present the documents in the evidentiary hearing on the Rule 60(b) motion but had failed to do so. Deer Corp. v. Carter, 177 N.C. App. 314, 629 S.E.2d 159, 2006 N.C. App. LEXIS 968 (2006).

3. Relief Held Improper.

Where important information was requested from plaintiff by plaintiff's counsel, and plaintiff did not produce the information until well after the time for filing a response to the counterclaim and after hearing on summary judgment, plaintiff showed no excusable neglect and was not entitled to relief under subsection (b)(1) of this rule. East Carolina Oil Transp., Inc. v. Petroleum Fuel & Term. Co., 82 N.C. App. 746, 348 S.E.2d 165 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 745 (1987).

Where facts found in order setting aside default judgment did not constitute excusable neglect as a matter of law, and defendant failed to show a meritorious defense, and there was no finding that he had such a defense, such order was erroneous. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

Failure to Consult an Attorney. — Denial of a landlord's motion to set aside a default judgment against him pursuant to N.C. R. Civ.

P. 60(b) was upheld on appeal, because the landlord's failure to consult an attorney or any alleged lack of legal knowledge did not constitute excusable neglect under N.C. R. Civ. P. 60(b). Scoggins v. Jacobs, 169 N.C. App. 411, 610 S.E.2d 428, 2005 N.C. App. LEXIS 684 (2005).

Failure to Obtain Attorney and Other Delays. — Wife was not entitled to relief under G.S. 1A-1-60(b)(1) from a consent judgment due to excusable neglect, as the wife was on notice that she needed to hire an attorney and be prepared to proceed with trial, the proceedings had been going on for over three years, and the wife had contributed to those delays; the order denying the Rule 60(b)(1) motion set forth in great detail the case's procedural history and the reasons there was not excusable neglect. McIntosh v. McIntosh, 184 N.C. App. 697, 646 S.E.2d 820, 2007 N.C. App. LEXIS 1596 (2007).

Failure to Monitor Corporate Affairs. — Trial judge committed no error in denying company's motion for relief under subsection (b)(1) of this rule, where company's own neglect and not any intervening negligence was responsible for its failure to appeal in the action. Not only did company fail to change registered agents in Maryland, it failed altogether to name one in this State as required by statute. Furthermore, had the company established some means to ensure that it was promptly informed of important business matters coming to registered agent's attention, the loss of summons and complaint in the mail would not have gone unnoticed, and it would have received motion for default judgment and notice of hearing. Anderson Trucking Serv., Inc. v. Key Way Transp., Inc., 94 N.C. App. 36, 379 S.E.2d 665 (1989).

Failure to Notify Party of Depositions. — Attorneys' failure to notify a party of depositions, resulting in a default judgment against the party for discovery misconduct, was not "excusable neglect" justifying relief from the judgment under G.S. 1A-1, Rule 60(b)(1). Henderson v. Wachovia Bank of N.C., N.A., 145 N.C. App. 621, 551 S.E.2d 464, 2001 N.C. App. LEXIS 735 (2001), cert. denied, 354 N.C. 572, 558 S.E.2d 869 (2001).

Failure to Appear on Date Calendared for Trial. — Failure to retain counsel promptly or otherwise to maintain contact with the court, resulting in failure to appear on the date calendared for trial, should not be classified as excusable neglect of one's own lawsuit. Standard Equip. Co. v. Albertson, 35 N.C. App. 144, 240 S.E.2d 499 (1978).

Failure to Answer Requests for Admissions While Proceeding Pro Se. — Subcontractor failed to show excusable neglect, as the subcontractor was proceeding pro se when it did not respond to a builder's requests for admissions; further, when the subcontractor's attorney, who had been permitted to withdraw, filed a second motion for continuance, the attorney purportedly did so solely "at the subcontractor's request" and only promised "a limited appearance" should the continuance be denied. McKinley Bldg. Corp. v. Alvis, — N.C. App. —, 645 S.E.2d 219, 2007 N.C. App. LEXIS 1158 (2007).

Judgment would not be set aside because present counsel was not made aware of prior action until after summary judgment was rendered, as it was inconceivable that plaintiff was unaware of the prior action, since it was instituted in his behalf by counsel retained by him. Plaintiff's failure to apprise his counsel of the prior action was not the attention to litigation required. Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972).

Dismissal of Party With Prejudice. — Counsel's decision in a medical malpractice case to dismiss one defendant with prejudice and proceed against a single defendant was part of counsel's trial strategy rather than excusable neglect; thus, relief under this rule was not available. Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 515 S.E.2d 30 (1999), aff'd, 351 N.C. 92, 520 S.E.2d 785 (1999).

Where inattention and neglect were attributed to the similarity in the title of a case to a former action, and to his preoccupation in the duties of his profession, this should not be held in law to constitute such excusable neglect as would relieve an intelligent and active businessman from the consequences of his inattention, as against diligent suitors. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

Failure to Take Note of Order. — The trial court did not abuse its discretion in denying defendant's motion for relief from judgment where a default judgment was entered against defendants as a sanction for failure to comply with discovery requests and defendants argued in their motion that defendants' counsel mistakenly failed to take note of the order for sanctions, which was timely served, and mistakenly thought that the motion for sanctions that appeared on the court docket pertained to another defendant. Ignorance, excusable neglect, or carelessness on the part of an attorney will not provide grounds for relief under G.S. 1A-1, Rule 60(b)(1). Clark v. Penland, 146 N.C. App. 288, 552 S.E.2d 243, 2001 N.C. App. LEXIS 863 (2001).

Defendant Failed to Show Good Cause. — Trial court did not abuse its discretion under G.S. 1A-1-55(d) and G.S. 1A-1-60(b) in denying an insurance carrier's motion to vacate a default judgment, as the carrier failed to show good cause to grant the requested relief where the carrier's actions upon being served with the papers were not diligent, and it was not attentive to its responsibilities and duties; there was no showing that the judge's decision was manifestly unsupported by reason in the circumstances. Lowery v. Campbell, 185 N.C. App. 659, 649 S.E.2d 453, 2007 N.C. App. LEXIS 1948 (2007).

Pro Se Representation And Lack of Knowledge. — The Industrial Commission erred by concluding that excusable neglect existed where plaintiff represented himself before the deputy commissioner and was unacquainted with the complexities of the Workers' Compensation Act. Moore v. City of Raleigh, 135 N.C. App. 332, 520 S.E.2d 133 (1999).

Failure to file an answer in a paternity and child support action was not the result of excusable neglect where defendant had a ninth grade education and could read and write, had employed attorneys in other matters, and testified that he failed to file an answer because he did not believe he could be subject to orders of paternity and child support more than seven years after the child was born. Boyd v. Marsh, 47 N.C. App. 491, 267 S.E.2d 394 (1980).

Physical and Mental Strain. — An affidavit stating that as a result of certain duties defendant affiant was under tremendous physical and mental strain at the time he was served with a summons and complaint and for several weeks thereafter was insufficient to support an order setting aside a default judgment on the ground of excusable neglect. Rawleigh, Moses & Co. v. Capital City Furn., Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

Consumer Installment Contract Signed by Wife. — Following a deficiency judgment on a consumer installment contract, defendant wife showed excusable neglect by her reliance on her husband's verbal assurances that he would take care of the matter, but she failed to show a meritorious defense by admitting that she signed the consumer installment contract as a co-customer, thus acknowledging that she became bound thereby. Hickory White Trucks, Inc. v. Greene, 34 N.C. App. 279, 237 S.E.2d 862 (1977).

Failure to Attend Termination Proceedings. — Where respondent testified that she could have returned to North Carolina in time to attend proceeding to terminate her parental rights, but did not think about it because she was worrying about finding work, caring for her other child, and the termination of her relationship with baby's father, while her financial situation may have been a difficult one, under the circumstances, it did not constitute excusable neglect. In re Hall, 89 N.C. App. 685, 366 S.E.2d 882, cert. denied, 322 N.C. 835, 371 S.E.2d 277 (1988).

Timeliness of Motion. — Father's motion to strike an existing order of paternity, filed after he learned he was excluded as the father of his alleged daughter, was properly denied despite the father's allegations that such was warranted on the basis of either mistake or fraud under N.C. R. Civ. P. 60(b)(1) or G.S. 1A-1, N.C. R. Civ. P. 60(b)(3), where such motion was filed more than three years after the order was entered. State ex rel. Davis v. Adams, 153 N.C. App. 512, 571 S.E.2d 238, 2002 N.C. App. LEXIS 1177 (2002).

Failure of defendant subcontractor to contact its attorney until after a default judgment was entered against it did not constitute excusable neglect, and the trial court, therefore, properly denied the subcontractor's motion for relief from judgment. JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., 169 N.C. App. 199, 609 S.E.2d 487, 2005 N.C. App. LEXIS 509 (2005).

Where defendants should have been aware of the deficiency in their case before judgment was entered, relief for alleged mistake under subsection (b)(1) of this rule was not justified. Hagwood v. Odom, 88 N.C. App. 513, 364 S.E.2d 190 (1988).

Consent Order. — Motion under section (b)(6) of this rule should have been denied where defendant altered the agreement from what was agreed upon at trial, as each side apparently did during several redrafts. There was no finding or evidence which would lead to a conclusion that this was inadvertent; therefore, any mistake was not mutual, and a consent order incorporating the agreement could not be modified. Stevenson v. Stevenson, 100 N.C. App. 750, 398 S.E.2d 334 (1990).

A finding that plaintiff received a greater percentage of the marital assets pursuant to the consent judgment would not otherwise be sufficient to render the agreement invalid, and defendant could not invoke the broad language of subdivision (b)(6) of this rule simply to obtain relief to which she was otherwise not entitled. Thacker v. Thacker, 107 N.C. App. 479, 420 S.E.2d 479, cert. denied, 332 N.C. 672, 424 S.E.2d 407 (1992).

Subdivision (b)(6) of this rule is not a catch-all rule; in order to be entitled to relief thereunder, the movant must show that (1) extraordinary circumstances exist and that (2) justice demands such relief. Goodwin v. Cashwell, 102 N.C. App. 275, 401 S.E.2d 840 (1991).

Trial court erred in treating father's motion to amend a written order to comply with the trial court's oral custody decree as a motion for relief made under G.S. 1A-1, Rule 60(b)(6), and granting it; rather than seeking relief from the effect of the custody order, the father sought to amend the effect of that order to reduce the mother's weeknight visitation privilege. Black v. Black, 174 N.C. App. 361, 620 S.E.2d 924, 2005 N.C. App. LEXIS 2395 (2005).

Failure to Attend Proceedings After Insurance Carrier Refused to Defend. — Where defendants were well aware that their insurance carrier refused to represent them, and counsel for plaintiff waited three months before moving for default and also sent defendants a letter stating his intention to seek default if defendants continued to fail to respond, there was sufficient time to protect their interests; accordingly, trial court's refusal to grant defendants relief from judgment for excusable neglect was not an abuse of discretion. Hayes v. Evergo Tel. Co. Ltd., 100 N.C. App. 474, 397 S.E.2d 325 (1990).

Evaluation of Case for Settlement Purposes. — The court would reverse an order setting aside a default judgment entered against the defendants in an action arising from a motor vehicle accident because there was insufficient evidence to support the trial court's conclusion of excusable neglect, notwithstanding the trucking company's assertion that it failed to retain counsel based on its insurance carrier's desire to first evaluate the case to determine if it could be settled prior to proceeding with litigation, where the defendant trucking company was aware of the pending litigation prior to the judgment, and the trucking company's insurance carrier knew that entry of default had been rendered against the trucking company, yet failed to give defense of the lawsuit that attention usually given to important business in the exercise of ordinary prudence. Gibson v. Mena, 144 N.C. App. 125, 548 S.E.2d 745, 2001 N.C. App. LEXIS 332 (2001).

An order reopening and enlarging a default judgment was erroneous because, by deciding to obtain a final judgment for the sum certain that was owed when the default judgment was entered, rather than to have the damages determined later by a trial, plaintiff waived any right it might have had to obtain judgment for a larger amount. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Plaintiff's affidavits did not support the court's finding that judgment was entered as a result of mistake, inadvertence or excusable neglect, as the inadvertence, mistake, or neglect that they showed were of a kind that the law does not excuse. All the affidavits showed, when sifted down, was that in signing the court papers which enabled default judgment to be entered plaintiff's treasurer and counsel were unaware that they had sued for future rents — a matter that they could have known through the exercise of due diligence and reasonable care, and that they were required to know by G.S. 1A-1, Rule 11 of our civil procedure rules. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, cert. denied, 329 N.C. 497, 407 S.E.2d 534 (1991).

Defendant's Failure to Protect Interests. — The defendant failed to show excusable neglect necessary to vacate a default judgment in a wrongful death action, where both the defendant's insurer's refusal to defend and the defendant's attorney's failure to forward a copy of the plaintiff's amended complaint to the insurer or to file a responsive pleading constituted inexcusable neglect. Estate of Teel v. Darby, 129 N.C. App. 604, 500 S.E.2d 759 (1998).

Trial court did not abuse its discretion in denying a father's motion to set aside a judgment awarding sole custody of his minor children to his ex-wife, because the father did not show excusable neglect in his failure to attend the modification of custody hearing as the father knew that a hearing was scheduled and then continued to permit him to obtain replacement cancel but did not obtain replacement counsel and did not inquire as to the continued date of the hearing; furthermore, the father learned of the rescheduled hearing date, but did not take action to continue the hearing, other than a few phone calls to the courthouse, and continued with his plans to leave on a vacation during the rescheduled hearing date. Trivette v. Trivette, 162 N.C. App. 55, 590 S.E.2d 298, 2004 N.C. App. LEXIS 40 (2004).

Case Unsupported by Evidence. — Subsection (b) afforded no relief from summary judgment for a medical malpractice plaintiff, where the plaintiff would have had a sufficient forecast of evidence to defeat the motion, but the plaintiff's affidavit presented bare allegations unsupported by evidence. Briley v. Farabow, 348 N.C. 537, 501 S.E.2d 649 (1998).

Evidence Did Not Support Finding of Excusable Neglect or Fraud. — Trial court did not err in denying the buyers relief from a judgment enforcing a settlement agreement procured by their counsel, due to counsel's fraud on the court or his negligence in handling the case, as the latter did not amount to excusable neglect, their joint and several liability was supported by the terms of the agreement, and the trial court did not rely on any representations made by the attorney to render a judgment in favor of his clients. Purcell Int'l Textile Group, Inc. v. Algemene AFW N.V., 185 N.C. App. 135, 647 S.E.2d 667, 2007 N.C. App. LEXIS 1698 (2007).

Trial court did not have authority to grant the heirs and devisees of deceased property owners affirmative relief on their counterclaims in a tax foreclosure action upon their motion under N.C. R. Civ. P. 60(b) for relief from a default judgment entered against them on a city and county's tax foreclosure claim, as the trial court only had authority to vacate, modify, or set aside the default judgment; further, it was improper to assert a counterclaim in a tax foreclosure matter pursuant to G.S. 105-374. County of

Durham v. Daye, — N.C. App. —, 673 S.E.2d 683, 2009 N.C. App. LEXIS 214 (2009).

C. Newly Discovered Evidence.

Criteria in Subsection (b)(2) Must Be Met. — A motion based on newly discovered evidence must meet the criteria established in subsection (b)(2) of this rule. Cole v. Cole, 90 N.C. App. 724, 370 S.E.2d 272, cert. denied, 323 N.C. 475, 373 S.E.2d 862 (1988).

Fathering of Child After First Trial Held Not Newly Discovered Evidence. — Evidence that approximately one year after first trial, in which the Court of Appeals reversed the trial court's finding that defendant was the father of couple's third child, based on evidence that he had undergone a vasectomy and was infertile, defendant had fathered a daughter with his new wife, did not qualify as "newly discovered evidence" within the meaning of subsection (b)(2) of this rule, because the evidence did not exist at the time of the first trial. Cole v. Cole, 90 N.C. App. 724, 370 S.E.2d 272, cert. denied, 323 N.C. 475, 373 S.E.2d 862 (1988).

Failure to Produce Evidence Earlier Must Not Be Due to Lack of Diligence. — For relief to be granted under subsection (b)(2) of this rule the failure to produce evidence at a hearing under G.S. 1A-1, Rule 12(b) must not have been caused by the moving party's lack of due diligence. The evidence must be such as was not and could not by the exercise of diligence have been discovered in time to present in the original proceeding. Harris v. Family Medical Ctr., 38 N.C. App. 716, 248 S.E.2d 768 (1978).

The trial court did not abuse its discretion in ordering a new trial pursuant to subsection (b)(2) of this rule where the plaintiff used due diligence in bringing to the court's attention the merits of its motion and the plaintiff could not have otherwise learned of the recanted evidence and perjured testimony of defendant's witness which formed the basis of the motion but for the subsequent change by said witness. Conrad Indus., Inc. v. Sonderegger, 69 N.C. App. 159, 316 S.E.2d 327, cert. denied, 311 N.C. 752, 321 S.E.2d 129 (1984).

Where, in support of its petition for certiorari, a bond company sought to include documents, amounting to evidence of a federal indictment and county district attorney's dismissal of state charges against defendant, that were never presented to the trial court until after it entered its bond forfeiture order, and the bonding company did not make a motion pursuant to either G.S. 1A-1, N.C. R. Civ. P. 59 or 60 to bring the material to the trial court's attention, but rather sought to bring the material to light for the first time while this case was already pending on appeal, the court found that it was further evidence of the bond company's lack of diligence and denied its petition for writ of certiorari. State v. Gonzalez-Fernandez, 170 N.C. App. 45, 612 S.E.2d 148, 2005 N.C. App. LEXIS 900 (2005).

Trial court did not err in denying the estate administratrix's motion for relief under N.C. R. Civ. P. 60(b) because laboratory findings as to the decedent's blood chemistry at the time of an automobile accident could have been discovered with the exercise of due diligence in time to present them in the original trial. Robinson v. Trantham, — N.C. App. —, 673 S.E.2d 771, 2009 N.C. App. LEXIS 245 (2009).

Prior Action Is Not Newly Discovered Evidence. — The existence of a prior action is not newly discovered evidence which by due diligence could not have been discovered. To say plaintiff was unaware of an action instituted by him would be ludicrous. Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972).

Commission's Authority on Remand to Take Additional Evidence in Workers' Compensation Claim Not Limited. — Employer cited no pertinent authority for the proposition that the commission's authority on remand to take additional evidence regarding the issue of a worker's disability was limited by the strictures of G.S. 1A-1-60 because it constituted newly discovered evidence; the issue of the worker's disability was not litigated at the first hearing because disability evidence was not required under G.S. 97-61.5. Austin v. Cont'l Gen. Tire, 185 N.C. App. 488, 648 S.E.2d 570, 2007 N.C. App. LEXIS 1813 (2007).

Results of a new physical examination were not "newly discovered evidence" which would allow reopening a judgment and granting a new trial under section (b) of this rule. Grupen v. Thomasville Furn. Indus., 28 N.C. App. 119, 220 S.E.2d 201 (1975), cert. denied, 289 N.C. 297, 222 S.E.2d 696 (1976).

D. Fraud, Misrepresentation and Misconduct of Adverse Party.

Time for Bringing Attack on Judgment. — An attack against judgment on the basis of fraud must be brought within one year after judgment. Caswell Realty Assocs. v. Andrews Co., 121 N.C. App. 483, 466 S.E.2d 310 (1996), review denied, 343 N.C. 304, 471 S.E.2d 68 (1996).

Intrinsic or Extrinsic Nature of Fraud Irrelevant to Motion Under Subsection (b)(3). — Under subsection (b)(3) of this rule, where relief is sought from final judgment by motion it is irrelevant whether the fraud alleged is "intrinsic" or "extrinsic." Textile Fabricators, Inc. v. C.R.C. Indus., Inc., 43 N.C. App. 530, 259 S.E.2d 570 (1979).

But Intrinsic Fraud Can Only Be Subject to Subsection (b)(3) Motion. — While this rule does not limit the power of a court to entertain an independent action to set aside a judgment for fraud, whenever the alleged fraud is intrinsic it can only be the subject of a motion under subsection (b)(3) of this rule, and it is barred after one year following the judgment. Textile Fabricators, Inc. v. C.R.C. Indus., Inc., 43 N.C. App. 530, 259 S.E.2d 570 (1979).

Only Extrinsic Fraud Is Defense to Action on Foreign Judgment. — Although extrinsic fraud is a defense to an action to recover on a foreign judgment, intrinsic fraud is not. Florida Nat'l Bank v. Satterfield, 90 N.C. App. 105, 367 S.E.2d 358 (1988).

Allegations that defendant's attorney in a foreign state had a conflict of interest and failed to protect his interests were claims of intrinsic fraud and had to be directly attacked in that state. Florida Nat'l Bank v. Satterfield, 90 N.C. App. 105, 367 S.E.2d 358 (1988).

Attorney Fraud. — Trial court erred in concluding that it lacked jurisdiction under G.S. 1A-1, N.C. R. Civ. P. 60(b) to set aside an order of dismissal for attorney fraud because the plaintiff, a foreign corporation, claimed that the dismissal of the complaint was a result of the fraud and misrepresentation of defendants' attorney in its motion to dismiss for plaintiff's failure to obtain a certificate of authority. Plaintiff argued that defendants' counsel argued the motion in a misleading way by failing to provide the court with the relevant legal authority of G.S. 55-15-01, which was paramount in the determination of whether the plaintiff was required to obtain a certificate of authority. Harbin Yinhai Tech. v. Greentree Fin. Group, Inc., — N.C. App. —, 677 S.E.2d 854, 2009 N.C. App. LEXIS 525 (2009).

Fraud by Party's Own Attorney. — Attorneys' failure to notify a party of depositions, resulting in a default judgment against the party for discovery misconduct, was not grounds for relief from that judgment because of fraud, under G.S. 1A-1, Rule 60(b)(3), because that rule governed fraud by an adverse party, not fraud by a party's own attorney. Henderson v. Wachovia Bank of N.C., N.A., 145 N.C. App. 621, 551 S.E.2d 464, 2001 N.C. App. LEXIS 735 (2001), cert. denied, 354 N.C. 572, 558 S.E.2d 869 (2001).

Where decedent's nephew was not notified or made a party to adoption nullification proceeding initiated by daughter of decedent's former wife, the nephew was fully empowered to bring an independent action to vacate the clerk's order. Flinn v. Laughinghouse, 68 N.C. App. 476, 315 S.E.2d 72, appeal dismissed and cert. denied, 311 N.C. 755, 321 S.E.2d 132 (1984).

Failure to Serve Amended Complaint on Defendant. — A default judgment was not void as to the defendant, where the defendant argued that the plaintiff in a wrongful death action never served its amended complaint on defendant, but the defendant's attorney admitted via affidavit that the defendant was served with a copy of the amended complaint and that the defendant forwarded a copy of the amended complaint to the attorney. Estate of Teel v. Darby, 129 N.C. App. 604, 500 S.E.2d 759 (1998).

Fraudulent Acceptance of Service. — Divorce judgment was declared void pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b) for lack of service when the wife proved that her signature was forged on the acceptance of service filed pursuant to G.S. 1A-1, N.C. R. Civ. P. 4(j5) and that she and her husband had continued to live and conduct themselves as husband and wife after the divorce. Freeman v. Freeman, 155 N.C. App. 603, 573 S.E.2d 708, 2002 N.C. App. LEXIS 1575 (2002), cert. denied, 357 N.C. 250, 582 S.E.2d 32 (2003).

Evidence of a fraudulent scheme on the part of plaintiff and her husband was not admissible to support a motion for a directed verdict where the defendant in an alienation of affection case neither affirmatively pled, as required by G.S. 1A-1, Rule 8(c), nor tried the case on the theory of fraud. Ward v. Beaton, 141 N.C. App. 44, 539 S.E.2d 30, 2000 N.C. App. LEXIS 1288 (2000), cert denied, 353 N.C. 398, 547 S.E.2d 431 (2001).

Undue influence not shown. — Mother who signed a consent judgment agreeing to an award of custody of the mother's child to the mother's sister and brother-in-law did not show that the mother was entitled to have the consent judgment set aside, under G.S. 1A-1, N.C. R. Civ. P. 60(b), due to undue influence because (1) the mother did not show the mother was under the influence of drugs when the mother signed the consent judgment, (2) it was not shown that a lawyer who represented both the sister and brother-in-law and the department of social services when the custody arrangements were being discussed tried to influence the mother, and (3) a social worker's statement that the mother did not need a lawyer, when signing the judgment, viewed in context, did not show the mother was unduly influenced. Yurek v. Shaffer, — N.C. App. —, 678 S.E.2d 738, 2009 N.C. App. LEXIS 1079 (July 7, 2009).

False Testimony. — Trial court did not abuse its discretion in denying plaintiffs' motion for a new trial because defendant's witness's alleged false testimony did not relate to a crucial issue in the case and did not prevent a fair trial. Krantz v. Owens, 168 N.C. App. 384, 607 S.E.2d 337, 2005 N.C. App. LEXIS 264 (2005).

E. Other Reasons Justifying Relief Under Subdivision (b)(6).

Subdivision (b)(6) of this section is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought. State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107 (1991), discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

Subdivision (b)(6) serves as a "grand reservoir of equitable power" by which a court may grant relief from a judgment whenever extraordinary circumstances exist and there is a showing that justice demands it. Dollar v. Tapp, 103 N.C. App. 162, 404 S.E.2d 482 (1991).

Subdivision (b)(6) has been referred to as a "vast reservoir of equitable power." Lumsden v. Lawing, 117 N.C. App. 514, 451 S.E.2d 659 (1995).

Subdivision (b)(6) Not a "Catch-All" Rule. — While subsection (b)(6) of this rule has been described as a grand reservoir of equitable power to do justice in a particular case, it should not be a "catch-all" rule. Standard Equip. Co. v. Albertson, 35 N.C. App. 144, 240 S.E.2d 499 (1978); Vaglio v. Town & Campus Int'l, Inc., 71 N.C. App. 250, 322 S.E.2d 3 (1984).

Although subsection (b)(6) of this rule has often been termed "a vast reservoir of equitable power," a court cannot set aside a judgment pursuant to this rule without a showing (1) that extraordinary circumstances exist, and (2) that justice demands relief. Thacker v. Thacker, 107 N.C. App. 479, 420 S.E.2d 479, cert. denied, 332 N.C. 672, 424 S.E.2d 407 (1992).

Nature of Fraud Envisioned Under Rule. — Attorneys' failure to notify a party of depositions, resulting in a default judgment against the party due to discovery misconduct, was not grounds for relief from the default judgment under G.S. 1A-1, Rule 60(b)(6), due to fraud, because the fraud envisioned under that rule was a deliberate, egregious scheme of directly subverting the judicial process which could not be exposed by the normal adversarial process. Henderson v. Wachovia Bank of N.C., N.A., 145 N.C. App. 621, 551 S.E.2d 464, 2001 N.C. App. LEXIS 735 (2001), cert. denied, 354 N.C. 572, 558 S.E.2d 869 (2001).

Movant Must Proceed Under Proper Subsection. — Subsection (b)(6) of this rule cannot be the basis for a motion to set aside a judgment if the facts supporting it are facts which more appropriately would support one of the five preceding subsections; a movant may not be allowed to circumvent the requirements of subsections (b)(1) through (b)(5) of this rule by designating their motion as one made under subsection (b)(6) of this rule. Therefore, where appellants' arguments were based upon circumstances which would allow relief, if at all, under subsection (b)(1) and not subsection (b)(6), and they did not bring their motions within one year of entry of judgment, their motions were not timely filed and denial was proper. Bruton v. Sea Captain Properties, Inc., 96 N.C. App. 485, 386 S.E.2d 58 (1989).

Two-Pronged Test. — The setting aside of a judgment pursuant to subsection (b)(6) of this rule should only take place where (i) extraordinary circumstances exist and (ii) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist. In addition to these requirements, the movant must also show that he has a meritorious defense. State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107 (1991), discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

A judgment may be valid, irregular, erroneous, or void. An erroneous judgment is one rendered according to the course and practice of the court but contrary to the law or upon a mistaken view of the law. A void judgment has semblance of a valid judgment, but lacks some essential element such as jurisdiction or service of process. Thus, a judgment is not void if the court had jurisdiction over the parties and the subject matter and had authority to render the judgment entered. Windham Distrib. Co. v. Davis, 72 N.C. App. 179, 323 S.E.2d 506 (1984), cert. denied, 313 N.C. 613, 330 S.E.2d 617 (1985).

A judgment or order rendered without an essential element, such as jurisdiction or proper service of process, is void. County of Wayne ex rel. Williams v. Whitley, 72 N.C. App. 155, 323 S.E.2d 458 (1984).

Failure to Obtain Personal Jurisdiction Over Defendant. — Motion to set aside the consent judgment, although made more than six years after its entry, was based on the argument that the trial court did not have personal jurisdiction over defendant. Because a judgment entered without personal jurisdiction over a party is void, defendant's motion was not untimely because it was undisputed that defendant neither accepted service of process nor was served with process. Nye, Mitchell, Javis & Bugg v. Oates, 109 N.C. App. 289, 426 S.E.2d 291 (1993).

Waiver of Objection to Personal Jurisdiction. — Defendants were not entitled to relief from the judgment pursuant to this rule as any objection to personal jurisdiction was waived by defendant appearing at the hearing and consenting to the substitution of the administrator as party defendant and the subsequent entry of judgment against the defendants. Farm Credit Bank v. Edwards, 121 N.C. App. 72, 464 S.E.2d 305 (1995).

Where the record supported the trial court's finding that there was no evidence to show that plaintiff's attorney had actual knowledge of an address where defendant could be served, substituted service on the Secretary of State was effective, and trial court did not err in denying defendant's motion to set aside the judgment on that ground pursuant to subdivision (b)(4) of this rule. Patridge v. Associated Cleaning Consultants & Servs., Inc., 108 N.C. App. 625, 424 S.E.2d 664 (1993).

The lack of notice to interested party of the original incompetency proceeding would clearly justify granting relief pursuant to subsection (b)(6). In re Ward, 337 N.C. 443, 446 S.E.2d 40 (1994).

Irregular, But Not Erroneous, Judgments Within Purview of Subsection (b)(6). — Under the broad power of subsection (b)(6) of this rule an erroneous judgment cannot be attacked, but irregular judgments, rendered contrary to the cause and practice of the court, come within its purview. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975), cert. denied, 289 N.C. 619, 223 S.E.2d 396 (1976).

Procedure for setting aside an irregular judgment is now found in subsection (b)(6) of this rule. City of Salisbury v. Kirk Realty Co., 48 N.C. App. 427, 268 S.E.2d 873 (1980).

Section (b)(6) of this rule is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought. Kennedy v. Starr, 62 N.C. App. 182, 302 S.E.2d 497, cert. denied, 309 N.C. App. 321, 307 S.E.2d 164 (1983); Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987); Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Court Has Power Under Subsection (b)(6) to Vacate Judgments to Accomplish Justice. — The broad language of subsection (b)(6) of this rule gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971); Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976); Thomas v. Thomas, 43 N.C. App. 638, 260 S.E.2d 163 (1979).

Subsection (b)(6) of this rule empowers the court to set aside or modify a final judgment, order or proceeding whenever such action is necessary to do justice under the circumstances. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Where Competent Evidence Shows That Justice Requires It. — While subsection (b)(6) of this rule vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice, a judge cannot do so without a showing based on competent evidence that justice requires it. Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148, cert. denied, 291 N.C. 176, 229 S.E.2d 689 (1976).

Notwithstanding the broad equitable power of a trial court to vacate judgments pursuant to subsection (b)(6) of this rule, it should not grant such relief absent a showing based on competent evidence that justice requires it. Sides v. Reid, 35 N.C. App. 235, 241 S.E.2d 110 (1978).

Courts have the power to vacate judgments when such is appropriate, yet they should not do so under subsection (b)(6) of this rule except in extraordinary circumstances and after a showing that justice demands it. Vaglio v. Town & Campus Int'l, Inc., 71 N.C. App. 250, 322 S.E.2d 3 (1984).

The expansive test by which relief can be given under subsection (b)(6) of this rule is whether (1) extraordinary circumstances exist, and (2) there is a showing that justice demands it. Oxford Plastics v. Goodson, 74 N.C. App. 256, 328 S.E.2d 7 (1985).

Test for Setting Aside Judgment Pursuant to Subsection (b)(6). — The setting aside of a judgment pursuant to subsection (b)(6) of this rule should only take place where (1) extraordinary circumstances exist, and (2) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist. Baylor v. Brown, 46 N.C. App. 664, 266 S.E.2d 9 (1980); Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987).

Courts have the power to vacate judgments when such action is appropriate, yet they should not do so under subsection (b)(6) of this rule except in extraordinary circumstances and after a showing that justice demands it. Standard Equip. Co. v. Albertson, 35 N.C. App. 144, 240 S.E.2d 499 (1978).

The test for whether a judgment, order or proceeding should be modified or set aside under subsection (b)(6) of this rule is two pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands that relief be granted. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Meritorious Defense Required Under Subsection (b)(6). — In proceeding under subsection (b)(6) of this rule the movant must show that he has a meritorious defense. Sides v. Reid, 35 N.C. App. 235, 241 S.E.2d 110 (1978).

Where a default judgment was entered against an insured in an individual's negligence action because the insured failed to respond despite proper service of process, the trial court did not abuse its discretion in denying the intervening insurer's motion to set aside the judgment pursuant to Rule 60(b)(6) where the insurer failed to allege or show the existence of extraordinary circumstances, a meritorious defense, or that the trial court abused its discretion in refusing to set aside the judgment. Barton v. Sutton, 152 N.C. App. 706, 568 S.E.2d 264, 2002 N.C. App. LEXIS 976 (2002).

To set aside a judgment for irregularity,

it is necessary to make a motion in the cause before the court which rendered the judgment, with notice to the other party. The objection cannot be made by an appeal, an independent action, or collateral attack. The time for such motion is not limited to one year after the judgment is rendered, but it must be made by the party affected and within a reasonable time, in order to show that the movant has been diligent to protect his rights. The application should also show that the judgment affects injuriously the rights of the party and that he has a meritorious defense; otherwise, it would be useless to set aside the judgment. City of Salisbury v. Kirk Realty Co., 48 N.C. App. 427, 268 S.E.2d 873 (1980).

Timeliness of Motion. — Entry of a default judgment, and not the point of the defendant's actual notice, was the appropriate point in time to consider the timeliness of the defendant's motion for relief under N.C. R. Civ. P. 60(b)(6) motion. Further, the motion, which was filed 17 months after entry of the default judgment, was reasonably timely considering that the trial court granted more relief beyond than was authorized by the allegations of the complaint. Sharyn's Jewelers, LLC v. Ipayment, Inc., — N.C. App. —, 674 S.E.2d 732, 2009 N.C. App. LEXIS 362 (2009).

Motion to Amend Divorce Judgment Not Proper Under Subsection (b)(6). — Defendant's motion to amend divorce judgment to permit him to claim the two children of the parties as dependents on his State and federal tax returns was not properly made pursuant to subsection (b)(6) of this rule, since defendant sought to amend the judgment rather than to be relieved of it, and his motion should have been made pursuant to G.S. 1A-1, Rule 59(e). Coleman v. Arnette, 48 N.C. App. 733, 269 S.E.2d 755 (1980).

Motion to Obtain Modifications of Separation Agreement Improper Under Subsection (b)(6). — Husband's motion under G.S. 1A-1, N.C. R. Civ. P. 60(b)(6) was improper where he sought to vacate the alimony provision of his separation agreement with his wife, which had been incorporated into the parties' divorce decree; the motion should have been filed under G.S. 50-16.9. Oakley v. Oakley, 165 N.C. App. 859, 599 S.E.2d 925, 2004 N.C. App. LEXIS 1511 (2004).

Motion to Amend Consent Judgment Not Allowed. — Subsection (b)(6) of this rule permits motions for relief from judgments for "[a]ny other reason justifying relief from the operation of the judgment." However, where a request for relief pursuant to subsection (b)(6) of this rule was in reality a motion to amend the Consent Judgment and that result could not be achieved by a motion under subsection (b)(6). State ex rel. Envtl. Mgt. Comm'n v. House of Raeford Farms, Inc., 101 N.C. App. 433, 400 S.E.2d 107 (1991), discretionary review denied, 328 N.C. 576, 403 S.E.2d 521 (1991).

Reduction of Amount of Attorney's Fees Awarded as a Sanction. — Trial court did not abuse its discretion in reducing the amount of attorney's fees awarded to an employer as a sanction for its employee initiating an action against the employer for an improper purpose after the employer terminated the employee from her employment. Davis v. Durham Mental Health/Development Disabilities/Substance Abuse Area Auth., 165 N.C. App. 100, 598 S.E.2d 237, 2004 N.C. App. LEXIS 1156 (2004).

The interest of deciding cases on the merits cannot outweigh all other considerations and entitle plaintiff to extraordinary relief under subsection (b)(6) of this rule. Standard Equip. Co. v. Albertson, 35 N.C. App. 144, 240 S.E.2d 499 (1978).

Motions under subsection (b)(6) of this rule are not to be used as a substitute for appeal, and an erroneous judgment cannot be attacked under this subsection. Waters v. Qualified Personnel, Inc., 32 N.C. App. 548, 233 S.E.2d 76 (1977), rev'd on other grounds, 294 N.C. 200, 240 S.E.2d 338 (1978).

When debtors' motion for attorney's fees, pursuant to G.S. 75-16.1, was denied, it was error for a trial court to grant attorney's fees pursuant to a reconsideration of the court's prior denial, under G.S. 1A-1, N.C. R. Civ. P. 60(b)(6), because the motion to reconsider raised alleged errors of law by claiming the trial court applied the wrong legal standard in denying the attorney's fees motion, and such errors could not properly be considered under a motion to reconsider, but, rather, had to be considered either on appeal or pursuant to a new trial motion under G.S. 1A-1, N.C. R. Civ. P. 59. Catawba Valley Bank v. Porter, 188 N.C. App. 326, 655 S.E.2d 473, 2008 N.C. App. LEXIS 77 (2008).

Attorney Negligence Not Shown. — Defendants failed to establish a meritorious defense or prove evidence showing gross negligence on the part of their attorney; evidence presented was otherwise unpersuasive. Royal v. Hartle, 145 N.C. App. 181, 551 S.E.2d 168, 2001 N.C. App. LEXIS 556 (2001).

Failure to Perfect Appeal. — The Superior Court's appropriate dismissal of defendant's appeal on the grounds that defendant failed to perfect it barred any discussion of the merits of the exchange rate used in the judgment; accordingly, the trial court properly denied defendant's motion under subdivision (b)(6) of this rule. Lang v. Lang, 108 N.C. App. 440, 424 S.E.2d 190 (1993).

Trial court properly denied defendants' motion for relief on alleged errors of law under G.S. 1A-1-60(b)(6) because, although defendants properly appealed a trial court order to the Court of Appeals, they failed to perfect such appeal, leading to the dismissal of the appeal, and to the Supreme Court of North Carolina's denial of defendants' petition for discretionary review; accordingly, defendants could not then seek a second bite at the apple through Rule 60(b)(6). Baxley v. Jackson, 179 N.C. App. 635, 634 S.E.2d 905, 2006 N.C. App. LEXIS 2055 (2006).

Attacking Consent Judgment on Grounds of Mutual Mistake. — When parties seek to attack a consent judgment on the basis of mutual mistake by way of a motion in the cause, section (b)(6) of this rule controls. In re Baity, 65 N.C. App. 364, 309 S.E.2d 515 (1983), cert. denied, 311 N.C. 401, 319 S.E.2d 266 (1984).

Failure to Agree to Order's Modification. — Where order set aside equitable distribution award because the parties could not agree as to a modification of the order, and plaintiff failed to preserve his right of appeal while such modification was being considered, the parties' failure to agree as to the order's modification was not a justifiable reason for setting the order aside; setting the order aside because plaintiff lost his right to appeal through his own oversight would amount to using subsection (b)(6) of this rule as a substitute for appeal, which the law does not permit. Draughon v. Draughon, 94 N.C. App. 597, 380 S.E.2d 547 (1989).

Court May Not Nullify Effect of Judgment While Leaving Judgment Intact. — Neither subsection (b)(6) of this rule nor any other provision of law authorizes a court to nullify or avoid one or more of the legal effects of a valid judgment while leaving the judgment itself intact. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

Trial court erred in granting wife's motion to be "relieved of the effect" of a divorce judgment solely to the extent that the judgment barred her claim for equitable distribution. Howell v. Howell, 321 N.C. 87, 361 S.E.2d 585 (1987).

The Industrial Commission has inherent power analogous to that conferred on courts by subsection (b)(6), of this rule in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in achieving a just and proper determination of a workers' compensation claim requires it. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

Plaintiffs who because of procedural blunders made by some of their attorneys had never had a full hearing on the merits of any of their claims, and whose avenues of appeal were cut off through gross neglect by their attorneys, showed a basis for relief under subsections (b)(5) and (b)(6) of this rule, and the trial court abused its discretion in denying plaintiffs' motion to modify a prior court order which enjoined further suits by plaintiffs against defendants as vexatious as a matter of law. Poston v. Morgan, 83 N.C. App. 295, 350 S.E.2d 108 (1986).

Four Year Old Consent Order. — Trial court did not abuse its discretion in refusing to set aside a consent order that plaintiff had signed over four years ago on grounds that it was void because of plaintiff's lack of voluntary consent thereto. Prescott v. Prescott, 83 N.C. App. 254, 350 S.E.2d 116 (1986).

Failure to Give Notice or Opportunity to Be Heard. — Defendant, who defaulted on original complaint which alleged that she was a resident of this State, was entitled to notice of plaintiff's subsequent motion to declare that none of her property was exempt by virtue of non-residency, and an opportunity to contest the factual allegations as to her non-residency. Where she was given neither notice nor an opportunity to be heard, in violation of statutory and constitutional provisions, the order declaring that her property was not exempt was invalid, and she was entitled to relief therefrom pursuant to subsection (b)(4) of this rule. First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

Lost Mail. — Trial judge did not abuse his discretion in refusing to grant equitable relief from a judgment under subsection (b)(6) of this rule, since loss of summons and complaint in the mail was not an extraordinary circumstance; the evidence suggested that corporation exhibited a longstanding pattern of irresponsibility and disregard of legal matters and failed to respond to two communications about a pending suit, only one of which allegedly was lost in the mail. Anderson Trucking Serv., Inc. v. Key Way Transp., Inc., 94 N.C. App. 36, 379 S.E.2d 665 (1989).

No Notice of Calendaring for Trial. — Judge erred in denying defendants' motion to obtain relief from judgment pursuant to their motion under this rule where defendants had no notice that the case which they had appealed from the magistrate to the district court had been calendared for trial; since the judge found as a fact that the case had been duly calendared and that neither plaintiff nor defendants appeared and since the only evidence regarding the matter of whether defendants had received notice was in the negative, it was the duty of the trial judge to find as a fact that defendants did not have notice and to allow defendants' motion entering an order vacating the judgment. Windley v. Dockery, 95 N.C. App. 771, 383 S.E.2d 682 (1989).

Unilateral Reduction of Verdict. — In a breach of contract case in which the jury awarded judgment against one defendant in the amount of $2,426.10 and judgment in the amount of $2,426.10 against the other defendant, the total recovery being the precise amount of the prayer for relief, $4,852.20, it was an abuse of discretion for the trial court, on its own motion, to enter a judgment jointly and severally against the defendants in the total sum of $2,426.10, thereby reducing the verdict by 50 percent. Jorgensen v. Seeman, 95 N.C. App. 767, 383 S.E.2d 702 (1989).

Where defendant failed to appeal from judgment against it in favor of subcontractor and failed to move for a new trial under G.S. 1A-1, Rule 59, it was not entitled to relief from judgment under section (b) of this rule on grounds that it had already paid contractor all that was due under contract. Concrete Supply Co. v. Ramseur Baptist Church, 95 N.C. App. 658, 383 S.E.2d 222 (1989).

After foreclosure, where property was owned and possessed by independent third persons, it was impossible for plaintiffs to satisfy the requirement of reconveyance; this change in circumstances is a good example of a situation which would justify relief under subdivision (b)(6). Lumsden v. Lawing, 117 N.C. App. 514, 451 S.E.2d 659 (1995).

Incompetent Plaintiff Not Yet Declared Incompetent. — The trial court properly nullified its previous orders giving plaintiff relief from all dismissals, costs, and fee orders entered in the previous cases where none of the parties was entitled to act on the incompetent's behalf, as incompetent plaintiffs must be represented by a general or testamentary guardian or guardian ad litem, and where the inexcusable negligence of the parents' attorney could not be charged against her because she was an incompetent "entitled to the greatest possible protection by this court." Fox v. Health Force, Inc., 143 N.C. App. 501, 547 S.E.2d 83, 2001 N.C. App. LEXIS 298 (2001).

Denial of Motion Upheld. — The trial court did not abuse its discretion in denying property owner's motion for relief from default judgment granting subcontractor a lien against certain real property, under G.S. 1A-1, Rule 60(b)(6), where the default judgment against the property owner was not void, and the record revealed no extraordinary circumstances or other showing by the property owner that would warrant relief from the judgment. Piedmont Rebar, Inc. v. Sun Constr., Inc., 150 N.C. App. 573, 564 S.E.2d 281, 2002 N.C. App. LEXIS 583 (2002).

Trial court did not abuse its discretion by denying a husband's motion for review and reconsideration, due to a fall in stock market prices, of a lump sum distribution to be made in the equitable distribution of the parties' property. Lee v. Lee, 167 N.C. App. 250, 605 S.E.2d 222, 2004 N.C. App. LEXIS 2189 (2004).

Trial court properly denied a condominium owner's motion to set aside an execution sale, the order confirming the sale, and the sheriff's deed pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b) because the sheriff complied with G.S. 1-339.54(2)a by sending the notice of the sale via registered mail more than 30 days prior to the sale of the property to the owner's last known address; because the owner was not located in the county, he was not entitled to have a copy of the notice served on him personally pursuant to G.S. 1-339.54(1). St. Regis of Onslow County, N.C. Owners Ass'n v. Johnson, 191 N.C. App. 516, 663 S.E.2d 908, 2008 N.C. App. LEXIS 1468 (2008).

Denial of Motion Improper. — In a medical malpractice case, the trial court erred in granting the doctor and hospital's motions for judgment on the pleadings and denying the injured party's motion to set aside the dismissal where the injured party filed the case on the last day of a 120-day extension filed an amended complaint to include the expert testimony certification, voluntarily dismissed the action and later refiled the complaint; the statute of limitations for malpractice actions under G.S. 1-15(c) had not run, because the original complaint was timely filed, and the first action was properly dismissed without prejudice and properly re-filed within a year. Bass v. Durham County Hosp. Corp., 158 N.C. App. 217, 580 S.E.2d 738, 2003 N.C. App. LEXIS 1044 (2003), cert. denied, 357 N.C. 457, 585 S.E.2d 382 (2003).

Trial court erred in denying a seller's motion for relief from judgment under G.S. 1A-1-60(b)(6), as the seller presented evidence that was not presented at trial that the seller did not own the watercraft that the seller was ordered to convey to the buyers. Curran v. Barefoot, 183 N.C. App. 331, 645 S.E.2d 187, 2007 N.C. App. LEXIS 1156 (2007).

Relief Awarded to Plaintiff. — Trial court erred by awarding relief to a plaintiff in a default judgment against one of the named defendants in excess of the relief supported by the allegations in the plaintiff's complaint because the complaint only stated claims for relief as to that defendant on theories of breach of contract and negligent misrepresentation, but the court awarded relief for additional claims in the complaint that were asserted against the other defendants. Sharyn's Jewelers, LLC v. Ipayment, Inc., —N.C. App. —, 674 S.E.2d 732, 2009 N.C. App. LEXIS 362 (2009).

F. Void Judgments.

Four Year Old Consent Order. — Trial court did not abuse its discretion in refusing to set aside a consent order that plaintiff had signed over four years ago on grounds that it was void because of plaintiff's lack of voluntary consent thereto. Prescott v. Prescott, 83 N.C. App. 254, 350 S.E.2d 116 (1986).

Ratified Consent Order. — Where record demonstrated that both plaintiff and defendant understood and consented to oral stipulations as read into the record by plaintiff's counsel, and defendant's subsequent actions ratified and validated the trial court's order, the defendant was estopped from challenging it on the basis of withdrawal of consent; consequently, trial court did not err in denying his motion for relief from judgment. Chance v. Henderson, 134 N.C. App. 657, 518 S.E.2d 780 (1999).

A void judgment binds no one, and it is immaterial whether the judgment was or was not entered by consent. Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291, cert. denied, 320 N.C. 166, 358 S.E.2d 47 (1987).

A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered. Burton v. Blanton, 107 N.C. App. 615, 421 S.E.2d 381 (1992).

Order setting aside a summary judgment was void ab initio and could be attacked at any time; the trial court did not have personal jurisdiction over the individual employers since the employee failed to serve the individual employers with a copy of the summons and complaint. Van Engen v. Que Scientific, Inc., 151 N.C. App. 683, 567 S.E.2d 179, 2002 N.C. App. LEXIS 871 (2002).

Decision to deny an ex-wife's Rule 60(b)(4) motion was affirmed since the ex-wife did not show that an equitable distribution order was void; the ex-wife did not raise any jurisdictional challenge or assert that the district court was without authority to enter the equitable distribution order, so the ex-wife failed to show that the order was void under the law. Britt v. Britt, 168 N.C. App. 198, 606 S.E.2d 910, 2005 N.C. App. LEXIS 170 (2005).

A judgment is not void if the court has jurisdiction over the parties and the subject matter and had the authority to render the judgment entered. Sharp v. Sharp, 84 N.C. App. 128, 351 S.E.2d 799 (1987).

Sanctions ordered by a district court against a party whose cause of action was dismissed by a magistrate was not a void judgment under G.S. 1A-1, Rule 60(b)(4) since the district court had jurisdiction over the motion for sanctions the defendant filed with the district court after the magistrate dismissed the underlying action. Chandak v. Electronic Interconnect Corp., 144 N.C. App. 258, 550 S.E.2d 25, 2001 N.C. App. LEXIS 413 (2001).

A judgment, if proper on its face, is not void. Burton v. Blanton, 107 N.C. App. 615, 421 S.E.2d 381 (1992).

Default judgment was not void for lack of jurisdiction due to a failure to use due diligence to obtain personal service before service by publication because the person against whom the judgment was entered was not allowed to attack the judgment under Rule 4(j)(4) when he had actual notice of the proceedings against him. Creasman v. Creasman, 152 N.C. App. 119, 566 S.E.2d 725, 2002 N.C. App. LEXIS 856 (2002).

Where the person who was served with a summons directed to a corporation attended the Small Claims Division proceedings and fully participated on the corporation's behalf, the corporation made a general appearance and thus waived its right to challenge proper service of process; the trial court erred in reversing judgment entered by a Small Claims Division magistrate based on invalid service. Woods v. Billy's Auto., 174 N.C. App. 808, 622 S.E.2d 193, 2005 N.C. App. LEXIS 2595 (2005).

Former husband was not entitled to relief under G.S. 1A-1, N.C. R. Civ. P. 60(b) from a divorce judgment as void based on allegations that his signature on pleadings that acted as an answer and an agreement to summary judgment was a forgery because: (1) the notary who notarized his signature, although she did not remember the husband, testified that her usual practice was to require identification and have the person whose signature she notarized sign before her; and (2) the former wife's attorney testified that the husband had contacted the attorney to see what was taking so long to get the divorce judgment done. Macher v. Macher, 188 N.C. App. 537, 656 S.E.2d 282, 2008 N.C. App. LEXIS 219 (2008).

Excess Relief Granted Did Not Void Default Judgment. — Excess relief granted by a trial court in excess of that to which a plaintiff was entitled upon the facts alleged in the plaintiff's complaint did not void a default judgment under N.C. R. Civ. P. 60(b)(4) because the default judgment was thus irregular, not void. Sharyn's Jewelers, LLC v. Ipayment, Inc., — N.C. App. —, 674 S.E.2d 732, 2009 N.C. App. LEXIS 362 (2009).

Failure to Give Notice or Opportunity to Be Heard. — Defendant, who defaulted on original complaint which alleged that she was a resident of this state, was entitled to notice of plaintiff's subsequent motion to declare that none of her property was exempt by virtue of non-residency, and an opportunity to contest the factual allegations as to her non-residency. Where she was given neither notice nor an opportunity to be heard, in violation of statutory and constitutional provisions, the order declaring that her property was not exempt was invalid, and she was entitled to relief therefrom pursuant to subsection (b)(4) of this rule. First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

Where a default judgment was entered against an insured in an individual's negligence action, the trial court did not abuse its discretion in denying the intervening insurer's motion to set aside the judgment as void under Rule 60(b)(4) on the ground that the individual who sued the insured had not given the insurer proper notification of the suit under G.S. 20-

279.21(b)(3), as the insurer failed to show that the lack of notice to the insurer deprived the trial court of jurisdiction or authority to enter the default judgment against the insured, or otherwise rendered the judgment void. Barton v. Sutton, 152 N.C. App. 706, 568 S.E.2d 264, 2002 N.C. App. LEXIS 976 (2002).

In a termination of parental rights proceeding, if service of process on the father was defective, orders adjudicating the father's children neglected would be void, and the father would be relieved from that judgment under G.S. 1A-1, N.C. R. Civ. P. 60(b); however, the record was not sufficiently clear to warrant voiding the trial court's order on that basis. In re Shermer, 156 N.C. App. 281, 576 S.E.2d 403, 2003 N.C. App. LEXIS 112 (2003).

Judgment Was Void Where Trial Court Lacked Personal Jurisdiction Over The Father. — Trial court erred in denying the father's motion for relief from judgment or order since the record failed to show that the mother made diligent efforts to locate the father prior to publication of notice of service; thus, the trial court did not have personal jurisdiction over father and the child custody and support order was void. Cotton v. Jones, 160 N.C. App. 701, 586 S.E.2d 806, 2003 N.C. App. LEXIS 1929 (2003).

Trial court erred in denying the father's motion to set aside an order terminating his parental rights; since the father was not served within the time limit for serving process once a summons was issued and no extension of time was obtained, the trial court did not obtain personal jurisdiction over him in a case where the mother filed a petition to terminate the father's parental rights. In re A.B.D., 173 N.C. App. 77, 617 S.E.2d 707, 2005 N.C. App. LEXIS 1925 (2005).

Improper Entry of Default By Clerk. — Although a trial court did not abuse its discretion by finding that a failure to file an extension of time did not constitute a mistake since there was no explanation for a law firm's actions, a motion to set aside a default judgment should have been granted under G.S. 1A-1, N.C. R. Civ. P. 60(b) because a judgment was void since a clerk was unable to enter a default where there was no sum certain. Basnight Constr. Co. v. Peters & White Constr. Co., 169 N.C. App. 619, 610 S.E.2d 469, 2005 N.C. App. LEXIS 605 (2005).

Time for Attacking Void Judgment. — Although section (b) of this rule contains the requirement that all motions made pursuant thereto be made "within a reasonable time," the requirement is not enforceable with respect to motions made pursuant to subsection (b)(4) of this rule, because a void judgment is a legal nullity which may be attacked at any time. Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291, cert. denied, 320 N.C. 166, 358 S.E.2d 47 (1987); In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991), cert. denied, 330 N.C. 612, 413 S.E.2d 800 (1992).

Attacking Void Judgments Based on Error of Law Must be Pursued by Direct Appeal. — When an injured party argued, in a motion for relief from judgment, that a trial court's judgment adopting an arbitrator's award dismissing her case was void, to the extent the injured party said the judgment was invalid or reversible for errors of law, such arguments were not properly before the appellate court because they should have been pursued in a direct appeal of the trial court's judgment. Clendening v. Sears, Roebuck & Co., — N.C. App. —, — S.E.2d —, 2002 N.C. App. LEXIS 2114 (Aug. 20, 2002).

Relief from Void Divorce Following Death of Spouse. — A proceeding to set aside an invalid divorce decree is not barred by the death of one of the spouses where property rights are involved. Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291, cert. denied, 320 N.C. 166, 358 S.E.2d 47 (1987).

Husband's motion for relief from December 16, 1985, judgment of divorce from bed and board, filed on May 20, 1986, two months after wife's death, was timely, and was properly granted, as the judgment of divorce, although entered with the consent of the parties, contained no finding of material facts and was therefore void. Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291, cert. denied, 320 N.C. 166, 358 S.E.2d 47 (1987).

Order for Husband to Sign Standard Separation Agreement Held Void. — Court erred in denying husband's motion to be relieved from "Memorandum of Judgment/Order" requiring husband to sign "a standard separation agreement," since the provision in the "Memorandum of Judgment/Order" requiring husband to sign such agreement was void for vagueness, as the law does not recognize that any particular form is a "standard separation agreement." Morrow v. Morrow, 94 N.C. App. 187, 379 S.E.2d 705 (1989), cert. denied, 326 N.C. 365, 389 S.E.2d 816 (1990).

Failure of Court to Follow Terms of Custody Agreement. — Although signed by both parties and the court and filed with the clerk of the court, custody and child support agreement would be vacated because the trial court did not read its terms to the parties and inquire into the parties understanding of and voluntary consent to the terms, as provided in the agreement. Tevepaugh v. Tevepaugh, 135 N.C. App. 489, 521 S.E.2d 117, 1999 N.C. App. LEXIS 1149 (1999).

Tenants' Consent Judgment with Landlords Not Enforceable by Contempt Action. — Tenants' consent judgment with landlords was not enforceable by a contempt action, and the trial court erred by holding one of the landlords in contempt after he refused to deliver a tobacco marketing card so the tenants could sell tobacco and by denying the landlords' motion, pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b), for relief from that judgment. Hemric v. Groce, 154 N.C. App. 393, 572 S.E.2d 254, 2002 N.C. App. LEXIS 1466 (2002).

Lack of In Personam Jurisdiction. — Judgment entered against defendant over which the court does not have in personam jurisdiction is void and subject to being set aside pursuant to subsection (b)(4) of this rule. Hayes v. Evergo Tel. Co., 100 N.C. App. 474, 397 S.E.2d 325 (1990).

Evidence of Backdated Signature Voids Subject Matter Jurisdiction. — Wife who agreed to husband's request that she backdate her signature on the "Acceptance of Service" submitted sufficient testimony that she did so in support of her motion to set aside a judgment of absolute divorce on the grounds that the trial court was without jurisdiction to adjudicate the absolute divorce prior to the expiration of the requisite thirty days. Latimer v. Latimer, 136 N.C. App. 227, 522 S.E.2d 801, 1999 N.C. App. LEXIS 1313 (1999), decided prior to 2001 amendment to subsection (c).

Proper Service of Process Found. — Motion to set aside default judgment was denied because although a car dealership submitted affidavits from its general manager, its receptionist, and its controller denying the receipt of the summons and complaint, the trial court found proper service of process on defendant as indicated by the return of service filed with the clerk of court. Blankenship v. Town & Country Ford, Inc., 155 N.C. App. 161, 574 S.E.2d 132, 2002 N.C. App. LEXIS 1599 (2002), cert. denied, appeal dismissed, 357 N.C. 61, 579 S.E.2d 384 (2003).

Proper Service of Process No Found. — Default judgment was void under G.S. 1A-1, N.C. R. Civ. P. 55(d) and G.S. 1A-1, N.C. R. Civ. P. 60(b) because the service by publication under G.S. 1A-1, N.C. R. Civ. P. 4(j1) failed to list the correct county where the action was commenced. Accordingly, because the default judgment was void, the trial court abused its discretion in not granting a motion to set aside the judgment. Connette v. Jones, — N.C. App. —, 674 S.E.2d 751, 2009 N.C. App. LEXIS 359 (2009).

Motion Under Subsection (b)(4) Held Inappropriate. — Where the court had jurisdiction and authority to enter a contempt order, the order was not void, and therefore, a subsection (b)(4) motion was an inappropriate means to rectify the alleged error of failing to appoint counsel for defendant. Vaughn v. Vaughn, 99 N.C. App. 574, 393 S.E.2d 567 (1990).

Failure to Address Motion to Set Aside Default Judgment in Brief. — Appellant could have moved for relief from a default judgment pursuant to G.S. 1A-1, N.C. R. Civ. P. 60(b), but the appellant failed to address a motion to set aside in its brief, so that motion was not before the appellate court. Autec, Inc. v. Southlake Holdings, Inc., 169 N.C. App. 232, 609 S.E.2d 485, 2005 N.C. App. LEXIS 510 (2005).

IV. DECISIONS UNDER PRIOR LAW.

A. In General.

Editor's Note. — *The cases cited below were decided under former G.S. 1-220.*

Former § 1-220 was not applicable to proceedings before the Industrial Commission, because the Industrial Commission is not a court of general jurisdiction. It has no jurisdiction except that conferred upon it by statute. Hartsell v. Pickett Cotton Mills, 4 N.C. App. 67, 165 S.E.2d 792 (1969).

No Application to Irregular Verdicts. — Where an irregular verdict was rendered by the court, the same could not be set aside or altered under former statute. Becton v. Dunn, 137 N.C. 559, 50 S.E. 289 (1905); Gough v. Bell, 180 N.C. 268, 104 S.E. 535 (1920); Hood v. Stewart, 209 N.C. 424, 184 S.E. 36 (1936).

Judgment or Order Not to Be Set Aside on Motion of Stranger. — The remedy provided is restricted to the parties aggrieved by the judgment or order sought to be set aside, and the superior court had no power to set aside a judgment or order once rendered upon motion of a stranger to the cause. Smith v. City of New Bern, 73 N.C. 303 (1875); Edwards v. Phillips, 91 N.C. 355 (1884); In re Hood, 208 N.C. 509, 181 S.E. 621 (1935).

On application for relief no distinction is made between adult and infant parties, provided the latter are represented according to the requirements of the law and the practice of the court. Mauney v. Gidney, 88 N.C. 200 (1883).

Modification by One Judge of Judgment Rendered by Another. — Where on notice and showing that there was on the part of the complainant a mistake, inadvertence, surprise, or excusable neglect by which he was injured, the judgment rendered against him may be modified by a judge other than the one by whom it was rendered. Johnson v. Marcom, 121 N.C. 83, 28 S.E. 58 (1897).

A judgment may be set aside in whole or in part; the court is invested with full legal discretion over the matter. Geer v. Reams, 88 N.C. 197 (1883).

Relief Discretionary with Judge. — The application for relief is addressed to the discretion of the judge presiding. Bank of Statesville v. Foote, 77 N.C. 131 (1877).

The setting aside of a judgment is in the sound legal discretion of the trial judge. Dunn v. Jones, 195 N.C. 354, 142 S.E. 320 (1928).

A rehearing is not a matter of right, but rests in the sound discretion of the court. Williams v. Alexander, 70 N.C. 665 (1874).

It is discretionary with a judge whether he will relieve a party against a judgment taken against him through his "inadvertence, mistake, surprise, or excusable neglect." If a judge refuses to entertain a motion to set aside a judgment for any of the enumerated causes because he thinks he has no power to grant it, then there is error, as he has failed to exercise the discretion conferred on him by law. Hudgins v. White, 65 N.C. 393 (1871).

The surprise contemplated is some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any fault or negligence of his own, which ordinary prudence could not have guarded against. Townsend v. Carolina Coach Co., 231 N.C. 81, 56 S.E.2d 39 (1949).

Withdrawal of defendant's attorney by leave of court when the case is called for trial constitutes "surprise." Perkins v. Sykes, 233 N.C. 147, 63 S.E.2d 133 (1951).

The court's permitting counsel for defendant to withdraw from a case upon the calling of the case for trial, in the absence of notice to defendant, constitutes "surprise," but does not entitle defendant to have the judgment set aside in the absence of a showing of a meritorious defense. Roediger v. Sapos, 217 N.C. 95, 6 S.E.2d 801 (1940).

Relief Afforded from Mistakes of Fact and Not of Law. — Former statute applied only to matters of fact, and did not afford relief from a judgment on the ground of a mistake of law. Skinner v. Terry, 107 N.C. 103, 12 S.E. 118 (1890); Crissman v. Palmer, 225 N.C. 472, 35 S.E.2d 422 (1945).

Relief given on the ground of "mistake, inadvertence, surprise or excusable neglect" referred to mistake of fact and not of law. Rierson v. York, 227 N.C. 575, 42 S.E.2d 902 (1947).

Mistaken legal advice by counsel acted on by client is not remediable, being a mistake of law and not of fact. Phifer v. Travellers Ins. Co., 123 N.C. 405, 31 S.E. 715 (1898).

A judgment may be set aside for excusable neglect irrespective of whether the neglect is induced by mistake of fact or law. Rierson v. York, 227 N.C. 575, 42 S.E.2d 902 (1947).

The larger part of the court's jurisdiction is invoked under "excusable neglect" where there is neither mistake of law nor fact. Rierson v. York, 227 N.C. 575, 42 S.E.2d 902 (1947).

The discretion to set aside a judgment is not given unless there has been excusable neglect. Norton v. McLaurin, 125 N.C. 185, 34 S.E. 269 (1899). See also, Meir v. Walton, 2 N.C. App. 578, 163 S.E.2d 403, cert. denied, 274 N.C. 518, 164 S.E.2d 289 (1968).

Along with a Meritorious Defense. — A party moving in apt time to set aside a judgment taken against him on the ground of excusable neglect, not only must show excusable neglect, but also must make it appear that he has a meritorious defense to the plaintiff's cause of action. Hanford v. McSwain, 230 N.C. 229, 53 S.E.2d 84 (1949). See Bowie v. Tucker, 197 N.C. 671, 150 S.E. 200 (1929); State v. O'Connor, 223 N.C. 469, 27 S.E.2d 88 (1943); Perkins v. Sykes, 233 N.C. 147, 63 S.E.2d 133 (1951).

A judgment may be set aside if the moving party can show excusable neglect and that he has a meritorious defense. Dunn v. Jones, 195 N.C. 354, 142 S.E. 320 (1928). See also, Henderson Chevrolet Co. v. Ingle, 202 N.C. 158, 162 S.E. 219 (1932); Bowie v. Tucker, 206 N.C. 56, 173 S.E. 28 (1934); Jones v. Craddock, 211 N.C. 382, 190 S.E. 224 (1937); Sawyer v. Sawyer, 1 N.C. App. 400, 161 S.E.2d 625 (1968).

Court held without discretion to vacate default judgment except upon a finding of fatal irregularity or excusable neglect and meritorious defense. Wilson v. Thaggard, 225 N.C. 348, 34 S.E.2d 140 (1945).

A party seeking to have a judgment set aside on the ground of excusable neglect must at least set forth in his application such a case as prima facie amounts to a valid defense; whether the defense is valid is a question to be determined by the court, not the party. Mauney v. Gidney, 88 N.C. 200 (1883).

Denial of a motion to set aside a judgment will not be disturbed on appeal when there is neither allegation nor finding of a meritorious defense, and the appellate court will not consider affidavits for the purpose of finding facts in motions of this sort. Cayton v. Clark, 212 N.C. 374, 193 S.E. 404 (1937).

Which Is Prerequisite to Relief. — Existence of a meritorious cause of action is a prerequisite to relief on motion to vacate former judgment. Craver v. Spaugh, 226 N.C. 450, 38 S.E.2d 525 (1946).

In order to set aside a judgment for mistake, surprise, or excusable neglect, there must be a showing of a meritorious defense so that the courts can reasonably pass upon the question whether another trial, if granted, would result advantageously for the defendant. Farmers & Merchants Bank v. Duke, 187 N.C. 386, 122 S.E. 1 (1924); Hill v. Huffines Hotel Co., 188 N.C. 586, 125 S.E. 266 (1924). See Fellos v. Allen, 202 N.C. 375, 162 S.E. 905 (1932); Hooks v. Neighbors, 211 N.C. 382, 190 S.E. 236 (1937); Garrett v. Trent, 216 N.C. 162, 4 S.E.2d 319 (1939).

Absence of a sufficient showing of excusable neglect renders the question of meritorious defense immaterial. Johnson v. Sidbury, 225 N.C. 208, 34 S.E.2d 67 (1945); Whitaker v. Raines, 226 N.C. 526, 39 S.E.2d

266 (1946); Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

And a want of a sufficient showing of a meritorious defense renders the question of excusable neglect immaterial. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

Mistake, etc., Must Be of the Party Seeking Relief. — Former statute applied only where the mistake, surprise, etc., was that of the party seeking relief and had no application where the mistake and surprise arose from the fraudulent conduct of another. Boyden v. Williams, 80 N.C. 95 (1879).

And not of the Court. — Former section did not apply where a motion was made to correct an erroneous judgment rendered at a former term, if it appeared that the error committed was that of the court and not that of the party. Simmons v. Dowd, 77 N.C. 155 (1877).

Whether neglect is excusable is to be determined with reference to the litigant's neglect, and not that of his attorney or defendant's insurer. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

The omission of an attorney retained as counsel to perform his duty as such is excusable neglect in the party, and the judgment may be vacated. Griel v. Vernon, 65 N.C. 76 (1871); Wiley v. Logan, 94 N.C. 564 (1886).

Especially where counsel is insolvent, and unable to respond in damages for his negligence. Hygenic Plate Ice Mfg. Co. v. Raleigh & A. Air Line R.R., 125 N.C. 17, 34 S.E. 100 (1899). See also, Deal v. Palmer, 68 N.C. 215 (1873); English v. English, 87 N.C. 497 (1882).

Where a party to an action employs a reputable attorney and is guilty of no negligence himself, the attorney's negligence in failing to appear and answer will not be imputed to such party in a proceeding to vacate a default judgment, but the law will excuse the party and afford him relief. Stallings v. Spruill, 176 N.C. 121, 96 S.E. 890 (1918). See also, Geer v. Reams, 88 N.C. 197 (1883).

But the client may not abandon his case on employment of counsel, and when he has a case in court he must attend to it. Meir v. Walton, 2 N.C. App. 578, 163 S.E.2d 403 (1968).

Where a defendant engages an attorney and thereafter diligently confers with the attorney and generally tries to keep informed as to the proceedings, the negligence of the attorney will not be imputed to the defendant. If, however, the defendant turns a legal matter over to an attorney upon the latter's assurance that he will handle the matter, and then the defendant does nothing further about it, such neglect will be inexcusable. Meir v. Walton, 2 N.C. App. 578, 163 S.E.2d 403 (1968).

For the personal inattention of a suitor no relief can be granted. Ellington, Royster & Co. v. Wicker, 87 N.C. 14 (1882).

Failure to Comply with Ordinary Prudent Man Standard Not Excusable. — Parties who have been duly served with summons are required to give their defense that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable. Meir v. Walton, 2 N.C. App. 578, 163 S.E.2d 403 (1968); Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

Changing or Setting Aside Consent Judgment. — Where court enters a judgment on its record which appears to have been by the consent of the parties, such judgment cannot thereafter be changed, altered, or set aside without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court wherein it had been entered, that the judgment was obtained by fraud or mutual mistake, or that consent had not in fact been given. The burden is on the party attacking the judgment to show facts which will entitle him to relief. Gardiner v. May, 172 N.C. 192, 89 S.E. 955 (1916).

Voidability of Judgment Against Incompetent Defendant. — A judgment obtained against one who was non compos mentis is not void, but voidable, and can only be set aside for excusable neglect and the showing of a meritorious defense. Farmers & Merchants Bank v. Duke, 187 N.C. 386, 122 S.E. 1 (1924).

Verification of a complaint by swearing with uplifted hand rather than on the Bible is not a sufficient ground for setting aside a judgment entered by default. Fellos v. Allen, 202 N.C. 375, 162 S.E. 905 (1932).

The burden is upon the party seeking to vacate a judgment to show facts which would make the refusal to vacate appear to be an abuse of discretion. Kerchner v. Baker, 82 N.C. 169 (1880).

Findings of Fact Are Required. — Before a judge can vacate a judgment on the grounds of excusable neglect, he must find and state the facts. Clegg v. New York White Soapstone Co., 66 N.C. 391 (1872); Powell v. Weith, 66 N.C. 423 (1872).

In setting aside a judgment, the court is required to find not only the facts in regard to the excusable neglect relied on, but also the facts in regard to a meritorious defense, and a finding of a "meritorious defense," without finding the facts showing a meritorious defense, is insufficient. Parnell v. Ivey, 213 N.C. 644, 197 S.E. 128 (1938).

And Are Conclusive When Supported by Competent Evidence. — The findings of fact by the trial court upon the hearing of a motion to set aside a judgment for excusable neglect are conclusive on appeal when supported by any competent evidence. Carter v. Anderson, 208 N.C. 529, 181 S.E. 750 (1935).

Where, on a motion to set aside a default judgment, the trial court finds facts sufficient to support the conclusion that the litigant's neglect was excusable, objection to the order setting aside the default judgment on the ground that the facts were insufficient to show a mistake of fact, is untenable, the finding of excusable neglect and meritorious defense being sufficient to support the judgment, and the appellate court being bound by the findings when supported by evidence. Rierson v. York, 227 N.C. 575, 42 S.E.2d 902 (1947).

But Are Not Conclusive If Made Under a Misapprehension of Law. — Upon motion to set aside a judgment, the findings of the court as to excusable neglect and meritorious defense are conclusive on appeal when supported by evidence, but such findings are not conclusive if made under a misapprehension of the law, in which instance the cause will be remanded to the end that the evidence be considered in its true legal light. Van Hanford v. McSwain, 230 N.C. 229, 53 S.E.2d 84 (1949). See also, Perkins v. Sykes, 233 N.C. 147, 63 S.E.2d 133 (1951).

Discretion of Judge Not Reviewable on Appeal. — The appellate court can review on appeal what is a mistake, surprise, or excusable neglect, but it cannot review the discretion exercised by a judge of the superior court. Branch v. Walker, 92 N.C. 87 (1885); D.J. Foley, Bro. & Co. v. Blank & Lovick, 92 N.C. 476 (1885).

Absent Abuse of Discretionary Power. — The refusal of a motion to set aside a judgment on the grounds of surprise or excusable neglect is a matter of discretion with the judge below, and cannot be reviewed on appeal unless it should appear that such discretion was abused. Cowles v. Cowles, 121 N.C. 272, 28 S.E. 476 (1897).

But Whether Facts Found Constitute Mistake, etc., May Be Reviewed. — When the judge grants relief, in the exercise of his discretion, that conclusion is not reviewable; but whether the facts found constitute, in law, mistake, inadvertence, surprise, or excusable neglect may be reviewed, and if it is determined that the court below erred therein, the judgment will be corrected, and the motion remanded, to the end that the trial judge may exercise the discretion conferred on him alone. Weil v. Woodard, 104 N.C. 94, 10 S.E. 129 (1889).

After hearing the evidence and finding the facts, the action of the judge is conclusive upon the parties, and there is no appeal therefrom; however, this discretion is not arbitrary, but implies a legal discretion, and if the judge mistake the meaning of "mistake, inadvertence, surprise, or excusable neglect," his judgment is the subject of appeal and review. Hudgins v. White, 65 N.C. 393 (1871); Albertson v. Terry, 108 N.C. 75, 12 S.E. 892 (1891).

Existence of mistake, surprise, inadvertence, or excusable neglect as a ground for relieving a party from a judgment, etc., is a question of law, and if the judge below errs in his ruling in regard thereto, his decision is subject to review. Powell v. Weith, 68 N.C. 342 (1873).

Should the judge set aside a judgment upon a state of facts which did not bring the case within the scope of the former statute, his action would be subject to correction on appeal. Beck v. Bellamy, 93 N.C. 129 (1885).

The discretionary power of the trial court to set aside a default judgment for mistake, inadvertence, surprise, or excusable neglect is a legal discretion and reviewable. Rierson v. York, 227 N.C. 575, 42 S.E.2d 902 (1947).

Whether, upon the facts found by the judge, the neglect of attorneys for defendants to file answers to the complaint within the time required by statute was excusable, or whether, in any event, such neglect was imputable to defendants, were questions of law with respect to which the conclusions of the judge were reviewable on appeal. Abbitt v. Gregory, 195 N.C. 203, 141 S.E. 587 (1928).

Upon the facts found the court determines, as a matter of law, whether or not they constitute excusable neglect, and whether or not they show a meritorious defense; and from such ruling either party may appeal. Ellison v. White, 3 N.C. App. 235, 164 S.E.2d 511 (1968).

Effect of Judge's Failure to State Facts Found on Review. — When, in setting aside a judgment for excusable negligence, the judge did not state the ground on which he founded his order, his action would nevertheless be upheld if in any aspect of the case it would be proper. D.J. Foley, Bro. & Co. v. Blank & Lovick, 92 N.C. 476 (1885).

Presumption on Appeal That Excusable Neglect Was Considered. — When the court below refused a party permission to file an answer at a term subsequent to the time allowed by a former order, the appellate court would assume that the question of "excusable neglect" was passed upon. Clegg v. New York White Soap Stone Co., 67 N.C. 302 (1872).

Presumption That Findings of Fact Were Based on Sufficient Evidence. — Where no evidence appeared on appeal from an order setting aside a judgment for surprise and excusable neglect, it would be presumed that findings of fact were based upon sufficient evidence, in the absence of exceptions to the findings, and the order would be affirmed where the findings sustained the court's holding that movants had shown excusable neglect and meritorious defense. Radeker v. Royal Pines Park, 207 N.C. 209, 176 S.E. 285 (1934).

Right of Appeal May Be Lost. — The right of appeal from a judgment and a review thereof for errors of law cannot be restored to a party who has lost the right by a mere motion to vacate and an appeal from the refusal, whether founded on irregularity or for other causes. Badger v. Daniel, 82 N.C. 468 (1880).

When Certiorari Granted. — The writ of certiorari, as a substitute for a lost appeal, will be granted only when the petitioner shows that he has been diligent, that there have been no laches on his part in respect to his appeal, and further, that his failure to take and perfect the same was occasioned by some act or misleading representation on the part of the opposing party or some other person or cause in some way connected with it and not within his control. Williamson v. Boykin, 99 N.C. 238, 5 S.E. 378 (1888), rehearing denied, 104 N.C. 100, 10 S.E. 87 (1889); Graves v. Hines, 106 N.C. 323, 11 S.E. 362 (1890).

As to appeal from order of clerk, see Caldwell v. Caldwell, 189 N.C. 805, 128 S.E. 329 (1925); Kerr v. North Carolina Joint Stock Land Bank, 205 N.C. 410, 171 S.E. 367 (1933); Gunter v. Dowdy, 224 N.C. 522, 31 S.E.2d 524 (1944).

The effect of an amendment made by the court cannot be collaterally considered, but must be done in a proceeding brought for that purpose. Foster v. Woodfin, 65 N.C. 29 (1871).

Institution of an independent action in lieu of a renewal of the motion was such an abandonment of the remedy by motion as worked a discontinuance of the same. Norwood v. King, 86 N.C. 80 (1882).

Duty of Court to Supply Omissions in Record. — It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance, and this it must do upon the application of any interested person, and without regard to its effect upon the rights of parties or of third persons. It is not open to any other tribunal to call in question the propriety of the action or the verity of its records, as made, and no lapse of time will debar the court of the power to discharge this duty. Walton v. Pearson, 85 N.C. 34 (1881).

B. Relief Held Proper.

Where the answer and record disclosed a meritorious defense, denial of a motion to set aside the judgment because defendant had offered no evidence of a meritorious defense was erroneous. Perkins v. Sykes, 233 N.C. 147, 63 S.E.2d 133 (1951).

Action of the trial court in setting aside judgment for surprise and excusable neglect, etc., and placing the parties in status quo would be upheld on appeal where the record disclosed that the answer of the defendant set up a meritorious defense. Cagle v. Williamson, 200 N.C. 727, 158 S.E. 391 (1931).

Entry of Default Judgment in State Court Following Removal to Federal Court. — Where clerk erroneously granted defendants' motion to remove a cause to the federal court, the moving defendants were entitled to assume that no further proceedings would be had in the State court until the cause was remanded from the federal court, and where a judgment by default and inquiry was entered therein for the want of an answer, without notice, nothing else appearing to show laches on the part of defendants' attorneys, upon relevant findings of the trial judge, including that of a meritorious defense, the action of the trial judge is setting aside the judgment and permitting the defendants to file an answer would not be disturbed on appeal. Abbitt v. Gregory, 195 N.C. 203, 141 S.E. 587 (1928).

Where service of summons was had on defendant bus company by service on an employee of the lessees of a bus station who sold tickets for the bus companies using the station, but the ticket saleswoman failed to notify defendant and judgment by default final was taken against it, it was held that the neglect of the ticket saleswoman would not be imputed to defendant, and the trial court had discretionary power to set aside the judgment upon a showing of meritorious defense. Townsend v. Carolina Coach Co., 231 N.C. 81, 56 S.E.2d 39 (1949).

Court's order setting aside a judgment by default against a corporation that had not been properly served with summons on the ground of excusable neglect was not error where the motion was made in apt time and a meritorious defense was found as a fact upon supporting evidence. Hershey Corp. v. Atlantic C.L. R.R., 203 N.C. 184, 165 S.E. 550 (1932).

For case granting relief to a party who thought he was being summoned as a witness when in fact he was being summoned as the defendant, see Holden v. Purefoy, 108 N.C. 163, 12 S.E. 848 (1891).

Where defendant endorser of a note was required by the illness of his wife to be outside the State, and the complaint was filed on the first day of the term while judgment by default was entered two days later, there was sufficient excuse for failure to answer to justify the opening of the default. Bank of Union v. Brock, 174 N.C. 547, 94 S.E. 301 (1917).

Wife's neglect to file answer upon assurances of her husband that he would do so was excusable in joint action against them. Wachovia Bank & Trust Co. v. Turner, 202 N.C. 162, 162 S.E. 221 (1932).

Fact that an order which in effect deprived plaintiff of right of appeal was made at midnight, when plaintiff was absent and neither knew nor had reason to believe that court was in session, his counsel not being able to attend to the trial, constituted a case of "excusable neglect." Long v. Cole, 74 N.C. 267 (1876).

Where defendant employed a licensed, reputable attorney of good standing, residing in one county of the State, to defend an action brought in another county, and put him in possession of the facts constituting his defense, which attorney prepared and duly filed an answer, and the case was calendared and called for trial without notice to the defendant or his attorney, upon a judgment being obtained by default against defendant, defendant, upon his motion aptly made, could have the judgment set aside for surprise, excusable neglect, etc., upon a showing of a meritorious defense, the negligence of the attorney, if any, not being imputed to the client, and the latter being without fault. Meece v. Commercial Credit Co., 201 N.C. 139, 159 S.E. 17 (1931).

Where defendant, who had retained an attorney of high character and reputation for diligence and faithfulness in the practice of his profession, with instructions to employ an attorney local to the litigation, and fully relied on him to notify him of the steps necessary to be taken in his defense, sought to set aside a judgment by default entered against him for his failure to answer, the laches of the attorney, if any, nothing else appearing, were not attributable to defendant and the order of the superior court setting aside the judgment for his excusable neglect, when otherwise correct, would be sustained on appeal. Helderman v. Hartsell Mills Co., 192 N.C. 626, 135 S.E. 627 (1926).

Failure of Counsel to File Defendants' Verified Answers. — Where defendants, who had employed counsel who were learned in the law and skillful and diligent in its practice and whose zeal and fidelity to the cause of a client were unquestioned, verified their answers promptly and entrusted them to their attorneys for filing, attorneys' failure to file the answers within time required by law was not due to such negligence on the part of defendants as deprived the judge of power to grant them relief from a default judgment. Abbitt v. Gregory, 195 N.C. 203, 141 S.E. 587 (1928).

Failure to Notify Client of Attorney's Withdrawal. — Though an attorney may withdraw from a case with the permission of the court in proper instances, his client is entitled to such specific notice, either before or after the withdrawal, as will permit him to protect his rights, and where, for failure of such notice, a judgment upon a verdict was obtained against the client and he was without laches in moving to set it aside for surprise and excusable neglect upon a showing of a meritorious defense, it was correct for the trial judge to grant his motion. Gosnell v. Hilliard, 205 N.C. 297, 171 S.E. 52 (1933).

Attorney Prevented from Examining Complaint. — On motion to set aside a judgment on the ground of excusable negligence, where it appeared that defendant had twice called on the clerk to enter upon the docket the name of the attorney whom he had employed, and that the attorney himself had applied to the clerk to examine the plaintiff's complaint but was unable to see it and during the remainder of the term was absent in obedience to a summons as a witness, defendant's neglect was excusable. Wynne v. Prairie, 86 N.C. 73 (1882).

Incapacity of Attorney Due to Illness. — Findings that the neglect of defendant was due to the incapacity of her lawyer induced by serious illness, that she had used due diligence, that the attorney's neglect should not be imputed to her, and that defendant had a meritorious defense, were sufficient to support court's order setting aside a default judgment. Rierson v. York, 227 N.C. 575, 42 S.E.2d 902 (1947).

Where after summons and complaint were served on defendant, he timely employed an attorney to make answer and resist the suit, but judgment by default was taken by plaintiff, no answer having been filed in consequence of the illness and death of the wife of defendant's attorney and the prolonged illness of the attorney himself, such circumstances constituted excusable neglect. Gunter v. Dowdy, 224 N.C. 522, 31 S.E.2d 524 (1944).

C. Relief Held Improper.

Where there were no findings of fact which would show excusable neglect on the part of defendants, or that the failure to file proper answer and undertaking was due to excusable neglect, it was error for court to allow defendant's motion to set aside judgment. Whitaker v. Raines, 226 N.C. 526, 39 S.E.2d 266 (1946).

Fact that defendants were old and feeble, although of sound mind, and that they forgot about the service of summons upon them, and therefore took no steps to defend the action, did not show excusable neglect. Pierce v. Eller, 167 N.C. 672, 83 S.E. 758 (1914).

Infirm Party of Sound Mind. — Where defendant was of sound mind, and, though his bodily infirmities confined him, carried on business and defended other suits, a default judgment against such defendant would not be vacated on account of excusable neglect because of his infirmities. Jernigan v. Jernigan, 179 N.C. 237, 102 S.E. 310 (1920).

Mistake as to Nature of Summons. — The fact that a defendant supposed a summons which was served on him to be a paper in another cause pending between himself and plaintiff, and for that reason did not take any measure to answer the same, was not such excusable neglect as entitled him to relief. White v. Snow, 71 N.C. 232 (1874).

Inattention to Action. — Where notwithstanding fact that summons and complaint were duly served on defendant and copies left with him, defendant failed for a period of 30 days to acquaint himself with their contents and to file an answer or other defense, attributing his inattention and neglect to the similarity of the title of the case to a former action and to his preoccupation in the duties of his profession, there was no evidence of such excusable neglect as would relieve an intelligent and active businessman from the consequences of his conduct as against diligent suitors proceeding in accordance with statute. Johnson v. Sidbury, 225 N.C. 208, 34 S.E.2d 67 (1945).

Absence from Trial. — It is the duty of a party to be present in court at the trial of his cause for the performance of matters outside the proper duties of his attorney, and where, without cause, he remains out of court, he cannot claim relief, as his act amounts to inexcusable neglect. Cobb v. O'Hagan, 81 N.C. 293 (1879).

Where an attorney had ample notice as to the day of the trial, the continued absence of the client for two successive calls was inexcusable neglect for which no relief could be had under the statute. Henry v. Clayton, 85 N.C. 371 (1881).

Where party was in courtroom when court announced that motions in his case would be heard the following day, his motion to set aside an order made on the day stipulated on the ground of excusable neglect was properly denied. Abernethy v. First Sec. Trust Co., 211 N.C. 450, 190 S.E. 735 (1937).

Client Misinformed by Attorney as to Time of Trial. — When defendant moved to vacate a judgment upon the ground of excusable neglect, for the reason that his counsel, by mistake, had misinformed him as to the time of holding court, whereby he failed to answer, it was held that the excuse was not sufficient, when the facts showed that defendant did not suffer harm by the mistake of his counsel. Clegg v. New York White Soap Stone Co., 67 N.C. 302 (1872).

Failure of Defendant and Attorney to Answer. — Where it appeared upon defendant's motion to set aside a judgment by default that the same was regularly calendared for trial, and that the defendant had notice thereof and was afforded full opportunity to file his answer, but that his attorney failed to do so, defendant did not show such excusable neglect as would entitle him to have the judgment set aside on his motion. Gaster v. Thomas, 188 N.C. 346, 124 S.E. 609 (1924).

Failure to Answer After Attempt to Compromise. — Judgment by default for the want of an answer would not be set aside for excusable neglect when it was regularly entered at the preceding term of the court, and it appeared that the moving party, after endeavoring to compromise, had promised to send at once the amount sued for but failed to do so, and that his attorney had been notified before the commencement of the term at which the judgment was entered that this course would be taken. Union Guano Co. v. Middlesex Supply Co., 181 N.C. 210, 106 S.E. 832 (1921).

Failure to Defend After Denial of Motion for Continuance. — Where the trial court found that defendants and their attorney were present in court when defendants' motion for a continuance was refused that defendants and their attorney thereupon left the courtroom without definite agreement with the court or opposing counsel and did not return to defend the case, and that defendants and their attorney had failed to exercise due diligence, the court's refusal of the motion to set aside the judgment would be affirmed on appeal. Carter v. Anderson, 208 N.C. 529, 181 S.E. 750 (1935).

Failure of Counsel to Receive Notice Sent Through Mail. — Refusal of a motion to set aside a judgment for surprise and excusable neglect would be upheld where the trial court found from competent evidence that notice of the time set for trial was duly sent movant's counsel through the mail but was not received by him. Clayton v. Adams, 206 N.C. 920, 175 S.E. 185 (1934).

Fact that party was misled by a conversation between his counsel and adversary's attorney did not entitle him to relief. Hutchinson v. Rumfelt, 83 N.C. 441 (1880).

Change of Post Office and Failure to Inquire. — A judgment by default would not be set aside on the ground of excusable neglect where it appeared that defendants changed their post office and did not receive the answer mailed to them by their counsel until 11 months after it was mailed, no inquiry for letters having been made by them at their former post office, and no communication being addressed to their counsel concerning the matter until 11 months after the time for answering the complaint had expired. Vick v. Baker, 122 N.C. 98, 29 S.E. 64 (1898).

Failure to Question Counsel as to Case. — While as a general rule a client will be relieved against a judgment by default taken against him through the negligence of his attorney, yet where it devolved upon client to question his counsel in regard to his case, his failure to do so was inexcusable neglect and relief would be denied. Holland v. Edgecombe Benevolent Ass'n, 176 N.C. 86, 97 S.E. 150 (1918).

Attorney's Death Within Knowledge of Client. — Where an attorney in whose hands a cause had been placed died, and the client had notice of such fact and failed to file his answer at the proper time, he could not later claim relief on the ground of excusable neglect. Simpson v. Broom, 117 N.C. 482, 23 S.E. 441 (1895).

Failure to Retain New Counsel upon Disqualification or Withdrawal of Counsel During Pendency of Trial. — Where, pending a reference, counsel for a party to the action became disqualified, but the client, although having notice of the subsequent orders, proceedings, etc., in the cause, neglected to retain another counsel, this did not require the court to set aside the report and recommit the matter passed upon therein. Smith v. Smith, 101 N.C. 461, 8 S.E. 128 (1888).

Where the court found that defendant in claim and delivery proceedings was in court when his attorney was allowed to withdraw from case and was told he would have to employ other counsel, and the case was continued to the next term, the motion made by defendant and the surety on his replevin bond to set aside the judgment taken at the next succeeding term on the ground of mistake, surprise, and excusable neglect was properly refused. Baer v. McCall, 212 N.C. 389, 193 S.E. 406 (1937).

Neglect of Nonresident Local Attorneys. — A judgment would not be set aside for irregularity and surprise when it appeared that it had come to issue and was regularly set upon the trial docket and that judgment was entered in the due course and practice of the court, and the only ground upon which relief was sought was the employment of nonresident local attorneys, who were not notified, though means of easy communication in ample time were available, as the neglect of the attorneys was personally attributable to the party, whose duty it was also to attend to the action himself, as well as to employ attorneys for the purpose. Hyde County Land & Lumber Co. v. Thomasville Chair Co., 190 N.C. 437, 130 S.E. 12 (1925).

Consent Judgment Signed by Attorney. — Where, upon a motion to set aside a judgment for surprise and excusable neglect on the ground that the judgment was a consent judgment and was signed by movant's attorney without authority, and a motion to set aside the consent judgment for such want of authority by movant's attorney, the court found, upon evidence by affidavits, that the attorney was duly authorized to sign the judgment for movant, that finding was conclusive on the appellate court upon appeal, and the order refusing the motions would be upheld. Alston v. Southern Ry., 207 N.C. 114, 176 S.E. 292 (1934).

Where defendant, upon the suggestion of counsel, allowed judgment by default to go against him, he could not, upon discovering that the recovery was greater than he had anticipated, seek relief, for his action did not amount to excusable neglect. State ex rel. Hodgin v. Matthews, 81 N.C. 289 (1879).

Excusable Neglect Not Shown Despite Attorney's Absence. — Although their attorney's failure to appear for defendants at a summary judgment hearing would not be imputed to defendants, where the trial court properly determined that attorney's absence did not cause summary judgment to be entered against defendants, excusable neglect for purposes of setting aside the judgment did not exist. PYA/Monarch, Inc. v. Ray Lackey Enters., Inc., 96 N.C. App. 225, 385 S.E.2d 170 (1989).

Workers' Compensation Cases. — A motion made under G.S. 97-47 is not the same as a motion under this rule, and a motion by defendant before the Industrial Commission pursuant to G.S. 97-47 would not afford the same relief as a motion filed pursuant to subsections (b)(2) and (b)(6) of this rule. Hill v. Hanes, 319 N.C. 167, 353 S.E.2d 392 (1987).

The Industrial Commission had authority to grant relief from a judgment entered against the employee, even though the employee filed his notice of appeal after expiration of the time limit, where he showed excusable neglect in that his counsel was on vacation when the workers' compensation opinion arrived, the opinion was filed by the attorney's clerical staff, and no entry was made on the office calendar showing the date the opinion arrived. Murray v. Ahlstrom Indus. Holdings, Inc., 131 N.C. App. 294, 506 S.E.2d 724 (1998).

Failure to Monitor Corporate Affairs. — Trial judge committed no error in denying company's motion for relief under subsection (b)(1) of this rule, where company's own neglect and not any intervening negligence was responsible for its failure to appeal in the action. Not only did company fail to change registered agents in Maryland, it failed altogether to name one in this State as required by statute. Furthermore, had the company established some means to ensure that it was promptly informed of important business matters coming to registered agent's attention, the loss of summons and complaint in the mail would not have gone unnoticed, and it would have received motion for default judgment and notice of hearing. Anderson Trucking Serv., Inc. v. Key Way Transp., Inc., 94 N.C. App. 36, 379 S.E.2d 665 (1989).

Rule 61. Harmless error.

No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right. (1967, c. 954, s. 1.)

COMMENT

The substance of this rule has been many times endorsed by the court. See e.g., Collins v. Lamb, 215 N.C. 719, 2 S.E.2d 863 (1937).

Legal Periodicals. — For article, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Error alone will not justify reversal; the error must affect some substantial right of the appellant. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Plaintiffs' arguments as to the admissibility of testimony about the possibility of other causes for a child's cerebral palsy were rejected where the plaintiffs had not shown how the proffered testimony would have changed the outcome of their medical malpractice claim. O'Mara v. Wake Forest Univ. Health Scis., 184 N.C. App. 428, 646 S.E.2d 400, 2007 N.C. App. LEXIS 1478 (2007), petition allowed as to additional issues, 362 N.C. 468 (2008).

Former spouse had not demonstrated that the spouse was prejudiced by the trial court's allegedly improper reliance on a book of forms; while the trial court did reference a form prenuptial agreement to emphasize the lack of "hereafter acquired" language in the parties' prenuptial agreement, the trial court could have drawn the same comparison by relying on cases interpreting prenuptial or postnuptial agreements containing similar language. McIntyre v. McIntyre, 188 N.C. App. 26, 654 S.E.2d 798, 2008 N.C. App. LEXIS 85 (2008).

Mere formal defects in findings ordinarily will be ignored if the substance of the judgment is sufficient. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

The failure to make certain findings, even when specifically requested, does not rise to the level of reversible error if the requested findings are not material. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Especially in light of the conclusive nature of stipulations and the binding effect of pretrial orders, failure to find facts stipulated to in a pretrial order can hardly be prejudicial. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

The introduction of inadmissible evidence by itself will not require reversal; the appellant must demonstrate that the error was prejudicial, i.e., that it probably influenced the verdict of the jury. Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32 (1986).

Even if evidence of an Occupational Safety and Health Administration complaint was improperly admitted in a case in which a former employee sought to recover for injuries incurred based on his alleged exposure to a toxic workplace, such error did not require reversal as it would not have changed the outcome of the trial and was, therefore, harmless under N.C. R. Civ. P. 61. Cameron v. Merisel Props., 187 N.C. App. 40, 652 S.E.2d 660, 2007 N.C. App. LEXIS 2318 (2007).

The admission of incompetent testimony will not be held prejudicial when its import is abundantly established by other competent testimony or when the testimony is merely cumulative or corroborative. Warren v. City of Asheville, 74 N.C. App. 402, 328 S.E.2d 859, cert. denied, 314 N.C. 336, 333 S.E.2d 496 (1985).

In the Face of Contributory Negligence. — Where plaintiffs introduced records of 911 calls from January 1988 through July 1993 concerning incidents at a restaurant where the subject murder occurred and their crime analyst testified as to the type of offenses that prompted the calls in 1992 and 1993 as well as crimes that occurred within a one-half mile radius of the restaurant in those years, the trial court did not err in excluding data pertaining to criminal activity from 1988 to 1991, some of which was probably cumulative, and if such exclusion did constitute error, such error was, in the face of the plaintiffs' contributory negligence, harmless. Benton v. Hillcrest Foods, Inc., 136 N.C. App. 42, 524S.E.2d 53, 1999 N.C. App. LEXIS 1296 (1999).

Admission of Hearsay Testimony. — Court disagreed that the propounder's inadmissible hearsay testimony showed caveator to be a "vile" person, thereby prejudicing the jury against him, and held that the admission of this testimony was harmless error. In re Estate of Ferguson, 135 N.C. App. 102, 518 S.E.2d 796 (1999).

The burden is on the appellant not only to show error, but also to enable the court to see that he was prejudiced and that a different result would likely have ensued had the error not occurred. Warren v. City of Asheville, 74 N.C. App. 402, 328 S.E.2d 859, cert. denied, 314 N.C. 336, 333 S.E.2d 496 (1985).

The party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

Introduction of Erroneous Instruction. — Trial court did not commit prejudicial error by presenting an allegedly erroneous view of the law regarding breach of fiduciary duty in its instruction to the jury by basing the instruction on a North Carolina case rather than on several Georgia cases cited in plaintiffs' brief because there was no substantial difference between the Georgia and North Carolina cases regarding the treatment of minority stockholders in a close corporation. Powell v. Omli, 110 N.C. App. 336, 429 S.E.2d 774 (1993), cert. denied, 334 N.C. 621, 435 S.E.2d 338 (1993).

Court of Appeals erred in requiring an instruction on unconsciousness as part of sudden-incapacitation defense, and plaintiff was entitled under this rule to a new trial because of the possibility of prejudice and error affecting a substantial right. Word v. Jones ex rel. Moore, 350 N.C. 557, 516 S.E.2d 144 (1999).

Plaintiff was entitled to a new trial under G.S. 1A-1-61 because the trial court's error in giving a sudden emergency instruction probably influenced the jury's verdict, in that the instructions of the trial judge plainly permitted the jury to find that the skidding of defendant's car was evidence of negligence solely because there was ice or snow on the roadway. Sobczak v. Vorholt, 181 N.C. App. 629, 640 S.E.2d 805, 2007 N.C. App. LEXIS 403 (2007).

The exclusion of memorandum as evidence was harmless error because plaintiff did not show that (1) it was prejudiced by the exclusion of the memorandum and (2) had the memorandum been admitted, a different result would likely have ensued. Raintree Homeowners Ass'n v. Bleimann, 116 N.C. App. 561, 449 S.E.2d 13, rev'd on other grounds, 342 N.C. 159, 463 S.E.2d 72 (1995).

Even though it is error to permit the jury to view exhibits in the jury room absent the parties' express consent, the complaining party is not entitled to a new trial absent a showing that the error was prejudicial. Gardner v. Harriss, 122 N.C. App. 697, 471 S.E.2d 447 (1996).

Failure to Show Prejudice. — Any assignment of error based on G.S. 1A, N.C. R. Civ. P. 61, was overruled because respondent-father failed to cite any finding made by the trial court "out of Court," and none appeared on the face of the record; thus, respondent-father had not shown how he was prejudiced. In re T.M., 187 N.C. App. 694, 654 S.E.2d 502, 2007 N.C. App. LEXIS 2568 (2007).

State was not entitled to judicial review of claimed error in admitting a photograph that illustrated a witness' testimony. The State failed to articulate how the photo changed the outcome of the trial, beyond a generalized assertion that it was intended to elicit sentimental value to the opposing party. City of Wilson Redevelopment Comm'n v. Boykin, — N.C. App. —, 667 S.E.2d 282, 2008 N.C. App. LEXIS 1755 (2008).

No Error Committed. — Grant of new trial was improper under G.S. 1A-1, N.C. R. Civ. P. 59(a)(8) and 61 since by having a former employee read aloud the verbatim transcript of the employee's deposition, a patron had the full benefit of the prior inconsistent statements that the patron sought to introduce by having the jury view a videotaped deposition; a conclusion that the videotaped deposition was admissible to contradict the employee's testimony as a witness and that excluding the videotape amounted to an error of law was erroneous. Harrell v. Sagebrush of N.C., LLC, 191 N.C. App. 381, 663 S.E.2d 444, 2008 N.C. App. LEXIS 1319 (2008).

No Harmful Error Committed. — Although the trial court should not have instructed the jury on the issue of the outdoor advertising company's commercial bribery in a case where the outdoor advertising company sued the ad agency for unfair and deceptive trade practices (UDTP), the error was harmless pursuant to G.S. 1A-1, N.C. R. Civ. P. 61. Commercial bribery was not a defense to a North Carolina UDTP action, but the outcome in the case, a verdict in the outdoor advertising company's favor, did not change because of the error. Media Network, Inc. v. Long Haymes Carr, Inc., — N.C. App. —, 678 S.E.2d 671, 2009 N.C. App. LEXIS 774 (2009).

Dismissal of Appeal was Harmless Where Alternate Grounds for Dismissal Existed. — Although a mother's oral notice of appeal in a termination case was timely under N.C. R. App. P. 3, and thus the trial court used invalid grounds for its order dismissing the mother's appeal, because valid grounds existed on which the trial court's order could have been based, N.C. R. App. P. 25(a) authorized the trial court's actions, and the error was harmless. In re J.L., 184 N.C. App. 750, 646 S.E.2d 861, 2007 N.C. App. LEXIS 1598 (2007).

Applied in In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978); Fisher v. Thompson, 50

N.C. App. 724, 275 S.E.2d 507 (1981); Coulbourn Lumber Co. v. Grizzard, 51 N.C. App. 561, 277 S.E.2d 95 (1981); Barber v. Dixon, 62 N.C. App. 455, 302 S.E.2d 915 (1983); McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983); Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984); Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759 (1985); Robinson v. Seaboard Sys. R.R., 87 N.C. App. 512, 361 S.E.2d 909 (1987); Wentz v. Unifi, Inc., 89 N.C. App. 33, 365 S.E.2d 198 (1988); Tompkins v. Tompkins, 98 N.C. App. 299, 390 S.E.2d 766 (1990); Sheppard v. Zep Mfg. Co., 114 N.C. App. 25, 441 S.E.2d 161 (1994); In re Ezzell, 113 N.C. App. 388, 438 S.E.2d 482 (1994); In re Chasse, 116 N.C. App. 52, 446 S.E.2d 855 (1994); Ryals v. Hall-Lane Moving & Storage Co., 122 N.C. App. 134, 468 S.E.2d 69 (1996); Wells v. Consolidated Judicial Retirement Sys., 136 N.C. App. 671, 526 S.E.2d 486, 2000 N.C. App. LEXIS 162 (2000).

Cited in Lawery v. Newton, 52 N.C. App. 234, 278 S.E.2d 566 (1981); Hasty v. Turner, 53 N.C. App. 746, 281 S.E.2d 728 (1981); In re Farmer, 60 N.C. App. 421, 299 S.E.2d 262 (1983); Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville, 308 N.C. 255, 302 S.E.2d 204 (1983); Marley v. Gantt, 72 N.C. App. 200, 323 S.E.2d 725 (1984); Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323 (1984); Madden v. Carolina Door Controls, Inc., 117 N.C. App. 56, 449 S.E.2d 769 (1994); NationsBank v. American Doubloon Corp., 125 N.C. App. 494, 481 S.E.2d 387 (1997); Shore v. Farmer, 133 N.C. App. 350, 515 S.E.2d 495 (1999); Nolan v. Town of Weddington, 182 N.C. App. 486, 642 S.E.2d 261, 2007 N.C. App. LEXIS 690 (2007).

Rule 62. Stay of proceedings to enforce a judgment.

(a) *Automatic stay; exceptions — Injunctions and receiverships.* — Except as otherwise stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of the time provided in the controlling statute or rule of appellate procedure for giving notice of appeal from the judgment. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of section (c) govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) *Stay on motion for new trial or for judgment.* — In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b). If the time provided in the controlling statute or rule of appellate procedure for giving notice of appeal from the judgment had not expired before a stay under this subsection was entered, that time shall begin to run immediately upon the expiration of any stay under this section, and no execution shall issue nor shall proceedings be taken for enforcement of the judgment until the expiration of that time.

(c) *Injunction pending appeal.* — When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) *Stay upon appeal.* — When an appeal is taken, the appellant may obtain a stay of execution, subject to the exceptions contained in section (a), by proceeding in accordance with and subject to the conditions of G.S. 1-289, G.S. 1-290, G.S. 1-291, G.S. 1-292, G.S. 1-293, G.S. 1-294, and G.S. 1-295.

When stay is had by giving supersedeas bond, the bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal as the case may be, and stay is then effective when the supersedeas bond is approved by the court.

(e) *Stay in favor of North Carolina, city, county, local board of education, or agency thereof.* — When an appeal is taken by the State of North Carolina, or a city or a county thereof, a local board of education, or an officer in his official capacity or agency thereof or by direction of any department or agency of the State of North Carolina or a city or county thereof or a local board of education and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) *Power of appellate court not limited.* — The provisions of this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(g) *Stay of judgment as to multiple claims or multiple parties.* — When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. (1967, c. 954, s. 1; 1973, c. 91; 1979, c. 820, s. 10; 1987, c. 462, s. 1; 1989, c. 377, ss. 3, 4.)

COMMENT

While in general this rule leaves the present North Carolina law intact in this area, it does make some specific provisions in order to tie in the procedure here employed to other rules.

Legal Periodicals. — For survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

CASE NOTES

Constitutionality. — Section (a) of this rule, insofar as it excepts summary ejectment cases from an automatic ten-day stay of execution of judgment, is unconstitutional and unenforceable. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977), decided prior to 1979 amendment to this rule.

The denial to tenants in summary ejectment of the automatic ten-day stay on execution which section (a) of this rule allows to other appellants is arbitrarily discriminatory. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977), decided prior to 1979 amendment to this rule.

Taken together, section (a) of this rule and G.S. 42-34(b) and G.S. 42-32 deny access to jury trial and place an unconstitutionally discriminatory burden upon less-than-affluent tenants in summary ejectment cases, in violation of the equal protection clause of the United States Constitution. Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977), decided prior to 1979 amendments to this rule and §§ 42-34(b) and 42-32.

Construction with Other Sections. — Section 1-292 must be complied with notwithstanding defendant's appeal rights under this rule. Venture Properties I v. Anderson, 120 N.C. App. 852, 463 S.E.2d 795 (1995).

Where defendant did not request the setting of a bond nor did he post a bond as required, the defendant made no attempt to comply with the requirements of G.S. 1-292, thus he was not entitled to a stay of execution under this rule. Venture Properties I v. Anderson, 120 N.C. App. 852, 463 S.E.2d 795 (1995).

Trial court did not err by failing to order a stay of execution on a money judgment because: (1) the appellant did not deposit with the clerk of court amounts specified for interest and costs and, therefore, did not satisfy the requirements of G.S. 1-289 to post a bond in the amount directed to be paid by the judgment; and (2) the appellant took no action following the insufficient deposit with the clerk of court and, therefore, did not proceed in accordance with G.S. 1-293. Babb v. Graham, 190 N.C. App. 463, 660 S.E.2d 626, 2008 N.C. App. LEXIS 1024 (2008).

Trial court did not err in dismissing a judgment assignee's complaint to enforce a judgment entered because the assignee failed to assert his claim within the ten-year statute of limitations, G.S. 1-47(1), and nothing in the plain language of G.S. 1A-1, N.C. R. Civ. P. 62(a), indicated that the legislature intended the automatic stay from execution to add thirty days to the ten-year statute of limitations on commencing an action to enforce a judgment; because the issuance of an execution does not prolong the life of a judgment lien, the thirty-day stay on the issuance of an execution or proceedings to enforce the judgment will also not operate to toll the statute of limitations for commencement of an action to enforce a judgment. Fisher v. Anderson, — N.C. App. —, 667 S.E.2d 292, 2008 N.C. App. LEXIS 1806 (2008).

Trial court did not err in denying a stay of a judgment pending appeal. Under G.S. 1-291, a stay was not compelled, and the wording of G.S. 1A-1, N.C. R. Civ. P. 62(d) was that an appellant may obtain a stay of execution. Meares v. Town of Beaufort, — N.C. App. —, 667 S.E.2d 244, 2008 N.C. App. LEXIS 1764 (2008).

Stay of Execution to Prevent Mootness. — Former husband could have attempted to prevent the issue of the husband's ability to pay alimony from becoming moot by seeking a stay of execution of the trial court's contempt order pursuant to G.S. 1A-1, N.C. R. Civ. P. 62(d). Tucker v. Tucker, — N.C. App. —, 675 S.E.2d 676, 2009 N.C. App. LEXIS 499 (2009).

Automatic Stay Bypassed. — Intervenors' failure to preserve the status quo by obtaining an injunction to prevent town council from issuing a special use permit mooted their appeal, where town council voluntarily complied with the superior court's mandate to issue the permit, thereby bypassing the automatic stay that had issued to prevent proceedings to enforce the court's mandate. Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998).

Effect on Tolling of Building Permit. — Plaintiffs had a valid building permit because their appeal of the order that prevented them from building tolled the statutory time period in which plaintiffs could resume construction under their office building permit; however, the building permit only authorized the construction of an office building it did not establish a statutory vested right to mine the property. Sandy Mush Props. v. Rutherford County, 181 N.C. App. 224, 638 S.E.2d 557, 2007 N.C. App. LEXIS 87 (2007), petition allowed as to additional issues, 361 N.C. 569, 2007 N.C. LEXIS 958 (2007).

Superior Court Mandate as "Judgment." — The term "judgment" as used in this rule must include the mandate of a superior court when it sits as an appellate court to review the decision of a town council in granting or denying a special use permit. Estates, Inc. v. Town of Chapel Hill, 130 N.C. App. 664, 504 S.E.2d 296 (1998).

Granting or refusing an order for the appointment of a receiver is not a mere matter of discretion in the judge, and either party dissatisfied with such ruling may have it reviewed. Doxol Gas of Angier, Inc. v. Howard, 28 N.C. App. 132, 220 S.E.2d 203 (1975).

Authority to Stay Enforcement of Judgment Under Subsection (g). — Section (g) of this rule allows the trial court, after it has ordered a final judgment as to one or more but fewer than all parties under the conditions stated in G.S. 1A-1, Rule 54(b), to stay enforcement of the judgment until the entering of a subsequent judgment or judgments, and to prescribe such conditions as are necessary to prevent harm that might result to a party if the trial court should decide not to certify judgment for immediate appeal. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

A trial court possesses the legal authority to stay its own orders pending appeal in cases involving the Public Records Act. Wilmington Star-News, Inc. v. New Hanover Regional Medical Ctr., Inc., 125 N.C. App. 174, 480 S.E.2d 53 (1997), appeal dismissed, 346 N.C. 557, 488 S.E.2d 826 (1997).

Abuse of Discretion Not Found. — Trial court's denial of a town and its historic preservation board's motion to stay or enjoin enforcement of a judgment pending the appeal and its order that a Certificate of Appropriateness executed by the town and its commission be released and delivered by the Clerk of Superior Court to an owner was not an abuse of discretion even though the arguments on appeal were not frivolous. Meares v. Town of Beaufort, — N.C. App. —, 667 S.E.2d 244, 2008 N.C. App. LEXIS 1764 (2008).

Trial court did not abuse its discretion when it denied a G.S. 1A-1, N.C. R. Civ. P. 62(c) motion for an injunction pending appeal. Plaintiffs failed to show that the trial court's ruling was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision. N. Iredell Neighbors for Rural Life v. Iredell County, — N.C. App. —, 674 S.E.2d 436, 2009 N.C. App. LEXIS 370 (2009).

Applied in Cox v. Cox, 33 N.C. App. 73, 234 S.E.2d 189 (1977).

Cited in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975); Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976); Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977); Sawyer v. Cox, 36 N.C. App. 300, 244 S.E.2d 173 (1978); Howard v. Williams, 40 N.C. App. 575, 253 S.E.2d 571 (1979); Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980); Glyk & Assocs. v. Winston-Salem Southbound Ry., 55 N.C. App. 165, 285 S.E.2d 277 (1981); DuBose v. Gastonia Mut. Sav. & Loan Ass'n, 55 N.C. App. 574, 286

S.E.2d 617 (1982); In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982); Forsyth County v. Shelton, 74 N.C. App. 674, 329 S.E.2d 730 (1985); Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985); Haywood v. Haywood, 95 N.C. App. 426, 382 S.E.2d 798 (1989); Hieb v. Howell's Child Care Ctr., Inc., 123 N.C. App. 61, 472 S.E.2d 208 (1996); Howell v. Clyde, 127 N.C. App. 717, 493 S.E.2d 323 (1997); Ross v. Ross, — N.C. App. —, 669 S.E.2d 828, 2008 N.C. App. LEXIS 2245 (2008).

OPINIONS OF ATTORNEY GENERAL

Rule Inapplicable to Execution on Small Claim Judgment. — A judgment creditor is entitled as a matter of right to have execution issued on a small claim judgment irrespective of this rule, as since there is specific statutory authorization for issuance of execution, this rule is not applicable. See opinion of Attorney General to Mr. James R. Sugg, 41 N.C.A.G. 368 (1971).

Rule 63. Disability of a judge.

If by reason of death, sickness or other disability, resignation, retirement, expiration of term, removal from office, or other reason, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:

(1) In actions in the superior court by the judge senior in point of continuous service on the superior court regularly holding the courts of the district. If this judge is under a disability, then the resident judge of the district senior in point of service on the superior court may perform those duties. If a resident judge, while holding court in the judge's own district suffers disability and there is no other resident judge of the district, such duties may be performed by a judge of the superior court designated by the Chief Justice of the Supreme Court.

(2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.

If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing. (1967, c. 954, s. 1; 2001-379, s. 7.)

COMMENT

Formerly, there was no statutory prescription in respect to the problem dealt with by this rule. It can be seen, however, that in particular cases where a verdict has already been returned or findings of fact and conclusions of law filed and then the trial judge is unable to continue to function, it will be highly useful to have some judge authorized to step into the breach.

CASE NOTES

Original Judge Need Not Have Become Incapacitated. — Trial court did not err in having their post-judgment motions ruled upon by another judge; this rule neither requires nor implies that before a different judge can rule on post-trial motions, the judge who heard the case must have become incapacitated. Borg-Warner Acceptance Corp. v. Johnston, 107 N.C. App. 174, 419 S.E.2d 195 (1992), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

Substitute Judge to Function Only After Return of Verdict or Filing of Findings and Conclusions. — Under this rule an appropriate judge may substitute for a disabled or deceased judge before whom an action has been tried only with respect to duties remaining to be performed after a verdict has been returned or findings of fact and conclusions of law have been filed. Girard Trust Bank v. Easton, 12 N.C. App. 153, 182 S.E.2d 645, cert. denied, 279 N.C. 393, 183 S.E.2d 245 (1971), decided prior to 2001 amendment, which substituted reference to a trial or hearing having concluded for reference to the filing of findings of fact and conclusions of law.

Successor Judge Authorized to Reconsider Original Judge's Order. — Notwithstanding the original judge's absence from the bench due to retirement, the successor judge erred in denying the motion to reconsider an original expungement order for lack of jurisdiction because he was statutorily authorized to address the motion to reconsider the order for expungement and, in accordance with the dictates of G.S. 15A-146(a), to amend the earlier order. In re Expungement for Kearney, 174 N.C. App. 213, 620 S.E.2d 276, 2005 N.C. App. LEXIS 2294 (2005).

So as to Effectuate Decision Already Made. — This rule does not contemplate that a substitute judge, who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision making process; it contemplates only that he may perform such acts as are necessary under the rules of procedure to effectuate a decision already made. Girard Trust Bank v. Easton, 12 N.C. App. 153, 182 S.E.2d 645, cert. denied, 279 N.C. 393, 183 S.E.2d 245 (1971); In re Whisnant, 71 N.C. App. 439, 322 S.E.2d 434 (1984).

Successor Judge Did Not Abuse Discretion in Denying New Trial. — Under an exception to the general application of G.S. 1A-1, N.C. R. Civ. P. 63, the successor judge who did not try the subcontractor's action on the payment bonds and took the place of the retired judge did not abuse the judge's discretion in denying the surety's motion for a new trial based on a lack of jurisdiction. Gemini Drilling & Found., LLC v. Nat'l Fire Ins. Co., — N.C. App. —, 665 S.E.2d 505, 2008 N.C. App. LEXIS 1628 (2008).

Judge's Oral Statements Held Insufficient to Support Entry of Judgment by Substitute. — Where, at the conclusion of the evidence in an action tried before the court without a jury, the trial judge orally indicated answers in favor of plaintiff to issues which had been prepared by counsel for defendant in anticipation of a jury trial, and instructed plaintiff's counsel to submit a proposed judgment containing appropriate findings of fact and conclusions of law, the issues and the court's answers thereto constituted neither a verdict nor findings of fact and conclusions of law which would permit a substitute judge to proceed under this rule to enter judgment in the case. Girard Trust Bank v. Easton, 12 N.C. App. 153, 182 S.E.2d 645, cert. denied, 279 N.C. 393, 183 S.E.2d 245 (1971).

A new hearing on the petition to terminate a mother's parental rights was ordered where a judge who did not preside over the hearings signed an order terminating parental rights based on oral statements in court of the presiding judge because the presiding judge was no longer available; this rule does not contemplate that a substitute judge, who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision making process, but only contemplates the judge performing such acts as are necessary under the rules of procedure to effectuate a decision already made. In re Savage, 163 N.C. App. 195, 592 S.E.2d 610, 2004 N.C. App. LEXIS 296 (2004).

Entry of judgment in open court by another district court judge without notice to the parties that the judgment was entered was error, but as the notice of appeal was timely filed, there was no prejudice. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

Appeal from Recusal Not Moot. — It was error to dismiss as moot an appeal from a judicial recusal order after the subject judge retired from the bench because a decision on the merits of the appeal would have had a practical effect given the options afforded to substituted judges under the rule. Lange v. Lange, 357 N.C. 645, 588 S.E.2d 877, 2003 N.C. LEXIS 1419 (2003).

Cited in In re Pittman, 151 N.C. App. 112, 564 S.E.2d 899, 2002 N.C. App. LEXIS 642 (2002); Lange v. Lange, 157 N.C. App. 310, 578 S.E.2d 677, 2003 N.C. App. LEXIS 542 (2003); Lange v. Lange, 167 N.C. App. 426, 605 S.E.2d 732, 2004 N.C. App. LEXIS 2334 (2004).

ARTICLE 8.

Miscellaneous.

Rule 64. Seizure of person or property.

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of this State. (1967, c. 954, s. 1.)

COMMENT

This rule seems to be self-explanatory.

Rule 65. Injunctions.

(a) *Preliminary injunction; notice.* — No preliminary injunction shall be issued without notice to the adverse party.

(b) *Temporary restraining order; notice; hearing; duration.* — A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (i) it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (ii) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the judge fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice and a motion for a preliminary injunction is made, it shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with a motion for a preliminary injunction, and, if he does not do so, the judge shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the judge may prescribe, the adverse party may appear and move its dissolution or modification and in that event the judge shall proceed to hear and determine such motion as expeditiously as the ends of justice require. Damages may be awarded in an order for dissolution as provided in section (e).

(c) *Security.* — No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the State of North Carolina or of any county or municipality thereof, or any officer or agency thereof acting in an official capacity, but damages may be awarded against such party in accord with this rule. In suits between spouses relating to support, alimony, custody of children, separation, divorce from bed and board, and absolute divorce no such security shall be required of the plaintiff spouse as a condition precedent to the issuing of a temporary restraining order or preliminary injunction enjoining the defendant spouse from interfering with, threatening, or in any way molesting the plaintiff spouse during pendency of the suit, until further order of the court, but damages may be awarded against such party in accord with this rule.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the persons giving the security and the sureties thereon if their addresses are known.

(d) *Form and scope of injunction or restraining order.* — Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice in any manner of the order by personal service or otherwise.

(e) *Damages on dissolution.* — An order or judgment dissolving an injunction or restraining order may include an award of damages against the party procuring the injunction and the sureties on his undertaking without a showing of malice or want of probable cause in procuring the injunction. The damages may be determined by the judge, or he may direct that they be determined by a referee or jury. (1967, c. 954, s. 1; 2001-379, s. 8.)

COMMENT

Practice Prior to Rule. — While a plaintiff may be entitled to legal and equitable relief in a civil action, the preliminary injunction continues to be an extraordinary and provisional remedy and will not be granted except where adequate relief cannot be had without it. Town of Clinton v. Ross, 226 N.C. 682, 40 S.E.2d 593 (1946).

When temporary injunction issued. — The form of relief may be a preliminary injunction or restraining order, which may be issued:

(1) To preserve the status quo pending the action. As a rule, a mandatory order or injunction will not be made as a preliminary injunction except when the injury is immediate, pressing, irreparable, and clearly established. Seaboard Air Line Ry. v. Atlantic Coast Line Ry., 237 N.C. 88, 74 S.E.2d 430 (1953).

(2) To protect the subject matter of the action.

(3) To prevent fraudulent transfer. See § 1-485.

Time of issuing. — The preliminary injunction may be granted at the time of commencing the action or at any time afterwards, before judgment. Requisites are (a) affidavits; (b) summons.

When notice required. — When the restraining order is asked for as a preliminary motion, notice is not required, but if the judge deems it proper that the other party should be heard, he may issue a show cause order, and the defendant may, in the meantime, be restrained. A restraining order cannot be granted by a judge for a longer time than twenty days, without notice. After the defendant has answered, an injunction will not be granted except upon notice. However, the defendant may be restrained pending such action. See former §§ 1-490, 1-491, 1-492.

Undertaking. — Upon granting a restraining order or an order for an injunction, the judge shall require a written undertaking. See former § 1-496.

Appeals. — Upon appeal from a judgment vacating a restraining order or denying a perpetual injunction where the injunction is the principal relief sought, the court, in its discretion, may require plaintiff to give bond and continue the restraining order pending the appeal. See § 1-500.

Damages in injunction. — A judgment dissolving an injunction carries with it judgment for damages against the party procuring it and against his sureties without the requirement of malice or want of probable cause, which damages may be obtained by a reference or otherwise, as the judge directs. See former § 1-497.

Practice under Rule. — This rule is substantially the same as federal Rule 65.

Section (a). — This section provides that no preliminary injunction shall be issued without notice to the adverse party. While the rule does not specify the type of notice, proper service of the complaint and summons upon the party or his proper agent have been held sufficient. The court must have in personam jurisdiction. Section (b) specifies the time for hearing. On the hearing, the pleadings, if verified, and other affidavits have been held sufficient to grant a preliminary injunction.

The principal change here is the requirement of notice. Ordinarily, the purpose of the preliminary or interlocutory injunction is to preserve the status quo until the issues are determined after final hearing. Section (b) takes care of the situation where immediate action is necessary.

Section (b). — A restraining order is a temporary order, entered in an action, without notice, if necessary, and upon a summary showing of its necessity in order to prevent immediate and irreparable injury, pending a fuller hearing and determination of the rights of the parties. The ex parte restraining order is, under this section, then, subject to definite time limitations and is to preserve the status quo until the motion for a preliminary injunction can, after notice, be brought on for hearing and decision. Such ex parte order must be upon verified facts. Note, also, that such order granted without notice expires by its terms within such time after entry, not to exceed ten days, unless the time is, for good cause shown, extended.

Section (c). — The requirements with respect to security as set forth in this section are similar to the requirements of former § 1-496.

In general, there are two methods for enforcement of liability on a bond or other security given to secure the issuance of a restraining order or preliminary injunction: An independent action or motion for judgment in the injunction action. The second paragraph of section (c) deals with this second method of enforcement. Since this motion procedure is part of the "equity suit," there is no right to trial by jury on the issues raised. If, however, an independent action is brought, this would be one of law, and a right to jury would be preserved.

Section (d). — The requirement that the judge state the reasons for granting the injunction and the acts to be restrained is new. Under prior law no particular form of order was required, although the decisions hold that "the defendant shall be given authentic notification of the mandate of the court or judge." Davis v. Champion Fiber Co., 150 N.C. 84, 63 S.E. 178 (1908). There does not appear to be a statute as explicit as the final clause of section (d) with respect to the parties affected by the action.

Section (e). — This is substantially the same provision as is found in former § 1-497.

Legal Periodicals. — For article on remedies for trespass to land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

For article, "Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?," see 52 N.C.L. Rev. 1091 (1974).

For article, "Statutory Waiver of Municipal Immunity Upon Purchase of Liability Insurance in North Carolina and the Municipal Liability Crisis," see 4 Campbell L. Rev. 41 (1981).

For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

CASE NOTES

I. In General.
II. Preliminary Injunctions.
III. Temporary Restraining Orders.
IV. Security.
V. Form and Scope of Injunction or Restraining Order.
VI. Damages on Dissolution.
VII. Decisions under Prior Law.

I. IN GENERAL.

A "temporary restraining order" and a "preliminary injunction" serve the same function. Lambe v. Smith, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

Unclear Order May Require Clarifying Instructions. — The language of an injunctive order may be so unclear that a party is, in good faith, unable to follow the trial court's directives in the absence of clarifying instructions. Hopper v. Mason, 71 N.C. App. 448, 322 S.E.2d 193 (1984).

No appeal lies to an appellate court from an interlocutory order unless the order deprives the appellant of a substantial right which he would lose absent a review prior to final determination. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. Robins & Weill, Inc. v. Mason, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 559 (1984).

The voluntary and unconditional dismissal of the proceedings by the plaintiff is equivalent to a judicial determination that the proceeding for an injunction was wrongful, since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought. Leonard E. Warner, Inc. v. Nissan Motor Corp., 66 N.C. App. 73, 311 S.E.2d 1 (1984).

Enforcement of Ordinances Through Injunctive Relief. — Although the General Assembly has given to municipalities the power to enforce ordinances through injunctive relief, a municipality must comply with the requirements of this rule, which requires a clear showing of specific facts of irreparable injury; the availability of injunctive relief as the appropriate ultimate remedy is not prima facie evidence establishing a municipality's right to injunctive relief prior to the resolution of a matter on its merits. Town of Knightdale v. Vaughn, 95 N.C. App. 649, 383 S.E.2d 460 (1989).

Applied in Town of Hillsborough v. Smith, 10 N.C. App. 70, 178 S.E.2d 18 (1970); Register v. Griffin, 10 N.C. App. 191, 178 S.E.2d 95 (1970); State ex rel. Moore v. John Doe, 19 N.C. App. 131, 198 S.E.2d 236 (1973); Swenson v. All Am. Assurance Co., 33 N.C. App. 458, 235 S.E.2d 793 (1977); Dixon v. Dixon, 62 N.C. App. 744, 303 S.E.2d 606 (1983); Spencer v. Spencer, 70 N.C. App. 159, 319 S.E.2d 636 (1984); Unigard Mut. Ins. Co. v. Ingram, 71 N.C. App. 725, 323 S.E.2d 442 (1984); Industrial Innovators, Inc. v. Myrick-White, Inc., 99 N.C. App. 42, 392 S.E.2d 425 (1990); State v. Moore, 132 N.C. App. 197, 511 S.E.2d 22 (1999); Fayetteville Publ. Co. v. Advanced Internet Techs., Inc., — N.C. App. —, 665 S.E.2d 518, 2008 N.C. App. LEXIS 1610 (2008).

Cited in Stevenson v. North Carolina Dep't of Ins., 31 N.C. App. 299, 229 S.E.2d 209 (1976); State ex rel. Edmisten v. Challenge, Inc., 54 N.C. App. 513, 284 S.E.2d 333 (1981); Glyk & Assocs. v. Winston-Salem Southbound Ry., 55 N.C. App. 165, 285 S.E.2d 277 (1981); Shishko v. Whitley, 64 N.C. App. 668, 308 S.E.2d 448 (1983); American Motors Sales Corp. v. Peters, 311 N.C. 311, 317 S.E.2d 351 (1984); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984); American Marble Corp. v. Crawford, 84 N.C. App. 86, 351 S.E.2d 848 (1987); Barr-Mullin, Inc. v. Browning, 108 N.C. App. 590, 424 S.E.2d 226 (1993); Kaplan v. Prolife Action League, 111 N.C. App. 1, 431 S.E.2d 828 (1993); South Blvd. Video & News, Inc. v. Charlotte Zoning Bd. of Adjustment, 129 N.C. App. 282, 498 S.E.2d 623 (1998); State v. Byrd, 185 N.C. App. 597, 649 S.E.2d 444, 2007 N.C. App. LEXIS 1953 (2007).

II. PRELIMINARY INJUNCTIONS.

Purpose of Preliminary or Interlocutory Injunction. — Purpose of a preliminary injunction is to preserve the status quo pending trial on the merits. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975); A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

Purpose of an interlocutory injunction is to preserve the status quo of the subject matter involved until a trial can be had on the merits. Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

Prohibitory and Mandatory Injunctions Distinguished. — The law recognizes a distinction between prohibitory and mandatory injunctions. A prohibitory injunction seeks to preserve the status quo, until the rights of the parties can be determined, by restraining the party enjoined from doing particular acts. A mandatory injunction is intended to restore the status quo, and to that end requires a party to perform a positive act; it is comparable in nature and function to a writ of mandamus, and will ordinarily be granted only where the injury is immediate, pressing, irreparable, and clearly established. Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co., 15 N.C. App. 634, 190 S.E.2d 729 (1972).

Decree May Be Both Preventive and Mandatory. — While in the greater number of instances injunction is a preventive remedy, the court has jurisdiction to issue a preliminary mandatory injunction where the case is urgent and the right is clear; moreover, if necessary to meet the exigencies of a particular situation, the injunctive decree may be both preventive and mandatory. Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co., 15 N.C. App. 634, 190 S.E.2d 729 (1972).

Notice and Hearing Required for Preliminary Injunction. — Preliminary injunction, unlike a temporary restraining order, requires notice to the adverse party and a hearing. Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

A preliminary or interlocutory injunction can only be issued after notice and a hearing, which affords the adverse party an opportunity to present evidence in his behalf. Lambe v. Smith, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

Where movant received no notice of injunction and was not given an opportunity to be heard before the order was entered, the court lacked personal jurisdiction over movant and the court's order was void. Helbein v. Southern Metals Co., 119 N.C. App. 431, 458 S.E.2d 518 (1995).

The trial court abused its discretion in denying a seller's motion to set the preliminary injunction aside because the seller never received notice of the buyer's intention to seek a preliminary injunction; the lack of notice affected the seller's substantial rights, and the seller's purported attorney of record did not represent the seller in the instant action, thus making service on the attorney insufficient to provide notice to the seller. Perry v. Baxley Dev., Inc., 188 N.C. App. 158, 655 S.E.2d 460, 2008 N.C. App. LEXIS 88 (2008).

A preliminary injunction is interlocutory in nature, issued after notice and hearing, and restrains a party pending final determination on the merits. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

A preliminary or interlocutory injunction is usually not for a fixed, limited period of time, since ordinarily its purpose is to preserve the status quo until the issues are adjudged after a final hearing. Lambe v. Smith, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

Verification of Complaint Not a Condition for Issuance. — Verification of a complaint is not a condition for issuance of a preliminary injunction under this rule. Moore v. Wykle, 107 N.C. App. 120, 419 S.E.2d 164, cert. denied, 332 N.C. 666, 424 S.E.2d 405 (1992).

Verification Not Required. — Trial court did not lack subject matter jurisdiction to consider the animal welfare agency's complaint, and to enter a permanent injunction and temporary custody order; the animal owners could not show that a requirement existed that the animal welfare agency's complaint be verified, as the statute that the animal owners cited to, G.S. 19A-3, involved preliminary injunctions not permanent injunctions; G.S. 19A-4, involving permanent injunctions, did not contain verification-language requirement, and verification of a complaint was not a condition for issuance of an injunction pursuant to G.S. 1A-1-65. Animal Legal Def. Fund v. Woodley, 181 N.C. App. 594, 640 S.E.2d 777, 2007 N.C. App. LEXIS 254 (2007), appeal dismissed, cert. denied, 361 N.C. 690, 652 S.E.2d 254 (2007), Animal Legal Def. Fund v. Woodley, 181 N.C. App. 594, 640 S.E.2d 777, 2007 N.C. App. LEXIS 254 (2007).

Grounds for Preliminary Injunction. — A temporary injunction will ordinarily be granted pending trial on the merits (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity, and (2) if there is a reasonable apprehension of irreparable loss unless injunctive relief is granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's rights. Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co., 15 N.C. App. 634, 190 S.E.2d 729 (1972); Robins & Weill, Inc. v. Mason, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 559 (1984).

Ordinarily, to justify the issuance of a preliminary injunction it must be made to appear that (1) there is probable cause that plaintiff will be able to establish the right he asserts, and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiffs' rights during the litigation. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975); Pruitt v. Williams, 25 N.C. App. 376, 213 S.E.2d 369, appeal dismissed, 288 N.C. 368, 218 S.E.2d 348 (1975); Waff Bros. v. Bank of N.C., N.A., 25 N.C. App. 517, 214 S.E.2d 261 (1975), rev'd on other grounds, 289 N.C. 198, 221 S.E.2d 273 (1976); Herff Jones Co. v. Allegood, 35 N.C. App. 475, 241 S.E.2d 700 (1978); Howard Schultz & Assocs. v. Ingram, 38 N.C. App. 422, 248 S.E.2d 345 (1978).

A preliminary injunction will be issued only if plaintiff is able to show the likelihood of success on the merits of his case and if plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of plaintiff's rights during the course of litigation. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

Irreparable Injury. — Corporation could not establish irreparable injury sufficient for a preliminary injunction by alleging the possibility that it would have to defend itself against lawsuits because it was adequately protected by G.S. 1A-1, Rule 11. DaimlerChrysler Corp. v. Kirkhart, 148 N.C. App. 572, 561 S.E.2d 276, 2002 N.C. App. LEXIS 60 (2002).

To constitute irreparable injury it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

Conclusory Allegation of Irreparable Harm. — In action instituted by town alleging that defendant was operating a used car lot in violation of town's zoning ordinance, where the only evidence before the trial court was town's verified complaint, wherein town alleged irreparable injury, town's conclusory allegation of irreparable harm was insufficient to allow the trial court to determine whether an interlocutory injunction should have been issued or refused. Town of Knightdale v. Vaughn, 95 N.C. App. 649, 383 S.E.2d 460 (1989), vacating preliminary injunction.

Decision of the trial judge to grant or deny a preliminary injunction rests in his sound judgment and discretion. Lambe v. Smith, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

To issue or to refuse to issue an interlocutory injunction is usually a matter of discretion to be exercised by the trial court. Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975).

Issuance of a preliminary injunction is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. A.E.P. Indus., Inc. v. McClure, 308

N.C. 393, 302 S.E.2d 754 (1983).

Determination of Relative Conveniences and Inconveniences. — Where a serious question exists, the hearing judge must consider the relative conveniences and inconveniences of the parties in determining the propriety of a preliminary injunction and the terms thereof if granted. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975).

Burden is on plaintiffs to establish their right to preliminary injunction. Pruitt v. Williams, 25 N.C. App. 376, 213 S.E.2d 369, appeal dismissed, 288 N.C. 368, 218 S.E.2d 348 (1975); Waff Bros. v. Bank of N.C., N.A., 25 N.C. App. 517, 214 S.E.2d 261 (1975), rev'd on other grounds, 289 N.C. 198, 221 S.E.2d 273 (1976).

The prayer for relief in a complaint may constitute a sufficient motion for a preliminary injunction, and a separate or additional motion is not necessarily required. Collins v. Freeland, 12 N.C. App. 560, 183 S.E.2d 831 (1971).

And Complaint Need Not Use Technical Language. — Although the wording of the prayer for relief in a complaint and the wording in the notice to show cause did not technically follow the language of this rule, the meaning was clear and unambiguous and sufficient to constitute a motion for a preliminary injunction. Collins v. Freeland, 12 N.C. App. 560, 183 S.E.2d 831 (1971).

Court May Consider Affidavits. — Both before and after the adoption of the Rules of Civil Procedure, it was and is proper for the court to consider evidence by affidavits in show cause hearings for injunctions, and subdivision (1) of G.S. 1-485 does not prohibit this. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

When proceeding under subdivision (1) of G.S. 1-485 for a preliminary injunction, the court is not limited to what appears in the complaint. The courts have historically heard motions for preliminary injunction on affidavits. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

Standard for Affidavits. — An injunction under this rule is a temporary order pending trial; thus the affidavits need not meet as high a standard as those for a summary judgment ruling. Howard Schultz & Assocs. v. Ingram, 38 N.C. App. 422, 248 S.E.2d 345 (1978).

Scope of Review of Preliminary Injunction. — In reviewing orders for temporary injunctive relief an appellate court may look beyond the findings of fact made by the trial court and determine from the evidence whether a preliminary injunction is justified. Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co., 15 N.C. App. 634, 190 S.E.2d 729 (1972).

On appeal from an order of a superior court judge granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge, but may review and weigh the evidence and find the facts for itself. Setzer v. Annas, 286 N.C. 534, 212 S.E.2d 154 (1975); Pruitt v. Williams, 288 N.C. 368, 218 S.E.2d 348 (1975); A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

The scope of appellate review in the granting or denying of a preliminary injunction is essentially de novo. An appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself. Robins & Weill, Inc. v. Mason, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 559 (1984).

On appeal of the entry of a preliminary injunction, the enjoined party bears the burden of showing that the trial court erred, as there is a presumption that the judgment is correct. Howard Schultz & Assocs. v. Ingram, 38 N.C. App. 422, 248 S.E.2d 345 (1978).

Specific Performance of Alimony Provisions. — Trial court had authority under this rule to grant specific performance of the alimony provisions of a separation agreement in order to preserve the status quo pending final determination of the merits of an action on the agreement. Gibson v. Gibson, 49 N.C. App. 156, 270 S.E.2d 600 (1980).

Covenant Not to Compete. — Dental practice was entitled to a preliminary injunction against former employee dentists who violated a covenant not to compete against the dental practice as the dental practice showed a likelihood of success on the merits of its case through a showing that the restrictive covenants were reasonable and enforceable, and established irreparable harm through a showing that a substantial portion of its patients followed the employee dentists to the new practice. Kennedy v. Kennedy, 160 N.C. App. 1, 584 S.E.2d 328, 2003 N.C. App. LEXIS 1675 (2003).

Preliminary Injunction Barring Challenge to Certificate of Need Application Proper. — Preliminary injunction enjoining medical providers from challenging a hospital's Certificate of Need application was proper because the parties' agreement barred challenges to noncompetitive applications, and provided that, for applications to be competitive, they must have been received in same review period; the medical providers did not file an application in same review period and the state Department of Health and Human Services determined that the hospital's application was noncompetitive. Irreparable harm was shown by, among other things, the agreement itself, which stated that a breach would have resulted in irreparable harm. N.C. Baptist Hosp. v. Novant Health, Inc., — N.C. App. —, 673 S.E.2d 794, 2009 N.C. App. LEXIS 250 (2009).

III. TEMPORARY RESTRAINING ORDERS.

Section (b) of this rule is constitutional. Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

Although the ex parte temporary restraining order procedure is drastic, it operates within an emergency context which recognizes the need for swift action, but passes constitutional muster because it immediately affords defendants notice and an opportunity to be heard. State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 233 (1981).

Section 1A-1, Rule 3 and section (b) of this rule must be construed in pari materia. Carolina Freight Carriers Corp. v. International Bhd. of Teamsters Local 61, 11 N.C. App. 159, 180 S.E.2d 461, cert. denied, 278 N.C. 701, 181 S.E.2d 601 (1971).

Procedure under section (b) of this rule is permissible only after an action is commenced as provided by § 1A-1, Rule 3. Carolina Freight Carriers Corp. v. International Bhd. of Teamsters Local 61, 11 N.C. App. 159, 180 S.E.2d 461, cert. denied, 278 N.C. 701, 181 S.E.2d 601 (1971).

Temporary Restraining Order Entered Under N.C. R. Civ. P. 65(b) Not Equivalent to Protective Order Entered Under G.S 50B-1 et seq. — By limiting applicability of the enhancement provision to violation of protective orders issued after a hearing, the General Assembly recognizes and gives deference to protection of a defendant's liberty interest through due process of law; therefore, a temporary restraining order entered under N.C. R. Civ. P. 65(b) is not the functional legal equivalent of a protective order entered pursuant to the procedure set forth in Chapter 50B. State v. Byrd, 363 N.C. 214, 675 S.E.2d 323, 2009 N.C. LEXIS 347 (2009).

The purpose of a temporary restraining order, issued ex parte, is "to preserve the status quo" pending a full hearing. Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

The ex parte temporary restraining order neither contemplates nor authorizes the deprivation of property, and so long as certain procedural safeguards are afforded, such as definite duration, it is a universally accepted and employed procedure. State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 233 (1981).

An ex parte restraining order is subject to definite time limitations, and is intended to preserve the status quo until the motion for a preliminary injunction can, after notice, be brought on for hearing and decision. Lambe v. Smith, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

Temporary restraining order is not predicated upon illusory injury, loss, or damage, but is entered only upon a showing of immediate and irreparable injury, loss, or damage. Jolliff v. Winslow, 24 N.C. App. 107, 210 S.E.2d 221 (1974), appeal dismissed, 286 N.C. 545, 212 S.E.2d 656 (1975).

Precedence of Hearing on Temporary Restraining Order over Hearing on Change of Venue. — This rule would appear to require that a hearing on the return of a temporary restraining order take precedence over a hearing on a motion for a change of venue. Herff Jones Co. v. Allegood, 35 N.C. App. 475, 241 S.E.2d 700 (1978).

Section 19-2.3 Made Subject to Section (b) of this Rule. — Section 19-2.3, authorizing the issuance of an ex parte temporary restraining order to abate certain nuisances, is plainly made subject to section (b) of this rule. State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980), cert. denied, 301 N.C. 720, 274 S.E.2d 233 (1981).

No Jurisdiction to Determine Controversy on Merits. — A judge conducting a hearing to determine whether a temporary restraining order should be continued as a preliminary injunction pursuant to this rule has no jurisdiction to determine a controversy on its merits; neither can the parties to an action confer this jurisdiction upon the trial court by granting consent to such a hearing. Everette v. Taylor, 77 N.C. App. 442, 335 S.E.2d 212 (1985).

Denied Due to Lack of Standing. — Temporary restraining order, under G.S. 1A-1-65(b), was denied as the State Employees Association of North Carolina, Inc. (SEANC) lacked standing to contest the reallocation of funds from the State retirement systems; the SEANC failed to demonstate that all of its members otherwise had standing to sue in their own right, and its complaint was dismissed for failure to state a cause of action, under G.S. 1A-1, N.C. R. Civ. P. 12(b)6), and for the lack of subject matter jurisdiction under Rule 12(h)(3). State Employees Ass'n of N.C., Inc. v. State, 154 N.C. App. 207, 573 S.E.2d 525, 2002 N.C. App. LEXIS 1451 (2002).

Factors considered justified the conclusion that absent ex parte restraining order, plaintiff wife would suffer irreparable injury for which she had no adequate remedy at law. Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

It was error for the court to issue a permanent injunction at a hearing to show cause why a temporary restraining order should not be continued. Everette v. Taylor, 77 N.C. App. 442, 335 S.E.2d 212 (1985).

Where defendants moved to vacate temporary restraining order thirty days after it was entered, but the order had already expired by operation of law 10 days after issuance, there was no temporary restraining order in existence to vacate or dissolve so that defendants could not recover damages in a dissolution order pursuant to subsection (e). Democratic Party v. Guilford County Bd. of Elections, 342 N.C. 856, 467 S.E.2d 681 (1996), rehearing denied, 343 N.C. 517, 471 S.E.2d 70 (1996).

Since temporary restraining order expired, by operation of law, after ten days, defendant bank had no legal authority to continue to freeze plaintiff's funds after the ten days had passed. Taylor v. Centura Bank, 124 N.C. App. 661, 478 S.E.2d 226 (1996).

Penalty Enhancement for Knowingly Violating Protective Order. — Trial court erred in enhancing defendant's sentence under G.S. 50B-4.1(d) for his knowing violation of a valid protective order because a temporary restraining order (TRO) was not a valid domestic violence protective order under Chapter 50B but an ex parte TRO entered under N.C. R. Civ. P. 65(b), and the order was not entered upon hearing by the trial court or consent of the parties as required under G.S. 50B-1(c); only a valid protective order entered under Chapter 50B can be used to enhance a defendant's sentence under G.S. 50B-4.1(d), and Chapter 50B requires that a defendant be given notice and the opportunity to be heard before entry of a protective order. State v. Byrd, 363 N.C. 214, 675 S.E.2d 323, 2009 N.C. LEXIS 347 (2009).

IV. SECURITY.

Rule for North Carolina practice under section (c) of this rule, in its entirety, is as follows: "The trial court has power not only to set the amount of security but to dispense with any security requirement whatsoever where the restraint will do the defendant no material damage, where there has been no proof of likelihood of harm, and where the applicant for equitable relief has considerable assets and is able to respond in damages if defendant does suffer damages by reason of a wrongful injunction." Keith v. Day, 60 N.C. App. 559, 299 S.E.2d 296 (1983).

The purpose of the security requirement in section (c) of this rule is to protect the restrained party from damages incurred as a result of the wrongful issuance of the injunctive relief. Similarly, it has been suggested that the purpose of the bond is to require that the plaintiff assume the risk of paying damages he causes as the "price" he must pay to have the extraordinary privilege of a temporary restraining order or preliminary injunction. Leonard E. Warner, Inc. v. Nissan Motor Corp., 66 N.C. App. 73, 311 S.E.2d 1 (1984).

Federal Decisions Must Be Utilized for Interpretation of Section (c). — Because of the dearth of North Carolina precedent, and the fact that section (c) of this rule was adopted verbatim from the Federal Rules of Civil Procedure, it is necessary to look to federal decisions interpreting this section for guidance. Keith v. Day, 60 N.C. App. 559, 299 S.E.2d 296 (1983).

The question of when recovery on a bond posted under this rule is proper has rarely been addressed by North Carolina courts. It has been held that in interpreting section (c) of this rule North Carolina courts may look to federal decisions for guidance. Leonard E. Warner, Inc. v. Nissan Motor Corp., 66 N.C. App. 73, 311 S.E.2d 1 (1984).

Application of Section (c). — Where trial court specifically stated in its order that no security should be required of the plaintiff since this was a suit between spouses relating to divorce from bed and board, alimony, temporary alimony, possession of personal property and attorneys' fees, and it properly could view foreign action initiated by defendant-husband as a type of interference with plaintiff during pendency of the suit, its restraining order thus fell within the express exclusion from the usual security requirements of section (c) of this rule. Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

Where the record established no material damage or likelihood of harm to defendant-husband from issuance of restraining order and that plaintiff-wife had considerable assets with which to respond in damages if defendant-husband subsequently was found to have suffered from wrongful issuance of the order, trial court properly dispensed with the requirement for security. Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

Where, in accordance with Rule 65(c), the trial court required an $ 800 bond from a former employer in granting the employer's motion for a temporary restraining order (TRO) against a former employee, the trial court did not have to revisit the issue of the adequacy of that security in converting the TRO into a preliminary injunction unless there was some proper suggestion that the existing security was inadequate, and, therefore, since the former employee failed to show that it challenged the sufficiency of the security in the trial court, the employee was precluded from challenging its sufficiency on appeal. Precision Walls, Inc. v. Servie, 152 N.C. App. 630, 568 S.E.2d 267, 2002 N.C. App. LEXIS 980 (2002).

No security is required when a preliminary injunction is issued to preserve the trial court's jurisdiction over the subject matter involved. Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

Governmental immunity is not abrogated by section (c) of this rule. Orange County v. Heath, 282 N.C. 292, 192 S.E.2d 308 (1972).

Failure to Make Findings for Order Set-

ting Bond. — Where order setting an injunction bond at $20,000 contained no findings of fact or conclusions of law relating to the amount of the bond, and facts were in dispute, remand was necessary for proper determination of the amount of the security bond. Iverson v. TM One, Inc., 92 N.C. App. 161, 374 S.E.2d 160 (1988).

The fact that the party against which the injunction was entered prevails at trial, does not, by itself, entitle it to the posted bond; the prevailing party also must have suffered damages as a result of the injunction. Tedder v. Alford, 128 N.C. App. 27, 493 S.E.2d 487 (1997), cert. denied, 348 N.C. 290, 501 S.E.2d 917 (1998).

Trial Court Did Not Err in Not Requiring Security. — North Carolina trial court did not err in issuing an antisuit injunction against appellants, trusts and trustees, regarding a declaratory judgment action they filed in Florida without requiring appellee co-trustee to provide security pursuant to N.C. R. Civ. P. 65(c) where (1) appellants failed to seek any security deposit as a condition precedent to entry of the injunction in the trial court, (2) appellants failed to make any showing regarding how they would be harmed by the issuance of the injunction, and (3) it was implicit from the trial court's findings that one purpose of the antisuit injunction was to preserve the North Carolina trial court's jurisdiction over the interpretation of documents involved in certain cases pending in North Carolina. Staton v. Russell, 151 N.C. App. 1, 565 S.E.2d 103, 2002 N.C. App. LEXIS 688 (2002).

V. FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER.

Application of Section (d). — Section (d) of this rule applies only to injunctions and restraining orders, not to contempt orders. R.E. Uptegraff Mfg. Co. v. International Union of Elec. Workers Local 189, 20 N.C. App. 544, 202 S.E.2d 309, cert. denied, 285 N.C. 234, 204 S.E.2d 24 (1974).

In an apartment complex owner's action to enjoin a developer and a corporation from parking a 40-foot eight-wheeled construction trailer on a lot on which the owner had an easement for ingress and egress to the complex, a trial court erred in applying a 1996 injunction against the developer and a corporation because the 1996 injunction had been entered against their predecessors in ownership and there was no evidence to support a finding that the developer and the corporation were in active concert with one or more of the predecessors. Ferrell v. Doub, 160 N.C. App. 373, 585 S.E.2d 456, 2003 N.C. App. LEXIS 1800 (2003).

Necessity That Order Detail Acts Enjoined. — The mandate of this rule that an order set forth in reasonable detail the acts enjoined involves the question of whether the party enjoined can know from the language of the order itself, and without having to resort to other documents, exactly what the court is ordering it to do. Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co., 15 N.C. App. 634, 190 S.E.2d 729 (1972).

Reference to some other document within a temporary restraining order is not sufficient to provide a description of the act or acts enjoined or restrained. Gibson v. Cline, 28 N.C. App. 657, 222 S.E.2d 478 (1976).

Absence of a statement of the reasons for an injunction renders the order irregular, not void, and should be corrected by the trial court and not on appeal. Howard Schultz & Assocs. v. Ingram, 38 N.C. App. 422, 248 S.E.2d 345 (1978).

An injunctive order which does not state the reasons for its issuance is merely irregular, not void, and must be obeyed by the parties until corrected. Poor Richard's, Inc. v. Stone, 86 N.C. App. 137, 356 S.E.2d 828 (1987), rev'd on other grounds, 322 N.C. 61, 366 S.E.2d 697 (1988).

Irregular injunctive orders which do not state the reasons for their issuance are properly corrected by a motion made before the trial court and will not be corrected on appeal. Poor Richard's, Inc. v. Stone, 86 N.C. App. 137, 356 S.E.2d 828 (1987), rev'd on other grounds, 322 N.C. 61, 366 S.E.2d 697 (1988).

Motion under § 1A-1, Rule 60(a) was proper to reform an order granting a preliminary injunction so as to comply with the requirements of section (d) of this rule, since the correction did not alter the effect of the order, but only clarified the record for appeal. Howard Schultz & Assocs. v. Ingram, 38 N.C. App. 422, 248 S.E.2d 345 (1978).

Findings and Conclusions Only Required When Requested. — There is no statute that requires the court to make findings of fact and conclusions of law in granting or denying a preliminary injunction under this rule. Hence, absent a request by a party that the court make findings of fact and conclusions of law, the court is required to state only the reasons for its issuance. Pruitt v. Williams, 25 N.C. App. 376, 213 S.E.2d 369, appeal dismissed, 288 N.C. 368, 218 S.E.2d 348 (1975).

Reason for Issuance Correctly Set Out in Order. — When an order provided that it was issued by consent of the parties, it correctly set forth the reason for its issuance within the meaning of section (d) of this rule. R.E. Uptegraff Mfg. Co. v. International Union of Elec. Workers Local 189, 20 N.C. App. 544, 202 S.E.2d 309, cert. denied, 285 N.C. 234, 204 S.E.2d 24 (1974).

Order Held Sufficiently Detailed. — Where allegedly ambiguous terms used by the court in injunctive order were the exact words used in defendant's letter or the contract under which the parties functioned, apparently without complaint, for more than three years, defendant could not insist that the court speak with more clarity than did plaintiff and defendant in establishing the relationship which the court sought to preserve, especially when no showing was made as to any previous difficulty on the part of either party in understanding the language used. Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co., 15 N.C. App. 634, 190 S.E.2d 729 (1972).

Permanent Injunction Held Proper. — Trial court properly entered a permanent injunction prohibiting the State from interfering with corporation's sale of pre-paid phone cards with game pieces where the inclusion of game pieces was merely a marketing system, the phone card was sufficiently compatible with the price being charged and had sufficient value and utility to support the conclusion that it, and not the associated game of chance, was the object being purchased, and consumers could receive free game pieces via written request without purchasing the phone card. Am. Treasures, Inc. v. State, 173 N.C. App. 170, 617 S.E.2d 346, 2005 N.C. App. LEXIS 1928 (2005).

VI. DAMAGES ON DISSOLUTION.

Remedies Available to Party Wrongfully Restrained. — When a temporary restraining order is dissolved as having been improvidently issued, the remedies available to the party who has been wrongfully restrained are as follows: (1) He may recover damages from the party who procured the restraining order and the sureties on his injunction bond, without proof of malice or want of probable cause, or (2) he may institute an action for malicious prosecution against the party who procured the restraining order and recover damages, without regard to the limit of the bond, upon establishing the elements necessary to constitute an action for malicious prosecution. International Bhd. of Elec. Workers Local 755 v. Country Club E., Inc., 283 N.C. 1, 194 S.E.2d 848 (1973).

Recovery under this rule may not be granted until the court has finally decided that plaintiff was not entitled to the injunction, or until something occurs equivalent to such a decision. Leonard E. Warner, Inc. v. Nissan Motor Corp., 66 N.C. App. 73, 311 S.E.2d 1 (1984).

Limitation on Recovery When Proceeding by Motion in Cause. — If a party damaged by an improvidently issued restraining order elects to proceed by motion in the cause on the bond of the opposing party and his sureties, his recovery is limited to the amount of the penalty of the injunction bond. Stevenson v. North Carolina Dep't of Ins., 45 N.C. App. 53, 262 S.E.2d 378 (1980).

Damages Following Voluntary Dismissal. — Award of damages upon the dissolution of an injunction was not improper where the injunction was granted because there was probable cause to believe that defendants might be able to establish their right to the injunction upon trying the issues raised by their counterclaim, but where after the case was tried almost to a conclusion, defendants voluntarily dismissed their counterclaim; although it was done "without prejudice," this dismissal could only be construed as an acknowledgement by the defendants that they could not establish their entitlement to the restraining order. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Unsworn Statement Not Sufficient Evidence of Damages. — Where the record indicated the trial court relied upon the unsworn statement of counsel that the Board of Education suffered "about seven fifty" in damages in making finding of fact, the statement by the attorney at trial was not considered evidence. Ronald G. Hinson Elec., Inc. v. Union County Bd. of Educ., 125 N.C. App. 373, 481 S.E.2d 326 (1997).

VII. DECISIONS UNDER PRIOR LAW.

Editor's Note. — The cases cited below were decided under former G.S. 1-496 and 1-497.

Provision for Bond Mandatory. — The provision that the plaintiff in injunction give bond is mandatory and the amount fixed by the judge is conclusive of the extent of the liability thereon, the procedure being for the defendant to move to have the amount increased when he so desires or thinks it necessary for his protection. James v. Withers, 114 N.C. 474, 19 S.E. 367 (1894); McAden v. Watkins, 191 N.C. 105, 131 S.E. 375 (1926).

But the validity of an injunction is not affected by a failure to require an indemnity bond to accompany it, nor is a party for that reason justified in disobeying the mandate, but if aggrieved, his remedy is in a motion to dissolve. Young v. Rollins, 90 N.C. 125 (1884).

Failure to give the required undertaking is merely an irregularity which will be cured by a subsequent execution thereof. McKay v. Chapin, 120 N.C. 159, 26 S.E. 701 (1897); Standard Bonded Whse. Co. v. Cooper & Griffin, Inc., 30 F.2d 842 (W.D.N.C. 1929).

Bond Not Required in Action to Abate Nuisance. — In an action to abate a public nuisance, plaintiff relator was not required to give an undertaking, the provisions of former G.S. 1-496 not being applicable. Carpenter v. Boyles, 213 N.C. 432, 196 S.E. 850 (1938).

Where an injunction was issued under an order that plaintiff should give an un-

dertaking with sufficient sureties in a certain sum, it seemed that a deposit in money of the sum named would be sufficient; but whether it was or not, the giving by plaintiff of the required undertaking before the hearing of a motion to vacate the injunction for the want of it would supply the alleged defect and prevent the injunction from being vacated on that account. Richards v. Baurman, 65 N.C. 162 (1871).

Where an undertaking was given before the issuance of a restraining order, it was not necessary for the court, on the return of the order to show cause and upon continuing the injunction to the trial, to require a new undertaking from the plaintiff, unless it was shown that the bond already given was insufficient. Preiss v. Cohen, 112 N.C. 278, 17 S.E. 520 (1893).

Procedure to Recover Damages. — It is not contemplated that a separate action shall be brought upon an injunction bond, but the damages sustained by reason of an injunction shall be ascertained by proper proceedings in the same action, and may be by reference or otherwise, as the judge shall direct. North Carolina Gold Amalgamating Co. v. North Carolina Ore Dressing Co., 79 N.C. 48 (1878). See also, Crawford v. Pearson, 116 N.C. 718, 21 S.E. 561 (1895); Nansemond Timber Co. v. Rountree, 122 N.C. 45, 29 S.E. 61 (1898).

Right to Elect to Seek Damages in Same or Separate Action. — The provision requiring a bond in an injunction to cover defendant's damages, and further provision for recovery thereof in the same action, do not limit the remedy to that action, in the event the injunction was sought with malice and without probable cause; and defendant has the right therein to elect between this remedy and that by independent action, without limiting his recovery to an action on the bond when the damages sought are in excess of that amount. Shute v. Shute, 180 N.C. 386, 104 S.E. 764 (1920).

To sustain an action for damages, it must be made to appear that such injunction was wrongful in its inception, or at least was continued owing to some wrong on the part of plaintiff. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963).

Burden of Proof in Action for Damages. — The burden of proof was on defendant to show as a prerequisite to his right to recover damages from plaintiff and its surety either that the court had finally decided that plaintiff was not entitled to temporary restraining order or that something had occurred equivalent to such a decision. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963).

Want of probable cause need not be alleged. Crawford v. Pearson, 116 N.C. 718, 21 S.E. 561 (1895).

Amount of Damages Sustained Must Be Shown. — Before judgment can be given upon an injunction bond, the party alleging that he has been damnified by reason of the injunction must establish the quantum of damages sustained. Hyman v. Devereux, 65 N.C. 588 (1871).

Amount of damages does not include personal expenses in attending the hearing. Midgett v. Vann, 158 N.C. 128, 73 S.E. 801 (1912).

No Damages Where Injunction Is Rightfully Awarded and Properly Dissolved on Matters Subsequently Arising. — If an injunction is rightfully awarded, but afterwards properly dissolved because of matters done or arising subsequent to its issuance, there can be no recovery of damages. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963).

Voluntary Unconditional Dismissal Held Equivalent to Determination That Plaintiff Was Not Entitled to Equitable Relief. — In an action in which plaintiff obtained a temporary restraining order or injunction by giving bond as required by former G.S. 1-496, the voluntary and unconditional dismissal of the proceedings by plaintiff was equivalent to a judicial determination that the proceeding for an injunction was wrongful, since thereby plaintiff was held to have confessed that he was not entitled to the equitable relief sought. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963).

Voluntary Dismissal by Agreement Not Adjudication That Restraining Order Was Erroneous. — A judgment of voluntary dismissal by agreement of the parties of an action in which a restraining order has been issued is not an adjudication that the restraining order was improvidently or erroneously issued. M. Blatt Co. v. Southwell, 259 N.C. 468, 130 S.E.2d 859 (1963).

For discussion as to attorneys' fees, see Hyman v. Devereux, 65 N.C. 588 (1871).

Rules 66, 67.

Omitted.

Rule 68. Offer of judgment and disclaimer.

(a) *Offer of judgment.* — At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(b) *Conditional offer of judgment for damages.* — A party defending against a claim arising in contract or quasi contract may, with his responsive pleading, serve upon the claimant an offer in writing that if he fails in his defense, the damages shall be assessed at a specified sum; and if the claimant signifies his acceptance thereof in writing within 20 days of the service of such offer, and on the trial prevails, his damages shall be assessed accordingly. If the claimant does not accept the offer, he must prove his damages as if the offer had not been made. If the damages assessed in the claimant's favor do not exceed the sum stated in the offer, the party defending shall recover the costs in respect to the question of damages. (1967, c. 954, s. 1.)

COMMENT

Both sections of the rule would seem to be self-explanatory. They encompass the substance of former §§ 1-541 and 1-542. Former § 1-543, permitting a disclaimer of title by the defendant in trespass actions together with an offer to make amends, was repealed on the theory that its purpose can be accomplished by use of section (a).

Legal Periodicals. — For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

For note, "Rule 68 — Should Costs Incurred After the Offer of Judgment be Included in Calculating the 'Judgment Finally Obtained' — The So-Called Novel Issue in Roberts v. Swain," see 24 Campbell L. Rev. 245 (2002).

For article, "Law Between the Lines," 25 Campbell L. Rev. 151 (2003).

For article, "Holding, Dictum ... Whatever," 25 N.C. Cent. L.J. 139 (2003).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Purpose of this rule is to encourage settlements and avoid protracted litigation. Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843, cert. denied, 306 N.C. 744, 295 S.E.2d 480 (1982).

The offer operates to save defendant the costs from the time of that offer if plaintiff ultimately obtains a judgment for less than the sum offered. Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843, cert. denied, 306 N.C. 744, 295 S.E.2d 480 (1982).

Lump Sum Offer. — Lump sum offers of judgment which expressly include both the amount of the judgment and the amount of costs are permissible under Rule 68, but it is incumbent on the defendant to make sure that he has used language which conveys that he is making a lump sum offer. Phillips v. Warren, 152 N.C. App. 619, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

In determining the "costs then accrued," the relative positions of the parties as they existed at the time the offer was made must be considered. Purdy v. Brown, 307 N.C. 93, 296 S.E.2d 459 (1982).

Meaning of "Judgment Finally Obtained". — The Court of Appeals erred in concluding the "judgment finally obtained" under this rule means the jury's verdict. The decision to equate "judgment finally obtained" with the jury's verdict ignores the plain meaning of the words chosen by the legislature and employed in this rule. Poole v. Miller, 342 N.C. 349, 464 S.E.2d 409 (1995).

Costs incurred after the offer of judgment but prior to the entry of judgment should be included in calculating the "judgment finally obtained," even where attorney's fees are awarded under a federal statute. Roberts v. Swain, 353 N.C. 246, 538 S.E.2d 566, 2000 N.C. LEXIS 913 (2000).

Within the confines of G.S. 1A-1, Rule 68, "judgment finally obtained" is not simply the amount of the jury's verdict but includes applicable adjustments to the verdict by the trial court, such as costs incurred after the offer of judgment but prior to the entry of judgment, including reasonable attorney fees. Thorpe v. Perry-Riddick, 144 N.C. App. 567, 551 S.E.2d 852, 2001 N.C. App. LEXIS 525 (2001).

Costs incurred after an offer of judgment but prior to the entry of judgment should be included in calculating the "judgment finally obtained," under Rule 68. Phillips v. Warren, 152 N.C. App. 619, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Judgment finally obtained, when applying this rule consists of the verdict, costs, fees, interest and any other cost assessed to defendant for plaintiff's benefit, such as attorneys' fees. Phillips v. Warren, 152 N.C. App. 619, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Satisfaction of Judgment Discharged Defendant From Liability. — In an action filed by a patient and wife to recover for a doctor's negligence, a trial court erred in entering judgment against a hospital upon the verdict of a jury and by denying the hospital's motion for a judgment notwithstanding the verdict because the satisfaction of a G.S. 1A-1, N.C. R. Civ. P. 68, judgment discharged the hospital from liability when the patient and wife accepted an offer of judgment, and a judgment was entered in their favor in a prior action against the doctor for the same injury at issue in their action against the hospital; under the language of G.S. 1A-1, N.C. R. Civ. P. 68, and G.S. 1B-3(e), entry and satisfaction of a judgment pursuant to Rule 68(a) discharges all other tort-feasors from liability to the claimant for the same injury pursuant to G.S. 1B-3(e). Akins v. Mission St. Joseph's Health Sys., — N.C. App. —, 667 S.E.2d 255, 2008 N.C. App. LEXIS 1740 (2008).

Defendant is entitled to the protections afforded him under this rule when plaintiff's recovery is not more favorable than the offer. Thus, where defendant's offer was for $5,001.00, but plaintiff only received $3,500.00 from the jury, plaintiff would have to bear the costs incurred after the offer of judgment was made. Purdy v. Brown, 307 N.C. 93, 296 S.E.2d 459 (1982).

Prevailing Parties. — Because the rational behind this rule is to encourage a voluntary, mutual settlement, both parties may consider themselves prevailing parties. Evans v. Full Circle Prods., Inc., 114 N.C. App. 777, 443 S.E.2d 108 (1994).

Attorneys' fees were not part of the "costs then accrued" under this rule when defendant made offer to plaintiff of $5,001.00, including costs accrued, with the exception of attorneys' fees, as attorneys' fees could not properly have been taxed against defendant at that time, since at the time defendant tendered his offer to plaintiff, G.S. 6-21.1 was not applicable, because the situation did not then involve a judgment for $5,000.00 or less. Purdy v. Brown, 307 N.C. 93, 296 S.E.2d 459 (1982).

Attorneys' fees under 42 U.S.C. § 1988 are "costs then accrued" within the meaning of that phrase as it is used in this rule. Purdy v. Brown, 307 N.C. 93, 296 S.E.2d 459 (1982).

Ambiguity of Phrase. — The phrase "together with costs accrued" was ambiguous as to whether the "costs accrued" were included in the amount offered pursuant to this rule or whether the costs were left to be separately determined by the court. Craighead v. Carrols Corp., 115 N.C. App. 381, 444 S.E.2d 651 (1994).

What Attorneys' Fees Recoverable. — Attorneys' fees which were incurred prior to the time the offer of judgment was made are recoverable. Sanctions under this rule only provide protection against the costs incurred after the offer has been made. Purdy v. Brown, 307 N.C. 93, 296 S.E.2d 459 (1982).

Attorney's fees were properly awarded pursuant to N.C. Gen. Stat. G.S. 6-21.1 in an automobile accident case; although an offer of judgment exceeded the amount of the jury's verdict, the offer did not exceed the judgment finally obtained, which included costs and attorney's fees. Robinson v. Shue, 145 N.C. App. 60, 550 S.E.2d 830, 2001 N.C. App. LEXIS 572 (2001).

Matter was remanded as trial court could properly consider the award of appellate attorney fees under circumstances in which an offer of judgment was made that was refused. Davis v. Kelly, 147 N.C. App. 102, 554 S.E.2d 402, 2001 N.C. App. LEXIS 1072 (2001).

When deciding whether to award attorneys' fees under G.S. 6-21.1, a trial court must examine the entire record, including but not limited to: (1) settlement offers made prior to institution of the action; (2) offers of judgment made pursuant to Rule 68 and whether the judgment finally obtained was more favorable than such offers; (3) whether defendant unjustly exercised superior bargaining power; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; and (6) the amounts of settlement offers as compared to the jury verdict. Phillips v. Warren, 152 N.C. App. 619, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002).

Although the trial court did not expressly find that the judgment the injured party finally obtained exceeded the tortfeasor's Offer of Judgment, which was one Washington factor regarding whether an award of attorney fees was proper, it did make it clear that the factor had been considered and the trial court did not abuse its discretion in awarding attorney fees to the injured party where the judgment finally obtained was more than twice the tortfeasor's Offer of Judgment. Furmick v. Miner, 154 N.C. App. 460, 573 S.E.2d 172, 2002 N.C. App. LEXIS 1474 (2002).

Award of Attorneys' Fees Held Error. — In a breach of contract suit wherein plaintiff subcontractor accepted an offer of judgment made by defendant general contractor, the suit was settled and the trial court erred by granting an award of attorneys' fees to the subcontractor; when an offer of judgment is involved, no prevailing or losing party exists and an award of attorneys' fees is precluded under G.S. 44A-35. Martin & Loftis Clearing & Grading, Inc. v. Saieed Constr. Sys. Corp., 168 N.C. App. 542, 608 S.E.2d 124, 2005 N.C. App. LEXIS 341 (2005).

Costs Subsequent to Offer. — The trial court abused its discretion in calculating the "judgment finally obtained" under this rule by including costs incurred after the offer of judgment. Roberts v. Swain, 135 N.C. App. 613, 521 S.E.2d 493, 1999 N.C. App. LEXIS 1185 (1999).

Taxing of Costs Incurred After Making of Offer Held Error. — Where offer was made and served on May 21, 1979, and the judgment was for less than the sum offered, the trial court erred in taxing costs against the plaintiff up to and including October 15, 1979; under section (a) of this rule the judgment should have ordered plaintiff to pay the costs incurred after May 21, 1979. Scallon v. Hooper, 58 N.C. App. 551, 293 S.E.2d 843, cert. denied, 306 N.C. 744, 295 S.E.2d 480 (1982).

Interest and Other Costs Not Included. — Where the relevant portion of defendant's offer of judgment allowed judgment to be taken against them for "$10,001.00 for all damages and attorney's fees taxable as costs, together with the remaining costs accrued"; use of the language "together with" evidenced an intent to make an offer of judgment only as to the substantive claim and attorney fees, but not as to any other costs such as interest; therefore, construing the offer against defendants, as the drafters, a lump sum offer was not intended. Aikens v. Ludlum, 113 N.C. App. 823, 440 S.E.2d 319 (1994).

Taxing of Costs on Nonspecific Offer. — Trial court did not have authority under this rule to tax costs to the plaintiff where defendants made a nonspecific offer for both plaintiffs to take judgment against defendants for a total sum of $25,000. When multiple plaintiffs in the same complaint have independent claims for relief, an offer of judgment can be valid only if it is specific as to the offer made to each plaintiff; a party wishing to accept the offer should not be barred from doing so, and thus subject himself to penalties under this rule, just because the other party would not accept. True v. T & W Textile Mach., Inc., 112 N.C. App. 358, 435 S.E.2d 551 (1993), cert. granted, 335 N.C. 555, 441 S.E.2d 134, aff'd per curiam, 337 N.C. 798, 448 S.E.2d 514 (1994).

Statement by an insurance company's agent that he would reconsider his decision to deny a pedestrian's claim seeking damages for injuries he sustained when he was hit by a truck, if the pedestrian would settle his case against the truck driver for litigation costs "in the $3,000 to $8,000 range," was not an offer of settlement under G.S. 1A-1, N.C. R. Civ. P. 68, and the trial court did not err when it decided that there was no offer of settlement and awarded the pedestrian over $32,000 in attorneys' fees, even though the jury awarded him only $7,000 in damages. Overton v. Purvis, 162 N.C. App. 241, 591 S.E.2d 18, 2004 N.C. App. LEXIS 120 (2004).

Taxing of Costs in Child Custody Case. — Where a trial court denied a father's motion to tax costs in a child custody modification action after the mother rejected the father's offer of judgment under N.C. R. Civ. P. 68, the trial court's decision was affirmed on appeal because a Rule 68 offer of judgment in a child custody case would permit a party to circumvent the court's statutory authority and responsibility to determine custody in the best interests of the child. Mohr v. Mohr, 155 N.C. App. 421, 573 S.E.2d 729, 2002 N.C. App. LEXIS 1590 (2002).

Offer for Division of Marital Estate Was Insufficient. — Where a wife's offer in a divorce case related only to the distribution of the marital residence, but failed to address the division of the entire marital estate, thus allowing the remaining separate and marital assets to be subjected to further litigation, the offer was insufficient to create a binding final judgment and thus failed to meet the requirements of G.S. 1A-1, N.C. R. Civ. P. 68. Lauterbach v. Weiner, 174 N.C. App. 201, 620 S.E.2d 317, 2005 N.C. App. LEXIS 2297 (2005).

An offeree who does not accept an offer of judgment must bear those costs incurred from the date the offer of judgment was tendered only when the "judgment finally obtained" is not more favorable than the amount of the offer. Poole v. Miller, 342 N.C. 349, 464 S.E.2d 409 (1995).

The provision of § 84-13 for double dam-

ages applies only after a factual determination at trial of fraudulent practice by an attorney and, thus, did not apply where plaintiffs accepted defendant's offer of judgment tendered pursuant to this rule. Estate of Wells v. Toms, 129 N.C. App. 413, 500 S.E.2d 105 (1998).

Where defendants made a reasonable settlement offer, four times the amount plaintiff actually recovered, the court held that plaintiff had to bear defendants' costs incurred since the making of the offer, pursuant to this rule. Blackmon v. Bumgardner, 135 N.C. App. 125, 519 S.E.2d 335 (1999).

Trial court did not err in declining to award costs to defendant pursuant to G.S. 1A-1, N.C. R. Civ. P. 68 in a passenger's action for personal injuries sustained in an automobile collision because the total amount of the judgment obtained by the passenger, including the amount of damages, attorney's fees, and costs, exceeded defendant's offer for judgment, even after the amount of damages was reduced by the passenger's settlement with a third-party defendant pursuant to G.S. 1B-4. Reinhold v. Lucas, 167 N.C. App. 735, 606 S.E.2d 412, 2005 N.C. App. LEXIS 10 (2005).

Trial Court Did Not Err in Awarding Costs. — Although the creditors properly submitted an offer of judgment to the secured creditor before trial, which the secured creditor rejected, the trial court was not required to charge the court's post-offer costs to the secured creditor, even though the final judgment was less than the offer of judgment because, when the judgment award was combined with the costs awarded, as was required, a final judgment was reached in favor of the secured creditor in an amount which was more than the amount proffered in the offer of judgment. Bartlett Milling Co., L.P. v. Walnut Grove Auction & Realty Co., — N.C. App. —, 665 S.E.2d 478, 2008 N.C. App. LEXIS 1546 (2008).

Applied in Shanahan v. Shelby Mut. Ins. Co., 19 N.C. App. 143, 198 S.E.2d 47 (1973); Yates Motor Co. v. Simmons, 51 N.C. App. 339, 276 S.E.2d 496 (1981); Lowe v. Bell House, Inc., 74 N.C. App. 196, 328 S.E.2d 301 (1985); Porterfield v. Goldkuhle, 137 N.C. App. 376, 528 S.E.2d 71, 2000 N.C. App. LEXIS 320 (2000); Phillips v. Warren, 152 N.C. App. 619, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002); Griffis v. Lazarovich, 164 N.C. App. 329, 595 S.E.2d 797, 2004 N.C. App. LEXIS 821 (2004).

Cited in Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973); Taylor v. Brigman, 52 N.C. App. 536, 279 S.E.2d 82 (1981); Burgess v. Vestal, 99 N.C. App. 545, 393 S.E.2d 324 (1990); Patrick v. Ronald Williams, Professional Ass'n, 102 N.C. App. 355, 402 S.E.2d 452 (1991); Members Interior Constr., Inc. v. Leader Constr. Co., 124 N.C. App. 121, 476 S.E.2d 399 (1996); Washington v. Horton, 132 N.C. App. 347, 513 S.E.2d 331 (1999); Tew v. West, 143 N.C. App. 534, 546 S.E.2d 183, 2001 N.C. App. LEXIS 314 (2001); Phillips v. Warren, 152 N.C. App. 619, 568 S.E.2d 230, 2002 N.C. App. LEXIS 959 (2002); Messina v. Bell, 158 N.C. App. 111, 581 S.E.2d 80, 2003 N.C. App. LEXIS 978 (2003); Moquin v. Hedrick, 163 N.C. App. 345, 593 S.E.2d 435, 2004 N.C. App. LEXIS 372 (2004); House v. Stone, 163 N.C. App. 520, 594 S.E.2d 130, 2004 N.C. App. LEXIS 507 (2004); Morgan v. Steiner, 173 N.C. App. 577, 619 S.E.2d 516, 2005 N.C. App. LEXIS 2105 (2005); Wright v. Murray, 187 N.C. App. 155, 651 S.E.2d 913, 2007 N.C. App. LEXIS 2308 (2007); Priest v. Safety-Kleen Sys., 191 N.C. App. 341, 663 S.E.2d 351, 2008 N.C. App. LEXIS 1317 (2008); Bryson v. Cort, — N.C. App. —, 668 S.E.2d 84, 2008 N.C. App. LEXIS 1981 (2008).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. — *The cases cited below were decided under former G.S. 1-541 and 1-542.*

Nature of Offer. — An offer of compromise, to be sufficient, must be in a form that will enable plaintiff, if he accepts it, to have judgment entered by the clerk conformably to the offer. It must consequently come from all the defendants, or their common attorney-at-law, since otherwise the clerk would not be authorized to enter judgment against all. Williamson v. Lock's Creek Canal Co., 84 N.C. 629 (1881).

Use of Evidence of Unaccepted Tender of Judgment. — The purpose of former G.S. 1-541 could be best subserved by holding, according to its language, that a tender of judgment that is unaccepted "cannot be given in evidence," and can only be used after verdict before the judge, to enable him to adjudge who shall pay the costs. A. Blanton Grocery Co. v. Taylor, 162 N.C. 307, 78 S.E. 276 (1913).

Former G.S. 1-541, authorizing a tender of judgment, provides that the tender, when not accepted, is to be deemed withdrawn, and cannot be given in evidence, and while this provision is primarily for the protection of the one making the tender, and to prevent its introduction against him, the statute is a part of the wholesome scheme devised to encourage compromises and settlements, before and after action commenced. A. Blanton Grocery Co. v. Taylor, 162 N.C. 307, 78 S.E. 276 (1913).

When Tender Sufficient to Stop Accrual of Costs. — A tender of payment, to stop the costs and the accrual of interest on a judgment subsequently rendered, must be in writing, signed by the party making it, and must contain an offer of judgment for the amount tendered. Dr. Shoop Family Medicine Co. v. Davenport, 163 N.C. 294, 79 S.E. 602 (1913).

When Costs to Be Taxed Against Plaintiff. — Where plaintiff is given judgment for no more than the amount tendered by defendant, costs from the time the tender was made should be taxed on plaintiff. Cowles v. Provident Life Assurance Soc'y, 170 N.C. 368, 87 S.E. 119 (1915).

Where defendant tenders judgment in its answer for the amount recovered by plaintiff, which tender is refused by plaintiff upon her claim that she is entitled to recover a larger amount, the costs are properly taxed against plaintiff. Webster v. Wachovia Bank & Trust Co., 208 N.C. 759, 182 S.E. 333 (1935).

A conditional tender may accompany an answer, and this alone is its proper placing so far as a pleading is concerned, or in reply to a counterclaim. Hall v. Western Union Tel. Co., 139 N.C. 369, 52 S.E. 50 (1905).

Defendant may not defeat the purpose of § 1-510 by undertaking to make a tender. McKay v. McNair Inv. Co., 228 N.C. 290, 45 S.E.2d 358 (1947).

Tender of judgment which was not made until after nonsuit had been entered and plaintiff had appealed therefrom and the session of court had expired did not comply with former G.S. 1-541. Oldham & Worth, Inc. v. Bratton, 263 N.C. 307, 139 S.E.2d 653 (1965).

Offer Held Not an Offer of Compromise and Admissible in Fixing Damages. — Where, pending an action to recover for damages done to a lot of tobacco which plaintiff had bought and paid for under a guarantee of soundness by defendants, an agreement was entered into adjusting the amount of damage per pound which plaintiff should recover, if entitled to recover at all, said agreement to be without prejudice to either party, it was held that such an agreement was not an offer of compromise and was admissible on the trial of the action to determine the amount of plaintiff's recovery. Garrett v. Pegram, 120 N.C. 288, 26 S.E. 778 (1897).

Defendant would have no right to force plaintiff to accept property which might have been injured or rendered worthless after conversion or pay the costs on refusal to do so, even if the action had been brought to recover the specific property tendered, unless the offer had also included with the proposed delivery of articles tendered in kind a proposal to pay an amount as damages for detention not less than that ultimately assessed by the jury. Stephens v. Koonce, 103 N.C. 266, 9 S.E. 315 (1889).

Where, in a justice's court, judgment was rendered against two defendants, and one appealed, and, pending the appeal, tendered in cash as a satisfaction of the judgment as to himself a sum which was less than the amount of the justice's judgment but more than that ultimately rendered in the superior court, plaintiff was entitled to costs. Wyatt v. Wilson, 152 N.C. 276, 67 S.E. 501 (1910).

Where defendants tendered judgment for a smaller amount on another and different liability from that alleged in the complaint, and plaintiff did not accept, the tender was thereby withdrawn, and upon judgment of nonsuit on the cause alleged plaintiff was not entitled to judgment for the amount tendered, there being no admission of liability in any amount upon the cause alleged. Doggett Lumber Co. v. Perry, 213 N.C. 533, 196 S.E. 831 (1938).

Where, on the admissions in the pleadings, plaintiff is entitled to recover any amount, it is error for the trial court to dismiss the action as in case of nonsuit, and the fact that defendant has tendered the amount admitted to be due with interest and costs to the time of filing his answer and has paid it into court subject to plaintiff's order does not vary this result. Penn v. King, 202 N.C. 174, 162 S.E. 376 (1932).

Rule 68.1. Confession of judgment.

(a) *For present or future liability.* — A judgment by confession may be entered without action at any time in accordance with the procedure prescribed by this rule. Such judgment may be for money due or for money that may become due. Such judgment may also be entered for alimony or for support of minor children.

(b) *Procedure.* — A prospective defendant desiring to confess judgment shall file with the clerk of the superior court as provided in section (c) a statement in writing signed and verified or sworn to by such defendant authorizing the entry of judgment for the amount stated. The statement shall contain the name of the prospective plaintiff, his county of residence, the name of the defendant, his county of residence, and shall concisely show why the defendant is or may become liable to the plaintiff.

If either the plaintiff or defendant is not a natural person, for the purposes of this rule its county of residence shall be considered to be the county in which it has its principal place of business, whether in this State or not.

(c) *Where entered.* — Judgment by confession may be entered only in the county where the defendant resides or has real property or in the county where the plaintiff resides but the entry of judgment in any county shall be conclusive evidence that this section has been complied with.

(d) *Form of entry.* — When a statement in conformity with this rule is filed with the clerk of the superior court, the clerk shall enter judgment thereon for the amount confessed, and docket the judgment as in other cases, with costs, together with disbursements. The statement, with the judgment, shall become the judgment roll.

(e) *Force and effect.* — Judgments entered in conformity with this rule shall have the same effect as other judgments except that no judgment by confession shall be held to be res judicata as to any fact in any civil action except in an action on the judgment confessed. When such judgment is for alimony or support of minor children, the failure of the defendant to make any payments as required by such judgment shall subject him to such penalties as may be adjudged by the court as in any other case of contempt of its orders. Executions may be issued and enforced in the same manner as upon other judgments. When the full amount of the judgment is not all due, or is payable in installments, and the installments are not all due, execution may issue upon such judgment for the collection of such sums as have become due and shall be in usual form. Notwithstanding the issue and satisfaction of such execution, the judgment remains as security for the sums thereafter to become due; and whenever any further sum becomes due, execution may in like manner be issued. (1967, c. 954, s. 1; 1987, c. 288, s. 1.)

COMMENT

While this rule largely follows former §§ 1-247, 1-248 and 1-249, there are some changes.

That part of former § 1-247 expressly allowing judgment to be confessed "to secure any person against contingent liability on behalf of the defendant" has been omitted. Otherwise, there has been no change in respect to the subject matter for which judgment may be confessed.

The provisions in respect to the particular county in which judgment may be confessed have been changed. Formerly, § 1-249 permitted a judgment to be confessed where the defendant resided or "has property." Since it would seem to be a simple matter for a defendant to have property in any county (simply by wearing his clothes there), the possibility of abuse of the procedure by nonresidents for the benefit of nonresidents is present. The rule therefore specifies that the property must be real property. More importantly, it provides that judgment may be confessed also in the county of the plaintiff's residence. It will be observed that section (c), after stating the appropriate counties for the confession of judgment, provides that entry of judgment is conclusive evidence that the section has been complied with. This, in effect, puts the responsibility on the clerks for the enforcement of this section. At any rate, it prevents any nice inquiry as to whether it has been complied with.

Editor's Note. — Session Laws 1987, c. 288, which amended this rule by inserting "or sworn to" in the first sentence of section (b) thereof, in s. 2 provides: "This act is effective upon ratification [June 4, 1987] and validates all confessions of judgment heretofore entered under G.S. 1A-1, Rule 68.1, which were sworn to but not verified, but this act shall not affect any pending litigation."

Legal Periodicals. — For note as to consent judgments for alimony, see 35 N.C.L. Rev. 405 (1957).

For article on the rights of individuals to control the distributional consequences of divorce by private contract and on the interest of the State in preserving its role as a third party to marriage and divorce, see 59 N.C.L. Rev. 819 (1981).

CASE NOTES

I. In General.
II. Decisions under Prior Law.

I. IN GENERAL.

Strict Construction. — A statute authorizing confession of judgment is in derogation of the common law and is to be strictly construed. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568, cert. denied, 290 N.C. 309, 225 S.E.2d 829 (1976).

A confession of judgment without action is a consent judgment. The judgment depends upon the consent of the parties, and the court gives effect to it as the agreement of the parties. It would not be valid unless the parties consented, nor could it affect one who was not a party. Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972); Yarborough v. Yarborough, 27 N.C. App. 100, 218 S.E.2d 411, cert. denied, 288 N.C. 734, 220 S.E.2d 353 (1975).

And Its Validity Depends upon Capacity to Contract. — Since the validity of a confession of judgment is based upon the contract of the parties, there must be the authority and capacity to contract. Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972).

Defendant's Written Authorization Required. — There can be no entry of a confession of judgment, under this rule, without a written authorization for entry by defendant, and defendant is therefore deemed to have notice, since without a written statement by defendant authorizing its entry there can be no confession of judgment. Rivers v. Rivers, 29 N.C. App. 172, 223 S.E.2d 568, cert. denied, 290 N.C. 309, 225 S.E.2d 829 (1976).

Effect of Judgment by Confession on Jurisdiction to Determine Custody. — Where a judgment by confession purported to grant custody of the child to a party, this judgment did not deprive the district court of jurisdiction to determine custody, but the parties, having agreed to it, were bound by its provisions until the court made some order for custody. Pierce v. Pierce, 58 N.C. App. 815, 295 S.E.2d 247 (1982).

Abatement of Later Custody Action. — Where a judgment by confession placed the custody issue before the court so that it retained jurisdiction to determine custody, it was error not to abate the subsequent action for custody. Pierce v. Pierce, 58 N.C. App. 815, 295 S.E.2d 247 (1982).

Plaintiff's Express or Implied Consent Necessary. — In order for a confession of judgment to be binding on plaintiff, it is essential that he either expressly or impliedly assent thereto. Yarborough v. Yarborough, 27 N.C. App. 100, 218 S.E.2d 411, cert. denied, 288 N.C. 734, 220 S.E.2d 353 (1975).

Minors Cannot Be Bound Without Court Investigation and Approval. — In the case of infant parties, the next friend, guardian ad litem or guardian cannot consent to a judgment or compromise without the investigation and approval of the court. Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972).

Where there was nothing in the record on appeal to disclose an investigation and approval by the court, a purported judgment in favor of a minor plaintiff was a nullity and its purported cancellation by his guardian was of no effect. Ballard v. Hunter, 12 N.C. App. 613, 184 S.E.2d 423 (1971), cert. denied, 280 N.C. 180, 185 S.E.2d 704 (1972).

Estoppel to Challenge Judgment by Confession for Alimony. — Where a husband ratifies, accepts, or acquiesces in a decree of alimony by confession, he is estopped, in the absence of a showing of fraud, mistake or oppression, to challenge the validity of the judgment on the grounds of informalities or irregularities in either the confession of judgment or the decree itself. Whitehead v. Whitehead, 13 N.C. App. 393, 185 S.E.2d 706 (1972).

Change of Child Support or Custody. — A judgment concerning the custody or support of a minor child is not final, but may be altered by the showing of a substantial change of circumstances; and jurisdiction over the person of the defendant began and remained with the North Carolina court when defendant knowingly and voluntarily signed a confession of judgment pursuant to this rule. Cromer v. Cromer, 49 N.C. App. 403, 271 S.E.2d 541 (1980), rev'd on other grounds, 303 N.C. 307, 278 S.E.2d 518 (1981).

Imposition of restitution as a condition of probation is not a legal obligation equivalent to a civil judgment; therefore, in sentences imposed for G.S. 14-100 convictions, that part of the judgment purporting to require defendant to sign confessions of judgment was vacated. State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

Cited in Snipes v. Snipes, 118 N.C. App. 189, 454 S.E.2d 864 (1995); Am. Gen. Fin. Servs. v. Barnes, 175 N.C. App. 406, 623 S.E.2d 617, 2006 N.C. App. LEXIS 54 (2006).

II. DECISIONS UNDER PRIOR LAW.

Editor's Note. *— The cases cited below were decided under former G.S. 1-247 through 1-249.*

Provisions Are Procedural Only. — Monarch Refrigerating Co. v. Farmers' Peanut Co., 74 F.2d 790 (4th Cir. 1935), cert. denied, 295 U.S. 732, 55 S. Ct. 643, 79 L. Ed. 1680 (1935).

They are in derogation of common right, and must be strictly construed. Gibbs v. G.H. Weston & Co., 221 N.C. 7, 18 S.E.2d 698 (1942).

Strict Compliance Required. — Strict compliance with the provisions of former G.S. 1-248 was required, and if all the requirements were not met the judgment was void because of a want of jurisdiction in the court to render judgment, which was apparent on the face of the proceedings. Smith v. Smith, 117 N.C. 348, 23 S.E. 270 (1895).

In Order to Confer Jurisdiction and Ensure Validity. — It was essential to the validity of a judgment by confession that it be confessed and entered of record according to the provisions of former G.S. 1-248. These were essential matters required by the statute to confer jurisdiction on the court and to ensure validity of the judgment. Farmers Bank v. McCullers, 201 N.C. 440, 160 S.E. 494 (1931).

Where the requirements with respect to the form and contents of the statement have been fully complied with, the court acquires jurisdiction, and a judgment by confession, as authorized by the debtor in the statement, is valid for all purposes. Cline v. Cline, 209 N.C. 531, 183 S.E. 904 (1936).

As to requirement of substantial compliance, see Sharp v. Danville, M. & S.W.R.R., 106 N.C. 308, 11 S.E. 530 (1890).

Rendition of judgment in a proceeding of this kind is a distinct office of the court, not to be confused with the ministerial acts of filing and docketing. Gibbs v. G.H. Weston & Co., 221 N.C. 7, 18 S.E.2d 698 (1942).

Court Must Have Jurisdiction. — It is essential that the court have jurisdiction before a judgment on confession can be validly entered. Slocumb v. Cape Fear Shingle Co., 110 N.C. 20, 14 S.E. 622 (1892).

The verified statement is jurisdictional, both as to its filing and as to its contents. Gibbs v. G.H. Weston & Co., 221 N.C. 7, 18 S.E.2d 698 (1942).

Failure to comply with the mandatory terms of former G.S. 1-248 and especially the want of rendition of judgment upon the statement and affidavit of defendant was not a mere irregularity, but constituted a fatal defect, rendering the proceeding of no effect as against creditors whose judgments were subsequently docketed. Gibbs v. G.H. Weston & Co., 221 N.C. 7, 18 S.E.2d 698 (1942).

And a judgment confessed must contain a verified statement of the facts and transactions out of which the indebtedness arose. Davenport v. Leary, 95 N.C. 203 (1886).

Filing of concise statement of the facts out of which the indebtedness arose, required of the party confessing judgment, is mandatory. Davidson v. Alexander, 84 N.C. 621 (1881).

As Well as Averment That Debt Is Justly Due. — A confession of judgment being a proceeding in derogation of a common right, former G.S. 1-248 required, as a protection against the perpetration of fraud, that the consideration out of which the debt arose be stated, and an averment that the debt for which the judgment is confessed "is justly due." Smith v. Smith, 117 N.C. 348, 23 S.E. 270 (1895).

Confession of judgment was sufficient when it was for "goods sold and delivered," although omitting the time of sale, quantity, price, and value of the goods. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Statement that the amount was due by a certain note described in the judgment, that said note became due on a day named, and that the consideration was cotton sold and delivered was a compliance with former G.S. 1-248. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Where affidavit stated that the amount was due on a bond under seal for borrowed money, due and payable 2 November, 1876, it was held that the statement was sufficient. George F. Uzzle & Co. v. Vinson, 111 N.C. 138, 16 S.E. 6 (1892).

Mere statement that debts were bona fide due, without embracing the account which was filed, was not a sufficient compliance. Davenport v. Leary, 95 N.C. 203 (1886). See also, Davidson v. Alexander, 84 N.C. 621 (1881).

Judgment confessed upon statement that defendant was indebted to plaintiff in a certain sum arising from acceptance of a draft, setting out a copy thereof, was irregular and void. Davidson v. Alexander, 84 N.C. 621 (1881).

Where judgment confessed by a wife in favor of her husband showed only that it was based upon a sum alleged to be due on account of money advanced by the husband from time to time to take care of obligations due at the banks by the wife, and failed to state the items constituting the claim, when advanced and to whom, and that the advancements were not gifts to the wife, the judgment was insufficient to meet statutory requirements and was void. Farmers Bank v. McCullers, 201 N.C. 440, 160 S.E. 494 (1931).

Failure to file note or other evidence of indebtedness does not invalidate the judgment, provided the confession contains a sufficient description of the nature of the indebtedness to enable a party to make inquiry and ascertain the truth of the matter. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Mere filing and entry of a verified state-

ment, although recorded on the judgment docket and cross-indexed as judgments are, will not be effective as a judgment. Gibbs v. G.H. Weston & Co., 221 N.C. 7, 18 S.E.2d 698 (1942).

Effect of Statement Not Expressly Authorizing Filing. — Although a confession of judgment did not contain words expressly authorizing the clerk to enter the same upon the records, yet, if the record showed that the confession was sworn to and filed and that judgment was thereupon entered, the filing was equivalent to an express authority for its entry and sufficiently conformed to the statute. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Failure to endorse the judgment on the verified statement was an irregularity which did not affect the validity of the judgment, which the entry on the judgment docket made by the clerk or under his immediate supervision showed was rendered by the court. Cline v. Cline, 209 N.C. 531, 183 S.E. 904 (1936).

Mere fact that judgments were entered in the nighttime in the law office of counsel, which was near to the courthouse and convenient, did not render them void or irregular. Sharp v. Danville, M. & S.W.R.R., 106 N.C. 308, 11 S.E. 530 (1890).

Lien from Date of Docketing. — A judgment by confession, like any other judgment, becomes a lien on the judgment debtor's real estate as of the date the judgment is docketed. Keel v. Bailey, 214 N.C. 159, 198 S.E. 654 (1938).

Setting Aside of Void Judgment. — Ordinarily, a judgment by confession without action will not be set aside for mere irregularities, the party confessing the judgment being presumed to have waived them; but where the judgment is void for a cause appearing in the record, or the record omits some essential element, it will be set aside or quashed. Nimocks v. Cape Fear Shingle Co., 110 N.C. 24, 14 S.E. 622 (1892).

On Application of a Party Thereto. — A judgment may be set aside for irregularity only upon the application of a party thereto. George F. Uzzle & Co. v. Vinson, 111 N.C. 138, 16 S.E. 6 (1892).

Distinction Between Attack on Judgment by Creditors of Debtor and by Debtor Himself. — There is a distinction between challenges to the validity of a confessed judgment made by creditors of the confessing debtor and by the debtor himself. Pulley v. Pulley, 255 N.C. 423, 121 S.E.2d 876 (1961).

Collateral Attack on Judgment Void for Want of Jurisdiction. — Judgment which is void for want of jurisdiction in the court, if such appears on the record, may be collaterally impeached in any court in which the question arises. Henry J. Hervey & Co. v. Edmunds, 68 N.C. 243 (1873).

As to the manner of attacking judgment by confession for fraud, see Sharp v. Danville, M. & S.W.R.R., 106 N.C. 308, 11 S.E. 530 (1890); George F. Uzzle & Co. v. Vinson, 111 N.C. 138, 16 S.E. 6 (1892).

Amendment of Judgments by Confession. — Such irregularities in a confession of judgment as might be corrected by amendment in the case of ordinary judgments may be the subject of amendment in a confession of judgment. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

If a proceeding is so defective in form and substance that it is void upon its face, no amendment can be made to give it life, but if there are irregularities they may be cured by amendment. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

Parol Evidence Not Admissible to Vary Judgment. — Where a judgment is confessed by one against himself and entered of record, parol evidence is not admissible to show that it was intended to have been entered against another. Davidson v. Alexander, 84 N.C. 621 (1881).

Defendant was estopped to question the validity of his own confessed judgment for alimony. See Pulley v. Pulley, 255 N.C. 423, 121 S.E.2d 876 (1961).

Confession of Judgment with Defeasance. — It is a well recognized practice to confess a judgment with a defeasance, and the courts will take notice of the condition and will not permit an execution to issue in violation of it. Hardy v. Reynolds, 69 N.C. 5 (1873).

A stipulation in a confession of judgment that no execution shall issue thereon within a time specified is not such a reservation for the benefit of the debtor as impairs the rights of other creditors, and does not vitiate the judgment. Merchants Nat'l Bank v. Newton Cotton Mills, 115 N.C. 507, 20 S.E. 765 (1894).

A judgment by confession may be taken to cover a future debt. Bank of Ga. v. Higginbottom, 34 U.S. 48, 9 L. Ed. 46 (1835).

Judgment may, it seems, be confessed for a specific sum claimed, subject to the right of the party confessing to reduce the amount, and in case of failure or omission to do so the whole amount will be collectible. Gear v. Parish, 46 U.S. 168, 12 L. Ed. 100 (1847).

Even before dissolution, one partner cannot confess judgment so as to bind copartners. Hall v. Lanning, 91 U.S. 160, 23 L. Ed. 271 (1875).

Confession by Guardian. — A judgment confessed by a guardian of one non compos mentis, if the statement required is verified by the guardian in the absence of fraud, is not irregular. And the analogy between infants and lunatics is so close as to justify the conclusion that a similar judgment against a lunatic would not be irregular. McAden v. Hooker, 74 N.C. 24 (1876).

Where process was served on guardian alone, and not on infants also, as it should have been, and the guardian permitted judgment against the infants by nil dicit, the judgment was nevertheless not irregular, although the court acted unadvisedly in permitting the guardian whose interests were opposed to those of the ward to represent him. White v. Albertson, 14 N.C. 241 (1831).

Judgment confessed by executors on a debt created after the death of the testator and during the time of administration will bind them in their individual capacity, even though they style themselves as executors in making such a confession. Hall v. Craige, 65 N.C. 51 (1871).

Confession by Corporation. — A corporation, nothing to the contrary appearing, may by the action of its proper officers confess judgments as a natural person, if the essential requirements are complied with. Sharp v. Danville, M. & S.W.R.R., 106 N.C. 308, 11 S.E. 530 (1890).

A corporation may confess judgment, without action, in or out of term, but the record should show that the officer or person who represented the corporation in the proceedings was duly authorized to act, and that he acted under the direction of his principal. Nimocks v. Cape Fear Shingle Co., 110 N.C. 24, 14 S.E. 622 (1892).

Confession May Be Made to State. — A person may confess a judgment, or recognizance on record, to the State for a sum of money, as well as to an individual. State v. Love, 23 N.C. 264 (1840).

Where A was convicted on an indictment, fined, and ordered into the custody of the sheriff, and B, in consideration that A should be discharged from custody, confessed a judgment to the State for the fine and costs, it was held that the judgment could not afterwards be set aside. State v. Love, 23 N.C. 264 (1840).

Construction of Warrant of Attorney. — It seems to be an established principle that an authority given by warrant of attorney to confess a judgment against the maker of a note must be clear and explicit and strictly construed, and the court cannot supply any supposed omissions of the parties. National Exch. Bank v. Wiley, 195 U.S. 257, 25 S. Ct. 70, 49 L. Ed. 184 (1904).

OPINIONS OF ATTORNEY GENERAL

Clerk of superior court is not authorized to enter judgment by confession which determines custody of minor children. See opinion of Attorney General to The Honorable Martha J. Adams, Clerk of Superior Court, Alexander County, 46 N.C.A.G. 168 (1977).

Rule 69.

Omitted.

Rule 70. Judgment for specific acts; vesting title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the judge may direct the act to be done at the cost of the disobedient party by some other person appointed by the judge and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The judge may also in proper cases adjudge the party in contempt. If real or personal property is within the State, the judge in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to execution upon application to the clerk upon payment of the necessary fees. (1967, c. 954, s. 1.)

COMMENT

While preserving the essence of the former vesting statute, § 1-227, the rule as drafted makes two changes. First, where a party has been directed in a judgment to perform an act and has failed to so perform, it imports into the statutes for the first time authorization for the court to have someone else to perform the act with "like effect as if done by the party." Perhaps this authorization is most obviously applicable to specific performance decrees, yet it should be noted that it is not limited to transfers of title but extends to all acts which the court might properly direct in a judgment. Second, the rule makes it clear that a judgment divesting title and vesting it in others "has the effect of a conveyance" without further words being added to the effect that the judgment "shall be regarded as a deed of conveyance." See Morris v. White, 96 N.C. 91, 2 S.E. 254 (1887), and Evans v. Brendle, 173 N.C. 149, 91 S.E. 723 (1917).

Cross References. — As to distribution by court of marital property upon divorce, see G.S. 50-20.

CASE NOTES

The recovery of costs in a civil action is totally dependent upon statutory authority, and without such authority costs may not be awarded. Upon being granted the authority to order costs, the amount of such costs lies within the discretion of the trial court. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 71 N.C. App. 421, 322 S.E.2d 398 (1984).

Where damages are alleged because of noncompliance with a consent judgment, a motion under this rule is inappropriate. Population Planning Assocs. v. Mews, 65 N.C. App. 96, 308 S.E.2d 739 (1983).

Defendant's Failure to Timely Comply with Judgment as Necessary Precedent to Action by Judge. — Defendant's contention that the trial judge was without authority to execute an assignment of defendant's wages on the ground that the judge could direct the act to be done by someone else but could not do it himself was without merit; however, though defendant's history of willful and intentional nonpayment of alimony was sufficient to justify the judge's entry of an order to defendant to execute an assignment of wages to secure future alimony payments, the judge was without authority himself to execute such an assignment absent defendant's failure to comply with a judgment within the time specified. Sturgill v. Sturgill, 49 N.C. App. 580, 272 S.E.2d 423 (1980).

As to consent judgments and decrees under former § 1-227, see Rollins v. Henry, 78 N.C. 342 (1878); In re Will of Smith, 249 N.C. 563, 107 S.E.2d 89 (1959).

Consent Order Was Not a Conveyance. — Dismissal of assignee's motion to subject real estate to execution sale was reversed as the assignee's judgment lien attached to a husband's undivided interest in property formerly held as a tenancy by the entirety upon the date of his divorce, when the property was converted by law to a tenancy in common, and when he conveyed his interest to his former wife, she took title subject to the judgment lien; a consent order providing for a future transfer of the property was not a conveyance as it provided for a future transfer of the property, did not provide a legal description or state the location of the property, and was not filed with the register of deeds. Martin v. Roberts, 177 N.C. App. 415, 628 S.E.2d 812, 2006 N.C. App. LEXIS 964 (2006).

Applied in Elliott v. Burton, 19 N.C. App. 291, 198 S.E.2d 489 (1973); Morrow v. Morrow, 94 N.C. App. 187, 379 S.E.2d 705 (1989).

Cited in Hill v. Hill, 11 N.C. App. 1, 180 S.E.2d 424 (1971); Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975); Newton v. Williams, 25 N.C. App. 527, 214 S.E.2d 285 (1975); Taylor v. Johnston, 27 N.C. App. 186, 218 S.E.2d 500 (1975); Price v. Horn, 30 N.C. App. 10, 226 S.E.2d 165 (1976); Ellis v. Ellis, 68 N.C. App. 634, 315 S.E.2d 526 (1984).

Rules 71 through 83.

Omitted.

Rule 84. Forms.

The following forms are sufficient under these rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate:

(1) Complaint on a Promissory Note.

1. On or about ____________, ________, defendant executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on ____________, ________, the sum of ____________ dollars with interest thereon at the rate of ________ percent per annum].

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore, plaintiff demands judgment against defendant for the sum of ____________ dollars, interest and costs.

(2) Complaint on Account.

Defendant owes plaintiff ____________ dollars according to the account hereto annexed as Exhibit A.

Wherefore, plaintiff demands judgment against defendant for the sum of ____________ dollars, interest and costs.

(3) Complaint for Negligence.

1. On ________, ________, at [name of place where accident occurred], defendant negligently drove a motor vehicle against plaintiff who was then crossing said street.

2. Defendant was negligent in that:

(a) Defendant drove at an excessive speed.

(b) Defendant drove through a red light.

(c) Defendant failed to yield the right-of-way to plaintiff in a marked crosswalk.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization [in the sum of one thousand dollars] (or) [in an amount not yet determined].

Wherefore, plaintiff demands judgment against defendant in the sum of ____________ dollars and costs.

(4) Complaint for Negligence.

(Where Plaintiff Is Unable to Determine Definitely Whether
One or the Other of Two Persons Is Responsible or
Whether Both Are Responsible and Where His
Evidence May Justify a Finding of Willfulness or of Recklessness or of Negligence.)

1. On ________, ________, at ________, defendant X or defendant Y, or both defendants X and Y, willfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said street.

2. Defendant X or defendant Y, or both defendants X and Y were negligent in that:

(a) Either defendant or both defendants drove at an excessive speed.

(b) Either defendant or both defendants drove through a red light.

(c) Either defendant or both defendants failed to yield the right-of-way to plaintiff in a marked crosswalk.

3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great

pain of body and mind, and incurred expenses for medical attention and hospitalization [in the sum of one thousand dollars] (or) [in an amount not yet determined].

Wherefore, plaintiff demands judgment against X or against Y or against both in the sum of ____________ dollars and costs.

(5) Complaint for Specific Performance.

1. On or about ____________, ________, plaintiff and defendant entered into an agreement in writing, a copy of which is hereto annexed as Exhibit A.

2. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

3. Plaintiff now offers to pay the purchase price.

Wherefore, plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of ________ dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of ________ dollars.

(6) Complaint in the Alternative.

I.

Defendant owes plaintiff ____________ dollars according to the account hereto annexed as Exhibit A.

II. ALTERNATIVE COUNT

Plaintiff claims in the alternative that defendant owes plaintiff ____________ dollars for goods sold and delivered by plaintiff to defendant between ____________, ________, and ____________, ________.

(7) Complaint for Fraud.

1. On ____________, ________, at ____________, defendant with intent to defraud plaintiff represented to plaintiff that ____________________________.

2. Said representations were known by defendant to be and were false. In truth, [what the facts actually were].

3. Plaintiff believed and relied upon the false representations, and thus was induced to ____________.

4. As a result of the foregoing, plaintiff has been damaged [nature and amount of damage].

Wherefore, plaintiff demands judgment against defendant for ____________ dollars, interest and costs.

(8) Complaint for Money Paid by Mistake.

Defendant owes plaintiff ____________ dollars for money paid by plaintiff to defendant by mistake under the following circumstances:

1. On ____________, ________, at ____________, pursuant to a contract ____________, plaintiff paid defendant ____________ dollars.

(9) Motion for Judgment on the Pleadings.

Plaintiff moves that judgment be entered for plaintiff on the pleadings, on the ground that the undisputed facts appearing therein entitle plaintiff to such judgment as a matter of law.

(10) Motion for More Definite Statement.

Defendant moves for an order directing plaintiff to file a more definite statement of the following matters: [set out]

The ground of this motion is that plaintiff's complaint is so [vague] [ambiguous] in respect to these matters that defendant cannot reasonably be required to frame an answer hereto, in that the complaint ____________.

(11) Answer to Complaint.

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiff as alleged in the complaint, he is indebted to plaintiff jointly with X. X is alive; is a resident of the State of North Carolina, and is subject to the jurisdiction of this court as to serve of process; and has not been made a party.

Third Defense

1. Defendant admits the allegations contained in paragraphs _______ and _______ of the complaint.
2. Defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph _______ of the complaint.
3. Defendant denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within _______ year next before the commencement of this action.

Counterclaim

[Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint.]

Crossclaim Against Defendant Y

[Here set forth the claim constituting a crossclaim against defendant Y in the manner in which a claim is pleaded in a complaint.]

Dated: __________.

____
Attorney for Defendant

(12) Motion to Bring in Third-Party Defendant.

Defendant moves for leave to make X a party to this action and that there be served upon him summons and third-party complaint as set forth in Exhibit A attached.

(13) Third-Party Complaint.

______________________________,
Plaintiff,
v.
______________________________,
Defendant and Third-Party Complaint
Third-Party Plaintiff,
v.
____
Third-Party Defendant.

Civil Action No. ______________________________

1. Plaintiff __________ has filed against defendant __________ a complaint, a copy of which is attached as "Exhibit C."

2. [Here state the grounds upon which the defendant and third-party plaintiff is entitled to recover from the third-party defendant all or part of what plaintiff may recover from the defendant and third-party plaintiff.]

Wherefore, plaintiff demands judgment against third-party defendant __________ for all sums that may be adjudged against defendant __________ in favor of plaintiff.

(14) Complaint for Negligence Under Federal Employer's Liability Act.

1. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at __________ and known as Tunnel No. ______.

2. On or about June 1, ______, defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

3. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.

4. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock which fell from the unsupported portion of the tunnel, and was (here describe plaintiff's injuries).

5. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning __________ dollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of __________ dollars for medicine, medical attendance, and hospitalization.

Wherefore, plaintiff demands judgment against defendant in the sum of __________ dollars and costs.

(15) Complaint for Interpleader and Declaratory Relief.

1. On or about June 1, ______, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of ______ dollars upon the death of G. H. The
policy required the payment by G. H. of a stipulated premium on June 1, ______, and annually thereafter as a condition precedent to its continuance in force.

2. No part of the premium due June 1, ________, was ever paid and the policy ceased to have any force of effect on July 1, ________.

3. Thereafter, on September 1, ________, G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

4. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designed as beneficiary of said policy in place of K. L.

5. Each of defendants, C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

6. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

(16) Averment of Capacity Under Rule 9 (a).

(North Carolina Corporation)

Plaintiff is a corporation incorporated under the law of North Carolina having its principal office in [address].

(Foreign Corporation)

Plaintiff is a corporation incorporated under the law of the State of Delaware having [not having] a registered office in the State of North Carolina.

(Unincorporated Association)

Plaintiff is an unincorporated association organized under the law of the State of New York having its principal office in [address] and (if applicable) having a principal office in the State of North Carolina at [address], and as such has the capacity to sue in its own name in North Carolina. (1967, c. 954, s. 1; 1999-456, s. 59.)

Legal Periodicals. — For survey of decisions under the North Carolina Rules of Civil Procedure, see 50 N.C.L. Rev. 729 (1972).

For comment on jurisdiction based upon attachment, see 16 Wake Forest L. Rev. 377 (1980).

CASE NOTES

Federal Rule Compared. — The language of this rule which declares that Forms (3) and (4) and all the other forms of complaint incorporated therein are "sufficient under these rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate" is identical to that of FRCP, Rule 84. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

Forms (3) and (4) illustrate the sufficient form of a complaint for negligence. Ormond v. Crampton, 16 N.C. App. 88, 191 S.E.2d 405, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

And Require Specific Allegations. — Although federal Forms 9 and 10, complaints for negligence, do not require specific allegations of acts of negligence, under this rule North Carolina's Forms (3) and (4) do require such specific allegations. Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972).

Forms (3) and (4) contain much more than the corresponding federal forms, by requiring the pleader to allege the specific acts which constitute the defendant's negligence. This North Carolina requirement was the result of compromise between the drafting committee and practicing lawyers on the General Statutes Commission who wanted more specificity, especially in automobile cases. Ormond v. Crampton, 16 N.C. App. 88, 191 S.E.2d 405, cert. denied, 282 N.C. 304, 192 S.E.2d 194 (1972).

Notice Afforded by Form (4). — Form (4) approves, for a complaint for negligence, a short statement of the basic occurrences and the use of the words "reckless" and "wilful" to describe the character of a defendant's conduct, as sufficient notice to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought. Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971).

Applied in Powell v. Wold, 88 N.C. App. 61, 362 S.E.2d 796 (1987).

Cited in Terry v. Terry, 302 N.C. 77, 273 S.E.2d 674 (1981).

READY REFERENCE INDEX

A

ADVERTISING.
Legal advertising.
Generally, §§1-595 to 1-601.

AFFIRMATIVE DEFENSE.
Year 2000 failure, §§1-539.25, 1-539.26.

APPEALS, §§1-268 to 1-298.
Appeals and transfers from superior court clerk, §§1-301.1 to 1-303.3.

ARBITRATION AND AWARD, §§1-569.1 to 1-569.31.
International commercial arbitration, §§1-567.30 to 1-567.67.

ARREST AND BAIL, §§1-409 to 1-439.

ATTACHMENT, §§1-440.1 to 1-440.46.

B

BETTERMENTS, §§1-340 to 1-351.

BONDS, SURETY.
Prosecution bonds, §§1-109 to 1-112.

C

CHARITABLE IMMUNITY.
Defense abolished, §1-539.9.

CLAIM AND DELIVERY, §§1-472 to 1-484.1.

CLAIMS AGAINST THE STATE.
False claims act, §§1-605 to 1-618.

CLASS ACTIONS.
Refund of state tax paid due to unconstitutional statute, §1A-1 Rule 23(d).

COMMENCEMENT OF ACTIONS.
Joint and several debtors, §§1-113, 1-114.
Lis pendens, §§1-116 to 1-120.2.
Prosecution bonds, §§1-109 to 1-112.
Summons, §§1-105 to 1-108.

COMMERCIAL CONCILIATION.
International commercial conciliation, §§1-567.78 to 1-567.87.

COMPROMISE, §§1-540 to 1-540.3.

CONCILIATION.
International commercial conciliation, §§1-567.78 to 1-567.87.

CONTRIBUTORY NEGLIGENCE.
Burden of proof, §1-139.

D

DECLARATORY JUDGMENTS, §§1-253 to 1-267.

DEFINITIONS, §§1-1 to 1-7.

DEPOSITIONS AND DISCOVERY.
Rules of civil procedure, §§1A-1 Rule 26 to 1A-1 Rule 37.

DEPOSIT OR DELIVERY OF MONEY OR OTHER PROPERTY, §§1-508 to 1-510.

E

ELECTRONIC MAIL.
Service of process.
Service by electronic mail not authorized, §1A-1 Rule 4(j6).

EXECUTIONS, §§1-302 to 1-324.7.
Betterment, §§1-340 to 1-351.
Sales, §§1-339.41 to 1-339.71.
Supplemental proceedings, §§1-352 to 1-368.
Validating provisions, §§1-339.72 to 1-339.77.

F

FALSE CLAIMS ACT, §§1-605 to 1-618.

G

GENERAL PROVISIONS, §§1-8 to 1-13.

I

INJUNCTIONS, §§1-485 to 1-500.

INTERNATIONAL COMMERCIAL ARBITRATION, §§1-567.30 to 1-567.67.

INTERNATIONAL COMMERCIAL CONCILIATION, §§1-567.78 to 1-567.87.

J

JOINT AND SEVERAL DEBTORS, §§1-113, 1-114.

JUDGMENTS, §§1-208.1 to 1-246.
Declaratory judgments, §§1-253 to 1-267.
Rules of civil procedure, §§1A-1 Rule 54 to 1A-1 Rule 63.

JUDICIAL SALES, §§1-339.1 to 1-339.40.

JURISDICTION, §§1-75.1 to 1-75.12.

L

LEGAL ADVERTISING.
General provisions, §§1-595 to 1-601.

LIMITATION OF ACTIONS.
Actions not otherwise limited, §1-56.
General provisions, §§1-15 to 1-34.
Other than real property, §§1-46 to 1-55.
Real property, §§1-35 to 1-45.1.

LIS PENDENS, §§1-116 to 1-120.2.

LOCAL GOVERNMENTS.
Actions pertaining to local units of government, §1-539.16.

N

NOTICES, §1-589.1.

NUISANCES, §§1-538.1 to 1-539.2A.

P

PARENT-CHILD IMMUNITY.
Abolition in motor vehicle cases, §1-539.21.

PARTIES, §§1-57 to 1-72.
Rules of civil procedure, §§1A-1 Rule 17 to 1A-1 Rule 25.

PLEADINGS.
Amendments, §§1-164, 1-166.
General provisions, §§1-148, 1-149.

Q

QUO WARRANTO, §§1-514 to 1-532.

R

REAL PROPERTY.
Limitation of actions, §§1-35 to 1-45.1.

RECEIVERS, §§1-501 to 1-507.11.

RULES OF CIVIL PROCEDURE, §1A-1.
Commencement of action, §§1A-1 Rule 3 to 1A-1 Rule 6.
Depositions and discovery, §§1A-1 Rule 26 to 1A-1 Rule 37.
Judgments, §§1A-1 Rule 54 to 1A-1 Rule 63.
Miscellaneous rules, §§1A-1 Rule 64 to 1A-1 Rule 84.
One form of action, §1A-1 Rule 2.
Parties, §§1A-1 Rule 17 to 1A-1 Rule 25.
Pleadings and motions, §§1A-1 Rule 7 to 1A-1 Rule 16.
Scope of rules, §1A-1 Rule 1.
Trial, §§1A-1 Rule 38 to 1A-1 Rule 53.

S

SPECIAL PROCEEDINGS, §§1-393 to 1-408.

STRUCTURED SETTLEMENT PROTECTION ACT, §§1-543.10 to 1-543.15.

SUMMONS, §§1-105 to 1-108.

T

TAXATION.
Class actions.
  Refund of state tax paid due to unconstitutional statute, §1A-1 Rule 23(d).

TENDER, §1-543.1.

TIME, §§1-593, 1-594.

TRIAL, §§1-180.1 to 1-186.
Rules of civil procedure, §§1A-1 Rule 38 to 1A-1 Rule 53.

V

VENUE, §§1-76 to 1-87.

VERDICT AND EXCEPTIONS, §1-202.

VOLUNTEERS.
Qualified immunity, §§1-539.10, 1-539.11.

W

WASTE, §§1-533 to 1-538.

State Library of North Carolina
Raleigh

TRIAL, §§1-180.1 to 1-189.
Rules of civil procedure, §§1A-1, Rule 38 to 1A-1 Rule 53.

V

VENUE, §§1-76 to 1-87.
VERDICT AND EXCEPTIONS, §1-200.
VOLUNTEERS.
Qualified immunity, §§1-539.10, 1-539.11.

W

WASTE, §§1-533 to 1-538.

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